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

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REG No: 071034

A Dissertation submitted in partial fulfillment of the Bachelor of Laws Degree,

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January 2016

DECLARATION

I, MUSAU EVANS MUTHUSI do certify that this Dissertation is my original work. It is a reflection of my personal research. I declare that this Dissertation has not been presented anywhere else before

Signature .....

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ACKNOWLEGDEMENT

I am grateful to God for the good health and wellbeing that were necessary to complete this research.

I place on record, my sincere thank you to **Dr. Luis Franceschi** Dean of the Faculty, for the continuous support and provision of a working environment.

I am also grateful to **Ms Mukami Wangai**, lecturer and supervisor, in the Strathmore University Law School. I am extremely thankful to her for sharing expertise, and sincere and valuable guidance and encouragement extended to me.

I take this opportunity to express gratitude to all of the Department faculty members for their help and support. I also thank my parents for the encouragement, support and attention.

I also express of gratitude to one and all, who directly or indirectly, have lent their hand in this venture.

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ABBREVIATIONS

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

LIST OF CASES

1. *X and Y v. The Netherlands*, 1985, Series A No. 9, No. 8978/80.
2. *Case of M.C. v. Bulgaria* , ECtHR Judgement of 13 November 2003
3. *R. v. Higgins*, (1988) 2 SCR 387, 1988 CanLII 126 (SCC)
4. *Boucher v The Queen* , (1955) SCR 16, 110 CCC 263

ABSTRACT

The main objective of this paper is to assess the veracity of penal law objectives in child abuse cases in Kenya. The Children's Act under Section 2 looks at child abuse as consisting physical, sexual, psychological and mental injury. The research endeavours to cover the various forms of child abuse covered by various pieces of legislation, which are sexual abuse, child physical abuse and child trafficking and exploitation. The area is of interest due to a significant rise in child abuse incidences in the country over the years. One of the objectives of laws is to bring about social order in its purest form with an end to avoid conflict. As such to maintain this order the characteristic response of Kenyan legislators to these atrocities was to pass laws that gave unlimited judicial discretion in sentencing and also severe deterrent punishments. From collected data over a span of 10 years since the enforcement of key legislations, the trend of child abuse crimes across the board have increased in conviction rates, prosecutions and arrests. The question then is whether the objective of the laws is responsible for this inefficiency. To figure out the whether a nexus exists the jurisdiction of Canada was used as a comparative study. The Canadian criminal system, based on Common law, is similar to that of Kenya. The similarity of judicial systems and similar child protection laws provided a proper specimen to analyse whether a nexus exists. The sentencing objectives in child abuse cases however is based on a mixture of retribution and deterrence tempered by mandatory minimum sentences. Across the board it was seen that the cases of child abuse either diminished or maintained the same number due to effective investigations, implementation of mandatory minimum sentences and less judicial discretion in sentencing. Therefore, the Kenyan experience can be remedied through introduction of mandatory minimums of penalties. This removes discretion of the judiciary and as such aligns the purpose of the laws. Strengthening of child abuse investigations by the Kenya Police Service. This goes to improvement of infrastructure and reduction of bureaucracy. Setting up of proper reporting mechanisms to ensure an associated effort to ensure prosecution of crimes. This goes to the front of accessibility to proper authorities and access to justice.

CHAPTER 1: Introduction

1.1 Background

The cases of child abuse in Kenya have been a major concern over the years with the ever rising number of such cases. Such was seen in the year 2005 where a characteristic response to this matter by the formulation of the Sexual Offences Act (Act *no. 3 of 2006)*. This Act was aimed at curbing sexual offenses committed against women and the girl child. This however does not cover the other forms of child abuse. These types of abuse have been catered for in the Constitution of Kenya Article 53(d) specifying and assuring protection of children from child abuse. Despite these assurances there is a disparity and a challenge in the judicial and institutional control of the situation.[1] At the forefront has been the matter of recurrent cases of abuse that have shifted the public view of punishment of offenders. The current legislation that outlines the crimes against children is drawn out in several pieces of legislation. The paradigm shift in the perception of punishment has been an instinctive one relying on high penalties laid upon offenders. As will be shown later on, the stringent laws in place do not necessarily translate to lower child abuse and conviction rates. To understand the point of view of protection of the child we must then look at the international protection of the child.

The international scene over the years has seen the strengthening of children's rights. This has come about due to global realization of the lack of substantive laws and conventions that cater to children.[2] Children, as recognized by different scholars, have been an interest under international law. The character and treatment of children under the international scene has attracted the attention of protection from various stakeholders leading to the formation of the United Nations Convention on the Rights of the Child (1989) vol. 1577(UNCRC). This was in response to the character of the child that has changing in the course of history.[3]

Among these rights of the child is the protection of children from abuse. Article 19 and 34 of the UNCRC clearly show the governmental responsibility to protect the child. This is seen by the

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[1] Summary of the outcome of mapping and assessing Kenya's child protection system: Strengths, weaknesses and recommendations, National Council For Children's Services (Nccs), 2010.

[2] United Nations Convention on the Rights of the Child 1990 s Pre-amble (To be known as the UNCRC).

[3] Martha Minow, 'Rights for the Next Generation: A Feminist Approach to Children's Rights' (1986) 9 Harv. Women's LJ 1. 1.

international community stating clearly the concern of there being a big problem concerning child abuse:[4]

> ***"The Committee is concerned by the reported increase in child abuse, including infanticide, domestic violence and child prostitution ..."*** [5]

The UNCRC imposes an obligation to set up mechanisms both administrative and legislative to protect the child in the society. This brings about an assurance that countries bound by the convention will accomplish the obligations set out.

On the continental stage the situation to child protection is from a different approach. Africa has seen wars, famine, corruption, poverty, failed states, dictatorships and crumbling economies.[6] Despite the aims of the UNCRC implementation is hard in these circumstances. The African Union in this regard came up with the African Charter on The Rights and Welfare of the Child, 1999(ACRWC). The ACRWC was aimed at protecting the African child. The African charter declared the position of the African countries in matters concerning child abuse. The UNCRC in its drafting, though obligatory, contained scattered provisions on child abuse. This was rectified by the ACRWC through Article 16. The 1999 Charter has now been the back bone of legislations on child abuse. The big question has been implementation of these rights in the African scene even though they are for the African context.[7]

The application of this charter has been more so seen in the Kenyan Context. The change of the Constitution of Kenya had a wide scale effect on legislation. This further stretched to the bolstering of Kenyan children's laws. In line with international and regional conventions, the Constitution of Kenya was particular under Article 53(d) on the right of a child to be protected from child abuse.[8]

Kenya in the year 2001 passed the Children's Act which was aimed at: first consolidating the various laws relating to children and second to ensure complementarity with the UNCRC. Part 2 Section 13 of the Act outlines the right of a child to be protected from neglect and physical or mental abuse. UNICEF, in its report on Child Violence, carried out in 2010, showed the statistics

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[4] Rachel H and Peter N, *Implementation Handbook for the Convention on the Rights of the Child*, vol 1 (United Nations Publications 2002), 264.
[5] Mauritius IRCO, Add 64, para. 18.
[6] African Charter On The Rights And Welfare Of The Child 1999 s Pre-amble Para 4.
[7] Peter L, '*Child Protection in Africa--The Road Ahead*' (1996) 20 Child abuse & neglect 543.
[8] Art 53(d), Kenya Constitution, 2010.

of reports made in the previous years on reporting of child abuse cases.[9] The low ratings of young children and adolescent persons not reporting to the authorities was alarming.[10] Some scholars state that the issue in most cases is the accommodation of such cases by the authorities in charge.[11] The cases therefore go unreported rendering the laws ineffective.

