AN ANALYSIS OF PENAL LAW OBJECTIVES IN CHILD ABUSE CASES: A COMPARISON OF THE KENYAN AND CANADIAN EXPERIENCES

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A Dissertation submitted in partial fulfillment of the Bachelor of Laws Degree, Faculty of Law, Strathmore University, January 2016.
I, MUSAU F. V. ANS MUTHUSI, do certify that this Dissertation is my original work. It is a reflection of my personal research. I declare that this Dissertation has not been presented anywhere else before.

Date: 31/3/2016

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Date: 23rd March 2016

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Before

I, MUSAU EVANS MUTHUSI, do certify that this Dissertation is my original work. It is a reflection

DECLARATION
I am grateful to God for the good health and wellbeing that were necessary to complete this venture. I also express gratitude to one and all, who directly or indirectly, have lent their hand in this help and support. I also thank my parents for the encouragement, support and attention. I take this opportunity to express gratitude to all of the Department faculty members for their guidance and encouragement extended to me. I am also grateful to Dr. Luis Franceschi, Dean of the Faculty, for the Law School, and also express heartfelt gratitude to her for sharing expertise and sincere and valuable continuous support and provision of a working environment. I place on record, my sincere thanks to my lecturer and supervisor, in the Strathmore University, Ms. Mukami Wangai, for the faculty, for the research. I am grateful to God for the good health and wellbeing that were necessary to complete this ACKNOWLEDGEMENT.
ABBREVIATIONS

ACRWC - African Charter on the Rights and Welfare of the Child
APPCAN - African Network for the Prevention & Protection against Child Abuse and Neglect
FIDA - Federation of Women Lawyers in Kenya
IOM - International Organization for Migration
NCCS - National Council for Children's Services
RMMS - Regional Mixed Migration Secretariat
UNCATOC - United Nations Convention Against Transnational Organized Crime
UNCRPC - United Nations Convention on the Rights of the Child
UNICEF - United Nations Children's Emergency Fund
UNICEF - United Nations Children's Education Fund
UNODC - United Nations Office on Drugs and Crime
LIST OF CASES

1. X and Y v. The Netherlands, 1985, Series A No. 9, No. 8978/80.
ABSTRACT

The main objective of this paper is to assess the veracity of penal law objectives in child abuse cases in Kenya. The Children's Act under Section 2 looks at child abuse as consisting of physical, sexual, psychological and mental injury. This goes to the heart of one of the objectives of laws is to bring about social order in its purest form with an end to avoid conflict. As such altering the purpose of the laws, implementation of mandatory minimum sentences and less judicial discretion in sentencing, makes either diminishing or maintaining the same number due to effective investigations, operations or mandating minimum sentences. Across the board it was seen that the cases of child abuse decreased in child abuse cases however is based on a mixure of retribution and deterrence to the jurisdiction of Canada was used as a comparative study. The Canadian criminal system, based on Common law, is similar to that of Kenya, The similarity of judicial systems and similar child protection laws provided a proper specimen to analyse whether a nexus exists. The sentencing objectives of the laws are responsible for this inefficiency. To figure out the whether a nexus exists the cases of child abuse either diminished or maintained the same number due to effective investigations, implementation of mandatory minimum sentences and less judicial discretion in sentencing. Across the board it was seen that the cases of child abuse have increased in conviction rates, prosecutions and arrests. The question then is whether the response of Kenyan legislations to these atrocities was to pass laws that gave unlimited judicial discretion in sentencing and also severe deterrent punishments. From collected data over a span of 10 years since the enforcement of key legislations, the trend of child abuse crimes across the board in Kenya largely reduced. The Children’s Act seeks to protect children from the various forms of abuse, include sexual, psychological and emotional injury. The research endeavours to cover the various forms of child abuse covered by various pieces of legislation which are sexual abuse; child abuse as consisting of physical, psychological and emotional injury. The Children’s Act under Section 2 looks at child abuse as consisting of physical, psychological and emotional injury. The main objective of this paper is to assess the veracity of penal law objectives in child abuse.
CHAPTER 1: Introduction

1.1 Background

The cases of child abuse in Kenya have been a major concern over the years with the ever-rising number of such cases which was seen in the year 2005 where a dramatic rise in the number of such cases. These types of abuse have been catered for in the Constitution of Kenya Article 53(d) specifying and assuring protection of children from abuse. Article 19 and 34 of the UN Convention on the Rights of the Child (1989) have been an interest under international law, The child protection and treatment of children under the international scene has been an interest under international children's rights. Children, as recognized by different scholars, have been an interest under international law, The International Convention on the Rights of the Child (1989) (UNCRC) as well as in response to the need for protection of children, various stakeholders have been involved in the formulation of the Child Rights Act 2005. This Act was aimed at curbing sexual offenses committed against women and the girl child.

1.2 Summary of the outcome of mapping and assessing Kenya’s child protection system: Strengths, weaknesses, and problems.

The International scene over the years has seen the strengthening of children’s rights. This has been drawn out in several pieces of legislation. The paradigm shift in the perception of punishment has been an important one relying on high penalties laid upon offenders. As will be shown later, the stringent laws in place do not necessarily translate to lower child abuse and conviction rates. To understand the point of view of protection of the child, we must then look at the nature of child abuse defined in place of protective law. The current legal framework is in place to protect children from abuse. Despite these efforts, child abuse in Kenya has been a major concern over the years. The cases of child abuse in Kenya have been a major concern over the years with the ever-rising number of child abuse cases.
international community stating clearly the concern there being a big problem concerning child abuse: 4

"The Committee is concerned by the reported increase in child abuse, including...

