



Strathmore University

Law School

**CUT THE CAMERAS: THE CASE FOR LIMITING PARENTS’
RIGHTS TO SHARE AUDIO-VISUAL MATERIAL OF THEIR
CHILDREN IN KENYA**

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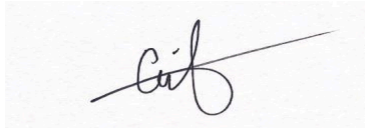
DECLARATION

I, **CLAIRE WAMBUI NJENGA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: *CN*

Date: 21ST MARCH 2025

This dissertation has been submitted for examination with my approval as University Supervisor.



Signed:.....

Abstract

It has been reiterated that children are one of the most vulnerable groups of people in the world and should be protected by all means. However, parents all around the world are increasingly posting both long and short form content of their children, some with the intent to simply document their growth and others for economic reasons. The long-standing belief that parents have a monopoly over the lives of their children, therefore have freedom to do with them as they wish has heavily influenced the situation as is, with many parents believing that it is within their rights to post audio-visual material of their children. While the potential harm that this may bring might be invisible at first, there are real challenges that could come out of such exposure. Unfortunately, the law as it stands in many countries including Kenya has no provision for the protection of the rights of children when it comes to situations like these. This study, through an in depth analysis of case law and scholarly work, will shed light on the potential harms of sharing of audio-visual material of children to find that there should be limitations to parental rights when it comes to exposure of children. The work will do this through the creation of a two part test which will be used to examine the necessity and possible consequences of the exposure, through which the possible limitation of parental rights will be implemented in line with the best interest of the child principle. Through the application of the test, a balance between the 'superior' rights of the parents over the child and the child's privacy will be struck

Key words: *Audio-visual material, exposure, best interests of the child, harms, limitation of parental rights.*

1.0 INTRODUCTION

1.1 Background to the problem

While social media has existed for a while, its use became significant around the early 2000s¹ with sites such as MySpace becoming popular around 2004². The growth continued with the introduction of sites such as LinkedIn, Pinterest, TikTok and Instagram³. As it stands, on average, 61.4% of the world's population is active on social media with 80.8% of the population being 18 years or older⁴. Shifting our focus to Kenya, in the last ten years there has been a three time escalation in the number of social media users⁵. As of 2024, the statistics read that 28.06% of Kenyans use YouTube and 32.21% use Twitter, just to mention a few sites⁶.

With this kind of growth come new developments in the use of social media such as the concept of 'sharenting'. 'Sharenting' is defined as parenting in the age of sharing where the parents want to share the lives of their children⁷, thus creating a digital footprint for them. In the Kenyan context, this is evidenced by the presence of social media pages where parents share content about their children such as in one case where we see a mother showing the life of her daughter on YouTube including her current journey through school⁸. This is very similar to yet another case where the parents show the life of their son as he navigates life and their experiences together.⁹ Article 53 of the Constitution of Kenya 2010 (hereinafter referred to as the Constitution) expressly states that children should be protected from abuse and neglect¹⁰, as well as bestowing them the right to parental care and protection¹¹. The Children Act 2012 takes a similar position under Section 31¹² where it outlines parental responsibility and very particular to this study, under sub-section (b)¹³ spells out the duty of a parent to protect the child from neglect, abuse, discrimination or other differential treatment. The law does not specify each and every

¹ -<<https://ourworldindata.org/rise-of-social-medi>>- on 21 August, 2024.

² -<<https://ourworldindata.org/rise-of-social-media#:~:text=MySpace%20was%20the%20first%20social,across%20various%20platforms%20since%202004.->>> on 21 August, 2024.

³ -<<https://ourworldindata.org/rise-of-social-medi>>- on 21 August, 2024.

⁴ -<<https://backlinko.com/social-media-users>>- on 21 August 2024.

⁵ -<<https://www.statista.com/statistics/1304674/number-of-social-media-users-in-kenya/>>- on 21 August, 2024.

⁶ -<<https://gs.statcounter.com/social-media-stats/all/kenya>>- on 14 September, 2024.

⁷ -<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10407087/>>- pn 21 August, 2024.

⁸ -<<https://www.youtube.com/@bimkurugenzi>>- on 21 August, 2024.

⁹ -<<https://www.youtube.com/@THEWAJESUSFAMILY>>- on 21 August, 2024.

¹⁰ Article 53, *Constitution of Kenya*, (2010).

¹¹ Article 53, *Constitution of Kenya*, (2010).

¹² Section 31, *Children Act*, (2012).

¹³ Section 31(b), *Children Act*, (2012).

right that a parent has, and this may be understood to mean that they can exercise their rights as regards their children in whichever way they see best. However, the law is very particular in specifying that the best interests of the child¹⁴ should be at the forefront of every decision.

The courts take the protection of children very seriously as has been brought to light by the case of *N.W.R & another v Green Sports Africa Ltd & 4 others*¹⁵ where the court ordered for the takedown of a billboard that had used pictures of two children without the consent of their parents. The case established a three-part test on the unlawful use of name or image which is use of a protected attribute, for an exploitative purpose and no consent. While this is a great step in the right direction, the scope of the use of this case is limited to situations where the parent did not give consent, seeing as the minors themselves cannot be said to consent.