This statistic shows the lack of confidence in the legal system to provide proper mechanisms of enforcement. The primary legislation (The Children's Act) does not provide for the punishment of perpetrators other than Section 20.[12]The question as to whether this single provision for a plethora of child abuse cases is enough to guarantee the protection of the rights of children under the UNCRC and the ACRWC.

From an international perspective the matter of defining children's rights has been an international discussion.[14] The various definitions of child abuse have catered for physical abuse and the mental state of the child.[15] This according to Dr. David Gil it only encompasses the physical aspect of abuse.[16] As such it has been deemed too naïve that the scope of child abuse is too narrow.[17]For the UNCRC to gain full effect in protection of the rights of children it must be of the utmost importance that the definition encompasses the mental frame of the child.

The best method of establishing the correct definition is to tackle the matter from the roots (the elements).[18] Richard Gelles takes a look at the elements of the abuse (the mind, body and development of the child). An African perspective is important as O. Famuyiwa states that the social-economic aspect of the community is important to determine what child abuse is.[19] The

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[9] Violence against Children in Kenya: Findings from a 2010 National Survey. Summary Report on the Prevalence of Sexual, Physical and Emotional Violence, Context of Sexual Violence, and Health and Behavioral Consequences of Violence Experienced in Childhood. Nairobi, Kenya: United Nations Children's Fund Kenya Country Office, Division of Violence Prevention, National Center for Injury Prevention and Control, U.S. Centers for Disease Control and Prevention, and the Kenya National Bureau of Statistics, 2012, 99.

[10] Violence against Children in Kenya at , 108.

[11] Ruto S, *Sexual Abuse of School Age Children: Evidence from Kenya,* CICE Hiroshima University, Journal of International Cooperation in Education, Vol.12 No.1 (2009) pp.177 ~ 192, 189.

[12] Section 20, Chidren's Act (Act No. 8 of 2001).

[14] Danya G, *Emotional abuse and neglect (psychological maltreatment): a conceptual framework, Child Abuse & Neglect* 26 (2002) 697–714, 701.

[15] Hart, S., Binggeli, N., & Brassard, M, *Evidence of the effects of psychological maltreatment,* Journal of Emotional Abuse, (1998). 1, 27–58.

[16] David G, *Violence against Children Physical Child Abuse in the United States* (1st, Harvard Press 1970)

[17] Helfer, R. B. (1982). *A review of the literature on the prevention of child abuse and neglect.* Child Abuse and Neglect, 6, 251-2.

[18] Richard J., *'Demythologizing Child Abuse,*The Family Coordinator, Vol. 25, No. 2 (Apr., 1976), pp. 135-141,136.

[19] Famuyiwa O, *Child abuse and neglect in sub-Saharan Africa,* Psychiatric Bulletin (1997), 21. 336-338.

World Health Organization in its 1999 Report on Preventing Child Maltreatment: a guide to taking action and generating evidence refers to the matter of child maltreatment. This is an interest to the paper as this is the basis of the definition to be relied on. It states:

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

It is upon this definition that the Children's Act 2001 Section 2 relies on. The paper will thus take this position on the definition of child abuse.

1.2 Statement of Problem

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

1.3 Justification of study

The punishment of child abuse crimes has been based on deterrent laws and judicial discretion. The downside of this decision, to apply such measures in the working of the penal system, has been ineffective as the intended objective of deterring offenders has been curtailed. As previously seen, in the various forms of child abuse, there has been an instinctive rise in the number of offences and convictions sparking the question whether the objective intended is actually working.

Taking into consideration the character of the child as a vulnerable individual, the measures taken to punish offenders should be balanced on the front of justice for the victims and also that of the perpetrator. As such there is need to look at the reason why the punishment of offenders is not working as the end result being the child suffers under an inefficient system.

1.4 Research objective

This research aims to analyse the deterrent objective of current legislation in its protection of the rights of children by assessing the penalties and trends in commission of crimes against children through a comparative study of Kenya and Canada.

1.5 Questions for research

The following questions will be posed:

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

- What objective is employed in punishment of offenders in Kenya and what shortfalls have been experienced in the Kenyan process?
- What considerations can be taken up reinforce our legal framework on protection of children from child abuse?

1.6 Methodology

This study will use a qualitative approach to study the implications of child protection penal laws. In this case it will rely mostly on secondary data to analyze the legislative framework in place. The approach to analysing will be based on the current Legislation set out to protect children. This will include: Children's Act (No. 8 of 2001), Sexual Offences Act (No.3 0f 2006), the Counter-Trafficking in Persons Act (No. 8 Of 2010)These pieces of legislation shall provide the first threshold of the study to establish the legislation framework. The study will look at the works and commentaries of scholars. Furthermore, it will rely on annual reports of Non-Governmental Organizations involved in the area of child abuse these include; UNICEF, FIDA, IOM, RMMS and IPCANN. The selection of reports will be based on clarity of information, availability of the information, and relevance of information sought after.

These methods will help frame and put into context the situation at hand and as such will provide a ground for searching for answers.

CHAPTER 2: Theoretical framework

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

2.1 Positivism (Kelsenian Theory)

Social order arises from social facts through the norms held by the community.[20] As such Hans Kelsen looks at there being a hierarchy of norms in any given society.[21] These norms form the basis under which laws are made. As such Hans Kelsen states that law is separate from the notion morality and exists in absolute solidarity.[22] This notion, however radical, forms the basis unto which this research is based upon. According to Hans Kelsen the pure theory of law gives cadence to the fact that the law is what it is. Hans Kelsen posits that law is made to control human behaviour.[23]

Thus the purpose and the aim of law is for social orderliness according to Hans Kelsen. This has been duly recognized by scholars as being the underpinning factor of law. P. W Patterson states that:

> ***"The stability of law does not consist merely in the rules and principles which prescribe lay conduct and are guides to judicial or administrative decisions, but also in the powers of officials to change the law and in the limitations on those powers."***[24]

This is taken to mean that the character of law is twofold. First, to bring social order but also to the law provides power for officials to make law. This fact of social order and power of discretion is what the research hinges on.