The UNCRC imposes an obligation to set up mechanisms both administrative and legislative to protect the child in the society. This brings about an assurance that countries bound by the Convention on the Rights of the Child, vol. I (United Nations, 1989), Part 2, Section 13 of the Act outlines the right of a child to be protected from neglect and physical or mental abuse. UNICEF, in its report on Child Violence, carried out in 2010, showed the statistics for the African continent. This research has been more so seen in the Kenyan Context. The change of the Constitution of Kenya had a wide scale effect on legislation. This further stretched to the bolstering of Kenyan children's laws. In line with international and regional conventions, the Constitution of Kenya was particular under Article 53(2) of the rights of a child to be protected from child abuse. Kenya in the Year 2001 passed the Children's Act which was aimed at first consolidating the laws, for the African context.
of reports made in the previous years on reporting of child abuse cases. The low ratings of young children and adolescent persons not reporting to the authorities was alarming.

10 Some scholars state that the issue in most cases is the accommodation of such cases by the authorities in charge. The cases therefore go unreported, rendering the law ineffective.

This statistic shows the lack of confidence in the legal system to provide proper mechanisms of enforcement. The primary legislation (The Children's Act) does not provide for the punishment of perpetrators other than Section 20. This means that a single provision for a plethora of child abuse cases is too narrow, for the scope of child abuse is too broad.

From an international perspective, the correct definition is to tackle the matter from the roots (the elements). Richard Gelles takes a look at the elements of the abuse (the mind, body and development of the child). An African perspective is important as well. Famuyiwa states that the social-economic aspect of the community is important to determine what child abuse is. The social-economic aspect of the child’s development (An African perspective is important as O. Famuyiwa states that the development of the child) is a book on the elements of the abuse (the mind, body and development).

The best method of establishing the correct definition is to tackle the matter from the roots (the elements). From an international perspective, the correct definition is to tackle the matter from the roots (the elements).
World Health Organization in its 1999 Report on Preventing Child Maltreatment: a guide to taking action and generating evidence refers to the matter of child maltreatment. This is an interest to the paper as this is the basis of the definition relied on. It states:

"Child maltreatment refers to the physical and emotional mistreatment, sexual abuse, neglect and negligent treatment of children, as well as to their commercial or other exploitation. It occurs in many different settings..."

The following questions will be posed:

I. Statement of Problem

The problem this paper intends to research is the ineffective application of deterrent laws as regards child abuse.

II. Questions for Research

1. Which comparative jurisdiction can be used to assess and test the Kenyan situation?
2. What is the legal framework of child protection in Kenya?

I. Research Objective

The research aims to analyse the deterrent objective of current legislation in its protection of the rights of children by assessing the penalties and rewards in commission of crimes against children. This research aims to analyse the deterrent objective of current legislation in its protection of the child, and, in consideration of the character of the child as a vulnerable individual, the measures taken in the past. A study of the various forms of child abuse, their has been an incentive rise in the number of offenses and convictions pertaining to the question whether the objective intended is actually working, and whether the objectives have been achieved. The downfall of the decision to apply such measures in the working of the penal system, has been ineffective as the end result being the child suffers under an inefficient system.

The question on the definition of child abuse:

Thus take this position on the definition of child abuse:

It is upon this definition that the Children's Act 2001 relies on. The paper will discuss the various forms of child abuse, their has been an incentive rise in the number of offenses and convictions pertaining to the question whether the objectives have been achieved. The downfall of the decision to apply such measures in the working of the penal system, has been ineffective as the end result being the child suffers under an inefficient system.

I.3 Justification of Study

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The following questions will be posed:

1. Which comparative jurisdiction can be used to assess and test the Kenyan situation?
2. What is the legal framework of child protection in Kenya?
a framework for searching for answers. These methods will help frame and put into context the situation at hand and as such will provide information and relevance of information sought after.

1.6 Methodology

This study will use a qualitative approach to study the implications of child protection penal laws. The approach to analyzing will be based on the current legislation set out to protect children. This will approach in analyzing will be based on the current legislation set out to protect children. This will approach in analyzing will be based on the current legislation set out to protect children.

In this case, it will rely mostly on secondary data to analyze the legislative framework in place. The study will use a qualitative approach to study the implications of child protection penal laws.

What considerations can be taken up to reinforce our legal framework on protection of children from child abuse? What objectives are employed in punishment of offenders in Kenya and what shortfalls have been experienced in the Kenyan process?
CHAPTER 2: Theoretical framework

To establish the foundation, there is need to ask on what basis legislation borrows its perspective. To understand where the position lies, we need to look at law from the point of view of social order. Order stemming from a system that recognizes the sovereign and its power to punish offenders.