The issue in question in this study is where the parents themselves are the perpetrators of the exposure of their children, where the consent has been drawn from their rights as parents over their children. On this particular matter, unfortunately, there has been no legislation in the country, and remains a grey area.

At the moment, there seems to be no limit as to what parents can do in terms of sharing audiovisual material of their children. Parents are charged with the right and responsibility of making decisions on behalf of the child¹⁶. Kenyan law is silent on the matter, with no legislation in place limiting the rights of the parents, which could be understood as freedom to handle the material as they please. Generally, however, most parents feel comfortable posting material on their children frequently and without their consent¹⁷. This is evidenced further by parents beginning to post material even before the child is born such as pictures from the ultrasound, throughout the life of the child, shaping the online persona of the child even before they can decide whether to have one¹⁸. Absence of judicial decision, however, does not connote absence

¹⁴ Wanyama J, 'Honey I blogged the kids: What bloggers need to know about children's rights and the internet' Strathmore Centre for Intellectual and Property Rights, 19 June, 2020
-<<https://cipit.strathmore.edu/honey-i-blogged-the-kids-what-bloggers-need-to-know-about-childrens-rights-and-the-internet/>>-.

¹⁵ *NWR & another v Green Sports Africa Ltd & 4 others* (2017) eKLR.

¹⁶ Moser C, Tianying C and Sarita Y, 'Parents' And Children's Preferences about Parents Sharing about Children on Social Media' CHI Conference on Human Factors in Computing Systems, Boston, 2 May, 2017 5221.

¹⁷ Amon J, Kartvelishvili N, Bertenthal B et al, 'Sharenting and Children's Privacy in the United States: Parenting Styles, Practices and Perspectives on Sharing Young Children's Photos on Social Media' Computer Supported Cooperative Work, Taipei, Taiwan November 12-16 2022, 1.

¹⁸ Walrave M, Verswijvel K, Ouvrein G, Staes L, Hallam L, and Kardies K, 'Sharenting Boundaries Through the Lens of Communication Privacy Management Theory' 7 *Frontiers in Education* 2022, 2.

of violation, with Article 16 of the of the Convention on the Rights of the Child¹⁹ expressly requiring the observance of protection of the rights of children.

The exposure of children through audiovisual material can harbour certain risks. Once the material is released into the public realm, even accidentally, it cannot be retrieved²⁰, which is the biggest nexus between the sharing of audiovisual material and the risks posed. Irreversible exposure means that the material will always be available for use by the public on any platform. The permanence cannot, as of now, be countered due to lack of legislation²¹, which means that there is not yet any redress in case of improper use of the material. Following that there is no protection over the material once released into the public domain, the same may be used within pornography sites²², for example. With the use of deepfake that facilitates morphing of audiovisual material for the achievement of any result, and taking the irreversibility of the exposure into consideration , this poses a big risk. Due to the advanced nature of technology, it is possible that an ill-intentioned internet user would use the material posted of the child in ways that would have a damaging and potentially long lasting effect on the child.

1.2 Statement of the problem

This study will look into whether Kenyan law should be interpreted to limit the rights of parents to share audiovisual material of their children.

1.3 Research objectives

1. To determine the legal and philosophical underpinnings of the discretion that the parents have over their children and the understanding of the underpinnings would be followed by a determination of where the discretion ends and the factors limiting it.

¹⁹ Article 16, *Convention of the Rights of the Child* (1989), Treaty Series 1577.

²⁰ Ferrara P, Cammisa I, Corsello G, Mantovani C, Indrio F ‘Online “Sharenting”: The Dangers of Posting Information About Children on Social Media’ 257 *The Journal of Pediatrics* 113322, 2023, 2.

²¹ Ferrara P, Cammisa I, Corsello G, Mantovani C, Indrio F ‘Online “Sharenting”: The Dangers of Posting Information About Children on Social Media’, 2.

²² Ferrara P, Cammisa I, Corsello G, Mantovani C, Indrio F ‘Online “Sharenting”: The Dangers of Posting Information About Children on Social Media’, 2.

2. To determine the scope of damage caused by the exposure of audio-visual material surrounding the telling aspects of the day to day life of a child so as to properly highlight the need for the limitation of the parental rights over their children in this way.
3. To determine the parameters defining bad reputation and apply the parameters to consistent sharing of audio-visual material that exposes the day to day life of the child, particularly when the scenarios are parent driven such as by restricting the number of times posting can be done or limiting the kind of content that can be posted of the child.

1.4 Research questions

- 1) What informs the discretion parents have over their children and how far that discretion goes?
 - a. What philosophical ideologies inform the discretion parents have over their children?
 - b. What legal ideologies inform the discretion parents have over their children?
- 2) To what extent can exposing children through audio-visual material harm them, and how does this influence the need to limit parental rights to share such content?
- 3) How can the parental rights be limited in a situation where they are sharing audio-visual material of their child?

1.5 Hypothesis

Kenyan law should be interpreted to limit a parent's right to share audiovisual material of their child in circumstances initiated by the parent which results in embarrassment or harm to the child.

