

**CHILD PROTECTION IN THE FAMILY HOME: THE STATE'S ROLE IN
ENHANCING THE BEST INTERESTS' PRINCIPLE**

This dissertation has been submitted as partial fulfilment of my degree program and as per the Strathmore Law School guidelines.

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1/04/2019

DECLARATION.

This dissertation has been submitted with the knowledge and approval of my supervisor.

This dissertation is my original work and no part of it has been submitted to any other institution in fulfilment of the requirements of my degree program.

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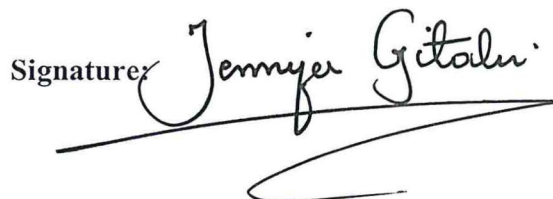


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I thank God and my family for the support during the period of writing my dissertation.

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ABSTRACT

The family is regarded by some as a private institution in society that does not require any intervention nor interference by the state. This is in consideration that the state has an interest in its citizens' wellbeing and owes them the duty of protection. This is also linked to the interest in having a society that ensures its members are thriving so as to have productive members. The state's interest intensifies when the members in question are considered to be vulnerable. Children are considered vulnerable in society for they need care and protection to thrive and attain their maximum potential. For the purposes of this research, I will focus on children and how the state ensures their protection in a private family institution while enhancing the best interests' principle. A comparative study between the US, South Africa and Kenya will be used to see the various ways states afford protection to children in the family institution.

CHAPTER 1

INTRODUCTION

In Kenyan society, children are regarded as the custodians of the future generations as anywhere else in the world. Based on this, the law handles children as a protected group of persons. Children rights are provided for in the Constitution of Kenya under the Bill of Rights and article 53 of the Constitution, Children Act¹ and international instruments like the Convention on Rights of a Child. The Children Act is a result of the consolidation of the repealed Guardianship of Infants Act, Adoption Act, and Children and Young Persons Act. This has brought about a mix of old and new progressive laws thus making it easier for the society to access children's rights. The Children Act defines a child as anyone below the age of eighteen years². It caters for children's entitlements that allow them to develop to their maximum potential while ensuring their protection.

In protecting children in society, a lot of importance is placed on clearly outlining their rights. This has been done by the previously mentioned legal instruments. The people tasked with protection of children in some instances fail to undertake this social and legal responsibility³. When the people in question are parents and guardians, abuse becomes difficult to discover or even bring to light. This is because such abuse mostly happens in the privacy of the family home.⁴ This can make the abuse difficult to discover and when discovered difficult to prosecute. Family members are often not willing to testify against each other in such matters. Such a scenario brings about some difficulty as family unions enjoy recognition and protection from the state.⁵ Families in many instances opt to settle most of child abuse and defilement cases out of court under traditional dispute resolution mechanisms that are

¹ Children Act, No 8 of 2001

² Section 2, Children Act, (Act 8 of 2001)

³ Citizen Television website, published on 5th December 2017, <https://citizentv.co.ke/news/police-arrest-mother-of-baby-found-with-14-needles-in-her-body-184268/> accessed on 30th January 2018.

⁴ ChildLine Kenya website, published in 2017 <http://childlinekenya.co.ke/assets/files/Child-Protection-Report-2006-2016.pdf> accessed on 30th January 2018.

⁵ Article 45(1), Constitution of Kenya, 2010

permitted in Kenyan legal framework⁶. The question of the extent of state authority in intervening in the private lives of families when a child's safety and wellbeing is at risk thus comes up. This discourse seeks to explore the various justifications, if any, that the state uses when intervening in a private family setting to protect children from neglect, abuse and exploitation. It will also seek to find out how the courts participate in such intervention and the legal framework involved. This will factor in culture and the position of the U.S and South African legal regimes on these matters.

1. Background

Most sexual abuses against children are perpetrated by neighbours followed by immediate family members. In cases of child abandonment and neglect, emotional abuse, physical abuse and child labour, immediate family members rank highest as perpetrators.⁷ For Female Genital Mutilation (FGM), either parents (father or mother) rank highest as perpetrators.⁸ It is therefore safe to conclude at this point that quite a number of ills against children are committed within the family set up that is considered private. Children in such circumstances are in need of protection and help from the state. The state is thus forced to intervene in what is considered a private family setting. A lot of opposition can be encountered by the state as parents and guardians may argue that the state has no authority to interfere in their private family lives. It is also recognised that parents are responsible for bringing up their children as per their cultural and religious beliefs.⁹ A question of the exact scope of the extent of state intervention that is permissible in private family life regarding children arises. This is in consideration of the best interests' principle in matters concerning children.

In spite of the above, the constitution recognises that the family is the natural and fundamental unit of society and the necessary basis of social order, and that it shall enjoy the recognition

⁶ *Republic v Mohamed Abdow* (2013), eKLR

⁷ ChildLine Kenya website, published in 2017 <http://childlinekenya.co.ke/assets/files/Child-Protection-Report-2006-2016.pdf> accessed on 30th January 2018

⁸ ChildLine Kenya website, published in 2017 <http://childlinekenya.co.ke/assets/files/Child-Protection-Report-2006-2016.pdf> accessed on 30th January 2018.

⁹ Article 53(1,e), Constitution of Kenya, 2010

and protection of the state¹⁰. This shows that the state has interest in the wellbeing of children who in ordinary circumstances are raised in a biological nuclear family. This also includes children with adoptive parents. This is in addition to the state generally having an interest in the wellbeing of its citizens and anyone within its jurisdiction.

2. Statement of the problem

Children are supposed to be protected so as to aid their psychological, physical and emotional development. Research indicates that supportive relationships with caring adults as early in life as possible has the effect of preventing or reversing the damaging effects of toxic stress response.¹¹ Psychological problems that are normally associated with child abuse are low self-esteem, personality disorders, and aggression and depression.¹² It can therefore be concluded that good child care helps in adjustment of the normal life changes. This shows the negative results of failure of child protection in a family setting. Most of these effects as can be seen are long term and such findings emphasise the need for the intervention of the state in private family life in in matters child protection. The state should have authority to intervene as per the best interests' principle of child protection. Children courts ought to have the authority to enjoin any person in a matter involving a child even if he/she is not a party to a case. This authority should be pegged on the person's involvement in the child's life and their potential to interfere with the welfare of the child.

3. Statement of objective

The main aim of this research is to find out the nature of state intervention through the courts, legislation and policy guidelines in cases of child abuse or mistreatment in a family setting.

4. Hypothesis

This research shall proceed on the hypothesis laid out hereunder:

¹⁰ Article 45(1), Constitution of Kenya, 2010

¹¹ UNICEF, *Ending Violence against Children: Six Strategies for Action*, September 2014, 8

¹² Child Welfare Information Gateway website, published in July 2013, https://www.childwelfare.gov/pubPDFs/long_term_consequences.pdf accessed on 20th February 2018.

- The state has authority to intervene in matters concerning the general wellbeing of all members of society with special attention given to vulnerable members. In the case of a child, this is based on recognising that the child because of the needs of his physical and mental development requires particular care paying attention to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security.¹³

5. Research question

The above statements lead to the question of the nature of state authority in intervening in private family life as per the best interests' principle and its role in enhancing it where child protection and welfare is concerned.

6. Justification of the study

A child occupies a unique and privileged position in the African society and for the full development of his personality, a child ought to grow up in a family environment in a happy, loving and understanding atmosphere.¹⁴ There is also no law that explicitly details the nature of state intervention allowed in private family life matters regarding child protection and also specific measures that can be taken to protect the child at that level. The Kenyan framework contains child protection laws that are to be applied in all spheres of a child's life.

The South African Constitution has been likened with the Kenyan Constitution in terms of the Bill of Rights framework in which children derive their rights from. In these two countries, the Constitution is the grund norm from which other laws derive their authority from. South Africa being an African society like Kenya, tends to have almost similar value systems in terms of family and child care. Traditional legal systems are also recognised to a certain extent as valid law.¹⁵

The US on the other hand has a legal framework that is considered tried and tested as compared to the South African and Kenyan frameworks. In terms of Constitutional framework, the US is different from both the Kenyan and South African frameworks. The US Constitution is not large in terms of coverage as compared to the South African one. This can

¹³ Preamble, African Charter on the Rights and Welfare of the Child adopted on 1st July 1990, CAB/LEG/24.9/49 (1990)

¹⁴ Preamble, Declaration of the Rights of the Child 20th November 1959, General Assembly 1386.

¹⁵ Article 2(4), Constitution of Kenya, 2010

be seen as a way to accommodate and give leeway to states legislating their own frameworks so that federal laws act as guidelines. This also gives a lot of space for civil societies to push for various policies and guidelines in various spheres of law including child protection laws. The diverse nature of the three legal frameworks makes an interesting study of how they tackle the issue of state intervention in child protection in the family home while still enhancing the child's best interests' principle.

7. Theoretical framework

This research will be based on the doctrine of *parens patriae* and the principle of the child's best interest. *Parens patriae* doctrine states that the state has power to provide protection to those that are unable to care for themselves.¹⁶ The history of this concept is that at one time the Crown, in England, as father of his country, was the guardian and superintendent of all infants, especially the homeless, abused, neglected and that upon creation of the office of the Chancellor, the latter was given this power.¹⁷

The early cases in which the power of *parens patriae* was exercised were concerned with children whose parents had vicious tendencies, and where the situation was manifestly improper to let children remain for fear that the evil surroundings would have a bad influence on the child.¹⁸ Historically, this power arose only upon unavailability of the natural guardian, but this is not true of the modern *parens patriae* that comes into play upon lesser defaults of parental guardianship and child behaviour.¹⁹ Application of this concept allows the state to intervene in children's matters either in cases of delinquent juveniles or abusive parents²⁰ and

¹⁶ Lawrence B. Cluster, The Origins Of the Doctrine of Parens Patriae, *Emory Law Journal Volume 27*, (1978)

¹⁷ George Rossman, Parens Patriae, *Oregon Law Review Volume 4*,(1925),5

¹⁸ George Rossman, Parens Patriae, *Oregon Law Review Volume 4*, (1925),7

¹⁹ Natalie Loder Clark, Parens Patriae and a Modest Proposal for the Twenty First Century: Legal Philosophy and a New Look At Children's Welfare, *Michigan Journal of Gender and Law Volume 6* (2000),386

²⁰ Timothy J. Grendell, Thomas S. Liu, Anthony J. Hurst and Tara Pavlovcak, Protecting Ohio's Children: Ohio Juvenile Court Jurisdiction to Prevent Non-Party Interference in the Protection of the Best Interest of a Child, *Juvenile and Family Court Journal 67 No. 2* (2016), 68

even in putting in place laws that entitle children to basic nutrition, shelter, health care and a free compulsory education²¹.

The principle of subsidiarity is the principle according to which a community of a higher order should not interfere in the internal life of a community of lower order, depriving it of its functions but rather should support it in the case of need and help coordinate its activity with the activities of the rest of the society, always with the view to the common good. This principle is opposed to all forms of collectivism and sets limits for state intervention. It proposes transfer of decision making from central to peripheral bodies, meaning that decisions should be taken at the lowest appropriate level.²² This is also applies to decisions concerning children and their welfare. In line with this principle, the family must be helped and defended by appropriate social measures. Where families cannot fulfil their responsibilities, other social bodies have the duty to help and support them. This also involves also relates to children.

The principle of the child's best interest derives its origins from the welfarism theory that emanated from the American juvenile system in the late 19th and early 20th century.²³ The focus of this theory was the welfare of the child rather than the rights of the child or of the parent. The best interests' principle is recognised in the Children Act of Kenya. In section 4 (2), the Act provides that in all actions concerning children, the best interest of the child should be the primary consideration.²⁴ This is also recognised in the constitution of Kenya.²⁵ Moreover, mankind owes the child the best it has to give.²⁶ This can be related to psychological, spiritual and physical needs.

²¹ Article 53 (1), Constitution of Kenya (2010)

²² Andrew Heywood, *Politics*, Palgrave New York, 2002, 152

²³ Richard A. Lawrence (2008) History and development of the juvenile court and justice process, Available at http://www.sagepub.com/upm-data/19434_Section_1.pdf Accessed on 6th March 2018.