2.1 Positivism (Kelsenian Theory)

Social order arises from social facts through norms held by the community. As such, Hans Kelsen looks at there being a hierarchy of norms in any given society. These norms form the base on which laws are made. As such, Hans Kelsen states that law is separate from the notion of morality and exists in absolute solidarity. This notion, however radical, forms the basis on which laws are made. To understand where the position lies, we need to look at law from the point of view of social order. To establish the foundation, there is need to ask on what basis legislation borrows its perspective.
The ideal situation in a society is a matter of reform and correction of the ills in the society. There is a need for punishment of crimes. According to Nagin, the matter of punishment is through police powers of the sovereign. The judicial system according to Nagin in the matter of the people/community. The ideal situation is a matter of reform and correction of the people/community. The ideal situation in a society is a matter of reform and correction of the ills in the society.
judicial leeway in discretion

The general principle adopted by the European Court of Justice is that child abuse laws have to provide a measure of deterrence rather than a retributive mode of punishment.

The theory of deterrence in child abuse cases has been focused on by scholars. Mark Capaldi in 2013 wrote on deterrence management in child abuse cases. The main aim of deterrence is to keep the perpetrators away and to discourage the commission of a crime. Mark Capaldi states that through increased deterrence, the theory of just deserts (retribution) is a better option. In the case of Kevin M. Carlsmith, John M. Darley and Paul H. Robinson it is however noticeable that one may argue that the theory of just deserts (retribution) is a

The same notion of deterrence has been focused on by the European Court of Human Rights. In the case of X and Y v. the Netherlands, 1985, the court reiterated the sentiments of Capaldi where they verbatim stated:

"fundamental values and essential aspects of private life are at stake. Increased deterrence is indispensable in this area and it can be achieved only by criminal provisions."

of Capaldi, where they verbatim stated:

Rights. In the case of X and Y v. the Netherlands, in this case the court reiterated the sentiments of Capaldi where they verbatim stated:

Increased deterrence."

such the cases of child abuse are lowered. He states:

punishment.

that child abuse laws have to provide a measure of deterrence rather than a retributive mode of judicial leeway in discretion. The general principle adopted by the European Court of Justice is
theory of just deserts and he states that the measure of the crime if small should have a small penalty and consequently the same for bigger crimes. 38

Despite the fact that the theory of just deserts is proper to the matter of child abuse, it is on the basis of the aim of current legislation in Kenya that this paper posits the theory of deterrence for the enforcement of child protection laws. As seen earlier the current legislation under Section 20 gives punishment that may not deter persons effectively from commission of offenses. 39

CHAPTER 3: Contextualizing the Kenyan and Canadian Legal Framework

3.1 Introduction

The main aim of this chapter is to assess the legal regime in punishment of child abuse offenders. The research aims to look at whether the laws and judiciary effectively, through deterrent laws, are capable of providing an efficient process of ensuring justice for children.

The Chapter endeavours to set out the Kenyan legislative position on punishment of child abuse. Thereafter, we will look at the Canadian Position on punishment of child abuse. As espoused earlier, Kenya's laws take into consideration detention as the object of prosecution of child abuse cases. The Canadian position is meant to act as the comparison against the Kenyan legislation. The jurisdiction has a similar end to criminal prosecution as that of Kenya.

3.2 The Kenyan Position

The current framework on Child protection is set out in various pieces of legislation. The Children's Act (No. 8 of 2001)⁹ is enacted to ensure the protection of children from physical, sexual and exploitative abuse. The Act provides for the establishment of a National Children's Authority to oversee the implementation of children's rights. The National Children's Authority is responsible for the protection of children from abuse, neglect, and exploitation.

The Sexual Offences Act (No. 3 of 2006)⁴⁰ and the Employment Act Cap. 226⁴¹ subscribe forms of child protection from physical, sexual, and exploitative abuse. The Employment Act Cap. 226⁴¹ and the Counter-Trafficking in Persons Act (No. 8 of 2010)⁴² subscribe forms of child protection from physical, sexual, and exploitative abuse.

The principal piece of legislation that takes lead in the situation is the Children’s Act (No. 8 of 2001).⁹ Subsequently, Acts such as the Sexual Offences Act (No. 3 of 2006),⁴⁰ the Employment Act Cap. 226⁴¹ and the Counter-Trafficking in Persons Act (No. 8 of 2010)⁴² subscribe forms of child protection from physical, sexual, and exploitative abuse.

⁹ Children’s Act (No 8 of 2001).
¹⁰ Sexual Offences Act (No 3 of 2006).
¹¹ Employment Act (Cap. 226 of 2007).
¹² Counter-Trafficking in Persons Act (No. 8 of 2010).
The Children's Act of 2001 was a much-awaited Act that was expected to reshape the arena of Children's rights and protection. The case for the legislation was brought forward by non-governmental actors to implement the African Charter on the Rights and Welfare of the Child and the UNCRC for the well-being of the child. At the forefront was the African Network for the Prevention & Protection against Child Abuse and Neglect (APPCAN).

The wait for a piece of legislation to outline child abuse and its constituents was eagerly awaited by the children's rights society. The Children's Act is an overview of the rights of the child. The Act is not catered to penal punishment. The Act, for the purpose of the study, has primarily 4 primal points of interest. First is the establishment of children's rights and duties. Second is the definition of a child and more importantly Child abuse. Third, establishment of the National Council for Children's Services, responsible for children's services. Fourth, establishment of the National Council for Children's Services, responsible for children's services. Finally, the Act itself is to be established. The Act is in itself not Child abuse rampant as Kenya waits for bill Children's rights since June 2001. The Children's Act aims to protect the welfare of the child as espoused in the FIDA Kenya Annual Report 2002 where it was stated: The principal object of the Act is to safeguard the rights and welfare of the child. The Act is a declaratory statute that states what child abuse is and also sweeps over the framework that is to be established. The Act in itself is not Child abuse rampant as Kenya waits for bill Children's rights since June 2001.
The Act gives an insight into the sanctions that are envisioned to be enforced. Section 20 of the Act states:

"(a) wilfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to health (including loss of sight, hearing, limb or any mental derangement); or
(b) commits an offence and is liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding five years, or to both.