1.6 Justification of the research

The work will be relevant to parents by giving them a glimpse into the violations of the rights of their children as well as the danger they are exposing them to, hopefully discouraging them from exposing their children to social media sites. It is also relevant to judges who are able to limit the scope of parents' rights through their judgements, when faced with matters of this nature. The

work will also be beneficial to researchers who would like to understand more about the issue, with the hope that they also develop work supporting the limitation of parental rights.

1.7 Conceptual framework

The conceptual framework forming the basis of this study is the best interest principle. This is a principle that seeks to put the interests of the child at the very forefront of any decision and offers them special legal protection²³ and should be a primary consideration²⁴. It is key in the realm of family and children's law and influences a lot of the decisions such as decisions on divorce, adoption and other matters²⁵. Its origin was the first draft of the United Nations Convention on the Rights of the Child where it was held that the best interests of the child should have a prominent position when it comes to any actions regarding them.²⁶ While authors have been unable to succinctly define it because it draws meaning from the circumstances in which it is applied, the general understanding is that in any period where the rights of the child seem to be demeaned by some external factor, precedence is given to the rights of the child.

The concept consists of three guidelines that generally direct its workings, despite lacking a unified definition²⁷. The first of these is the best interests as a substantive right, which requires that the children's rights be assessed and taken as a primary consideration. The second is best interests as a rule of procedure, requiring the authorities to carry out an exhaustive impact assessment of the place of the rights of the child in relation to the legal matter at hand.²⁸ Lastly, the interpretive legal principle²⁹ which speaks to scenarios where there are multiple legal provisions, requiring that the provision applied is the one that serves the interests of the child

²³ Gales N and Florea D, 'Best Interests of the Child- the Legal Determination of the Principle' 8 *European Journal of Law and Public Administration* 2, 2021, 2.

²⁴ Article 16, *Convention of the Rights of the Child* (1989), Treaty Series 1577.

²⁵ Juhlin A, 'The Best Interest of the Child under International Law: The Right to Respect for Private and Family Life in the Formation, Malfunctioning and Disruption of a Family' published LLM thesis, Stockholm University, 2023, 19.

²⁶ Hammarberg T, 'The Principle of the Best Interests of the Child- What It Means And What it Demands From Adults' Strasbourg, International Children's Day 30 May 2008, 3.

²⁷ Takacs N, 'The threefold concept of the best interest of the child in the immigration case law of the ECtHR' 62 *Hungarian Journal of Legal Studies* 1, 2022, 98

²⁸ Gales N and Dumitrita F, 'The Best Interests of the Child- the Legal Determination of the Principle' 8 *European Journal of Law and Public Administration* 2, 2021, 16.

²⁹ Dolgin J, 'Why has the best interest standard survived: The historic and social context' *Child Legal Rights Journal* 16, 1996, 2.

best. These three standards may vary slightly according to the fields within which they apply but there is some similarity across the board.

The concept has been developed over the years and continues to be applied in various legal and non-legal fields. A notable example is its application in the field of health where the idea is centred on the paramount nature of the participation of the child and their right to be heard³⁰. The child's wellbeing is based on the ability to contribute to the actions that would end up with the best results for them³¹. While acknowledging the parent's place in making decisions affecting the child, the child's views are still considered influential. In case there is deviation from the views of the child, then it is important that the alternative be, at the very least, in line with the child's views³². The application of the best interest principle in this field shows the primacy of the child's wellbeing, centred on weighing the relevant interests of the child³³.

The best interest of the child principle has also been applied in the asylum application and granting process. Here, the main idea is that the process has to be child-friendly and that they are the primary consideration within the whole process³⁴. It is in this field that the guidelines previously alluded to take shape with the process having 2 components- a substantive aspect that protects the child's right to have their best interests considered in any decision and a procedural component analysing the impact of the decision upon the child³⁵. Seeing as asylum is sought by people who have been through a lot of psycho-social turmoil, there is an obligation to hear the child out at the point of entry, if only to ease their minds³⁶ and where the process is unfriendly to children, it is rectified³⁷. Where separated from the parents, the child becomes an even bigger

³⁰ Marz J, 'What does the best interests principle of the Convention on the Rights of the Child mean for paediatric healthcare?' 181 *European Journal of Paediatrics* 2022, 3808.

³¹ Marz J, 'What does the best interests principle of the Convention on the Rights of the Child mean for paediatric healthcare?' 3812.

³² Donnelly M and Kilkelly U, 'Child-friendly healthcare: Delivering on the Right to Be Heard' 19 *Medical Law Review* 1, 2011, 32.

³³ Bester J, 'The Best Interest Standard is the Best We Have: Why the Harm Principle and Constrained Parental Autonomy Cannot Replace the Best Interest Standard in Paediatric Ethics' 30 *The Journal of Clinical Ethics* 3, 2019, 225.

³⁴ Lundberg A, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights' 3 *Journal of Human Rights Practice* 1 2011, 63.

³⁵ Avila E, 'The Best Interest of the Immigrant Child in Asylum Cases: What is the Answer?' 49 *University of Dayton Law Review* 3, 397.

³⁶ Lundberg A, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights' 63.