²⁴ Section 4(2), *Children Act*, Act 8 of 2001.

²⁵ Article 53, *Constitution of Kenya*, 2010

²⁶ Preamble, Declaration of the Rights of the Child 20th November 1959, General Assembly 1386.

8. Literature review

In the Harvard Educational Review, Hillary Rodham in her article, 'Children Under the Law'²⁷, notes that traditionally the law has reflected a social consensus that children's best interest are the same as those of their parents except few circumstances where the state is allowed to intervene in private family life. This exception is founded under the doctrine of *parens patriae*.²⁸ This doctrine gives the state power to protect the vulnerable in its communities and children are considered as such.

This train of thought is extended by Natalie Loder Clark who in her article²⁹ takes the view that government primarily exists to promote the common good as well as to protect individuals insofar as possible, consistently with the welfare of the greatest number. There is an assumption that common good and the good of the majority are similar concepts. Modern welfare state is founded upon such views and it co-exists with individuality. In this system parents may or may not be the primary care givers of children. The state may come in and enforce what is best in its view. *Parens patriae* in such a system recognises the natural dependence of children and as result their welfare will take precedence over the welfare of their parents and other adults. The challenge with this school of thought becomes establishing what is best for the greatest number of children and also deciding the role of parents, communities and governments.³⁰

The South African Constitutional Court in the case of *C v Department of Health and Social Development*³¹ stated that the coercive removal of a child from his home environment is undoubtedly a deeply invasive and disruptive measure. Uninvited intervention by the state into the private sphere of family life threatens to destroy the integrity and continuity of family relations, and even to disgrace the dignity of the family, both parents and children, in their

²⁷ Hillary Rodham, "Children Under the Law", *Harvard Education Review*, Vol 43 No 4 (1973), 487-514

²⁸ Hillary Rodham, Children Under the Law, *Harvard Educational Review* Vol 43 No. 4 (1973), 487-514

²⁹ Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty First Century: Legal Philosophy and a New Look At Children's Welfare*, *Michigan Journal of Gender and Law* Volume 6 (2000)

³⁰ Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty First Century: Legal Philosophy and a New Look At Children's Welfare*, *Michigan Journal of Gender and Law* Volume 6 (2000),391

³¹ *C v. Department of Health and Social Development*, *Gauteng* (2012) ZACC 1

own right as well as in the eyes of the community.³² This case was about the emergency removal of children who accompanied parents to beg in the street. The court relied on the principle of the child's best interest to arrive at the decision. From this case it is evident that even when the state is intervening in private family life, a balance has to be struck so as to ensure the intervention does not affect integrity and dignity of the family unit.

Michael Freeman³³ recognises that in some cases there is usually conflict between culture and children's rights.³⁴ He propounds that cultural pluralism placed between two extremes, places values within cultural context and provides for dialogue and change.³⁵ These extremes are cultural relativity where the laws in place must accommodate the cultures of those it serves and the other is universality. Universality is where laws do not necessarily consider the culture of those it serves thus leading to laws that have the potential of not serving the people. He rejects cultural relativism for it renounces normative judgement and also rejects the moral determinacy of monism because it offers blanket solutions but fails to address cultural difference.³⁶

These opinions are evident in the case of *Alhaji Mohamed v Knott*. In this case a man in his mid- twenties, who was a Nigerian Muslim, had married a girl who was almost 13 years old. This was discovered after he went to a doctor in South of London for medical treatment. The doctor reported the matter to the police who forwarded a complaint to the juvenile court that she was in need of care for she was being exposed to moral danger. The court made a "fit person order" under the Children and Young Persons Act 1963 that she be admitted to the

³² *C v. Department of Health and Social Development, Gauteng* (2012) ZACC 1, (23)

³³ Michael Freeman is an Emeritus Professor in the Law faculty at the University College of London whose interests are in rights of children and medical ethics. <https://www.ucl.ac.uk/laws/people/prof-michael-freeman> Accessed on 7th March 2018

³⁴ Michael Freeman, Cultural Pluralism and the Rights of the Child, *The Changing Family: Family Forms & Family Law* (1998), 304

³⁵ Michael Freeman, "The Morality of Cultural Pluralism", *The International Journal of Children's Rights* (1995), 1-17

³⁶ Michael Freeman, Cultural Pluralism and the Rights of the Child, *The Changing Family: Family Forms & Family Law* (1998), 304

care of a local authority. The rationale behind the order was that continuance of the marriage would be repugnant to any decent minded English man or woman.³⁷

This was reversed on appeal by the Divisional Court. Lord Justice Parker decided this on the basis of the culture the wife, and her husband were brought up in. He stated that the aspect of moral danger would be evident if one was only considering someone brought up and living the English way of life. What amounted to “moral danger” was being tested by the morality of the culture to which the couple belonged. This was consistent with the acceptance of moral and cultural pluralism.³⁸

These arguments also manifest in the sphere of children’s rights especially on matters relating to female circumcision that is pegged on various cultural beliefs. In this case, the fit person order admitting the child to the care of the local authority from the juvenile court should not have been overturned as the child’s health was put at risk. The man in his mid-twenties had gone to seek medical attention for a venereal disease. It was highly probable that the child might get infected since he admitted to having sexual relations with her even after noting the symptoms. A child’s health should not be put at risk so as to abide by culture or cultural pluralism in law.

9. Research design

i) Research Methodology

My research method will entail review and analysis of case law, statute and articles from relevant journals. Statistics might also apply in some instances that need concrete figures so as to support specific conclusions. Internet sources will also apply. Secondary sources like international law instruments, the Kenyan Constitution, various child care and welfare legislations, reports, background papers, books and academic articles will be relied on.

ii) Limitation of the study

The extent of state authority in terms of intervention through the courts has been well researched and documented in other jurisdictions. In the Kenyan framework, cases of state

³⁷ *Alhaji Mohamed v. Knott* (1969) 1 QB 1

³⁸ M.D.A Freeman, *The Legal Structure*, Longmans (1974), 48

intervention in matters relating to child protection in the family home are not adequately published. This necessitates reliance on the Constitution, the Children Act, articles by experts in child protection laws and government policies and guidelines in addressing questions in the Kenyan framework.

iii) Assumptions

- The state through the courts has authority to remove a child from the family home where the child's security and wellbeing is at risk.
- It is also assumed that the state interest in the welfare of the children within its jurisdiction and territory.
- States have a duty to protect children even in a family environment.
- The interests of the parents relating to the welfare of the child is not always the child's best interest.

iv) Chapter breakdown

This research paper will be presented in the following chapters:

- a) Chapter one of this paper will outline the background of the study, statement of the problem, research objectives, research question(s) that will guide the entire research, justification of the study, theoretical frameworks relied upon, literature review of the research, research methodology, limitation of the study and assumptions.
- b) Chapter two will discuss the Kenyan legal framework on the protection of children paying close attention to the various family settings and the involvement of the state in the same.
- c) Chapter three will discuss the U.S and South African perspective of state authority in child protection in private family life.
- d) Chapter four will deal with the comparison of the Kenyan framework with the U.S and South African frameworks. Findings from my research in relation to the Kenyan framework will be discussed. This will be answering the research question.
- e) Chapter five will contain conclusions and recommendations.

CHAPTER 2.

KENYAN LEGAL FRAMEWORK ON CHILD PROTECTION IN THE CONTEXT OF FAMILY

1. Introduction

The Kenyan Constitution being the supreme law of Kenya³⁹ makes it the foundation of any area of law within the Kenyan legal framework. This supreme law allows the application of customary law⁴⁰ albeit with limitations to its repugnancy and consistency with the Constitution⁴¹. It also provides for application of the general rules of international law and any treaty or convention ratified by Kenya as part of the law of Kenya under the constitution⁴². This means that all treaties and conventions pertaining the rights and protection of children internationally and ratified by Kenya have force of law in Kenyan territory. Customary international law principles also fall under this category. The constitution under article 53 talks about children's rights and the basic responsibilities of a child's parent(s). The Children Act, Act 8 of 2001, is a law expounding on the rights stated by the constitution solely dedicated to ensuring that children's rights are well articulated to the society. Kenya being a common law legal system, applies the doctrine of *stare decisis* that allows judge made law in the form of judicial precedent⁴³. As a result, case law emanating from the children courts form part of the legal framework of child protection. Jurisprudence from other jurisdictions though not binding, is persuasive to our legal system.

Some of the treaties ratified by Kenya concerning child protection are⁴⁴: Convention on the Rights of the Child, Optional Protocol on the Involvement of Children in Armed Conflict,

³⁹ Article 2(1), Constitution of Kenya (2010)

⁴⁰ Article 2(4), Constitution of Kenya (2010)

⁴¹ Section 3(2), Judicature Act, Act 16 of 1967

⁴² Article 2(5&6), Constitution of Kenya (2010)

⁴³ Cornell Law School website https://www.law.cornell.edu/wex/stare_decisis accessed on 7/05/2018

⁴⁴ United Nations Human Rights Council website https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_Annex3.pdf accessed on 4/08/2018

Optional Protocol to Convention on the Rights of the Child on Prostitution and Pornography, ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and African Charter on the Rights and Welfare of the Child. These treaties are applied in addition to the ratified human rights treaties that apply to everyone irrespective of age, race, religion and gender.

2. Understanding of family in law

Of importance is to first establish the context in which the law understands and describes a family. The word “family” is one which is difficult if not impossible to define⁴⁵. It can mean all persons related by blood or marriage and in another context it may include all members of a household, including parents and children with other relations and servants.⁴⁶ Intimate or caring relationships may be regarded as making a family even though there are no blood or status ties between the parties.⁴⁷ According to Engels, the term “family” is used to refer to the social organisation of reproduction and production of daily life at all stages of human society.⁴⁸ The most common family model is based on the system of consanguinity. Marriage between single pairs with easy dissolution by either pair is also known as the pairing family. The offspring of such married couple was known and recognised by all and no doubt arises as to the person to whom the designation of mother, father, brother, son, daughter, sister, brother should be applied.⁴⁹ This understanding creates the foundation of family on marriage.

An understanding of family at least within the European society can be derived from the jurisprudence from the European Convention on Human Rights. Article 8(1) of this Convention guarantees the right to respect for one’s private family home. It further goes ahead to state under article 12 that men and women of marriageable age have the right to marry and found a family. Article 8 refers to family life while article 12 refers to the family itself. From the European context it can be understood that the relationship between spouses

⁴⁵ B Hale, D Pearl, E Cooke and D Monk, *The Family, Law and Society: Cases and Materials*, 2008, 6th Edition, Chapter 1

⁴⁶ Nigel Lowe and Gillian Douglas, *Bromley’s Family Law, 11th Edition*, Oxford University Press, 1

⁴⁷ Nigel Lowe and Gillian Douglas, *Bromley’s Family Law, 11th Edition*, Oxford University Press, 1

⁴⁸ Frederick Engels, *The Origin of the Family, Private Property and the State*, Resistance Books, 2004, 12

⁴⁹ Frederick Engels, *The Origin of the Family, Private Property and the State*, Resistance Books, 2004, 45

will almost always create a family life.⁵⁰ It is also only recently that cohabitation between unmarried partners has been considered to create a family even between same sex couples.⁵¹ The relationship between a mother and her child will always be regarded under the Convention as constituting a family even if the child is born outside wedlock.⁵²

The European Court of Human Rights has distinguished between married and unmarried fathers, and between unmarried mothers and unmarried fathers, holding that family life arises between a married father and his child automatically⁵³, but that unmarried fathers must show more than a blood tie to establish a family life with their child.⁵⁴ Cohabitation outside marriage with the mother even if it terminates before the child is born may suffice⁵⁵ provided that he demonstrates a sufficient interest in and commitment to the child.⁵⁶

For the purposes of child protection, the European society regards the family as a basic social unit constituted by at least two people whose relationship may fall into one of three categories.⁵⁷ The first one is the relationship between two persons in a marital relationship or who are living in a manner similar to spouses. Secondly, a family may be constituted by a parent living with one or more children. Thirdly, brothers and sisters or other persons related by blood or marriage may be regarded as forming a family. In family law, the relationship between parents and children imposes some obligations upon the parents towards their child and not vice versa.⁵⁸