The question then arises whether these two provisions are enough to elicit any proper deterrence and enforcement among offenders. This will be discussed further in the paper.

3.2.2. Sexual Offences Act

Under Section 127:

Similiarly, the same Act also tries to deal with matters of maltreatment and neglect of the child.

Section 20 of the Act states:

The Act gives an insight into the sanctions that are envisioned to be enforced.
lobbying

To address any attempts of such crimes being perpetrated in future, the characteristics of deterrent action prescribed high penalties for the crimes committed. The punishment as such is intended to deter for growing offences that were not previously recognized under the Penal Code.

According to Justice Njoki Ndung'u, the Act was meant to be an inducive act that was meant to address the child. These offences are seen according to the Act from part of abuse to the child. The Act further defines this offence as defilement under Section 6.

Under Section 7 of the Act it states:

Offences.

The act stipulates certain offences that have a direct effect on children and their plight when it comes to sexual abuse. According to the prosecution and response to violence against women and girls, the legislation is designed to address law enforcement.

Preventing and responding to violence against women and girls. In an interview with the Hon. Nyokabi Ngũgĩ, Reproductive Health

Kenya National Assembly Official Record: Hansard (Transcript) 30 May 2006, 990: Contribution by Mr Kenneth Marende.

The previous overarching legislation was the Penal Code.

Despite the noble objectives of the Sexual Offences Act, the legislation only caters to a specific sub-set of persons in the community.
laws are marked by high severity for culprits. The more severe a punishment, it is thought, the more likely that a rationally calculating human being will desist from criminal acts. In ensuring deterrence is effective the courts are very prone to having a heavy hand in punishment. Determined more likely than a rationality calculating human being will desist from criminal acts. In ensuing laws are marked by high penalties for culprits. The more severe a punishment, it is thought, the


The Act gives provision for exploitation of children Section 3 states:

A person who works to determine the purpose of exploitation in persons.

The Act gives penalties for persons who commit crimes against the provisions of the Sexual Offences Act. The Act gives the

Prevention, Suppression and Punishment in Persons, especially Women and Children. The Act gives the

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (UNCATOC). Partly to Protocol to

The Counter-Trafficking Act was in Act of Parliament or Implementing Kenya’s obligations under the United

3.2.3. Counter-Trafficking in Persons Act

Given leeway by proposing a high minimum sentence to ensure a high threshold of punishment. done away with so easily. Similarly, as seen in the Sexual Offences Act, the courts have been

Typically the court stated its position as being one that retains discretion at all times and cannot be

expressed upon merely by courts expressing the general need for discretion in punishment. In a number of countries, the courts have been

laws are also characterized by rejection of high punishment by the judicial body. Thus, this has been seen

more likely than a rationality calculating human being will desist from criminal acts. In ensuing laws are marked by high penalties for culprits. The more severe a punishment, it is thought, the

(c) offers guardianship to a child or offers a child for guardianship;

(d) fosters a child or offers a child for fostering or

(e) adopts a child or offers a child for adoption.

A person who works to determine the purpose of exploitation in persons...
A person who initiates or assists in initiating adoption, fostering of guardianship proceedings for the purpose of subsection (I) commits an offence under this section. A person who commits an offence under this section is liable to imprisonment for a term of not less than thirty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.

The Act leans towards the deterrent objective of exploitation and abuse of children. The Act is strict in handing down punishment to protect children.

The effect expected from these provisions is to discourage persons from engaging in acts of child abuse and exploitation. The minimum punishment in both instances is rendered at least at thirty years, with the option of life imprisonment. This notion of high modes of punishment are meant to discourage persons from committing crimes.

The Canadian Context

Canada will be the context into which this paper will base its research on. The justification for the country was on the basis of documented convictions of child abuse cases. The Act is strict in handing down punishment to protect children.

1. Judicial rulings handed down by the courts. The punishment mechanisms with regards to judicial discretion has been tackled and dealt with in detail over the recent years.

2. Expansive laws that cover the various categories of vulnerable persons. The current framework provides for punishment according to the needs in society.

3. Long history of documented convictions of child abuse cases. These convictions have thus sparked debates socially and academically as such informing legislation.

Similar to the Sexual Offences Act, the Counter-Trafficking in Persons Act does not have a singular objective of protecting children alone. The question in this case is then, whether the notion of high fines and punishment for specified periods brings proper and aimed deterrence. This will be further explored in Chapter 4 looking at statistical evidence conviction rates.

3.3 The Canadian Context

The Canadian Jurisdiction has employed the Criminal Code as the substantive legislation that prescribes punishment for offenders. The Canadian Criminal Code RSC 1985, c C-46 enshrines the deterrent objective of Canadian laws. The laws provide high penalties and these to ensure effective discouragement of offences.