2.2 Deterrence Theory

Taking a leaf from Hans Kelsens' notion of law and order we extend to the ambit of Social order regarding matters of criminal behaviour.[25] Crimes committed by persons go against the norms of

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[20] EuropeanJournalofInternationalLaw9(1998).325, 3
[21] Edwin W . P atterson. Hans Kelsen and His Pure Theory of Law, 40 Cal. L. Rev. 5 (1952), 8.
[22] Kelsen H, *Pure Theory of Law*, 2nd,Berkley, California, 1967, 66.
[23] Kelsen H, *Pure Theory of Law*, 3?.
[24] Edwin W . P atterson, Hans Kelsen and His Pure Theory of Law, 40 Cal. L. Rev. 5 (1952), 9.
[25] Carlsmith K and Darley P. Journal of Personality and Social Psychology 2002, Vol. 83, No. 2, 284 –299, 284.

the people/community. The ideal situation in a society is a matter of reform and correction of the ills in the society. There is thus need for punishment of crimes. According to Nagin the matter of punishment is through police powers of the sovereign. The judicial system according to his research is aimed at looking and justifying the reason for punishment.[26]

The main posit of the deterrence theory is that the punishment of the offender should be enough to deter the offender from committing the crime again.[27] Jeremy Bentham looks at the matter of deterrence from the following point of view:

> ***"If the apparent magnitude, or rather value of (the) pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it"***[28]

This brings the issue of cost versus benefit. The citizen when conducting a crime will look at the magnitude of the punishment vis a vis the benefit of the crime.[29] This forms the two bases of the deterrence theory. These are:

1. Detection; and
2. Publicity.

The theory according to Kevin M. Carlsmith and John M. Darley posit that lowly detected crimes require high levels of punishment. The reasoning of this is due to the fact that the low detected crimes are the most severe crimes in the community.

Coupled with the notion of publicity then the members of the community will be careful of the crimes they may consider committing. The crimes committed by the erred persons in the community are published to the society and the members of the community will know the crime committed and cognizance of the punishment will be taken. This forms the notion of deterrence.[30]

The laws in place at the moment in Kenya regarding criminal activity and enforcement of rights are thus a matter of deterrence. This is due to the nature of the laws, bearing high penalties and

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[26] Nagin D, Criminal, *Deterrence Research at the Outset of the Twenty-First Century*, Crime and Justice, Vol. 23 (1998), pp. 1-42, 1.
[27] Nagin D, *Criminal Deterrence Research at the Outset* of the Twenty-First Century , 1.
[28] Bentham, J., & Bowring, J. *The works of Jeremy Bentham*. New York, Russell & Russell. (1962), 396.
[29] Carlsmith K and Darley *P Journal of Personality and Social Psychology* 2002, Vol. 83, No. 2, 284 –299, 285.

[30] Carlsmith K and Darley P. Robinson Journal of Personality and Social Psychology, 285.

judicial leeway in discretion The general principle adopted by the European Court of Justice is that child abuse laws have to provide a measure of deterrence rather than a retributive mode of punishment.[31]

The theory of deterrence in child abuse cases has been fronted by scholars. Mark Capaldi in 2013 wrote on deterrence management in child abuse cases. The main aim of deterrence is to keep the perpetrators away and to discourage the commission of a crime.[32] Mark Capaldi states that through enhancement of policies and reinforcement of laws, deterrence of child abusers is lowered and as such the cases of child abuse are lowered.[33] He states:

> ***"Enhancing detection and prosecution sends a clear message to child sex tourists that sexual exploitation of children would not be tolerated, thus resulting in increased deterrence."***[34]

The same notion of deterrence in child abuse has been focused on by the European Court of Human Rights. In the case of *X and Y v. the Netherlands.*[35]In this case the court reiterated the sentiments of Capaldi where they verbatim stated:

> ***"fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions"***[36]

It is however noticeable that one may argue that the theory of just deserts (***retribution***)is a better option. In the case of Kevin M. Carlsmith, John M. Darley and Paul H. Robinson look at the theoretical underpinnings of just deserts.[37] In this theory the main perception is that the offence committed by the criminal should be proportional to the punishment. In this regard Darley, Sanderson, & La Mantia, 1996 looked at the notion of magnitude in the

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[31] European Court Of Human Rights, *'Child Sexual Abuse And Child Pornography In The Court's Case-Law'* (2011) 1, 4.
[32] Carlsmith K and Darley P,Journal of Personality and Social Psychology 2002, Vol. 83, No. 2, 284 –299, 285.
[33] Capaldi M, *Deterrence Management to Keep Children Safe From Sexual Exploitation*, (2013) Ecpat 1.
[34] Capaldi M, *Deterrence Management to Keep Children Safe From Sexual Exploitation* ' (2013) Ecpat 1, 26.
[35] X and Y v. the Netherlands, 1985, Series A no. 9, no. 8978/80.
[36] X and Y v. the Netherlands, 1985, Series A no. 9, no. 8978/80.
[37]Carlsmith K and Darley P, Journal of Personality and Social Psychology , 285.

theory of just deserts and he states that the measure of the crime if small should have a small penalty and consequently the same for bigger crimes.[38]

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

[38] Darley, J. M., Sanderson, C. A., & LaMantia, P. S. *Community standards for defining attempt: Inconsistencies with the Model Penal Code.American Behavioral Scientist*, (1996). 39,405–420, 410.

CHAPTER 3: Contextualizing the Kenyan and Canadian Legal Framework

3.1 Introduction

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

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

3.2 The Kenyan Position

The current framework on Child protection from abuse is set out in various pieces of legislation. The respective legislation responsible for child abuse are not solely catered to specifically address child abuse offences, but endeavour to cover a plethora of cases. The provisions held in these pieces of legislation provide for sanction and punishment of offenders. This implies that administrative pieces of legislation are given the task of applying penal laws. Administrative pieces of legislation are meant to set out workings and relevant structures in a particular field. As such this mixture may prove to be a quagmire of sorts as the functions and spirit of the laws are muddled.

The principal piece of legislation that takes lead in the situation is the Children's Act (No. 8 of 2001).[39] Subsequently Acts such as the Sexual Offences Act (No.3 0f 2006)[40], the Employment Act Cap. 226[41] and the Counter-Trafficking in Persons Act (No. 8 Of 2010)[42] subscribe forms of child protection from physical, sexual and exploitative abuse.

[39] Children's Act (No 8 0f 2001).
[40] Sexual Offences Act (no, 3 of 2006).
[41] Employment Act (Cap. 226 2007).
[42] Counter-Trafficking in Persons Act (No. 8 Of 2010).

3.2.1. The Children's Act 2001

The Children's Act of 2001was a much awaited Act that was expected to reshape the arena of Children's rights and protection[43]. The case for the legislation was brought forward by non-governmental actors to implement the African Charter on the Rights and Welfare of the Child and the UNCRC for the well- being of the child[44]. At the forefront was the African Network for The Prevention & Protection against Child Abuse and Neglect(APPCAN)[45]. The wait for a piece of legislation to outline what child abuse and its constituents was eagerly awaited by the children's rights society.

The Children's Act is an overview of the rights of the child. This more so extends to the protection mechanisms, which this paper is interested in. The Act is a declaratory statute that states what child abuse is and also sweeps over the framework that is to be established. The Act in itself is not catered to penal punishment[46].

The Act, for the purpose of the study, has principally 4 primal points of interest. First is the establishment of children's rights and duties. Second, is the definition of a child and more importantly Child abuse. Third, establishment of the National Council for Children's Services, responsible for children's services. Fourth, it establishes the Children's Court, setting out procedure for children and magistrate designation[47].