The Constitution of Kenya describes a family as the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the

⁵⁰ *Berrehab v Netherlands*, ECtHR Judgement of 28 May 1988, para 322

⁵¹ *Schalk and Kopf v Austria* (2011) 2 FCR 650

⁵² *Marckx v Belgium*, ECtHR Judgement of 13 June 1979, para 330

⁵³ *J v Ireland*, ECtHR Judgement of 18 December 1986, para 203

⁵⁴ *G v Netherlands*, ECtHR Judgement of 22 September 1993, CD38

⁵⁵ *K v Ireland*, ECtHR Judgment of 26 May 1994

⁵⁶ *L v Netherlands* (2004) 2 FLR 463

⁵⁷ Nigel Lowe and Gillian Douglas, *Bromley's Family Law, 11th Edition*, Oxford University Press, 2

⁵⁸ Nigel Lowe and Gillian Douglas, *Bromley's Family Law, 11th Edition*, Oxford University Press, 2

state.⁵⁹ The Children Act of Kenya⁶⁰ doesn't provide any definition of a family. The preamble of the Convention on the Rights of the Child recognises the family as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children and that it should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.⁶¹ According to the African Charter on the Rights and Welfare of the Child, a family is recognised as the ideal environment where a child should grow up in an atmosphere of love, happiness and understanding.⁶²

There has also been tension between laying down norms for family rights and providing rights for individual members of the family.⁶³ There may be conflicts of interest between the two. An example of this can be the right of privacy that the family unit is entitled to versus the duty of the state to protect children in the society including those in a family set up. The American Convention on Human Rights (1969), attempts to deal with this under article 17 that deals with rights of the family by allocating rights of individuals within the family setting.⁶⁴ It is thus inferred from this is that a family in the Kenyan legal context is a fundamental unit of social order that requires protection by the state. In ordinary circumstances, children are raised by their biological parents and make a nuclear family.

3. Guarantees in the legal framework

Since the understanding of the concept of family in law has been defined, the next step is to study the various entitlements that the body of child protection laws guarantees children. This study entails looking into the specific statutes and the specific rights that provide for children's entitlements with focus on a family set up. These rights are in addition of the Bill of

⁵⁹ Article 45 (1), *Constitution of Kenya*, 2010

⁶⁰ Act No. 8 of 2001

⁶¹ Preamble, *Convention on the Rights of a Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

⁶² Preamble, *African Charter on the Rights and Welfare of a Child*, 11 July 1990, CAB/LEG/24.9/49 (1990)

⁶³ Nigel Lowe and Gillian Douglas, *Bromley's Family Law, 11th Edition*, Oxford University Press, 21

⁶⁴ Article 17, *American Convention on Human Rights*, 22 November 1969, OAS "Pact of San Jose"

Rights provided for under chapter four of the Constitution of Kenya and other international ratified statutes and case law.

The Constitution of Kenya under article 53 entitles children protection from abuse, neglect and harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour, parental care and protection which equally falls on both parents regardless of whether they are married. All this is based on the child's best interest which is paramount in every matter concerning the child.⁶⁵ The above is in addition the fundamental rights contained in the Constitution's Bill of rights.⁶⁶ The State has responsibility in ensuring that they are safeguarded. Guarantees like freedom from torture and cruel, inhuman or degrading treatment or punishment,⁶⁷ freedom from slavery or servitude,⁶⁸ freedom from forced labour,⁶⁹ right to life,⁷⁰ human dignity⁷¹ and freedom and security of the person⁷² are more likely to affect children in the private family home compared to other guarantees in the Bill of rights.

The Children Act of Kenya was passed to law in 2001. This piece of legislation was realised for the purpose of making a provision for parental responsibility, fostering, adoption, custody, maintenance, care and protection of children. It was to also give the force of law to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁷³ The Children Act delves deeper into aspects that are very specific and particular to child care and protection. Part two of the Act⁷⁴ is dedicated to highlighting

⁶⁵ Article 53, *Constitution of Kenya*, 2010

⁶⁶ Chapter 4, *Constitution of Kenya*, 2010

⁶⁷ Article 25(a), *Constitution of Kenya*, 2010

⁶⁸ Article 30(a), *Constitution of Kenya*, 2010

⁶⁹ Article 30(b), *Constitution of Kenya*, 2010

⁷⁰ Article 26, *Constitution of Kenya*, 2010

⁷¹ Article 28, *Constitution of Kenya*, 2010

⁷² Article 29, *Constitution of Kenya*, 2010

⁷³ Preamble, *Children Act*, Act 8 of 2001

⁷⁴ Act used hereinafter refers to the Children Act, Act 8 of 2001

the safeguards for the rights and welfare of the child. The state is tasked with taking maximum steps of its available resources with a view to achieve the full realisation of the rights of the child.⁷⁵ This can be taken to mean that the state has a responsibility to come up with guidelines for child protection in and even outside the family set up and form agencies that will help in the implementation of those guidelines. It establishes the important factor of state interest in the implementation of the guarantees under the Act.

The second part of the Act spells out the basic entitlements of a child within the Kenyan jurisdiction and the parties responsible in ensuring that such child is guaranteed those rights. Responsibility is placed on the state and the family to ensure the survival of the child in regards to the inherent right to life that every child is entitled to.⁷⁶ The principle of the best interest of the child is stated as the influencing factor in actions regarding children. All actions concerning children whether undertaken by private or public welfare institutions, courts of law, administrative authorities or legislative authorities should have the best interests of the child as the primary consideration.⁷⁷ A child is also entitled to have his opinion heard and considered in matters of procedure and that opinion will be weighed taking into account the child's age and maturity.⁷⁸

Right to parental care is also provided for by the Children Act⁷⁹ in addition to what the Constitution provides. Every child is guaranteed the right to live with and be cared for by his parents.⁸⁰ The law also recognises that there are instances where a child living with his parents might not be in his best interests. The state through the Director of Children Services shall intervene and provide the best alternative care for such a child.⁸¹ Also in cases where a child is separated from his family without leave of the court, the state has the duty to provide

⁷⁵ Section 3, *Children Act*, Act 8 of 2001

⁷⁶ Section 4(1), *Children Act*, Act 8 of 2001

⁷⁷ Section 4(2), *Children Act*, Act 8 of 2001

⁷⁸ Section 4(4), *Children Act*, Act 8 of 2001

⁷⁹ Section 6, *Children Act*, Act 8 of 2001

⁸⁰ Section 6(1), *Children Act*, Act 8 of 2001

⁸¹ Section 6(2), *Children Act*, Act 8 of 2001

assistance for reunification of the child with his family.⁸² Children are also guaranteed an education whose provision shall be the responsibility of the state and parents.⁸³ A child is also entitled to an education regardless of his/her race, sex, pregnancy, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁸⁴ This means that no child should be discriminated against in terms of getting an education.

All children are entitled to protection from economic exploitation and any work that is likely to be hazardous or to interfere with his/her education or be harmful to the child's health or physical, mental, spiritual, moral or social development.⁸⁵ The Employment Act delves deeper into the conditions for employing a child between the ages of 13 to 16 years. Such a child can be employed to perform light work on the condition that it is not likely to be harmful to the child's health and development and it shall not prejudice the child's school attendance.⁸⁶ These provisions are alive to the fact the youth need skills that can only be attained through employment and that children might want to be involved in family businesses.

Persons with disabilities are recognised as a protected group of persons as the Constitution provides for specific application of their rights.⁸⁷ Children with disabilities are also distinguished under the Act. They are guaranteed a right to be treated with dignity, to be accorded proper treatment, special care, education and training free of charge or at a reduced cost whenever possible.⁸⁸ Children are entitled to protection from abuse both physical and psychological, neglect and any other form of exploitation including sale, trafficking or abduction of any person.⁸⁹

⁸² Section 6(3), *Children Act*, Act 8 of 2001

⁸³ Section 7(1), *Children Act*, Act 8 of 2001

⁸⁴ Article 27(4), *Constitution of Kenya*, 2010

⁸⁵ Section 10(1), *Children Act*, Act 8 of 2001

⁸⁶ Section 56(2), *Employment Act*, No. 11 of 2007

⁸⁷ Article 54, *Constitution of Kenya*, 2010

⁸⁸ Section 12, *Children Act*, Act 8 of 2001

⁸⁹ Section 13(1), *Children Act*, Act 8 of 2001

No child shall also be subjected to harmful cultural rights like female circumcision, early marriage or other cultural rites that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.⁹⁰ This entitlement is however questioned by proponents of cultural pluralism when it comes to law and policy making.⁹¹ All children are entitled to protection from sexual exploitation and use in prostitution, inducement or coercion to engage in sexual activity, and exposure to any obscene materials.⁹² Children are also entitled to leisure, play and participation in cultural and artistic activities.⁹³ In addition to the bill of rights in the Constitution, the Act speaks on the children's entitlement to be protected from torture, cruel treatment or punishment.⁹⁴

The third part of the Act delves deeper into parental responsibility. This applies in a family context that is the key focus of this dissertation. Parental responsibility is taken to mean all duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.⁹⁵ These duties include and are not limited to: the duty to maintain the child and provide him with an adequate diet, shelter, clothing, and medical care including immunisation, education and guidance and duty to protect the child from neglect, discrimination and abuse. Parents are also given the right to: give parental guidance in religious, moral, social, cultural and other values, determine the name of the child, appoint a guardian in respect to the child, receive, recover and administer or deal with the property of the child for the benefit and interest of the child, arrange or restrict the emigration of the child from Kenya and upon the death of the child to arrange for a cremation or burial of the child.⁹⁶

The next section states the parties with parental responsibility. In the event that the child mother and father were married at the time of the child's birth, both shall have parental

⁹⁰ Section 14, *Children Act*, Act 8 of 2001

⁹¹ *Tatu Kamau v Attorney General & 14 others* (2018) eKLR

⁹² Section 15, *Children Act*, Act 8 of 2001

⁹³ Section 17, *Children Act*, Act 8 of 2001

⁹⁴ Section 18, *Children Act*, Act 8 of 2001

⁹⁵ Section 23(1), *Children Act*, Act 8 of 2001

⁹⁶ Section 23(2), *Children Act*, Act 8 of 2001

responsibility over the child. Neither parent shall have superior claim over the other in exercising parental responsibility.⁹⁷ Where the child's mother and father were not married at the time of the child's birth but are subsequently married to each other, they shall have parental responsibility over the child and neither of them shall have superior claim in exercising such responsibility.⁹⁸ Where the child's parents were not married at the time of the child's birth and have not subsequently married each other, the mother shall have parental responsibility at first instance.⁹⁹ The father also equally has parental responsibility at first instance. More than one person can have parental responsibility over a child at the same time¹⁰⁰ and a person having parental responsibility over a child may not cease to have such responsibility.¹⁰¹ A person having parental responsibility cannot transfer such responsibility but can arrange for some or all of it to be met by someone on his behalf.¹⁰²

Parental responsibility can arise where the mother or father of the child were married to each other at the time of the birth of the child or have subsequently married each other: on the death of the mother the father shall exercise parental responsibility over the child alone or together with a testamentary guardian appointed by the mother¹⁰³ or on the death of the father if the mother is living the mother shall exercise parental responsibility over the child alone or together with a testamentary guardian appointed by the father.¹⁰⁴ The relatives of the child may also apply for the appropriate orders if they feel the surviving parent is unfit to exercise parental responsibility on the child.¹⁰⁵ From this Part, the law has clearly stipulated the parties responsible for a child in the capacity of a parent. It also seeks to inform parents or persons

⁹⁷ Section 24(1), *Children Act*, Act 8 of 2001

⁹⁸ Section 24(2), *Children Act*, Act 8 of 2001

⁹⁹ Section 24(3), *Children Act*, Act 8 of 2001

¹⁰⁰ Section 24(4), *Children Act*, Act 8 of 2001

¹⁰¹ Section 24(5), *Children Act*, Act 8 of 2001

¹⁰² Section 24(8,a), *Children Act*, Act 8 of 2001

¹⁰³ Section 25(1,a), *Children Act*, Act 8 of 2001

¹⁰⁴ Section 25(1,b), *Children Act*, Act 8 of 2001

¹⁰⁵ Section 27(2), *Children Act*, Act 8 of 2001

with such responsibility of the various expectations that the law places on them in terms of child care in and out of the family set up.