The Criminal Code, RSC 1985, c C-46

Section 4, Counter-Trafficking-in-Peasons Act No. (8 of 2010).

years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction in respect of an offence under this section: A person who commits an offence...
The Canadian Criminal Code, similar to the Penal Code of Kenya, is an all-inclusive piece of legislation. The main difference is the regular amendment of the laws and the high detail expressed in statute. As opposed to the previous pieces of legislation, there is breathing room for various objectives for special categories of persons to be expressed.

The Legal Framework for the Protection of Children from Abuse

Additionally, the following are provisions in the Code that have been remedied as the legislative ground by which they can ensure that the aims of justice are not too strict but also effective.

The two provisions employ a form of deterrence and also a form of retributive justice.

1. Assault (causing bodily harm, with a weapon and aggravated assault) (ss. 265-268)

   The crime of assault in the Criminal Code is an umbrella offence under the code. The code stipulates under Section 265 defining the crime of assault.

   The crime of assault in the Criminal Code is an umbrella offence under the code. The code

   i. Assault (causing bodily harm, with a weapon and aggravated assault) (ss. 265-268)
2. Kidnapping & forcible confinement (s. 279)

279.01 Every person who, for a sexual purpose, recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years.

3. Abduction of a young person

280-283

Abduction of person under sixteen

280 (1) Everyone who, without lawful authority, takes or causes to be taken an unmarried person under the age of 16 years out of the possession of and against the will of the parent or guardian...

... is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

Abduction of person under fourteen

281. Everyone who, not being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, unlawfully takes, entices away, conceals, detains, receives or harbours that person with intent to deprive a parent or guardian, ...

... is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

282. Everyone who, being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody or access order...

... is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

4. Sexual offences against children and youth (ss. 151, 152, 153, 155 and 170-172)

Sexual interference

... is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

Abduction of person under sixteen

280. Everyone who, without lawful authority, takes or causes to be taken an unmarried person under the age of 16 years out of the possession of and against the will of the parent or guardian...

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... is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

Abduction of a young person (ss. 280-283)

... is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years.

279.01 (1) Everyone who, for a sexual purpose, recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years.
The overarching theme seen throughout the Canadian Criminal Code is the propagation of high penalties for crimes committed against children to meet the ends of justice. This means the direction of laws is to deter persons from committing offenses. Similarly, the same laws are aimed at retribution. The principle of retribution is known as just deserts which this paper has alluded to. David Wood clearly describes retributive justice when he states:

"The simplest view of retributive justice sees it as a basic, unadulterable, morally obvious, moral principle: 'The core of the idea of retribution is the moral notion that the wrongdoer ought to be punished.' At the heart of retributivism is the notion that it is the wrongness of the criminal act that requires the punishment of the wrongdoer. The just measure of a crime is the punishment of the wrongdoer for the wrong committed."

The view of retributive justice is also known as just deserts which this paper has alluded to. David Wood clearly explains retributive justice when he states:

The retribution system of justice is posed a challenge to the Canadian system of justice. The confidence of the lack of effectiveness of deterrence as a sole and to justice retribution. The confidence of the lack of effectiveness of deterrence as a sole end to justice means the direction of laws is to deter persons from committing offenses. Similarly, the same laws are aimed at punishing for crimes committed against children to meet the ends of justice. This means the direction of laws is to deter persons from committing offenses.
CHAPTER 4: Analysing Trends of Deterrence in Child Abuse

Understanding the framework set in place by legislation is hence essential to understand how the laws affect trends in child abuse cases and the extent to which the laws satisfy the objective of laws. The paper, from the outset, acknowledges the presence of factors that may affect the compliance by citizens with laws such as: economic standing, education and literacy levels and traditional customs. 64 The main aim however, is to see if the objective sought by the legislature is effective enough.

4.1 Analysis of Child abuse and neglect in Kenya

The Kenyan situation from the beginning has been analysed through social studies and surveys across Kenya. The definition taken in this regard will be from the Children’s Act. The Act under Section 2 defines child abuse to constitute physical, sexual, psychological and mental injury. As such the scope will be in accordance to the legislation highlighted under chapter 3. Section 2 defines child abuse to constitute physical, sexual, psychological and mental injury. As such the scope will be in accordance to the legislation highlighted under chapter 3.

The situation from the beginning has been analysed through social studies and surveys across Kenya. The report was compiled in 2005 to spark a change and enforcement of the Palermo Convention. The report was compiled in 2005 to spark a change and enforcement of the Palermo Convention. The report was compiled in 2005 to spark a change and enforcement of the Palermo Convention. The report was compiled in 2005 to spark a change and enforcement of the Palermo Convention. The report was compiled in 2005 to spark a change and enforcement of the Palermo Convention. The report was compiled in 2005 to spark a change and enforcement of the Palermo Convention.

4.2.4 Child Trafficking and exploitation

International Organization for Migration (IOM) conducted a study of trafficking of persons in East Africa. According to the report on trafficking of persons in East Africa, the IOM highlighted the plight of exploitation of children as constituting 1.4% of trafficking cases in East Africa. According to the report, the situation in both countries will be the point of discussion in the chapter asking various questions that demand introspection. The paper will be asking, why the choice of the deterrence approach at this point in time despite its success or failure; even though deterrence is the main aim, however, is to see if the objective sought by the legislature is effective enough. The main aim, however, is to see if the objective sought by the legislature is effective enough.