In light of these highlights the Children's Act aims to protect the welfare of the Child as espoused in the FIDA Kenya Annual Report 2002 where it was stated:

> *The principal object of the Act is to safeguard the rights and welfare of the child. The Act contains what can be considered as the bill of rights for the promotion and protection of the rights of the child.*[48]

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[43] Odongo G, *Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms*, 1 AHRLJ 112-141 (2012) , 114

[44] Yanghee L, *Child Rights And Child Well-Being, The 3rd OECD World Forum on Statistics, Knowledge and Policy Charting Progress, Building Visions, Improving Life* Busan, Korea, 27-30 October 2009, 2

[45] Zachary O, *Child abuse rampant as Kenya waits for bill Children's rights* June 2001 http://web.peacelink.it/afrinews/63_issue/p10.html on 22, November, 2015

[46] Paul I, *Children's rights legislation in Kenya*: an overview, 17.

[47] Paul I, *Children's rights legislation in Kenya*: an overview, 18.

[48] The Federation of Women Lawyers Kenya (FIDA Kenya), *FIDA Kenya Annual Report 2002*, 24.

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

Section 20 of the Act states:

> *"Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine."*[49]

Similarly, the same Act also tries to deal with matters of maltreatment and neglect of the child under Section 127[50]:

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

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

3.2.2. Sexual Offences Act

In response to both the meagre penalties handed out by Section 127 of the Children's Act and the rise in sexual violence against women and children; the characteristic response was the intensive

[49] Section 20, Children's Act (No 8 0f 2001)
[50] Section 127 Children's Act (No 8 0f 2001)

lobbying for an overarching piece of legislation that tackled sexual abuse on all possible fronts[51]. The previous overarching legislation was the Penal Code[52]

Despite the noble objectives of the Sexual Offences Act the legislation only caters to a specific sub-set of persons in the community.

The Act stipulates certain offences that cater to children and their plight when it comes to sexual offences.

Under Section 7 of the Act it states:

> *Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities*
>
> *A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years*[53].

The Act further defines this offence as defilement under Section 8.

Additionally, the Sexual Offences Act looks at the matter of child prostitution (Section 15 subject to a conviction to imprisonment for a term of not less than ten years), Child pornography (Section 16 subject to a conviction liable to imprisonment for a term of not less than six years or to a fine of not less than five hundred thousand shillings or to both) and Child Tourism as offences against the child. These offences are seen according to the Act form part of abuse to the child.

According to Justice Njoki Ndung'u the Act was meant to be an inclusive Act that was meant to cater for growing offences that were not previously recognized under the Penal Code.[54]

The Act prescribes high penalties for the crimes committed. The punishment as such is intended to repel any attempts of such crimes being perpetrated in future. The characteristics of deterrent

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[51] Kenya National Assembly Official Record (Hansard) 30 May 2006, 990: Contribution by Mr Kenneth Marende. Preventing and responding to violence against women and girls: From legislation to effective law enforcement.
[52] Penal Code, Cap 63. (Act No. 19 of 2014).
[53] Section 15, Sexual Offences Act (3 0f 2006).
[54] Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndung'u, Reproductive Health Matters 2007;15(29):149–154, 150.

laws are marked by high penalties for culprits. The more severe a punishment, it is thought, the more likely that a rationally calculating human being will desist from criminal acts.[55] In ensuring deterrence is effective the courts are very prone to having a heavy hand in punishment. Deterrent laws are also characterized by freedom of high punishment by the judicial body. This has been explored upon majorly by courts expressing the urgent need for discretion in punishment. In *R v Higgins* the court stated its position as being one that requires discretion at all times and cannot be done away with so easily.[56] Similarly, as seen in the Sexual Offences Act the courts have been given leeway by proposing a high minimum sentence to ensure a high threshold of punishment.

3.2.3. Counter-Trafficking in Persons Act

The Counter-trafficking Act was an Act of Parliament to implement Kenya's obligations under the United Nations Convention Against Transnational Organized Crime (UNCATOC), particularly its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children[57]. The Act gives the penal sentences for persons who commit crimes envisioned.

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

> *The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered "trafficking in persons" ... A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings...*[58]

Furthermore, the Act goes on to define under Section 4 where it states:

> *A person who for the purpose of trafficking in persons—*
>
> *(a) adopts a child or offers a child for adoption;*
>
> *(b) fosters a child or offers a child for fostering; or*
>
> *(c) offers guardianship to a child or offers a child for guardianship,*

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[55] John D, *Deterrence Theory,* Encyclopedia of Prisons & Correctional Facilities, Sage Publications, 2005, 235.
[56] *R. v. Higgins* (1988) 2 S.C.R. 387 (Beare), 41.
[57] Ministry of Labour, Social Security and Services, The National Plan of Action for Combating Human Trafficking 2013-2017, 2013, 5.
[58] Section 3, Counter Trafficking- in-Persons Act No. (8 of 2010).

commits an offence[59]

A person who initiates or attempts to initiate adoption, fostering of guardianship *proceedings for the purpose of subsection (1) commits an offence... A person who commits an offence under this section is liable to imprisonment for a term of not less than thirty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.*

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

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

3.3 The Canadian Context

Canada will be the context unto which this paper will base its research on. The justification for the country was on the basis of:

1. Judicial rulings handed down by the courts. The punishment mechanisms with regards to judicial discretion has been tackled and dealt with in detail over the recent years.
2. Expansive laws that cover the various categories of vulnerable persons. The current framework provides for punishment according to the needs in society.
3. Long History of documented convictions of child abuse cases. These convictions have thus sparked debates socially and academically as such informing legislation.

The Canadian Jurisdiction has employed the Criminal Code as the substantive legislation that prescribes punishment for offenders. The Canadian Criminal Code RSC 1985, c C-46[60] enshrines the deterrence objective of Canadian laws. The laws provide high penalties and fines to ensure effective discouragement of offences.

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[59] Section 4, Counter Trafficking- in-Persons Act No. (8 of 2010).

[60] Criminal Code, RSC 1985, c C-46

The Canadian Criminal Code, similar to the Penal Code of Kenya, is an all-inclusive piece of legislation. The main difference is the regular amendment of the laws and the high detail expressed in statute. As opposed to the previous pieces of legislation there is breathing room for various objectives for special categories of persons to be expressed. In this regard the plight of children is recognised in the Code. Supplementing legislation for all territories in Canada has been implemented to ensure proper enforcement of laws.

The legal provisions in the Criminal Code intend to tackle various offences committed against children. The offences include:

1. Assault (causing bodily harm, with a weapon and aggravated assault) (ss. 265-268)
   The crime of assault in the Criminal Code is an umbrella offence under the code. The code stipulates under Section 265 defining the crime of assault.

   267. Everyone who, in committing an assault,

   (a) carries, uses or threatens to use a weapon or an imitation thereof, or

   (b) causes bodily harm to the complainant,

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

   268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

   (2) Everyone who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

The two offences enshrined in the Code show a display of deterrence in accordance to the severity of the crime. Notably the statute does not reference directly to a child but rather employs an umbrella term of *persons* to include children.