The Fourth Part of the Act talks about administration of children's services by the state. It is under this part that we see how the state manages children's affairs including welfare programmes. All this is done under the National Council for Children's Services that is established by the Act. This Council¹⁰⁶ is a body corporate with perpetual succession and a common seal.¹⁰⁷ The object of the Council is to exercise general supervision and control over planning, financing and coordination of child rights and welfare activities and advise the state on all aspects of the same.¹⁰⁸ Local authorities also have the general duty of safeguarding and promoting the rights and welfare of children within its jurisdiction and promoting the good upbringing of children by their families through the establishment of suitable family oriented programmes and through the creation of a department to deal with the rights and welfare of children.¹⁰⁹

Part X of the Children Act defines a child in need of care and protection. This is to make it easier for the state through the courts to intervene in private family life so as to ensure a child's protection. A child in need of care and protection is one: who lacks a parent or guardian, or has been abandoned by his parent or guardian or is destitute; or who is found begging; or who lacks a parent or the parent is in prison; or whose parents or guardian find difficulty in parenting; or whose parent or guardian does not or is unfit to exercise proper care and guardianship; or who is truant or is falling into bad associations; or who is prevented from receiving education; or who being female is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or who is exposed to domestic violence; or who is pregnant; or who is terminally ill, or whose parent is terminally ill; or who is disabled and is being unlawfully confined or ill-treated; or who is sexually abused or is likely to be

¹⁰⁶ Council will be hereinafter taken to refer to the National Council for Children's Services

¹⁰⁷ Section 30(1), *Children Act*, Act 8 of 2001

¹⁰⁸ Section 32(1), *Children Act*, Act 8 of 2001

¹⁰⁹ Section 40, *Children Act*, Act 8 of 2001

exposed to sexual abuse and exploitation including prostitution and pornography; or who is engaged in any work likely to harm his health, education, mental or moral development; or who is displaced as a consequence of war, civil disturbances or natural disasters; or who is exposed to any circumstances likely to interfere with his physical, mental and social development; or who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the minister of health.¹¹⁰

To determine if a child is in need of care and protection, an authorised officer is tasked to step in to help such a child. An authorised officer as per the Children's Act refers to a police officer, an administrative officer, a children's officer, an approved officer, a chief appointed under the Chief's Act, a labour officer or any other officer authorised by the Director of Children's Services for the purposes of the Act.¹¹¹ Any person who has reasonable cause to believe that a child is in need of care and protection should report the matter to the nearest authorised officer.¹¹² Where a child is taken to a place of safety by an authorised officer without reference to the court, the parent or guardian or any person who has parental responsibility in respect of the child may apply to the Director of Children's Services for the release of the child from the place of safety into his care.¹¹³ Where under Part X a child is taken to or ordered to be taken to a place of safety, the person who takes him or, the person bringing him before the court, should send a notice to the court specifying the grounds on which the child is to be brought before the Children's court and should also send particulars to his parent or guardian or such other person who has parental responsibility over the child requiring such person to attend at the court which the child will appear.¹¹⁴

The Convention of the Rights of the Child guarantees children a right to education¹¹⁵, highest attainable standard of health and treatment facilities¹¹⁶, benefit from social security¹¹⁷,

¹¹⁰ Section 119 (1), Children Act, No. 8 of 2001

¹¹¹ Section 2, Children Act, No. 8 of 2001

¹¹² Section 120 (4), Children Act, No. 8 of 2001

¹¹³ Section 120(7), Children Act, No. 8 of 2001

¹¹⁴ Section 120 (9), Children Act, No. 8 of 2001

¹¹⁵ Article 28, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

standard of living adequate for a child's physical, mental, spiritual, moral and social development.¹¹⁸ States are also required under the Convention to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, exploitation including sexual abuse while in the care of parents or legal guardian.¹¹⁹ The Convention entitles a child to state special protection in the event that his/her best interests cannot be allowed to remain in that environment.¹²⁰ The Convention holds the view that child abduction across borders relates to protection in a family setting. State parties are thus required to take measures to combat the illicit transfer and non-return of children abroad.¹²¹ State have to ensure to the maximum extent possible the survival and development of the child¹²² and this requires a holistic approach in enforcing all provisions. States should also be held accountable for failing to adhere to the international laws that they ratify.

The above is a brief recap of the main body of laws that deal with child protection in Kenya. The sections highlighted mainly focus on what is applicable to the private family setup as per the understanding of family in law. An interrogation of the nature and extent of state intervention as per this laws will be done in the coming chapters that will also compare the Kenyan legal framework with the US and South African legal frameworks. The issue of cultural pluralism in law which manifests a lot in African legal frameworks will also be discussed.

¹¹⁶ Article 24, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

¹¹⁷ Article 26, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

¹¹⁸ Article 27, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

¹¹⁹ Article 19, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

¹²⁰ Article 20, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

¹²¹ Article 11, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

¹²² Article 6, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

CHAPTER 3

UNITED STATES AND SOUTH AFRICA: PERSPECTIVES ON STATE INTERVENTION IN CHILD PROTECTION IN PRIVATE FAMILY LIFE

Introduction

The United States legal regime is very different from the South African one in matters relating to children. The South African Constitution goes into great detail in stating and explaining the legal entitlements that children in South Africa are supposed to enjoy.¹²³ This is in contrast to the United States Constitution. It says nothing about parents, families or most importantly children.¹²⁴ The South African Constitution is explicit about the substance of rights and also procedural and jurisprudential issues. It makes various rights binding not only on public but on private actors and establishes government structures for monitoring and effecting these rights.¹²⁵ This makes it easier to also enforce children's rights that are provided for in the Constitution.

The American Constitution is silent or ambiguous on its scope of application and enforcement of rights affecting the family. As a result, this leaves room for judicial interpretation, influence from civil society and communities all over America. An important factor influencing the child protection laws is the culture and composition of people in the two jurisdictions. At the time of writing the American Constitution, the cultures and peoples in its jurisdiction were not as diverse as they are today. When the South African Constitution was re-written in 1996, the country had diverse cultures and peoples as it is today and had recently gotten rid of the apartheid regime. The understanding of family in South African law has also included the indigenous people's form of family in its jurisprudence in child care and protection.

¹²³Section 28, Constitution of the Republic of South Africa, No. 108 of 1996

¹²⁴ Barbara Bennett Woodhouse, Constitutional Interpretation and the Re-Constitution of the Family in the United States and South Africa, *The Changing Family: Family Forms & Family Law (1998)*, 463

¹²⁵ Barbara Bennett Woodhouse, Constitutional Interpretation and the Re-Constitution of the Family in the United States and South Africa, *The Changing Family: Family Forms & Family Law (1998)*, 464

This structuring of the different constitutions influences how various rights are applied to the members of the society. This is based on the fact that constitutions are the supreme laws of the land and other laws are made to give effect to various provisions in a specific manner. This chapter will delve into the various structures of child protection laws in relation to private family life in the two jurisdictions.

United States (US)

1. Children's Rights in the United States

Children's rights movements in the United States began in the late 19th century by countering the widely held view at the time that children were mainly quasi-property and economic assets. In the 18th and 19th century children were exploited in the workforce. Children at the time were as vulnerable in certain aspects as enslaved people. It is during the 19th century that American states enacted child neglect laws that provided them with the legal basis for intervening into the parent-child relation.¹²⁶

The American Constitution makes no mention of children's rights in any of its provisions. An example is the right to education. American children enjoy no federal explicit constitutional rights to education, to programmes of protection from abuse and exploitation and no rights to the basic nutrition, income supports, and shelter and health care on which the right to life depends.¹²⁷ The right to education in America is closely linked to the right to equality under the bill of rights. This was stated in the 1954 Supreme Court case of *Brown v Board of Education*¹²⁸ which found this segregated system of education in the American South to be "inherently unequal" and therefore unconstitutional. However, this Supreme Court decision stopped short of actually defining education as a fundamental right, thereby making educational policy vulnerable to varied constitutional interpretations and shifting political

¹²⁶ Sanford N. Katz, *Parental Rights and Social Responsibility in American Child Protection Law, The Changing Family: Family Forms & Family Law (1998)*, 433

¹²⁷ Barbara Bennett Woodhouse, *Constitutional Interpretation and the Re-Constitution of the Family in the United States and South Africa, The Changing Family: Family Forms & Family Law (1998)*, 471

¹²⁸ *Brown v. Board of Education of Topeca*, 347, U.S 483

priorities.¹²⁹ In a later case Supreme Court case in 1973, *San Antonio Independent School District v Rodriguez*¹³⁰, the Supreme Court's majority held that education was not a constitutional right, despite its "undisputed importance" and as a result, states were only required to provide the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process. The right to education is mostly left to the state governments and state laws. As a result, this leads to different standards as to the quality of education offered to children in America as some states are richer than others. These rights are governed by state laws and regulations. Federal laws only give standards and guidelines about the children's entitlements.¹³¹

i) Struggle between parental authority and state responsibility

Common rhetoric has been that parents have the basic right to raise their children as they see fit, subject to their not overstepping bounds of reasonableness in all aspects of child rearing.¹³² This can be attributed to the fact that children's rights in America are commonly referred to as interests and are treated as subsumed in the rights of the parent. Children's interests are defined by parents exercising the parent's constitutionally protected right to physical custody and control of children's upbringing.¹³³ The state under the concept of *parens patriae* has a right to subject parents to public scrutiny and legal examination. During the 1960s and 1970s when the government intervened in the parent child relationship, such intervention was often as a result of a report of child abuse. It is in the 1970s and 1980s that Congress came up with a federal legislation to explicitly allow state intervention in private family life. This was the Child Abuse Prevention and Treatment Act of 1974 (CAPTA) that was reconstituted in 2010. This legislation has given rise to many others in the form of amendments. These amendments

¹²⁹ Eric Lerum, Sheila Moreira, and Rena Scheinkman, "Strengthening America's Foundation: Why Securing the Right to an Education at Home is Fundamental to the United States' Efforts to Spread Democracy Abroad," *Human Rights Brief*, 13, Spring 2005, 3.

¹³⁰ *San Antonio Independent School District v. Rodriguez*, 411, U.S, 1 (1973)

¹³¹ www.d21.org/get-help/reporting/protection-laws/ accessed on 9/11/2018

¹³² Sanford N. Katz, *Parental Rights and Social Responsibility in American Child Protection Law, The Changing Family: Family Forms & Family Law* (1998), 434

¹³³ Barbara Bennett Woodhouse, Constitutional Interpretation and the Re-Constitution of the Family in the United States and South Africa, *The Changing Family: Family Forms & Family Law* (1998)

target specific issues like the child abuse prevention¹³⁴, adoption reform¹³⁵ and most importantly the safety of children and families.¹³⁶

A concept that has clearly brought out the struggle between parental authority and state responsibility in America is that of punishment. This has been observed in case law and various statutes that will be discussed. This arises from the parents' argument that they have a right to discipline their children according to their own religious beliefs and culture. Over time, parents have become less successful in justifying their abusive behaviour by relying on religious grounds.¹³⁷ Parents of a child may use reasonable force or impose reasonable punishments on their child to control, train and educate the child.¹³⁸ This right is based on the parental privilege doctrine that grants parents the right to bring up a child in an environment free of government interference. Restriction on government interference is to grant families privacy that is mainly seen to strengthen them. Government interference can only arise where the child's health or welfare is jeopardised by the parent's decisions.¹³⁹

In the 19th century, many parents before the courts for child assault and battery charges used the defence of religion and culture to justify their actions. In the North Carolina case of *State v. Jones*,¹⁴⁰ Mr. Jones was tried for assault and battery of his 16 year old daughter. His daughter testified during trial that her father had a bad temper and often hit her for no reason. She also gave an example of how he once gave her about 25 blows with a switch, choked her and threw her violently to the ground causing dislocation of her thumb joint. Mr. Jones gave the defence that his daughter was habitually disobedient and was only whipped for correction. The judge in the case found that a parent had the right to inflict punishment on his child for the purpose of correction but it must not be excessive and cruel, nor must it be to gratify

¹³⁴ Child Abuse Prevention and Treatment and Adoption Reform Act of 1978

¹³⁵ Child Abuse Prevention and Treatment and Adoption Reform Act of 1978

¹³⁶ Keeping Children and Families Safe Act of 2003

¹³⁷ Sanford N. Katz, *Parental Rights and Social Responsibility in American Child Protection Law, The Changing Family: Family Forms & Family Law (1998)*, 435

¹³⁸ US Legal website <https://definitions.uslegal.com/p/parental-discipline/> accessed on 10th November 2018

¹³⁹ US Legal website <https://definitions.uslegal.com/p/parental-privilege-doctrine/> accessed on 10th November 2018

¹⁴⁰ *S v. Jones*, 95 N.C 588 (1886)

malicious motives. He held that if the whipping was such as described by the daughter, there would arise a question as to the severity and extent of the punishment. In this case Mr. Jones' punishment to his daughter was considered cruel and excessive and he was found guilty. The Supreme Court of North Carolina set aside the verdict on the basis that the 19th century view of family privacy was that would allow for parents to have enormous discretion in raising their children and at the same time minimise governmental supervision. Another issue was that there was no set definition in law on what amounted to cruel and excessive and this would subject every exercise of parental authority in correction and discipline of children to the supervision and control of jurors. The Supreme Court at the same time admitted that though the punishment seemed to have been needlessly severe, it refused to consider it a criminal act believing that it belongs to the domestic rather than legal power, a domain into which the penal law is reluctant to enter unless induced by imperious necessity.