³⁷ Avila E, 'The Best Interest of the Immigrant Child in Asylum Cases: What is the Answer?' 397.

consideration for law and policy because there is no adult to guarantee the protection of the child³⁸.

The two areas considered above show how seriously the welfare of the child is taken in matters where a child is involved. Extrapolating that to the legal field, the interests of the child should be at the forefront of every decision regarding them. The concept will be used in this study as the basis for the justification of the interpretation of the law to limit the rights of parents where they have unnecessarily shared audiovisual material of their children. This will be done by examining the actions of the parent(s) to establish that there should be limitation of the sharing of audio-visual material of the child where it is done without consideration of what the best interest of the child is.

1.8 Literature review

1.8.1 On the limitation of parental rights

Multiple authors agree that the rights of parents should not be absolute and as a general concept, should have a tipping point beyond which there is restriction. In her paper, Libby Morehouse highlights how whereas parents are the ones who are supposed to be protecting their children, they post content of them that is embarrassing and would be detrimental to them in the future³⁹. This may be a cause of harm and while the state generally tries to maintain a distance from the parent-child relationship, in situations where there is serious harm threatened, then there would be intervention⁴⁰. While parents may not have the intention of harming their children,⁴¹ it sometimes happens unintentionally because more often than not, where the rights of the parents come into play, then those of the children no longer have weight⁴².

³⁸ Estin A, 'Child Migrants and Child Welfare: Toward a Best Interest Approach' 17 *Washington University Global Studies Law Review* 3, 2018, 614.

³⁹ Morehouse L, 'The Kids Are Not Alright: A Look into the Absence of Laws Protecting Children in Social Media', *Loyola of Los Angeles Entertainment Law Review*, 11 -<<https://digitalcommons.lmu.edu/elr/vol44/iss2/2/>>- on 21 August, 2024.

⁴⁰ Morehouse L, 'The Kids Are Not Alright: A Look into the Absence of Laws Protecting Children in Social Media', *Loyola of Los Angeles Entertainment Law Review*, 36 -<<https://digitalcommons.lmu.edu/elr/vol44/iss2/2/>>- on 21 August, 2024..

⁴¹ Abrams R, 'Family Influencing in the Best Interests of the Child' *Chicago International Law Journal* (2019) 3 -<<https://cjl.uchicago.edu/online-archive/family-influencing-best-interests-child>>- on 21 August, 2024.

⁴² Dailey A and Rosenbury A, 'The New Law of the Child' *Yale Law Journal* 2018, 24.

While there is a general consensus that it is common for the parents to have a reign over the lives of their children, there has been a shift from absoluteness to a more reasoned out understanding. The view held is that the parents' rights should generally work to serve the children's interests⁴³. The common law property theory of exclusive ownership of the children⁴⁴ has taken a curve and is no longer considered especially where the result of the superiority of the parental rights is controlling and decentering the children from the conversation⁴⁵. It also sets out a new model recognising the parents' rights as relational and limited by the children's independent interests and agency⁴⁶.

1.8.2 On the superior nature of parental rights

Laura. A. Rosenbury outlines a framework that she terms the 'authorities framework'⁴⁷, which in my opinion almost perfectly describes the general understanding of the inferior place of children in relation to adults. In particular is the acknowledgement that although there is a more modern trend geared towards the shift from the inferior-superior nature of this relationship, the law has failed to adjust to the situation and continues to hold up the hierarchy⁴⁸. There is cognisance that parents exercise a great amount of influence over their children⁴⁹. This is greatly influenced by the idea that children are inferior due to their lack of experience⁵⁰ which dismisses the idea that they could exercise any kind of control over their lives⁵¹.

The inferiority of children rhetoric would possibly explain why children who are not under some kind of parental control would be termed 'out of control'⁵². This kind of monopoly over the lives of children is what greatly contributes to parents' ability to control major aspects of their lives⁵³.

⁴³ Dailey A and Rosenbury L, 'The New Parental Rights' 71 *Duke Law Journal* 75, 2021, 97.

⁴⁴ Dailey A and Rosenbury A, 'The New Law of the Child' 11.

⁴⁵ Dailey A and Rosenbury A, 'The New Law of the Child' 25.

⁴⁶ Dailey A and Rosenbury L, 'The New Parental Rights', 117.

⁴⁷ Dailey A and Rosenbury A, 'The New Law of the Child' 10.

⁴⁸ Dailey A and Rosenbury A, 'The New Law of the Child' 16.

⁴⁹ Godwin S, 'Against Parental Rights' *Columbia Human Rights Law Review* (2015) 3.

⁵⁰ Godwin S, 'Children's Capacities and Paternalism' 24 *The Journal of Ethics*, 2020, 315.

⁵¹ Godwin S, 'Children's Oppression, Rights and Liberation' 4 *Northwestern Interdisciplinary Law Review* 2011, 263.

⁵² Godwin S, 'Children's Oppression, Rights and Liberation', 264.

⁵³ Godwin S, 'Against Parental Rights' 4.