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Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; 66. Furthermore, the Counter-Trafficking in Persons Act which was enforced in 2012 as the new legislation has however not been effective according to The Regional Mixed Migration Secretariat (RMMS) report on Mixed Migration in Kenya: The scale of movement and protection risks, June 2013, 47.

The study showed that since enacting the Children’s Act 2001, only 30 cases were prosecuted and 7 convictions of child trafficking and exploitation were obtained in 2010. Prior to this, the enforcement of the laws has been little and this has been attributed to the low level of awareness and lack of resources. The report also revealed that the government has not been proactive in the enforcement of the laws.

4.1.2 Physical Abuse

The statistics on physical abuse against children in Kenya were gathered in 2010. Prior to this, the 2000 report pre-dating the Children’s Act 2001 carried out by the African Child Protection Against Abuse and Neglect (ACPAN) organization. The 2010 report on Violence against Children Act 2001 carried out by the African Child Protection Against Abuse and Neglect (ACPAN) organization was not effective in enforcing the Children’s Act 2001. The report revealed that the number of incidents did not change significantly as compared to those in 2005 in the IOM report. The report also revealed that the number of incidents did not change significantly as compared to those in 2005 in the IOM report.

The study concluded that the enforcement of the Palermo Protocol on Protection of Children and Women, especially Women and Children, is insufficient. The report also revealed that the government has not been proactive in the enforcement of the laws.
carried out as a joint venture by the Kenyan Government and The United Nations Children's Education Fund.

The report indicates that during childhood, 32% of females and 18% of males experience sexual violence. 66% of females and 73% of males experienced physical violence and 26% of females and 32% of males experience any violence as children.

Similarly, the rate of reporting of these incidences to the authorities was viewed as insufficient since 34% of cases were reported and followed up on.


4.1.3 Sexual Abuse

In Kenya, the trend in sexual abuse against children has been on the rise even after the passing of the Sexual Offences Act. The following table shows the rise in number of cases of rape in Nairobi County during the 2006 to 2010 period:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rape</th>
<th>Other Crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>1291</td>
<td>1070</td>
</tr>
<tr>
<td>2007</td>
<td>1395</td>
<td>1005</td>
</tr>
<tr>
<td>2008</td>
<td>2100</td>
<td>982</td>
</tr>
<tr>
<td>2009</td>
<td>2800</td>
<td>742</td>
</tr>
<tr>
<td>2010</td>
<td>3000</td>
<td>630</td>
</tr>
</tbody>
</table>


Sexual Offences Act (Act No 3 of 2006).

Kenya Rape statistics, A Critical Analysis.
4.2 Assessment of deterrence objective of law

The outlook on deterrence has been weighed and balanced on the scales by academics with the consensus of Susan Slavin that the sanction is so great that it acts as an inhibition from the possibility of crime. On the other side of the divide are scholars bringing to task the notion of deterrence, its shortfalls and its inefficiency in totality. Deterrance in itself has been said to focus on the severity of punishment, and its influence in possibly deterring a crime may or may not null the weight of the crime. For example, 20 years imprisonment for drunk driving is not sufficient compared to the severity of punishment of a crime comes with high penal penalties which successfully prevent people from committing a crime which may also come in form of high fines which bars down a huge cost on committing a crime. The economic theory of deterrence is based on the fact that the cost of the action carried out by the offender is too high for the offender to consider in his actions. Therefore, the public or reformed offenders steer away from the possible crime.

The account of Susan Slavin shows a deep disparity in investigations. The account of Susan Slavin of such cases shows a deep disparity in investigations. The investigation system is rigid and hailed by corruption that no case is submitted before the courts. The difficulty according to her account is the numerous stages of making of help from authorities. The difficulty according to her account is the numerous stages of making of help from authorities. The difficulty according to her account is the numerous stages of making of help from authorities. The difficulty according to her account is the numerous stages of making of help from authorities. The difficulty according to her account is the numerous stages of making of help from authorities. The difficulty according to her account is the numerous stages of making of help from authorities. The difficulty according to her account is the numerous stages of making of help from authorities.
the offender. Lastly is the option of both penalties which is intended to make an example of the offender. Despite the high rate of punishment dished by courts, the deterrence in severity is not full proof as there was an increase in commission of crimes despite the deterrent laws. Case in point was the increase of drunk driving incidences in Australia in 1998 with the introduction of stringent penalties on drunk driving. Gary Kleck gives an interesting perspective on what we might perceive as the cause of the decrease in drunk driving. Kleck states that the cause of the decrease of drunk driving is the increased cost of alcohol. Despite the high rate of punishment dished out by courts, the deterrence in severity is not full proof. Knowing as the culpability heuristic.