Presently the limits of parental discipline privilege and the right of parents to use corporal punishment have not been addressed by the US Supreme Court. As a result, the states have leeway regarding the treatment of the parental privilege and corporal punishment of children in the home.¹⁴¹ Many jurisdictions have legislated on parental discipline privilege but this does not define corporal punishment but rather defines the line between reasonable and excessive corporal punishments.

The Court of Appeal in the District of Columbia in the case of *Newby v. United States*¹⁴² stated that parental good intentions is not an excuse to physical abuse in admitting that parental privilege can be used as a common law defence. The government on the other hand has to prove that the force used by the parents is unreasonable. There has to be no malice in the parent's actions. Some states like Florida set limits as to the extent of corporal punishment allowed in the home. Corporal discipline is considered illegal if it causes injuries such as temporary disfigurement, or significant bruises or welts. Moreover, the injury must be likely to cause the child's physical, mental or emotional health to be significantly harmed. The harm must also cause substantial impairment to the child's ability to function within a normal range

¹⁴¹ Kyli L. Willis, *Willis v. State: Condoning Child Abuse as Discipline*, *UC Davis Journal of Juvenile Law and Policy*, Volume 14.1, 2010

¹⁴² *Newby v. United States*, 797 A. 2d 1233 - DC: Court of Appeals 2002

of behaviour and performance to constitute mental injury.¹⁴³ It can therefore be inferred that the government is only allowed to intervene in private family life if punishment given to the child is unreasonable and excessive. The excessiveness of the punishment is determined by whether or not it causes significant harm to a child's physical, mental or emotional health.

The struggle between parental responsibility and the State's authority to intervene is not only limited to punishment. It is also witnessed in ensuring the general and social welfare of the child is catered for. This applies in the living conditions a child is subjected to and access to health care. In this context, the issue in question is family autonomy. This refers to the assumption that the family unit should be governed by the private decisions of all or some of its members. The decisions are not subject to scrutiny or interference from outside authorities unless there is a compelling reason which itself is discernible without intrusion.¹⁴⁴ In the 1925 case of *Pierce v. Society of Sisters*¹⁴⁵, the Court struck down an Oregon statute which required parents and guardians of children between the ages of eight and sixteen to send those children to public school. This statute effectively prevented parents from choosing to send their children to private school. The Court recognised the State's legitimate power to regulate schools and require school attendance but found that the Oregon law unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control.

In terms of health care, the state has constantly tried to override parental decisions where the child's life is in imminent danger. This is because the state's interest in public health has long been held to justify mandatory vaccinations of children, regardless of parental objections.¹⁴⁶ In instances where a parent's decision produces uncertain harm or mere risk, the benefit of doubt will be given to the parent whose judgement will stand. This was seen in *Re Phillip B.*¹⁴⁷ California challenged the refusal of parents to consent to cardiac surgery on their twelve year old son who suffered from Down's syndrome. The parents' decision was allowed to

¹⁴³ J.C v Department of Children and Families, 773, (Fla Dist. Ct. App.2000)

¹⁴⁴ Judith G. McMullen, Privacy, Family Autonomy, and Maltreated Child, *Marquette Law Review*, Volume 75, Issue 3, Spring 1992, Art 4

¹⁴⁵ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

¹⁴⁶ *Jacobson v. Massachusetts*, 197 U.S 11 37-38 (1905)

¹⁴⁷ *Re Phillip B.*, 445 U.S 949 (1980)

stand as a reasonable conclusion after balancing the possible benefits against the risks of the operation. Doctors had advised that failure to operate would lead to a deterioration in Phillip's quality of life and could eventually cause his death. He was not however in immediate danger of death if the operation was not performed. Four years later this changed as the guardianship of Phillip was awarded to a couple that consented to the operation. However, even in such circumstances the courts refused to categorise the parents' behaviour as neglectful. The court made a decision on the minor's guardianship so as to avert potential harm to the minor likely to occur from the parents' continuing custody and to observe the minor's best interests'.¹⁴⁸

The government has established mandatory reporting laws that compel members of some professional groups to report suspected cases of child abuse and maltreatment to appropriate authorities in the state. These groups of people are professionals who interact with children on a regular basis. They include teachers, medical practitioners and care givers in day care centres. The Child Abuse Prevention and Treatment Act 1974 (CAPTA) sets the parameters for this at a federal level. This is to curb the challenge of detecting child maltreatment cases especially in the family early. CAPTA provided for allocation of funds to states based on the parameters of their laws. First, state laws were amended to require members of additional professional groups to report suspicions of abuse. Second, types of reportable abuse were expanded to include not only physical abuse but sexual abuse, emotional or psychological abuse and neglect. Third, the extent of harm required to have been caused or suspected to have been caused to activate the reporting duty was required by CAPTA to be unqualified by expressions such as "serious harm", and this accompanied most states abandoning such qualifications.¹⁴⁹ The mandatory reporting clauses also state penalties for mandated persons for failing to report abuse. The Administration of Children and Families within the US Department of Health and Human Services maintains the Child Welfare Information Gateway which includes information on mandatory reporting, along with specific state laws.¹⁵⁰

The above arguments bring out two underlying presumptions in the American philosophy of family autonomy. The first presumption is that privacy strengthens families. This is because

¹⁴⁸ Guardianship of Phillip B, 188. Cal Rptr. 781, 784 (Ct. App 1983)

¹⁴⁹ Ben Mathews, Maureen C. Kenny, Mandatory Reporting Legislation in the United States, Canada and Australia: A cross-jurisdictional review of key features, differences and issues, *Child Maltreatment* 13 (1)

¹⁵⁰ www.d21.org/get-help/reporting/protection-laws/ accessed on 9/11/2018

families are the building blocks of society, privacy must be good for the families and the children in these families. The second presumption is that parents can be trusted to identify and consistently advance the interests of their children. However, it has been seen that these presumptions can be questioned in instances where maltreatment of children occurs.¹⁵¹ It is because of this that there is a constant struggle between family autonomy or parental authority and state intervention where a child's wellbeing is concerned. A solution to this can be to establish set standards as to when the state is allowed to intervene in private family life in relation to child welfare. It has been seen that the standard for this depends on reasonableness that varies depending on the circumstances at hand. Courts therefore have to determine cases based on their own individual facts and circumstances without relying heavily on precedent but considering a child's best interests. In spite of the US not having a child rights clause in its Constitution, it has nonetheless managed to promulgate laws and pursue policies that are child centred.¹⁵²

South Africa

1. Children's Rights in South Africa

Institutionalised discrimination constitutes a major characteristic of the political history of South Africa. Racial discrimination and sex discrimination formed a great part of the social fabric of apartheid in South Africa. Children too were affected by such discriminatory practices. The degradation imposed upon, and profound humiliation suffered by, children's parents under the apartheid system, had a severe impact on them.¹⁵³ This experience of South African children during apartheid influenced a great deal the provisions that concern children during the drafting of the post-independence constitution. In addition to the moral rights, children have been accorded more legal entitlements so as to ensure they thrive up to their full potential. This historical factor has also heavily influenced the application of the various rights.

¹⁵¹ Judith G. McMullen, Privacy, Family Autonomy, and Maltreated Child, *Marquette Law Review, Volume 75, Issue 3, Spring 1992*, Art 4

¹⁵² Tshepo L. M, "Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution", *Michigan Journal of Race and Law*, 3 (1998), 340-392

¹⁵³ Ogunbanjo G.A, The Rights and Wrongs of Children's Rights, *Ethics CPD Article 4*, 2010

The Constitution of the Republic of South Africa recognises children under article 28. This article states the entitlements of a child in South Africa. These include: a name and nationality from birth, right to family care or parental care or appropriate care when removed from the family environment, basic nutrition, shelter, basic health care services and social services, to be protected from maltreatment, neglect, abuse or degradation and to be protected from exploitative labour practices.¹⁵⁴ It is also stated that a child's best interests are of paramount importance in every matter concerning the child.¹⁵⁵ The Children Act of South Africa¹⁵⁶ goes into detail with regards to parental responsibilities and rights, children's courts, protection of children, children in need of care and protection, adoption, child trafficking and surrogate motherhood. In this part, more attention will be paid to child protection in the family environment and if and when the state can intervene if necessary.

The constitutional recognition of the separate status and personhood of the child shows that a child has unique and special interests away from the parents and guardians. A child's rights and interests as per South African law are not subsumed under the parents' interests. Both the Constitution and the Children Act send a signal that children are human beings in their own right with individual minds, views, emotions and rights which are different from those of parents. This was further affirmed by Sachs J in *S v M*¹⁵⁷, where he stated that every child has his or her dignity. He went on to say that if a child is to be constitutionally imagined as an individual with distinctive personality and not merely as a miniature adult waiting to reach full size he or she cannot be treated as a mere extension of his parents, umbilically destined to sink or swim with them. Individually and collectively all children have a right to express themselves as independent social beings.¹⁵⁸ The domestic protection of rights symbolises the

¹⁵⁴ Article 28(1), Constitution of the Republic of South Africa, No. 108 of 1996

¹⁵⁵ Article 28(2), Constitution of the Republic of South Africa, No. 108 of 1996

¹⁵⁶ Children Act, Act 38 of 2005

¹⁵⁷ *S v M* (CCT 53/06) (2007) ZACC, 18

¹⁵⁸ *S v M* (CCT 53/06) (2007) ZACC, 18 paras 18-19

social recognition of children as legal subjects.¹⁵⁹ This enables others initiate proceedings to promote the realisation of children's rights.

i) A parent in South African Law

In a nuclear family setting, parents are the primary care givers of their children. Family care and parental care are entitlements children are provided for under the South African Constitution.¹⁶⁰ The Children Act of South Africa gives the legal understanding of a parent in South African context. A parent in relation to a child includes the adoptive parent but excludes; the biological father of a child conceived through rape or incest with the child's mother, any person who is biologically related to a child by reason only of being a gamete donor for the purposes of artificial fertilisation and a parent whose parental responsibilities and rights in respect of a child have been terminated.¹⁶¹

The Children Act goes further to describe what amounts to care in the context of a child. Care includes where appropriate; within available means, providing the child with a suitable place to live; living conditions that are conducive to the child's health, well-being and development and the necessary financial support, safeguarding and promoting the well-being of a child; protecting the child from maltreatment, abuse, neglect, exploitation and other physical, emotional or moral harm; respecting, promoting, and securing the fulfilment of and guarding against any infringement of, the child's rights set out in the Bill of Rights; guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age maturity and stage of development; guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development; guiding the behaviour of the child in a humane manner; maintaining a sound relationship with the child; accommodating any special needs that the child may have and generally ensuring that the best