The negative effects of this kind of power have begun to be acknowledged. Such effects are the failure to promote the children's rights in the moment⁵⁴ where there is so much focus on parental control to lead to a 'good' adulthood, that there is failure to consider the current existence of the child. The overinvolvement of parents in their children's lives may also lead to a situation where the children have little opportunity to develop separate interests from their parents. The superiority of the parental interests may also lead to the devaluation of the interests of the child⁵⁵.

1.8.3 Contribution

While there has been work done on the topics mentioned above, this work comes in to provide uniqueness in terms of the scope and jurisdiction. In terms of scope, a lot of the focus in existing material has been on the child as a consumer of harmful(or otherwise) content on social media. My work will bring understanding of the challenges that are posed by the parents of children choosing to expose their lives on social media and will attempt to draw a line between the expression of the parent as the child's superior and the rights of the child in Kenya. This will hopefully begin a conversation on the change of pace and particularly in Kenya, which is the jurisdiction in which the work is based, where there is no such legal writing.

1.9 Methodology

The research conducted will be qualitative in nature. The evidence used to build the case that I am making will be derived from both primary and secondary sources. There will be reliance on primary sources- which are the Children Act⁵⁶ and the Data Protection Act⁵⁷ as well as case law. This will be fundamental in showing the gap in limitation of parental rights, as well as to establish how certain terms such as 'necessity' and 'best interest' have been understood. Secondary sources such as books, articles, journals, book chapters and case law shall be especially important in the development of my chapters. The research will generally be

⁵⁴ Dailey A and Rosenbury A, 'The New Law of the Child' 22.

⁵⁵ Godwin S, 'Against Parental Rights' 8.

⁵⁶ *Children Act* (No. 21 of 2012).

⁵⁷ *Data Protection Act* (2019).

deductive in nature, where from the different premises set out in each chapter, there will be an eventual claim made to validate the hypothesis.

To adequately develop the second chapter of this study, I will use doctrinal and content analysis. The primary sources including the statute and case law will be useful in defining the general understanding of the position that is understood as the norm between the parents and their children in the country. An in depth study of any existing literature will be useful for a fair analysis of the issue. The chapter will also contain a historical analysis to determine the reason for the position that is already established in the country.

Chapter three of the study will be built using content analysis. There will be analysis of the work of various scholars from the legal and psychological fields who have dealt with the risks of exposure of children on social media. Through this analysis, there will be establishment of commonalities between the issues the various authors have picked out to determine the most prevalent risks. The establishment of the risks will then be used to give life to the reasons why the limitation of parental rights is useful.

Chapter four of the study will take the doctrinal and content analysis methods as its mode of development. The chapter will focus on the creation of a test for the limitation of parental rights. The test will borrow from American jurisprudence as that is the jurisdiction in which the test has been established. The chapter, therefore, will consist of analysis of approximately thirty cases to determine the stance of the court on each of the elements to determine if they can be placed in the Kenyan context as they are, and where they cannot, then there will be adjustments to fit the context. Furthermore, there will be content analysis to determine the position of various scholars on the application of the test in that jurisdiction. Following the analysis of both kinds of work, then the test will be established focusing on the most workable aspects that can easily be translated into the Kenyan context.

1.10 Chapter breakdown

In the first chapter, I will deal with the introduction to the study. The chapter shall consist of the background, statement of the problem, hypothesis, research questions and objectives and

methodology among others. It will give a backdrop for the understanding of the problem being dealt with and set the pace for the rest of the work.

Chapter two will address what informs the discretion that parents have over their children and its breadth. The outcome of this analysis will be to understand the position that is generally held so as to understand the 'situation' that the children are in with regard to the place of their parent(s) rights. Understanding the position is also useful in the delineation of the limits, such that it is possible for a point of violation to be determined.

Chapter three is useful for the determination of the effects of the exposure of audiovisual material by the parent(s). Building on chapter two, the limitation of parental rights will find more foundation when understood in tandem with the multiple and possibly long standing detrimental effects that the exposure could have.

Chapter four will consist of work on the creation of a test for the determination of the parameters delineating the extent to which the rights of the parent can extend, beyond which there has to be limitation for the protection of the child. The test will follow an already established test but will emphasize on the aspect of emotional effects of the exposure, which is an area that is commonly overlooked.

Chapter five will offer solutions and recommendations as to how the laws of the country relating to the rights of the child can be interpreted to limit the rights of the parents in terms of sharing audio-visual material of their children. The chapter will also, where some of the laws cannot be interpreted to provide a solution through the limitation of parental rights, provide an alternative, that is amendment of the Children Act and/or Data Protection Act to expressly limit the parental rights.

2.0 Theoretical Influences And Legal Scope Of Parental Discretion In Kenya

2.1 Introduction

In the previous chapter, the study set the foundation by delineating the legal problem of the exposure of audio-visual material of children by their parents. This chapter will attempt to bring to life some of the ideas that influence the concept of parental rights over their children in a three-part development. The first part of this chapter will address the philosophical ideas informing parental discretion, the second part will focus on the legal sources of parental discretion and the last part will discuss the extent to which these discretionary powers can be practised.