The penalties as per these two provisions employ a form of deterrence and also a form of retributive justice for the perpetrators. The Canadian law have thus endeavoured to provide for a middle ground by which they can ensure that the aims of justice are not too strict but also effective.

Additionally, the following are provisions in the Code that have been termed as the Legislative framework for the protection of children from abuse.

2. Kidnapping & forcible confinement (s. 279)

279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence

...to imprisonment for a term of not more than 14 years.

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

Abduction of person under sixteen

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

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

Abduction of person under fourteen

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

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

282. Everyone who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody...is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years

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

151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

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

The overarching theme seen throughout the Canadian Criminal Code is the propagation of high penalties for crimes committed against children to meet the ends of justice. This means the direction of laws is to deter persons from committing offences. Similarly, the same laws are aimed at retribution.[61]. The cognisance of the lack of effectiveness of deterrence as a sole end to justice posed a challenge to the Canadian system of justice.

The view of retributive justice is also known as just deserts which this paper has alluded to. David Wood clearly describes retributive justice when he states[62]:

The simplest view of retributive justice sees it as a basic, unanalysable, intuitively obvious, moral principle: 'The core of the idea of retribution is the moral notion that the wrongdoer ought to be punished'; 'At the heart of retributivism is the contention that it is the wrongness of the criminal act that justifies the imposition of punishment on the offender[63]'

The principle of retributivism bases its whole existence on moral principle that wrongs cannot go unpunished. The principle question then is, what is the just measure of a crime? As such the Canadian Criminal Code in the salient provisions aforementioned intend to bring about this stern emergence of deterrence and just deserts. The Canadian Criminal Code Under section 718 has ensured the codification of this desire to ensure the implementation by the judicial system. As will be seen later on in the paper, is the question of a purely deterrent system vis a vis an amalgamation of two polar ends of justice- deterrence and retribution.

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[61] *Talk About Sentencing,* Cornwall Public Inquiry Phase 2 workshop, October 22, 2008, 2

[62] Wood D, *Retributive and Corrective Justice, Criminal and Private Law, Scandinavian Studies in Law*, Vol. 48, 2005 542-582, 545.

[63] Galligan D, *The Return to Retribution in Penal Theory,* in C.F.H. Tapper, ed., Crime, Proof and Punishment 144,Butterworths, London, 1981, 153.

CHAPTER 4: Analysing trends of Deterrence in Child Abuse Cases

Understanding the framework set in place by legislation it is then essential to understand how the laws affect trends in child abuse cases and the nexus between the objective of laws and the cases at hand.

This paper, from the onset, acknowledges the presence of factors that may affect the compliance by citizens with laws such as: economic standing, education and literacy levels and traditional customs.[64] The main aim however, is to see if the objective sought by the legislature is effective enough.

The analysis of the situations in both countries will be the point of discussion in the chapter asking various questions that require introspection. The paper will be asking, why the choice of the deterrence approach at this point in time despite its success or failure; even though deterrence is effective is it the right objective; keeping in mind the status of the persons the law is trying to protect and lastly, is the point of departure of deterrence meant to be reactionary or rational to ensure the true ends of justice are met? These are some of the questions the chapter will try handle making reference to what scholars have opined over the years.

4.1 Analysis of Child abuse and neglect in Kenya

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

3.2.4. Child trafficking and exploitation

The International Organization for Migration (IOM) conducted a study of trafficking of persons in East Africa covering Kenya, Uganda and Tanzania. The study highlighted the plight of exploitation of Children as constituting 1.% of trafficking cases in East Africa.[65] According to the report children engaged in trafficking are exposed to hard labour and sexual exploitation in various countries. The report was compiled in 2005 to spark a change and enforcement of the Palermo

[64] Schiller, J Black,W.,& Murphy, P. V. (n.d). Crime and Criminality, 292 , from www.des.ucdavis.edu/faculty/Richerson/BooksOnline/He16-95.pdf on 4, December, 2014

[65] International Organization for Migration, Data and research on human trafficking: A global survey, 2005 at 53

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children;[66]. Furthermore, the Counter-Trafficking in Persons Act which was enforced in 2012 as the new legislation has however not been effective according to The Regional Mixed Migration Secretariat (RMMS) report on Mixed Migration in Kenya: The scale of movement and associated protection risks[67]. The organization conducted a survey on the enforcement of the Counter-Trafficking in Persons Act 2010 to establish whether there has been proper follow up to the legislation. The study concluded that the enforcement of the Palermo Protocol on protection of children and women was only being enforced by donors with little assistance by the government[68]. Additionally, the study showed that since effecting the Act in 2010 only 30 cases were prosecuted in the courts but only 7 convictions of child trafficking and exploitation[69]. Though the legislation prescribes high punishment the number of incidences did not change significantly as compared to those in 2005 in the IOM report.

The miniscule efforts of enforcement of the laws has led to the Country being rendered a Tier 2 nation in trafficking of persons. This means that the country is ineffective in enforcement of protection laws. Though there was acknowledgement that the seven convictions from implementation of the Act have protected children from sexual exploitation there has been little deterrence.[70] The tier 2 at the moment ranks Kenya in a dismal position in enforcement, this position however can only be challenged through proper restructuring and institutional changes in monitoring.

4.1.2 Physical Abuse

The statistics on physical abuse against children in Kenya were gathered in 2010. Prior to this the 2000 report pre-dating the Children's Act 2001 carried out by the African Child Protection Against Abuse and Neglect(ACPAAN) organization . The 2010 report on Violence against Children was

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[66] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, June 2003.

[67] The Regional Mixed Migration Secretariat (RMMS) report on Mixed Migration in Kenya: The scale of movement and associated protection risks, June 2013, 50.

[68] The Regional Mixed Migration Secretariat (RMMS) report on Mixed Migration in Kenya: The scale of movement and associated protection risks, June 2013, 47.

[69] Records Applications Post-Mills, A Caselaw Review http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p3_4.html on 9 December 2015.

[70] US Department of State. Trafficking in Persons Report 2012. Washington: US Department of State, 2012, At 205

carried out as a joint venture by the Kenyan Government and The United Nations Children's Education Fund.

The report indicate that during childhood, 32% of females and 18% of males, experience sexual violence. 66% of females and 73% of males experienced physical violence and 26% of females and 32% of males experience any violence as a child. 13% of females and 9% of males experienced all three types of violence during childhood. Similarly, the rate of reporting of these incidences to the authorities was viewed as dismal since 34% of cases were reported and as such follow up on them were not ensured. During the year preceding the survey, approximately half of all females and males aged 13 to 17 experienced some type of physical violence (48.7% and 47.6%, respectively)[71]. The perpetrators, whom in most cases were family members and close persons to the victims, were not charged nor arraigned in court. As such there is the perception of little confidence in the process the laws are progressing.