¹⁵⁹ Moyo Admark, "Balancing child participation rights, parental responsibility and state intervention in medical and reproductive decision making under South African law", Published Doctoral thesis, University of Cape Town, September 2014, 158

¹⁶⁰ Article 28(1,b), Constitution of the Republic of South Africa, 1994

¹⁶¹ Section 1, Children Act of South Africa, Act 38 of 2005

interests of the child is the paramount concern in all matters affecting the child.¹⁶² From the two definitions, one can easily infer the meaning of parental care and the expectations of a parent to his/her child. It can also be noted that the definition of a parent is cognisant of surrogacy and artificial insemination. The Children's Status Act 82 of 1987 deals with parenthood arising from artificial insemination. The surrogate mother and her spouse in the case where they both consented to her to be inseminated in this way are considered to be the parents of a child born of this.¹⁶³

An interesting fact to note is that the law puts fathers in categories of married and unmarried fathers. Married fathers automatically acquire parental rights upon the child's birth if he is married to the child's mother or was married to the child's mother at the time of the child's conception, birth or anytime between the child's conception and birth.¹⁶⁴ On the other hand, unmarried fathers do not automatically acquire parental rights and responsibilities. For this to happen, some conditions have to be fulfilled. An unmarried father acquires parental responsibilities in respect of the child if at the time of the child's birth he was living with the child's mother in a lifelong partnership, or regardless of this fact he consents to be identified as the child's father or pays damages in customary law, contributes or attempts to contribute in good faith to the child's upbringing for a reasonable amount of time or contributes or attempts to contribute in good faith to costs related to the child's maintenance for a reasonable period.¹⁶⁵ This categorisation of fathers can be traced back to South African common law that did not acknowledge the natural father of an extra marital child as a parent. It brought about classes of fathers in the law thus resulting to discrimination that is constitutionally forbidden. To remedy this, the Natural Fathers of Children Born out of Wedlock Act, 1997¹⁶⁶ was drafted. Its aim was to normalise the relationship of the natural father and his extra marital child. The focus of this Act is the child's best interests.

¹⁶² Section 1, *Children Act of South Africa*, Act 38 of 2005

¹⁶³ The Child's Right to Parental Care and Family Care

¹⁶⁴ Section 20, *Children Act of South Africa*, Act 38 of 2005

¹⁶⁵ Section 21, *Children Act of South Africa*, Act 38 of 2005

¹⁶⁶ Natural Fathers of Children Born out of Wedlock Act, No 86 of 1997

ii) Best Interests principle in South African law

The best interests' principle has been the main guide in helping to determine children's matters. It was in 1994 and for the first time in South African legal history that a judge in the case of *Mc Call v Mc Call*¹⁶⁷ put a criteria of determining what amounts to the best interests of a child. King J in this case stated thirteen factors that should be considered when trying to reach an outcome that would be in the best interests of a child. The criteria are the following:

- The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- The capacity and disposition of the parent to give the child the guidance which he requires;
- The ability of the parent to provide for the basic physical needs of the child, the so-called "creature comforts", such as food, clothing, housing and the other material needs –generally speaking, the provision of economic security;
- The ability of the parent to provide for the educational well-being and security of the security of the child, both religious and secular;
- The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- The mental and physical health and moral fitness of the parent;
- The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
- The desirability or otherwise of keeping siblings together;
- The child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- The desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 should be placed in the custody of his father; and

¹⁶⁷ *Mc Call v Mc Call*, 1994 (3) SA 201 (C)

- Any other factor which is relevant to the particular case with which the Court is concerned.

In every case, a court would thus have to make an objective assessment within the particular framework of its specific circumstances.¹⁶⁸ This case was in the context of a child custody but it however influenced the recognition of the child's best interests in the South African constitution that came about in 1996.

To some the interpretation of the best interests' principle in *Mc Call* is the Western perspective. This then brings the question of what amounts to the African perspective of the best interests' principle. In African society, submission to will of the parent, particularly the father, is highly valued and is considered to be an essential virtue to be cultivated in a child.¹⁶⁹ This duty of submission to the father is based on the idea that parents make decisions which are in the best interests' of the child. In common law, the overriding principle in child law is that the best interests are paramount. This cannot be said of African customary law. Rules of affiliation, fostering, custody and guardianship all appear to serve interests other than those of the child. This does not suggest that the interests of the child are deemed irrelevant. Rather, there exists a presumption that those interests will be best served if the strong rights of fathers and their lineage are not interfered with, for it is by belonging that a child is best protected.¹⁷⁰ If paramouncy of a child's interests is to take precedent, it will fail to recognise the rights of the child together with the parents' rights. If a child's interests' are made the paramount consideration in all decisions concerning the child, it risks becoming a loose cannon destroying everything around it.¹⁷¹ The Convention on the Rights of the Child takes the same stance on paramouncy. The Convention on the Rights of the Child states that the best interests of the child shall be a primary consideration in order to avoid the elevation of the paramouncy principle beyond the reach of other important interests. The use of "shall

¹⁶⁸ *Mc Call v Mc Call*, 1994 (3) SA 201 (C) para 205

¹⁶⁹ Belembaogo. A, "The Best Interests of the Child-The Case of Burkina Faso", in Alston (ed), *The Best Interests of the Child Reconciling Culture and Human Rights*, Clarendon Press, Oxford, 1994, 209

¹⁷⁰ Nhlapo R. T, "Biological and Social Parenthood in African Perspective: The Movement of Children in Swazi Family Law", in Eekelaar and Sarcevic (eds), *Parenthood in Modern Society*, Kluwer Academic Publishers, The Netherlands, 1993, 47

¹⁷¹ Moyo .A, "Reconceptualising the 'paramouncy principle': Beyond the individualistic construction of the best interests of a child", *African Human Rights Law Journal*, 1 (2012), 142-177

be a primary consideration” indicates that the child’s best interest principle will not always be an overriding factor as there may other equally important competing interests.¹⁷²

The concept of belonging is closely tied to the duty of care for family members which lies at the heart of the African social system and is emphasised as a fundamental value in the African Charter on Human and Peoples rights.¹⁷³ In African customary perspective, a child’s welfare is considered from the communal perspective. The South African Constitution has recognised this by entitling children to not only parental care but also family care. Right to family care has been placed before the right to parental care with the word ‘or’ linking the two concepts.¹⁷⁴ A conclusion may be drawn that the Constitution attaches more weight to family care than parental care when it comes to the care of children.¹⁷⁵ Recognition of extended family as possible care givers of children in the Constitution is significant in the South African context as this family form is commonly accepted and adhered to by indigenous people.¹⁷⁶ The culturally diverse nature of the country is catered for by including cultural plurality in its laws and interpretations.

iii) Parental authority and State intervention

Chapter 9 of the South African Children Act¹⁷⁷ explains circumstances that necessitate the state to intervene in private family life where a child’s welfare is at risk. It starts by defining who qualifies as a child in need of special care and protection from the state. A child is in need of care and protection if, the child: has been abandoned or orphaned without any visible means of support; displays uncontrollable behaviour- that which a parent or care giver cannot control; lives and works in the streets; begs to sustain himself; is addicted to a dependence – producing substance and is without any support to obtain treatment for such dependency; has

¹⁷² Article 3, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577

¹⁷³ Bennett .T.W, “*Human Rights and African Customary Law*”, Juta and Co. Ltd, Cape Town, 1995, 6

¹⁷⁴ Article 28(b), *Constitution of the Republic of South Africa*, 1996

¹⁷⁵ Robinson .J.A, “The Child’s Right to Parental and Family Care”, in Eekelaar and Nhlapo (eds), *The Changing Family- Family forms & Family law*, Hart Publishing, Oxford, 1998,486

¹⁷⁶ Robinson .J.A, “The Child’s Right to Parental and Family Care”, in Eekelaar and Nhlapo (eds), *The Changing Family- Family forms & Family law*, Hart Publishing, Oxford, 1998,488

¹⁷⁷ Children Act, No. 38 of 2005

been exploited or is exposed to exploitation; lives in or is exposed to conditions which may seriously harm that child's overall well-being; may be at risk if returned to the custody of parent, guardian or care giver that the child will live in or be exposed to circumstances which may seriously harm the overall well-being of the child; is being physically or mentally neglected or is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a guardian or by a person under whose control the child is.¹⁷⁸ A victim of child labour or a child in a child-headed household may be in need of care and protection and must be referred for investigation by a designated social worker.¹⁷⁹ If upon investigation the social worker finds that the child in the above circumstances is not in need of care and protection from the state, must take where necessary measures to assist the child. Such measures can include counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.¹⁸⁰

If a child based on evidence of any person on oath or affirmation before a presiding officer in the area of the children's court concerned, appears to be in need of care and protection, the presiding officer must order the question of the child's need for care and protection be referred to a social worker for investigation.¹⁸¹ In line with such an order, the presiding officer may also order that the child be placed in temporary safe care if it appears necessary for the safety and well-being of the child.¹⁸² Such order must define the child in question in sufficient detail to execute the order.¹⁸³ The person who has removed a child as per the court must without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child if that person can be readily traced. The matter should also be referred to a designated social worker for investigation within 24 hours and reported to the

¹⁷⁸ Section 150 (1), *Children Act*, No. 38 of 2005

¹⁷⁹ Section 150 (2), *Children Act*, No. 38 of 2005

¹⁸⁰ Section 150 (3), *Children Act*, No. 38 of 2005

¹⁸¹ Section 151 (1), *Children Act*, No. 38 of 2005

¹⁸² Section 151 (2), *Children Act*, No. 38 of 2005

¹⁸³ Section 151 (4), *Children Act*, No. 38 of 2005

relevant provincial department of social development.¹⁸⁴ All these must be within the best interests of the child.

A child can be removed to temporary safe care without a court order by a designated social worker or police officer if there are reasonable grounds for believing that the child is in need of care and protection and needs immediate emergency protection. This should also be based on the fact that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being and removal of the child from his or her home environment is the best way to secure that child's safety and well-being.¹⁸⁵ The child's parent, guardian or care giver must be informed of this removal within 24 hours by the designated social worker if that person can be readily traced. The relevant clerk of the children's court must also be informed of the removal of the child not later than the next court day and the removal must also be reported to the relevant provincial department of social development.¹⁸⁶

A written notice is also issued to the alleged offender by the police official handling the matter. It states the full name, residential address, occupation and status of the alleged offender. It calls upon the alleged offender to leave the home or place where the child resides and refrain from entering such home or place or having contact with the child until the court hearing and also calls upon the alleged offender to appear at a children's court at a place and date specified in the notice to advance reasons why he or she should not be permanently prohibited from entering the home or place where the child resides.¹⁸⁷ The court after considering the circumstances giving rise to the issuing of the written notice and after having heard the offender may: issue and order prohibiting the alleged offender from entering the home or place where the child resides or from having any contact with the child for such period of time as the court deems fit; order that the alleged offender may enter the home or the place where the child resides or have contact with the child upon such conditions as would ensure that the best interests of the child are served; order that the alleged offender will

¹⁸⁴ Section 151 (7), *Children Act*, No. 38 of 2005

¹⁸⁵ Section 152 (1), *Children Act*, No. 38 of 2005

¹⁸⁶ Section 152 (2), *Children Act*, No. 38 of 2005

¹⁸⁷ Section 153 (1), *Children Act*, No. 38 of 2005

be responsible for the maintenance of his or her family during the period contemplated by the court; refer the matter to a designated social worker for an investigation or make any other order with regard to the matter as the court deems fit.¹⁸⁸

On deciding whether a child is in need of care and protection, the court relies on the designated social worker's report. Before the child is brought before the children's court, a designated social worker must investigate the matter within 90 days and compile a report in the prescribed manner on whether the child is in need of care and protection. The designated social worker must report the matter to the relevant provincial department of social development. If upon investigation, it is found that the child is not in need of care and protection, the reasons for the finding in the report must be indicated and submitted to the children's court for review. The social worker must where necessary indicate in the report the measures recommended to assist the family, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.