Child agency, or lack thereof, plays a significant role in the development of this idea. Children have been understood to be ‘special agents’ by Robert Noggle, and this means that while having more capacities than mere animals, they lack all the goods that would allow them to rationally make decisions⁵⁸. The role of the parent in the life of the child is then to act as a bridge between the child and society until the child has developed all the necessary goods⁵⁹. According to Noggle, parents are best suited for this role because of two reasons: they have developed ‘core concerns’, which are the deepest values that give life meaning and they have first hand experience with radical changes, thus would be able to appropriately guide the child⁶⁰. This concept is supported by the protectionist theory posited by Laura Purdy where she states that the decision making on behalf of the child should be done by adults as they have requisite background knowledge and experience⁶¹. It is from this perspective that the analysis of what informs parental discretion begins.

2.2 What Are The Philosophical Ideas That Influence The Discretion That Parents Have Over Their Children?

The concept of discretion has its foundation in philosophical works, with the general position being that the parents have a role to play in their children’s lives. However, this understanding

⁵⁸ Noggle R, ‘Special Agents: Children’s Autonomy and Parental Authority’ in David Archard(ed.) *The Moral and Political Status of Children*, Wiley-Blackwell, Britain, 2004, 103.

⁵⁹ Noggle R, ‘Special Agents: Children’s Autonomy and Parental Authority’, 103.

⁶⁰ Noggle R, ‘Special Agents: Children’s Autonomy and Parental Authority’, 104-105.

⁶¹ Purdy L, *In their best interest? The case against equal rights for children*, Cornell University Press, New York, 1992, 162.

branches out into two: work that speaks to wide discretion and that which provides for narrow discretion, and that is the shape this part will take.

2.2.1 Ideas informing wide parental discretion

In this subsection, ‘wide parental discretion’ means that the parents have more freedom when it comes to applying their discretionary power such that they have a strong belief that the decisions to be made about the child are almost, if not completely, in their hands. To develop this subsection best, Thomas Hobbes’s ideas, intimacy as a basis of authority and the investment theory will be relied on as they give the best account of reasons why parents may believe that they have that level of control over their children.

Thomas Hobbes develops a social contract theory stating that individuals in the state of nature create a social contract where the individuals living in a state of chaos surrender some freedoms in exchange for protection by a governing authority⁶². In the same way that the society submits to the authority granted to the governing authority, the child hypothetically consents to their parent and is therefore bound by their power⁶³. However, the relationship between parents and children is not ‘regular’ in the sense that children are subject to their parents decisions and there is no equal standing between them⁶⁴, unlike the consenting adults in the Hobbesian model. Due to the lack of rationality on the part of the child, the application of the Hobbesian contract to the parent-child relationship may lead to the justification of agreements favouring the parent because they are understood to be more rational⁶⁵. It is easy to see how many parents, even unknowingly, subscribe to this kind of thinking where the child is in the most absolute subjection to the parent, in the same way the servant is to a master⁶⁶. This leaves the parent wielding a lot of power in relation to the decisions they could make as regards the child.

The concept of intimacy as the basis of the parent-child relationship influences parental discretion because this is one of the ways that parental rights are acquired in the first place. An intimate relationship between the parent and the child is intrinsic to parenthood and is the basis

⁶² Burnyeat G and Johansson M, ‘*An anthropology of the social contract: The Political Power of an Idea*’ 42(3) Critique of Anthropology 2022, 226.

⁶³ King P, ‘Thomas Hobbes’s Children’ in Susan Turner and Gareth Matthews(eds) *The Philosopher’s Child: Critical Perspectives in the Western Tradition* University of Rochester Press, Rochester, 1998, 65.

⁶⁴ Brighouse H and Swift A, ‘Parents’ Rights and the Value of the Family’ 1 *Ethics* 2006, 92.

⁶⁵ Vopat M, ‘Contractarianism and Children’ 17, *Public Affairs Quarterly* 1, 2003, 57.

⁶⁶ King P, ‘Thomas Hobbes’s Children’, 65.

of the relationship between them⁶⁷. Due to the intimacy, the family is entitled to privacy preventing state interference in the parental decision making⁶⁸. Seeing as the relationship between the child and their parent is personal to the both of them, the state will have a minimal place in its development, leaving the parent to their own means to raise the child as they deem fit. This inadvertently grants them a lot of discretion as regards the development of the relationship⁶⁹. Non-interference by the state equally allows for the personal relationship to be formed without the society having a say in it⁷⁰, further broadening the scope of decision making available to the parent. As the child cannot consent to the intimacy between themselves and the parent and has no room to exit the relationship⁷¹, the parent remains the main decision maker in the relationship, reinforcing the idea that they have the greatest say.

Lastly, the idea that parents have a monopoly over the decisions affecting the child can be drawn from the investment theory. This is a moral theory stating that the persons with the strongest claim to parent and make decisions on behalf of and influencing the life of the children are those who have put in the most parental work⁷². Many parents believe that because they ‘work’ to provide for their children, the effort they put in gives them absolute rights over any and all decisions surrounding the child. The ‘work’ described is the relationship between the parent and the child, different from work as described in the labour theory⁷³, in this context meaning efforts such as those put in to raise them, resources used for their benefit such as taking them to school and the emotional investments.