4.1.3 Sexual Abuse

In Kenya the trend in sexual abuse against Children has been on the rise even after the passing of the Sexual Offences Act.[72] The Kenya Nairobi Rape Statistics of 2011 give an overview of the effectiveness of the deterrent laws in matters of sexual abuse[73]. The following table shows the rise in number of cases of rape in Nairobi County during the 2006 to 2010 period:

Year	Rape	Other Crimes
2006	1291	1070
2007	1395	1005
2008	2100	982
2009	2800	742
2010	3000	630

[71] Violence against Children in Kenya: Findings from a 2010 National Survey. Summary Report on the Prevalence of Sexual, Physical and Emotional Violence, Context of Sexual Violence, and Health and Behavioral Consequences of Violence Experienced in Childhood. Nairobi, Kenya: United Nations Children's Fund Kenya Country Office, Division of Violence Prevention, National Center for Injury Prevention and Control, U.S. Centers for Disease Control and Prevention, and the Kenya National Bureau of Statistics, 2012, 3.

[72] Sexual Offences Act (Act No 3 of 2006).

[73] Kenya Rape statistics, A critical Analysis Paper, 2011.

Table 1: Table showing trends in rape cases as compared to other offences in Nairobi County

These statistics show the general trend in the cases of abuse, furthermore, it was stated that 60% of the rape cases reported involved victims who were below 18 years[74]. This means that children were the most affected in this area of abuse. The fear of reporting incidences due to intimidation and low certainty incarceration led to a rise of incidences and low deterrence.[75] Such experience has been documented by one Susan Slavin, a human rights lawyer in Kibera who documented the struggle of asking of help from authorities. The difficulty according to her account is the numerous times the investigation system is rigid and flawed by corruption that no cases are submitted before courts. The account of Susan Slavin of such cases shows a deep disparity in investigations.[76]

4.2 Assessment of deterrent objective of law

4.2.1 Critique of deterrence

The outlook on deterrence has been weighed and balanced on the scales by academics with the prior generation of scholars looking at deterrence as the possible form of correction from an economic stand point[77]. The economic theory of deterrence is based on the fact that the cost of the action carried out by the offender is too high for the offender to consider in his actions. Therefore, the public or reformed offenders steer away from the possibility of crime.[78]

On the other side of the divide are scholars bringing to task the notion of deterrence, its shortfalls and its inefficiency in totality. Deterrence in itself has been said to focus on the severity of punishment.

The severity of punishment means that the sanction is so great that it fetters any person from attempting the crime. The severity of punishment of a crime comes with high penal penalties which may or may not suit the weight of the crime. For example, 20 years' imprisonment for drunk driving. Such penalties from an economic view is solid enough to deter any person from committing a crime. This may also come in form of high fines which bears down a huge cost on

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[74] A Mbithe, Factors Contributing to the Increase if Child Rape in Nairobi Province, Unpublished Bachelor's Thesis, Egerton University, 2007, 6.

[75] Letter to the New York Times by Susan Slavin Nairobi, Kenya, Jan. 14, 2014, http://www.nytimes.com/2014/01/18/opinion/child-rape-in-kenya.html?_r=0 on 9, December 2015.

[76] Letter to the New York Times by SUSAN SLAVIN Nairobi, Kenya, Jan. 14, 2014, http://www.nytimes.com/2014/01/18/opinion/child-rape-in-kenya.html?_r=0 on 9, December 2015.

[77] Kevin C. Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 Dick. L. Rev. 1, 1-13, (1983-1984) , 2

[78] C.Beccaria, On Crimes and Punishments Bobbs-Merrill ed. 1963, 2.

the offender. Lastly, is the option of both penalties which is intended to make an example of the offender to other culprits and the public. This aspect of severity is to shame the offender and make an example of him.

Despite the high rate of punishment dished out by courts, the deterrence in severity is not full proof as there was in the past an upshot in commission of crimes despite the deterrent laws[79]. Case in point was the increase of drunk driving incidences in Australia in 1998 with the introduction of stringent penalties on drunk driving[80]. Gary Kleck gives an interesting perspective unto what we might perceive as the cause of the disconnect[81]. Kleck states that the cause of inefficiency of deterrence is the perceptions of risk upon which deterrence depends not changing according to the actual punishment levels imposed. This statement extends to the question of reality. The reality of the effectiveness of the laws with a deterrent objective. The public perception of the punishment is not clear cut to allow understanding and comprehension of punishment.

On the other hand, the applicability of deterrence has been attempted by the justification of certainty of punishment rather than the severity of punishment. Nagin explains that the previous perception of high penalties does not work as stated above, however the focus on certainty of punishment may remedy the situation but not totally guarantee the complete working of the criminal system[82]. The law according to Nagin should be certain to state the punishment and its end. There should be certainty in conviction to bring about a deterrence. Jolls, Sustein and Thaler state correctly that:

> *"That the certainty of apprehension deters to a greater extent than the severity of punishment confirms the cognitive bias known as the 'availability heuristic'*[83].

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[79] Doob, A.N. and C.M. Webster. '*Sentence Severity and Crime: Accepting the Null Hypothesis.*' Crime and Justice, 30, (2003) 143–195.

[80] Watling N., Palk G, J Freeman and J Davey *Applying Stafford and Warr's Reconceptualization of Deterrence Theory to Drug Driving: Can It Predict Those Likely to Offend?* Accident Analysis and Prevention, 42: (2010), 452–458.

[81] G Kleck, B Sever, S Li,M Gertz, *The Missing Link In General Deterrence Research Criminology; Criminal Justice Periodicals* 43, 3Aug 2005 623-658, 631.

[82] D Ritchie, *Sentencing Matters Does Imprisonment Deter? A Review of the Evidence,* Sentencing Advisory Council, April 2011, 18.

[83] Jolls, C., C.R. Sunstein and R. Thaler (1998), *A Behavioral Approach to Law and Economics*, Stanford Law Review,1998, 50 1471--1550, 1477.

The question then stems whether this is enough. Ensuring the certainty of apprehension of an offender, does it ensure an effective system for the case of child abuse? The notion of deterring what can be deterred has been raised over the years. The subject of deterring what can be deterred is a question of whom do we want to protect and what circumstances surround the situation we are protecting.

4.2.2 Justification of deterrence

The Kenyan situation has acknowledged the presence of deterrence in its laws through the reaction to circumstances that have occurred in the past. More so, has been the sexual offences that occurred in 2005 and 2006. The rise in sexual assault led to the knee-jerk reaction of the legislation to fight this vice[84]. As such this reaction, from a by-stander's perspective, is an emotional and irrational response. The Sexual Offences Bill though rejected on the first stint in Parliament went on to garner support in the August House with subsequent drafts showing a reaction to the injustices[85]. As seen earlier Nagin talks of deterrence as an inhuman objective of penal laws. The laws passed are not in any way made for the current realities faced in the country.

The question is whether in deterring the deterrable can child abuse fit into the equation.

From the analysis of the Kenyan situation, the rise in number of cases five years after passing of key legislations in the various fields of abuse, has shown a non-characteristic response to the laws. The laws in themselves have been severe but not certain. There is therefore the need to recognise these shortfalls and actually remedy them. This was so espoused in the case of MC Bulgaria v Bulgaria[86] where the applicant was a Bulgarian national who was born in 1980. She alleged that she had been raped by two men on 31 July and 1 August 1995, when she was 14 years and 10 months old. The ensuing investigation came to the conclusion that there was insufficient proof of the applicant having been compelled to have sex. The court was charged to determine as one of the issues whether there was an obligation to punish and investigate rape cases. In this regard the court asserted the duty of the state to execute such a duty. The court insisted on reforming the objectives of penal law Justice Tulkens stated:

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[84] Kenya prisons Report, *Final Draft*. 2011, *20.*

[85] Hon. Njoki.S. Ndungu, *Preventing and responding to violence against women and girls: From legislation to effective law enforcement*, New Delhi, 15-17 September 2011.