If the child is found to be in need of care and protection, the child must be brought before the children's court. The court upon hearing the matter may order that pending decision of the matter, the child must: remain in temporary safe care at the place where the child is kept; be transferred to another place in temporary safe care; remain with the person under whose control the child is; be put under the control of a family member or relative of the child or placed in temporary safe care.¹⁸⁹ The child can even be placed in foster care with a suitable foster parent, foster care with a group of persons or an organisation operating a cluster foster care scheme, temporary safe care, pending an application for and finalisation of adoption of the child, shared care where different care givers or centres alternate in taking responsibility for the care of the child at different times or periods or a child and youth care centre that provides a residential care programme suited to the child's needs.¹⁹⁰

¹⁸⁸ Section 153 (6), *Children Act*, No. 38 of 2005

¹⁸⁹ Section 155, *Children Act*, No. 38 of 2005

¹⁹⁰ Section 156 (1,e), *Children Act*, No. 38 of 2005

iv) Struggle between parental authority and State responsibility

Punishment of children in South Africa often depicts the struggle between parental authority and limits of state intervention. Parents obliged to instil discipline in their children as part of their authority. When it comes to punishment and correction, parents resort to various means one of them being corporal punishment. This often brings about a debate in law on whether parents should be allowed to use physical violence, that is common in the African society, as a way of instilling discipline. It is argued that physical violence amounts to physical assault and degrading human treatment. The Convention on the Rights of the Child, which South Africa is party to, states that children should be protected from all forms of physical violence.¹⁹¹ Corporal punishment involves caning, spanking, slapping and use of physical objects to cause pain so as deter from wrong doing.

The case of *YG v. South Africa*¹⁹² brings out this struggle. YG (appellant) had been tried in the Regional Court on two charges of assault with intent to cause grievous bodily harm. The first charge that we are going to focus on related to alleged assault of his 13 year old son and the second was related to his wife. The appellant's defence at the trial was that he had done nothing more than to exercise his right as a parent to chastise his son by meting out reasonable corporal punishment for his indiscipline which in this case was watching porn which was forbidden given that they were a Muslim family. His son testified that the appellant kicked him three or four times with his bare foot. The appellant alleged that he only slapped his son with an open hand on his buttocks. Expert opinion on the matter showed that the appellant's son was truthful in the matter. The court found that the main issue concerned the question of whether the defence of moderate chastisement to a charge of assault, which is based on the common law right of a parent to inflict corporal punishment on his or her children was compatible with the South African constitution.

It should be noted that this defence is applicable in most states in the US as long as the chastisement is reasonable and does not cause any significant physical, psychological or emotional harm to a child. This has been discussed earlier in this chapter. Most authorities ascribe the origins of this defence to the common law rights and duties of parents: on the one

¹⁹¹ Article 19, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

¹⁹² *YG v. South Africa* (A263/2016) (2017) ZAGPJHC, 290

hand, parents have a right to demand that their children pay due reverence and obedience to their orders and parents have a duty to discipline their children in order to correct their behaviour.¹⁹³ This is consistent with the social importance attributed to the family unit in western society. The law accorded parents a uniquely independent authority in rearing children. This meant that the state did not interfere in the exercise of the rights, duties and responsibilities of the parent in rearing children.¹⁹⁴ The physical force employed must have been meted out for disciplinary purposes, but the method and extent of the force falls to the discretion of the parent provided of course that it's not excessive. Courts have over the years held that they will not lightly interfere with this parental discretion. This is in favour of non-intervention by the state in private family life. If a parent raises the defence to a charge of assault, the onus lies on the state to prove that he exceeded the bounds of the defence and thus did not have the authority to carry out what would otherwise be an unlawful assault. This means that the state in intervening in matters parental authority has to give reasons for the intervention.

Determining what is reasonable or moderate depends on the facts of each individual case. Courts have indicated that the following factors must be considered: nature of the child's disciplinary infraction; motive of the person administering the punishment; degree of force applied; object that was used to administer punishment and the age, sex and build of the child.¹⁹⁵ Concerning parents is that in this context some of their constitutional rights are implicated. These are the right to freedom of religion, belief and opinion¹⁹⁶ and the rights of cultural and religious communities.¹⁹⁷ It must also be noted that there is no protection of a self-standing right to family life in the South African Constitution. The Children Act of South Africa places a duty of care on parents to their children and this includes: the duty to guide the behaviour of the child in a human manner¹⁹⁸ and guiding, directing and securing the child's education and upbringing, including religious and cultural upbringing and education,

¹⁹³ Van Heerden, *Boberg's Law of Persons and the Family*(2nd ed), Juta Publishers, 668-669

¹⁹⁴ *South African Criminal Law and Procedure* (3rd ed), Juta, 117

¹⁹⁵ *YG v South Africa* (A263/2016) (2017) ZAGPJHC, 290, para 34

¹⁹⁶ Article 15, *Constitution of the Republic of South Africa*, 1996

¹⁹⁷ Article 31, *Constitution of the Republic of South Africa*, 1996

¹⁹⁸ Section 1(g), *Children Act*, No. 38 of 2005

in a manner appropriate to the child's age, maturity and stage of development.¹⁹⁹ Abuse under the Act is taken to mean any form of harm or ill-treatment deliberately inflicted on a child including among others: assaulting a child or inflicting any other form of deliberate injury to a child or exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.²⁰⁰

It is for a parent under common law to decide in first instance on the level of physical force his or her child deserves and can withstand as punishment. Many parents may behave or believe they are behaving reasonably in this regard. It is likely that many children are subjected to levels of physical punishment that regardless of their parent's belief, they are unable to withstand without harm to their physical and/or emotional states.²⁰¹ The judge in *YG v South Africa* noted the Constitution is very explicit in its exposition of rights for it gives protection from all forms of violence whether from public or private sources.²⁰² This clearly indicates that the same level of protection is to be afforded to those who are victims of violence in the home as to those who are the victims of violence from public sources.

When a child experiences violence from a parental source, that child is entitled to the same protection from the state as she would had the violence come from a non-parental source. Even if the level of chastisement is found to be reasonable under the defence, physical chastisement inevitably involves a measure of violence and breaches the physical integrity of the child.²⁰³ This also ties in to the child's general right to dignity. Right to dignity closely relates to protection from human degradation. Children under the Act enjoy special protection from degradation.²⁰⁴ It is then inferred that where a child is subjected to conduct that would otherwise be assault, but for the reasonable chastisement defence, there is an inherent breach of that child's dignity. The state can therefore be seen to have cause to intervene in private family life and parental authority where a child's dignity is violated for it is a constitutional

¹⁹⁹ Section 1(e), Children Act, No. 38 of 2005

²⁰⁰ Section 1, Children Act, No. 38 of 2005

²⁰¹ *YG v South Africa*, (A263/2016) (2017) ZAGPJHC, 290, para 68

²⁰² Article 12(1,c), Constitution of the Republic of South Africa, 1996

²⁰³ *YG v South Africa*, (A263/2016) (2017) ZAGPJHC, 290, para 68

²⁰⁴ Section 28(1,d), Children Act, No.38 of 2005

right to be enjoyed by all. In effect, the defence of reasonable chastisement undermines the critical concept of children having their own dignity. It subsumes the child's right to dignity under that of their parents. An assumption created as a result is that a parent meting out reasonable chastisement is acting in the child's best interests and that the parent knows what is best for the child. However, this does not regard the child's own, self-standing right to dignity or to the child's right to require the state to protect it.

The South African courts have tackled the issue of corporal punishment by parents in the home from a constitutional angle. Tying the physical violence to cruelty that results to degrading treatment, gives the State a chance to intervene in parental authority in private family life in terms of punishment. Courts had previously supported the defence of reasonable chastisement until *YG v South Africa* set a new precedent. Another argument being advanced is that the defence of reasonable chastisement for corporal punishment by parents in the home exposes children to unequal treatment in law.²⁰⁵ Physical violence as punishment amounts to assault for it fulfils the requirements of assault in common law. In general, the offence does not require unreasonable levels of violence to be perpetrated against the victim. This is with the exclusion of grievous bodily harm. All it requires is the unlawful and intentional application of force to the person of another. Pushing, or slaps on the buttocks would fall within the definition, as would striking someone with a slipper or other object, regardless of how benign the instrument might appear to be. However, where a parent carries out such conduct for disciplinary purposes, South African law accepts that the parent may claim to have been acting lawfully.²⁰⁶ The reasonable chastisement defence does not give children equal protection under the law in that it does not protect children from assault in circumstances where adults who are subjected to the same level of force are protected.²⁰⁷

Under the South African legal framework, the State is allowed to intervene in private family life in the event of corporal punishment that has now been declared unconstitutional. Parental authority can be effectively challenged by the State if the nature of a child's punishment is corporal. This is considered to be an enhancement of the best interests' principle by the State.

²⁰⁵ Article 9(3), Constitution of the Republic of South Africa, 1996

²⁰⁶ *YG v South Africa*, (A263/2016) (2017) ZAGPJHC, 290, para 74

²⁰⁷ *YG v South Africa*, (A263/2016) (2017) ZAGPJHC, 290, para 75

CHAPTER 4

KENYA: FINDINGS AND COMPARISON

The previous chapter looks at the various laws and policies in place in the United States and South Africa in relation to state intervention in the realm of child protection in a family environment. This chapter will look findings in the context of nature and extent of state intervention in private family life in relation to child protection and also the state's role in enhancing the best interests' principle. This will also look at a similar framework in Kenya and compare it with the aforementioned jurisdictions.

1. Findings

A child in need of care and protection may be taken to a place of safety by an authorised officer. This often entails removal from the family home if the maltreatment, abuse or neglect is occurring in the family. Such children are placed in foster care or in the care of charitable children's institutions. The state shall also ensure that medical care for such children is availed.

Parents or guardians who are found to or suspected of wilfully assaulting, abandoning or exposing a child in any manner likely to cause unnecessary suffering or injury to health or by act or omission, knowingly or wilfully causes the child to become in need of care and protection commits an offence and is liable for conviction. Such conviction may entail a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding 5 years or both. The court may direct that such an offender be charged under the Penal Code (Cap 63) if in its opinion the act or omissions are of a serious or aggravated nature.²⁰⁸

The court can also issue orders under section 114 of the Children Act as a way of intervention in ensuring protection of a child. An exclusion order can be issued requiring a person who has used violence or threatened to use violence against a child, whether or not that person permanently resides with the child, to depart from the home or restrain the person from entering the home or a specified part of the home or from a specified area in which the home

²⁰⁸ Section 127(1), *Children Act*, No. 8 of 2001

is included. A wardship order can be issued requiring that a child be placed under the protection and custody of the court.

It therefore be stated that the nature of the State's intervention in child protection in private family life occurs in form of removal of a child from the family home, criminally charging parents suspected of abuse, neglect or maltreatment, ensuring medical care inclusive of counselling for rescued children and issuance of specific court orders under the Children Act. The extent of such intervention is only as per law or court orders. This is in consideration of the best interests' principle.

2. Comparisons

Kenya's legal system is based on the British common law system. This is attributed to Kenya's colonial history since Kenya was a British colony. The South African legal system is based on the Roman-Dutch legal system while the U.S legal system is a federal system. These differences greatly influence the laws and procedures in the various jurisdictions and how they are applied.

In terms of the relationship of the family unit and the law, it is only in Kenya amongst the two other countries that the family unit enjoys explicit recognition and protection from the state.²⁰⁹ The South African and the United States constitutions do not contain such protection for the family unit. This is quite significant given that the constitution is the grund norm in these jurisdictions. Understanding of family in this context is that of a nuclear family. This is inferred from the mention of every adult's right to marry a person of the opposite sex based on the free consent of the parties.²¹⁰ Kenya only recognises marriage as a union between two adults of the opposite sex based on free consent of the parties. Polygamy is allowed under the traditional and Islamic forms of marriage. South Africa and the United States however recognise marriage between two adults of the same sex based on their free consent in addition to marriage between heterosexual couples.