It is important to keep in mind that in their individual capacity, parents have rights. When it comes to the parent-child relationship, there are weighty obligations that a parent has over the child⁷⁴ and this influences the understanding of having rights over them. The rights are supported by the idea that the parents are coming in to guide the judgement of a person whose decision making capacity is deficient⁷⁵. Parents should be allowed to raise their children as they see fit⁷⁶

⁶⁷ Millum J, ‘How Do We Acquire Parental Rights?’ 36 *Social Theory and Practice*, 1 2010, 8.

⁶⁸ Schoeman F, ‘Rights of Children, rights of parents, and the moral basis of the family’ 14.

⁶⁹ Brighouse H and Swift A, ‘Parents’ Rights and the Value of the Family’ 102.

⁷⁰ Schoeman F, ‘Rights of Children, rights of parents, and the moral basis of the family’ 17.

⁷¹ Brighouse H and Swift A, ‘Parents’ Rights and the Value of the Family’, 92.

⁷² Millum J, ‘How Do We Acquire Parental Rights?’ 7.

⁷³ Millum J, ‘How Do We Acquire Parental Rights?’ 7.

⁷⁴ Moschella M, ‘Defending the Fundamental Rights of Parents: A Response to Recent Attacks’ 37 *Notre Dame Journal of Law, Ethics & Public Policy* 2023, 403.

⁷⁵ Moschella M, ‘Defending the Fundamental Rights of Parents: A Response to Recent Attacks’ 404.

⁷⁶ Bigelow J, Campbell J, Dodds S, Pargetter R, Prior E, Young R, ‘Parental Autonomy’ 5 *Journal of Applied Philosophy* 2, 1988, 189.

and this is why parental autonomy should be allowed to prevail. The relationship between a child and their parent is very intimate and when the state interferes, the sense of security in the relationship is tampered with⁷⁷. As discussed previously, there should be room given to the parents to raise the child and because of their proximity, they are charged with the most responsibility when it comes to upbringing. Parental rights are a recognition of their authority to make decisions on behalf of their children⁷⁸

2.2.2 Ideas informing narrow parental discretion

‘Narrow parental discretion’ in this section is to be understood as the parent having less freedom when it comes to applying their discretionary power and will focus on the ideas of John Locke and Immanuel Kant. To understand the relevance of these ideas, there must first be an understanding of the liberationist background which sets the tone for reduced parental involvement.

The liberationist perspective acknowledges that while children lack full rational capacities, they are not secondary human beings⁷⁹, meaning they are not to be relegated to a lower position and requiring that they be allowed to develop into autonomous citizens⁸⁰. In defending the liberal position, Richard Cohen correctly argues that the children could borrow capacities from adults who have the full capacities⁸¹. This view acknowledges that granting children capacity equal to adults would cause them more harm than good, particularly because they are unaware of what their best interests are, therefore might end up making decisions that are harmful to their wellbeing⁸². Even then, it advocates for a bridled exercise of parental discretion to allow the child’s development into their person. It is from this perspective that the views of Locke and Kant come into play.

In his work *Thoughts*, Locke states that children should be treated as rational beings and this treatment should be relative to the child’s capacities which increase as they continue to grow⁸³. He does not believe that children have the same rights as adults but he does believe that the

⁷⁷ Schoeman F, ‘Rights of Children, rights of parents, and the moral basis of the family’ 14-16.

⁷⁸ Moschella M, ‘Defending the Fundamental Rights of Parents: A Response to Recent Attacks’ 402.

⁷⁹ Vopat M, ‘Contractarianism and Children, 60.

⁸⁰ Morgan J, ‘Children’s rights and the parental authority to instil a specific value system’ *7 Essays in Philosophy* 1, 2006, 53.

⁸¹ Vopat M, ‘Contractarianism and Children, 60.

⁸² Vopat M, ‘Contractarianism and Children , 60.

⁸³ Archard D, ‘John Locke’s Children’ in Susan Turner and Gareth Matthews(eds) *The Philosopher’s Child: Critical Perspectives in the Western Tradition* University of Rochester Press, Rochester, 1998, 90.

power parents have over their children should not be absolute⁸⁴. This is in line with the idea that the children should be raised with their prospective autonomy in mind, such that the ‘hold’ that the parents have over their children through their discretionary powers is progressively limited as the child develops into their own person⁸⁵. Understanding that the child will eventually grow into a distinct individual limits the discretion the parents have which extends as far as imparting religious values⁸⁶, for example, because there is the acknowledgement of the individuality of the child. It follows that such parents are less authoritarian about their children’s lives and may take a step back from involvement to allow their independence to develop.

Immanuel Kant put forward the view that all persons have intrinsic worth that is not merely dependent on their utility to other people⁸⁷. This speaks to the value of the child as well, where the child should be respected because of this value, even though they lack full capacity for rationality. In his work, he grants the children ‘personhood’, that they are regular people despite their incomplete rational development⁸⁸, allowing them to have some autonomy over their own lives when it comes to decision making. ‘Passive citizens’, as we would define children, have rights⁸⁹. This idea is important because acknowledging that children are people with rights in their own sense gives them some standing which would then justify the reduced parental control over them, the end result of this being a limited parental discretion.