[86] *M.C. V. Bulgaria*, Ecthr Judgement of 13 November 2003, Concurring Opinion Of Justice Tulkens Para 3.

"the observations set out in the Report on Decriminalisation by the European Committee on Crime Problems clearly show that the effectiveness of general deterrence based on the criminal law depends on various factors and that such an approach "is not the only way of preventing undesirable behaviour[87] [88]"

The justice faithfully asserting this position shows that the objective of penal laws needs to change and approach matters of child abuse from another perspective.

In many cases the incidences, as seen from the UNICEF report on Violence Against Children, go unreported due to the fact that there has been no measure of change in the number of abuse cases even if the laws are favourable[89].

The question then is whether Kenyan legislation needs certainty to uphold deterrence. The difficulty in continuing the objective of deterrence will be to reduce the threshold of crimes. The main reason then will be to question whom are we protecting and does this threshold of deterrence provide a proper motive for justice or does this curtail the most optimum level of compliance? This proposed question lead us to question the character of the child. The character of the Child in the Kenyan Perspective can be found in Article 53 of the Constitution of Kenya, where it states:

53. (1) Every child has the right:

(c) to basic nutrition. shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;[90]

The Constitution looks at the child from the point of view of need, neglect, weakness and vulnerability. The special needs as seen in the Constitution are critical enough to apply immediate action in the form of legislative reform.

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[87] European Committee on Crime Problems, Report on Decriminalization, Strasbourg, Council of Europe, 1980 at 75-78.
[88] *MC Vs Bulgaria*, para 2.
[89] UNICEF, Violence Against Children Report, 53.
[90] Art 53(1)(c) and (d), Constitution of Kenya, 2010.

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

> *Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"*[91]

Similarly, the ACRWC also states:

> *NOTING WITH CONCERN that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care.*[92]

The aforementioned instruments show the link in which the Kenyan system takes a leaf from. The question as to whether then if a deterrent objective is most suitable for a vulnerable set of persons is answered by the analysis evidently showing little effect of the rates of convictions and abuse cases in the recent years. By virtue of the rising number of child abuse cases it shows the child is hurting and does not see the effect of the laws passed. Penal laws therefore need to be reformed to have a more reactionary character.

4.2.3 Difference of the Canadian situation

Canadian legislation as espoused in Chapter 3 has a double objective of retribution and deterence. The rationale of deterrence and retribution in punishment were manifested in judicial discretion. This means the justices in their rulings were more inclined to attach their bias on utilitarian and retributive mechanisms. This thinking was expressed in the case of *R. v. Higgins* where the courts instinctively defended the position of discretion[93].

Furthermore, the 1996 reforms on sentencing in Canada brought codification of objectives of sentencing[94]. This set the pace to establish an objective for punishment in child abuse crimes.[95] In

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[91] Pre-amble, Convention on the Rights of the Child, 1990 general Assembly resolution 44/25 of 20.
[92] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.
[93] R. v. Higgins (1988) 2 S.C.R. 387 , 41.
[94] M. Long, L Tansey-Miller, *Non-familial Child Sexual Abuse: Sentencing Trends in Alberta, Ontario & Québec* 1969-2008, 30.
[95] M. Long, L Tansey-Miller, *Non-familial Child Sexual Abuse: Sentencing Trends in Alberta, Ontario & Québec*, 30.

addition to the 1996 reforms on sentencing, the 1999 Badgely Report [96]brought to light the shortfalls of the Criminal Code ensuring the enforcement of specific laws catered to children[97]. The report further noted that the necessity of protection of children from abuse stemmed from their vulnerability and as such deterrent laws should be enforced for the sake of justice[98]. This justified the reasoning of the higher sentences for child abuse crimes as compared to other crimes.

As such the hybrid system of retribution and deterrence was codified in the early 2000s. The emergence of these two objectives in the laws saw a change of perception in the community.

4.2.3.1 Child Physical Abuse.

In the cases of child physical abuse and maltreatment it was observed that with the introduction of new objectives in penal laws concerning children the rates of crimes were seen to slow down. In 1998 prior to the change in laws the number if child abuse investigations stood at 135,261 cases that were investigated[99]. In 2003 the number of cases rose to 235,316 investigations carried out. This rise in the number of investigations shows the increase in the certainty of the deterrent laws. This led to a minimal increase in 2008 where 235,842 investigations were carried out. These statistics show that the deterrent and retributive laws were oriented to certainty rather than just imposing a severe system. [100]

4.2.3.2 Child Sexual Abuse

The response of the laws to sexual abuse against children saw decrease in the conviction rates of offenders. The overall conviction rate for cases of child sexual exploitation in Canada in 2002/2003 was 38.5%, which is much lower than the general conviction rate in adult court. Among these cases the conviction rates of the offenders showed certainty on the part of the laws as 60% of child pornography cases led to convictions.[101] 51% of cases concerning communication with a minor

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[96] Committee on Sexual Offences Against Children and Youth. *Sexual Offences Against Children* (Ottawa: Minister of Supply and Services Canada, 1984) (Badgley Report), 32.
[97] Badgley Report, 37.
[98] Badgley Report, 40.
[99] Canadian Incidence Study of Reported Child Abuse and Neglect, Public Health Agency of Canada,2010, 25.
[100] Canadian Incidence Study of Reported Child Abuse and Neglect, Public Health Agency of Canada,2010, 25.
[101] Office to Monitor and Combat Trafficking In Persons 2014 Trafficking in Persons Report http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p3_4.html on 16, December, 2015.

with intent to commit a sexual act led to convictions. These instances show how the reforms of a directed retributive and deterrent system have led to a stable penal system.

4.2.3.3 Child trafficking

The crimes concerning child trafficking as seen before have attracted high mandatory minimum penalties. In 2012, after amendments in 2012 to introduce these penalties, led to 27 prosecutions of the 77 reported cases in the year.[102] As compared to 12 convictions in 2011 the laws have endeavoured to show a positive influence to bring a balance rather than a very punitive system to deter criminals.

4.2.3.4 Consolidating the Laws

The laws exposed of inefficiency of severe deterrence.[103] The main issue brought up by the Department of Justice of Ottawa was the rise in recidivism (repeat offenders). The state acknowledged that even if the sentences are high the offender is likely to repeat the offence regardless of the punishment since the offender may not be easily caught[104].

This has led to the introduction of minimum penalties to try and rationalise the punishment of crimes and achieve a lower recidivism rate and greater objective of the law other than just deterrence. Mandatory minimum sentences are defined as sentences where legislation prescribes a minimum number of years for a particular offence. The aim of these sentences is to minimize judicial discretion. The application of these sentences depend upon the jurisdiction. The severity of the minimum penalties depends with the severity of the crime. In cases of sexual abuse, the discretion of the courts to give stringent penalties is high due to the fact that an act that requires consent of persons was forcefully committed without consent. The minimum penalties are therefore given to limit the irrationality of the judiciary giving unjustified penalties.