The certainty of apprehension deters to a greater extent than the severity of punishment. The law according to Nagin should be certain to state the punishment and its criminal sanction. The law according to Nagin should be certain to state the punishment and its certainty in conviction, not only guarantee the complete working of the punishment, but also remediate the situation due to the risk. The perception of high penalties does not work as stated above. However, the focus on certainty of punishment rather than the severity of punishment, Nagin explains that the previous certainty of punishment failed while the certainty of punishment has been attempted by the justification of certainty. On the other hand, the applicability of deterrence has been attempted by the justification of certainty.
The question then stems whether this is enough. Ensuring the certainty of apprehension of an offender, does it ensure an effective system for the case of child abuse? The notion of deterring what can be deterred has been raised over the years. The subject of deterring what can be deterred has been closely linked to the idea of certainty. 4.2.2 Justification of deterrence

The Kenyan situation has acknowledged the presence of deterrence in its laws through the reaction to circumstances that have occurred in the past. For example, the sexual offences that occurred in 2005 and 2006. The rise in sexual assaults led to the knee-jerk reaction of the legislation to fight this vice. As such this reaction, from a by-stander’s perspective, is an emotional and irrational response. The Sexual Offences Bill, 2009, has been the sexual offences that occurred in circumstances that have occurred in the past. We see this as an emotional response to a terrifying crime. In this regard, the court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex.

From the analysis of the Kenyan situation, the number of cases five years after passing of key legislations in the various fields of abuse, has shown a non-characteristic response to the laws. The laws in themselves have been severe but not certain. There is therefore the need to recognize the need for legislation to fight this vice. As such this reaction, from a by-stander’s perspective, is an emotional and irrational response. The Sexual Offences Bill, 2009, has been the sexual offences that occurred in circumstances that have occurred in the past. We see this as an emotional response to a terrifying crime. In this regard, the court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex. The court was charged to determine whether there was an obligation to have sex.
The observations set out in the Report on Decriminalization by the European Committee on Crime Problems clearly show that the effectiveness of general deterrence based on the criminal law depends on various factors and that such an approach is not the only way to prevent undesirable behavior.

The Justice faithfuly asserting this position shows that the objective of penal laws needs to change and approach matters of child abuse from another perspective: the Kenyan Perspective can be found in Article 53 of the Constitution of Kenya, where it states:

(1) "Every child has the right:
(c) to basic nutrition, shelter and health care;
(d) to be protected from abuse, neglect, harmful cultural practices, or exploitative labor;"

The Constitution looks at the child from the point of view of need, neglect, weakness and punishment and hazardous or exploitative labor. The special needs as seen in the Constitution are critical enough to apply immediate preventative and protective measures of violence, inhuman treatment and abuse, neglect, harmful cultural practices, or exploitative labor.

(2) "in the Kenyan perspective can be found in Article 53 of the Constitution of Kenya, where it states:

Even if the laws are reasonable, unreported due to the fact that there has been no measure of change in the number of abuse cases and appointed matters of child abuse from another perspective: the Justice faithfully asserting this position shows that the objective of penal laws needs to change of preventing undesirable behavior.

The justice faithfully asserting this position shows that the objective of penal laws needs to change.


89 MC Vs Bulgaria, para 2.

The same character is echoed by the UNCRC and the ACRWC. The UNCRC recognises the vulnerability of the child by stating:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 1990 General Assembly resolution 44/27 of 20.

Similarly, the ACRWC also states:


Furthermore, the 1996 reforms on sentencing in Canada brought about changes of objectives of the Kenyan system took a leaf from. The question as to whether then if a deterrent objective is most suitable for a vulnerable set of persons is answered by the analysis evidently showing little effect of the rates of convictions and abuse cases in the recent years. By virtue of the rising number of child abuse cases it shows the child is hurting and does not see the effect of the laws passed. Penal laws therefore need to be reformed to have an actionary character.

4.2.3 Difference of the Canadian Situation

Canadian legislation as espoused in Chapter 3 has a double objective of retribution and deterrence. The rationale of deterrence and retribution were manifest in judicial discretion. This means the justices in their rulings were more inclined to attach their bias on utilitarian and retributive mechanisms. This thinking was expressed in the case of R. v. Higgins where the courts instinctively defended the position of discretion. The aforementioned instruments show the link in which the Kenyan system takes a leaf from. The enforcement of instruments show the link in which the Kenyan system takes a leaf from.
addition to the 1996 reforms on sentencing, the 1999 Badgely Report brought to light the shortcomings of the Criminal Code ensuring the enforcement of specific laws catered to children. The report further noted that the necessity of protection of children from abuse stemmed from their vulnerability and as such deterrent laws should be enforced for the sake of justice. This justified the reasoning of the higher sentences for child abuse crimes as compared to other crimes.

The emergence of these two objectives in the laws saw a change of perception in the community.

4.2.3.1 Child Physical Abuse

The response of the laws to physical abuse against children saw a change of perception in the community. As such the hybrid system of retribution and deterrence was codified in the early 2000s.
4.2.3.3 Child trafficking

The crimes concerning child trafficking as seen before have attracted high mandatory minimum penalties. In 2012, after amendments in 2012 to introduce these penalties, led to 27 prosecutions of the 77 reported cases in the year. Compared to 12 convictions in 2011, the laws have penalized the offender is likely to repeat the offence regardless of the introduction of minimum penalties to try and rationalise the punishment of crimes and achieve a lower recidivism rate and greater objective of the law other than just deterrence. The courts have imposed a severe penalty on the offender. The minimum penalties are therefore given to limit the rationality of the judiciary giving unfounded penalties.

Therefore given to limit the rationality of the judiciary giving unfounded penalties. The minimum penalties are decreases of persons was previously committed without consent. The severity of the crime in cases of sexual abuse, the discretion of the courts is given to rationalise the punishment of crimes and achieve a lower recidivism rate and greater objective of the law other than just deterrence. The courts have imposed a severe penalty on the offender. The minimum penalties are therefore given to limit the rationality of the judiciary giving unfounded penalties.