²⁰⁹ Article 45(1), *Constitution of Kenya*, 2010

²¹⁰ Article 45(2), *Constitution of Kenya*, 2010

The Kenyan²¹¹ and South African²¹² constitutions have devoted sole articles of the constitution to address children's welfare. Both recognise the best interests' principle as the guiding principle in arriving at decisions in matters concerning children. The same principle is also recognised in the United States though not explicitly mentioned in its constitution. The American constitution makes no mention of children's rights in any of its provisions. Children's interests in the US are defined by parents exercising the parent's constitutionally protected right to physical custody and control of children's upbringing.²¹³ South Africa's scope of interpretation of the best interests' principle is wider than that of Kenya and the United States. This is because it is perceived to have two approaches: Western and indigenous. The western approach is that which was laid down in *Mc. Call v Mc. Call*. This influenced the writing of the best interests' principle in the 1996 South African constitution as the case was decided in 1994. The indigenous approach is viewed to consider that a child's needs cannot be viewed in isolation. The parents' and family or community's interests' and rights also have to be considered. This brings about the debate of the paramountcy principle. It argues that a child's interests and needs cannot be considered paramount at all times. Other factors have to come into play when making a decision on a child's affairs.²¹⁴ The western approach does not consider the paramountcy principle. Kenya does not have multiple approaches when it comes to matters concerning a child. The Kenyan constitution provides that a child's best interests are of paramount importance in every matter concerning the child.²¹⁵

In terms of statutes, Kenya²¹⁶ and South Africa²¹⁷ have a Children Acts that provide for the principles relating to the care and protection of children, parental responsibilities and rights,

²¹¹ Article 53, *Constitution of Kenya*, 2010

²¹² Article 28, *Constitution of Kenya*, 2010

²¹³ Barbara Bennett Woodhouse, "Constitutional Interpretation and the Re-Constitution of the Family in the United States and South Africa", in Eekelaar and Nhlapo (eds), *The Changing Family: Family Forms & Family Law*, Hart Publishing, Oxford, 1998,463

²¹⁴ Moyo .A, "Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of a child", *African Human Rights Law Journal*, 1 (2012), 142-177

²¹⁵ Article 53(2), *Constitution of Kenya*, 2010

²¹⁶ Children Act, No. 8 of 2001

children's courts together with their procedures, custody, maintenance and guardianship and adoption procedures. The closest the US comes to this is the Child Abuse Prevention and Treatment Act of 1978 (CAPTA) that was reconstituted in 2010 (CAPTA Reauthorisation Act 2010). This has over time given rise to amendments like the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 and the Keeping Families and Children Safe Act of 2003. CAPTA is a federal legislation that allows state intervention in private family life so as to protect children from abuse. This legislation acts a guideline from which states derive guidance to come up with their own statutes and measures of child protection. Land mark court decisions also influence these guidelines.

To enable state intervention in the event that a child's welfare is in jeopardy, Kenya and South Africa have come up with a definition of a child in need of care and protection in their various child protection statutes. The US has no explicit definition of a child in need of care and protection in its federal laws. In South Africa the definition of a child in need of care and protection²¹⁸ is listed under chapter 9 of the Children Act. In Kenya, this is defined in part X of the Children Act. The Kenyan statute has a wider definition of a child in need of care and protection than the South African statute. It includes children whose parents are in prison, female children likely to be subjected to Female Genital Mutilation, female children likely to be forced in early marriage, children kept in unsanitary environments, children in danger of domestic violence, children displaced as result of war and a child who is pregnant. The South African definition mentions the basic circumstances that lead to a child needing care and protection while the Kenyan definition delves deeper into the specific circumstances.

To determine if a child is in need of care and protection, the South African statute tasks a social worker to investigate and determine if a child qualifies for care and protection. The South African procedure is explained in the previous chapter of this paper. The process in Kenyan law is slightly different. It tasks an authorised officer to step in to help a child in need of care and protection. An authorised officer as per the Children Act refers to a police officer, an administrative officer, a children's officer, an approved officer, a chief appointed under the Chief's Act, a labour officer or any other officer authorised by the Director of Children's

²¹⁷ Children Act, No. 38 of 2005

²¹⁸ Section 150, Children Act, No. 38 of 2005

Services for the purposes of the Act.²¹⁹ The South African Act provides timelines for informing such a child's parents or guardians of the decision to take the child into protection. The Kenyan Act does not have such provision. Where under Part X a child is taken to or ordered to be taken to a place of safety, the person who takes him or, the person bringing him before the court, shall send a notice to the court specifying the grounds on which the child is to be brought before the Children's court and shall send particulars to his parent or guardian or such other person who has parental responsibility over the child requiring such person to attend at the court before which the child will appear.²²⁰

Circumstances necessitating state intervention in private family life in matters concerning child protection are similar in the three jurisdictions. The US has a slightly wider scope in that it places responsibility on some members of some professional groups to report suspected cases of child abuse and maltreatment to the appropriate authorities in the state. These groups of people are professionals who interact with children on a regular basis. They include teachers, medical practitioners and care givers in day care centres. The Child Abuse Prevention and Treatment Act 1974 (CAPTA) sets the parameters for this at a federal level. This is to curb the challenge of detecting child maltreatment cases especially in the family early. As a result, types of reportable abuse were expanded to include not only physical abuse but sexual abuse, emotional or psychological abuse and neglect. the extent of harm required to have been caused or suspected to have been caused to activate the reporting duty was required by CAPTA to be unqualified by expressions such as "serious harm", and this accompanied most states abandoning such qualifications.²²¹ Kenya and South Africa do not have mandatory reporting clauses in their laws. The threshold for state intervention is when a child is in need of care and protection, abused, maltreated or neglected. To ascertain this, an authorised officer's or social worker's report is required. Under the Kenyan framework the state can intervene by way of making orders. These orders are: an access order, residence order, exclusion order, child assessment order, family assistance order, wardship order and a production order. All these are in relation to a child and its care givers. These are issued through the Children's court.

²¹⁹ Section 2, Children Act, No. 8 of 2001

²²⁰ Section 120 (9), Children Act, No. 8 of 2001

²²¹ Ben Mathews, Maureen C. Kenny, Mandatory Reporting Legislation in the United States, Canada and Australia: A cross-jurisdictional review of key features, differences and issues, *Child Maltreatment* 13 (1)

In terms of punishment, the US allows corporal punishment as long as it is not cruel and excessive. The challenge to this is that there is no set definition in law on what amounts to cruel and excessive. Parents charged in US courts for assault and battery of a child rely on the defence of parental discipline privilege. Presently the US Supreme Court has not specifically addressed the limits of parental discipline privilege and the right of parents to use corporal punishment. Consequently, the states have wide latitude regarding the treatment of the parental privilege and corporal punishment of children in the home.²²² Many jurisdictions have codified parental discipline privilege but this does not define corporal punishment but instead defines the line between reasonable and excessive corporal punishments. South Africa used to use the reasonable and excessive standard for corporal punishment until the case of *YG v South Africa*. It was decided in this case that such punishment falls under cruel, inhuman and degrading treatment and that children are entitled to equal treatment in law and therefore unconstitutional. There are no landmark cases in Kenya on corporal punishment yet. Corporal punishment has not been explicitly banned in the home environment unlike under the school environment.²²³

²²² Kyli L. Willis, *Willis v. State: Condoning Child Abuse as Discipline*, *UC Davis Journal of Juvenile Law and Policy*, Volume 14.1, 2010

²²³ Section 36, Basic Education Act, No. 14 of 2013

CHAPTER 5

RECOMMENDATIONS AND CONCLUSIONS

1. Recommendations

Based on the comparisons in the previous chapter and the current legal framework, Kenya is as per in terms of adequate child centred laws and policies. The State does not also unnecessarily intervene in private family life in relation to a child unless it is in the child's best interests. This does not mean that there is no room for improvement. Kenya should consider explicitly outlawing corporal punishment for children in all settings. This is because over the years it has been proven that corporal punishment is detrimental to a child's development and emotional and physical wellbeing. The argument that corporal punishment be allowed on the basis of it being reasonable and not excessive is not sufficient in protecting children. The standard of reasonable and excessive can be said to be relative thus leading to different interpretations. Children require laws that are certain so as to guarantee them utmost protection. Outlawing corporal punishment will also be in accordance with the Convention on the Rights of the Child that requires State parties to take all appropriate measures to protect the child from all forms of abuse and violence.²²⁴

Kenya can use the South African perspective of declaring corporal punishment unconstitutional. The Kenyan Constitution states that every person has the right to freedom and security of the person, which includes the right not to be subjected to corporal punishment²²⁵ or treated or punished in a cruel, inhuman or degrading manner.²²⁶ Also, every person is equal before the law and has the right to equal protection and equal benefit of the law.²²⁷ This right should be applied indiscriminately for the Constitution prohibits discrimination on the basis of age.²²⁸ In Kenya adults are not subjected to corporal

²²⁴ Article 19(1), *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

²²⁵ Article 29(e), *Constitution of Kenya*, 2010

²²⁶ Article 29(f), *Constitution of Kenya*, 2010

²²⁷ Article 27(1), *Constitution of Kenya*, 2010

²²⁸ Article 27(4), *Constitution of Kenya*, 2010

punishment on the basis of the Constitution. This then brings the question of why children cannot or should not benefit from the same legal provision. The outlawing of corporal punishment can play a part in reducing the instances of state intervention in a family set up thus enhancing the privacy of families.

In addition to parental care, children should also be entitled to family care in the event that parental care is not available. This will ensure that children get to grow in a nurturing family environment where there is love and affection. The best interests, safety and welfare of the child should not be neglected when deciding to place a child in family care. This also goes along with the values of the African society where there exists a presumption that it is by belonging that a child is best protected²²⁹ and considered to belong to the larger family as opposed to the nuclear family alone. Mandatory reporting guidelines for professionals who interact frequently with children should also be adopted for they are among the first in line to interact with children facing difficulties in the family home. Such professionals include teachers, medical professionals and care givers in day care centres. They are able to quickly discern if and when a child is experiencing a toxic family environment that might eventually need intervention from the state as a result of their training. The US model can be relied on as a benchmark in this regard.

The government through the Department of Children's Services in partnership with various Non-Governmental Organisations that advocate for children's rights can hold workshops in the various wards at the location level with the aim of sensitising parents on the various child protection laws. This will help parents know what type of treatment amounts to child maltreatment and it also help in community policing at the grass root level where parents can help each other come up with and use safe methods of parenting that do not inflict harm on their children. This has the potential to reduce the number of child abuse cases reported involving parents or primary care givers in the family set up. It can also help parents feel included and not controlled by the state in exercising their duty of parenting. The state can also advise the parents and guardians of situations where they can seek state intervention in matters involving children within the family set up. The government through the judiciary

²²⁹ Nhlapo R. T, "Biological and Social Parenthood in African Perspective: The Movement of Children in Swazi Family Law", in Eekelaar and Sarcevic (eds), *Parenthood in Modern Society*, Kluwer Academic Publishers, The Netherlands, 1993, 47

should publish decisions on children's matters from the children's courts so as to help grow the body of research in Kenya in the realm of state intervention in matters involving children.

2. Conclusions

In as far as state intervention in relation to private family life is concerned, Kenya can be said to be hesitant when it comes to private family life. The state only intervenes in dire situations when the child's welfare is severely at risk. Intervention in cases of corporal punishment rarely happens unless the punishment borders torture. Such punishment is said to be in the realms of torture when a child spots burn marks or wounds, bite marks, cuts and swollen limbs that are inflicted by a parent or care giver in the name of punishment. This can be partly blamed to the Kenyan society that is in support of corporal punishment of children in the family home. As a result, this makes it difficult to discern if a child is being abused in the process of being punished. The Children Act sets out very specific orders that the court can give while intervening to protect a child.²³⁰

Intervention is more common in cases of children living with disabilities. Many parents keep their children living with disabilities in deplorable conditions such as tying them to furniture and keeping them indoors for days at a time. This is associated with the stigma of having a child living with disability. Such stigma arises from misinformation and belief that such conditions are caused by witchcraft or curses. The Department of Children's Services intervenes on behalf of the state and takes such children into protective care that includes charitable children's institutions.

The state does not also intervene in cases of cultural practices that families subscribe to unless it is outlawed or repugnant to justice and morality. It is on this basis that male children undergo circumcision that is part of customary law. State intervention occurs in cases of female circumcision and early/child marriage regardless of whether it involves a male child or a female child. Such children are recognised by law as being in need of care and protection. Kenya needs to invest in a wider framework of state intervention in child protection especially in private family life. These structures need not be intrusive yet effective.

²³⁰ Section 114, *Children Act*, No. 8 of 2012

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