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[102] US Department of State. Trafficking in Persons Report 2012. Washington: US Department of State, 2012 http://canada.usembassy.gov/key-reports/trafficking-in-persons-report/2013-trafficking-in-persons-report-canada-chapter.html. On 7 January 2016.

[103] Raji Mangat, *More Than We Can Afford: The Costs Of Mandatory Minimum Sentencing*, The Canadian Bar Association, 2014, 23.

[104] Department of Justice, Directions for Reform: *A Framework for Sentencing, Corrections and Conditional Release*, Ottawa, Department of Justice, \(1990), 5.

The Public Prosecutor of Canada ensured this was so by applying the obiter in Boucher v The Queen,[105]: "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction...

The introduction of mandatory minimums in 2015 was thus based on the rationale that the ends of justice to be effective, should be rational and low on judicial discretion to allow the law to work as is with little interference.

The reforms carried out in the Criminal Code of Canada are justified on the basis that the punitive system of deterrence does not intently cater to the crime itself. The Canadian Sentencing Commission noted in 1987 that the disparity in sentences handed down and the actual offences do not correlate and the manner in which this has been seen from a societal view has not been effective to deter persons from crime.

The challenge as such has been the judiciary living up to the standards in these reforms. The general attitude noted from the bench was that the minimum sentences were not heavy handed enough for the crimes. The correct position of these penalties will be best seen as an add-on(or aid) to the penal system rather than an enemy to discretion and justice by the judiciary.

4.3 Considerations for Kenya

The two countries placed sided by side show a disparity in their penal laws and how the laws function. Canada has a hybrid system (concerning deterrence and retribution) in its objectives when dealing with child abuse crimes. Kenya has a sole implementation of deterrence. Study of the trends in cases, reporting and convictions have shown that the sole implementation of severe deterrence has not effectively worked in Kenya. However, the Canadian system has shown an openness to cater for justice and humanity. The Canadian system has employed not only retribution and certain deterrence but also, as an aid to the system, mandatory minimums. This conglomeration has led to higher conviction rates as the laws are certain of punishment of the offender, this has also led to the occurrence of lesser number of crimes or a miniscule rise in the number of crimes. This should go to show a working system that should be emulated.

Recommendations

[105] *Boucher v The Queen*, (1955) SCR 16, 23–24.

Kenya should therefore take a leaf from Canada. As such the Kenyan Penal System should consider:

1. Introduction of mandatory minimums of penalties. This removes discretion of the judiciary and as such aligns the purpose of the laws.
2. Incorporation of retribution as a choice of objectives in the laws.
3. Strengthening of child abuse investigations by the Kenya Police Service. This goes to improvement of infrastructure and reduction of bureaucracy.
4. Setting up of proper reporting mechanisms to ensure an associated effort to ensure prosecution of crimes. This goes to the front of accessibility to proper authorities and access to justice.

The implementation of these recommendations may require an overhaul of the child protection regime and active stakeholder participation. The recommendations may in themselves go on to take a period of time in implementation. However, then it is wise to consider the effects of these recommendation to ensure that the same recommendations are not made in a vacuum. The applicability of these recommendations must submit to working in the Kenyan situation.

Introduction of mandatory minimums in the criminal justice system would render the possibility of limited discretion of courts. In essence the system would be looking at a situation where deterrence would not be severe but rather a reasonable threshold. The expected return in societal change may take a number of years. This according to statistics seen previously would translate to decrease in the conviction and overall cases in the system. The judicial inertia in implementing these changes to break from the discretional sentencing will pose a challenge in ensuring a major turn-a-round.

The ideal situation would be to transfer the burden of deterrence from the courts to the enforcing authorities. This is on the basis that the enforcing authorities enforce deterrence through certainty of apprehension of the offenders. Therefore, there is need for proper investigation mechanisms to allow for the absolute enforcement of the law. Investigations would thus result in proper management of cases and as such the certainty of apprehension of the culprits would provide a proper deterrence in the community. To ensure the effective measure of recommending proper investigations there is need to bolster the reporting mechanisms in the society to allow for an approachable authority. The ideal result would be the implementation of certain deterrence through

the Kenya Police Service. This in turn would endeavour to reduce the number of cases in the society.

The impact of the recommendations above however cannot be set up efficiently without governmental support or consistency in the judiciary to uphold fair sentences towards the offenders.

CHAPTER 5: SUMMARY AND CONCLUSION

The study has brought to light the question of deterrence and whether it is the best fit for the child abuse cases. From the on-set the study recognized the position of child abuse as constituting various forms i.e. physical, mental, sexual and exploitative abuse. The research endeavoured to look at legislation and try to rationalize the trends in offences. The research based its assessment of these legislations on two levels the first was to look at the laws as being solitary and pure from a Kelsenian point of view. The notion of a "pure theory of law" was attractive since compliance and adoption of such is unfettered with the questions of morality. Second, would be rationalizing the compliance to these laws. The laws according to the paper should endeavour to bring about the greatest good for the greatest number. As such the theory of deterrence proposed by Jeremy Bentham was adopted. The objective of deterrence in criminal laws was seen as the objective underlying most pieces of legislation in Kenya especially concerning children. Later on the character of the child was explored to try and understand why deterrence was used in protection laws for children. This led to a conclusion that the African child has a special place in society as the future generation of a country and as such the health and well-being of the child is fundamental.

The paper went ahead to analyse the laws in Kenya and Canada. This exercise was to contextualize the penal terms and the applicability of the laws. As such the research focused on three types on abuse: sexual, physical and child trafficking and exploitation. The relevant laws in the countries came to show the application of deterrence in the Kenyan scenario and a hybrid situation of retribution and deterrence tempered by mandatory minimum sentences in Canada.

Despite the outlook on the laws it was important to look at the societal response to harsh and stringent laws as compared to a hybrid system adopted in Canada. The result was astonishing. It was found from statistical data the rate of abuse across the board in Kenya for a stipulated time after implanting of stringent laws had little effect on the rise in the number of crimes. The reverse

was seen in the Canadian jurisdiction. This led to a debate to search for the meaning of these statistics. It was found out that the root cause is first the asymmetry of information of penal laws and second the lack of certainty in apprehension even though the penalties are clearly high.

The paper as such recommends several measures to ensure the working of the system. These are:

1. Introduction of mandatory minimums of penalties.
2. Incorporation of retributive laws
3. Strengthening of child abuse investigations.
4. Setting up of proper reporting mechanisms

The application of these reforms does not happen in a vacuum but should be tempered with the notion of good governance and backing of the civil society. The recommendations have to be set in place and adopted for the Kenyan situation.

Conclusion

In conclusion, the situation of Kenya is in amber alert, meaning it is time to take notice of the changing tides that rage in the horizons. The need to fix the child protection laws should be rapid to respond to the current generation of children in the country to avoid a lax system which might realise its follies in the future.

The cooperation of the government with the civil society in working towards a new legislative framework and institutional system should keep in mind the vision of the UNCRC in keeping the well-being of the child at the forefront.

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