4.2.3 Child trafficking

Directed retributive and deterrent system have led to a stable penal system with intense public support.
The Public Prosecutor of Criminalia ensured this was so by applying the obiter in Boucher v The Queen, 105: “It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction ...”
Kenya should therefore take a leaf from Canada. As such the Kenyan Penal System should consider:

1. Introduction of mandatory minimums of penalties. This removes discretion of the judiciary and as such aligns the purpose of the laws.

2. Incorporation of retribution as a choice of objectives in the laws.

3. Strengthening of child abuse investigations by the Kenya Police Service. This goes to improve the infrastructure and reduction of bureaucracy.

4. Setting up of proper reporting mechanisms to ensure an associated effort to curtail the purpose of the laws.

The implementation of these recommendations may require an overhaul of the child protection regime and active stakeholder participation. The recommendations may in themselves go on to take a period of time in implementation. The implementation of these recommendations may require an overhaul of the child protection regime and active stakeholder participation.

The ideal situation would be to transfer the burden of deterrence from the courts to the enforcing authorities. This is on the basis that the enforcing authorities enforce deterrence through certainty of apprehension of the culprits.

The judicial inertia in implementing these changes to break from the discretionary sentencing would pose a challenge in ensuring a major decrease in the conviction and overall cases in the system. The judicial inertia in implementing certain deterrence may take a number of years. This according to statistics seen previously would translate to societal deterrence would not be severe but rather a reasonable threshold. The expected return in societal deterrence would be looking at a situation where deterrence is achieved through certainty of apprehension of the offenders.

There is need to bolster the reporting mechanisms to allow for the abysmally enforced new investigative powers. This goes to the idea that the enforcing authorities enforce deterrence through certainty.

The ideal situation would be to transfer the burden of deterrence from the courts to the enforcing authorities. This is on the basis that the enforcing authorities enforce deterrence through certainty of apprehension of the culprits.

The introduction of mandatory minimums in the criminal justice system would render the possibility of limited discretion of courts. In essence the system would be looking at a situation where deterrence is achieved through certainty of apprehension of the offenders.

There is need to bolster the reporting mechanisms to allow for the abysmally enforced new investigative powers. This goes to the idea that the enforcing authorities enforce deterrence through certainty of apprehension of the culprits.

The ideal situation would be to transfer the burden of deterrence from the courts to the enforcing authorities. This is on the basis that the enforcing authorities enforce deterrence through certainty of apprehension of the culprits.
After implementing stricter laws, the effect on the number of cases was found to be minimal. The number of cases did not decrease significantly. Despite this, the effort was important to look at the societal response to harsh and deterrent and determinate sentences by mandating minimum sentences in Canada.

The study has brought to light the question of deterrence and whether it is the best fit for the child abuse case. The paper recognizes the position of child abuse as constituting various forms: physical, sexual, and exploitative. The research endeavoured to look at legislation and try to nationalize the trends in offences. The research focused on two levels: the first being the laws as being solitary and pure from a Kenyan point of view. The notion of a "pure theory of law" was attractive since compliance and adoption of such is unhampered with the questions of morality. Second, would be rationalizing the compliance to these laws. The laws according to the paper should endeavour to bring about the greatest good for the greatest number. As such the research focused on these levels of deterrence and the applicability of the laws. As such the research focused on these levels of deterrence and the applicability of the laws.

The study was brought to life to highlight the question of deterrence and whether it is the best fit for the child abuse case. From the outset, the study recognized the position of child abuse as constituting various forms: physical, sexual, and exploitative. The research endeavoured to contextualize the penal terms and the applicability of the laws. As such the research focused on three types of abuse: sexual, physical, and child trafficking and exploitation.

Despite the outlook on the laws, it was important to look at the societal response to harsh and deterrent and determinate sentences by mandating minimum sentences in Canada.
was seen in the Canadian jurisdiction. This led to a debate to search for the meaning of these statistics. It was found out that the root cause is first the asymmetry of penal laws and second the lack of certainty. This has led to the development of a new legislative framework and institutional system. The cooperation of the government with the civil society in working towards a new legislative system is necessary. The need to fix the child protection laws should be rapid. The cooperation of the government with the civil society in working towards a new legislative framework and institutional system is necessary. The need to fix the child protection laws should be rapid.

Conclusion

In conclusion, the situation of Kenya is in amber alert, meaning it is time to take notice of the changing tides that rage on the horizon. The need to fix the child protection laws should be rapid. The cooperation of the government with the civil society in working towards a new legislative framework and institutional system should be kept in mind. This paper recommends several measures to ensure the working of the system. These are:

1. Introduction of mandatory minimums of penalties.
2. Incorporation of contributive laws.
4. Setting up of proper reporting mechanisms.

The application of these recommendations does not happen in a vacuum but should be tempered with the notion of good governance and backing of the civil society. The recommendations have to be set in place and adopted for the Kenyan situation. The cooperation of the government with the civil society in working towards a new legislative framework and institutional system should be kept in mind. The need to fix the child protection laws should be rapid. The cooperation of the government with the civil society in working towards a new legislative framework and institutional system should be kept in mind. This paper recommends several measures to ensure the working of the system. These are:

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