2.3 What Are The Legal Foundations That Influence The Discretion Parents Have Over Their Children?

In addressing the legal foundations influencing discretion, the focus will be on the fiduciary model as well as legal sources such as case law and statute from the Kenyan courts as well as laws within the international space.

A fiduciary relationship comes to life where there is a principal-agent relationship in which the principal is responsible for the actions of the agent⁹⁰, applying in areas such as in a trusteeship

⁸⁴ Archard D, ‘John Locke’s Children’ 92.

⁸⁵ Brighouse H and Swift A, ‘Parents’ Rights and the Value of the Family’ 104.

⁸⁶ -<[⁸⁷ Vopat M, ‘Contractarianism and Children’, 56.](https://jep.utm.edu/parentri/#:~:text=Parents%20have%20discretion%20regarding%20how,children%2C%20and%20this%20is%20unacceptable.> on 15 November, 2024.</p></div><div data-bbox=)

⁸⁸ Zweig A, ‘Immanuel Kant’s Children’ in Susan Turner and Gareth Matthews(eds) *The Philosopher’s Child: Critical Perspectives in the Western Tradition* University of Rochester Press, Rochester, 1998, 130.

⁸⁹ Zweig A, ‘Immanuel Kant’s Children’ 131.

⁹⁰ Noggle R, ‘ Special Agents: Children’s Autonomy and Parental Authority’, 100.

where assets are held on behalf of a third party. This model is relevant because parents are fiduciaries of their children's welfare⁹¹. As alluded to in the previous section of this chapter, the child's lack of cognitive capacities lead to the creation of the relationship where they 'borrow' from the adult's capacities to make decisions⁹². The parents are expected by law to act in ways that meet the interests of the child rather than their own interests⁹³. By legally requiring that the child's interests be put first, the discretion of the parents is limited as they have to act in a way that adequately meets the needs of the child and failure to do so will result in legal repercussions. This position is attractive because it requires parents to ensure that whatever decision they make can be justified in light of the best interests of their child.

2.3.1 Kenyan Statutory Law

The legal foundation of the discretion of parents can be derived from statute and case law. Article 53 of the Constitution lists some of the rights due to the children and particularly relevant for this section is sub-article 1(e) that states that the children are owed protection by both of the parents, whether they are together or not⁹⁴. Section 31 of the Children Act describes parental responsibility as the duties, right, powers, responsibilities and authority the parent has over the child, and in listing some of the duties, expressly states that they 'include but are not limited to' duties such as provision of basic nutrition, shelter, among other needs⁹⁵. The wording used in the Act portrays a level of discretion afforded to the parents because a wide range of decisions have been left in their hands. This discretion should be understood as a 'by-product' of parental responsibility because within the exercise of their responsibilities, there is room for application of their own discernment. To bring this position to life, this section will focus on case law surrounding responsibility.

The case law used to define parental responsibility has mostly come up when the parents of the child have separated, following from Article 53(1)(e) of the Constitution which states that the child is entitled to parental care and protection, whether the parents are married or not⁹⁶. Discretion cannot be limited only to the monetary terms but is expanded to include the duty of

⁹¹ Scott E, 'Parental Autonomy and Children's Welfare' Wm. & Mary Bill Rts. J. 2002, 1072.

⁹² Brighthouse H and Swift A, 'Parents' Rights and the Value of the Family' 95.

⁹³ Scott E, 'Parental Autonomy and Children's Welfare' Wm. & Mary Bill Rts. J. 2002, 1073.

⁹⁴ Article 53(1)(e), *Constitution of Kenya* (2010).

⁹⁵ Section 31, *Children Act* (2022).

⁹⁶ Article 53(1)(e), *Constitution of Kenya* (2010).

both parents to meet the needs of the child in all aspects as defined in the Act⁹⁷. In the Supreme Court, the idea that parental responsibility is inextinguishable, a position that is widely held, was expressly limited⁹⁸, affirming that the rights of the child always take precedence. While acknowledging the parent's place in the life of the child, the court limited the discretion by establishing that it is only acceptable as far as it meets the best interests of the child, emphasising that parental rights cannot trump these interests. The ideas developed through case law are that the child is to be provided for even when the parents are not together and that both parents have a duty to ensure that these needs are met. Following the premises previously set out, this can be interpreted as parents having discretion over their children.

2.3.2 Regional and International Law

There are other regional and international sources of law that support the discretion that parents have over their children. Examples of these sources of law are the Convention on the Rights of the Child(hereinafter referred to as the Convention) and the regional African Charter on the Rights and Welfare of the Child(hereinafter referred to as the Charter). Both of these bodies have provided for the best interests of the child and are used simultaneously when the need for the best interests has to be asserted and because they have been ratified by Kenya, they have been applied in various cases⁹⁹.

While there are provisions that indirectly show the discretion that parents have such as the requirement that state parties respect the rights and duties of the parents or legal guardians to provide direction to the child in matters such as religious views¹⁰⁰, there is the expectation that this will be done in line with the best interests. The best interests in The Charter are to be the primary consideration¹⁰¹ while in The Convention are stated to be a consideration¹⁰².

In the application of these laws in the Kenyan context, they have been used to the end of limiting parental rights or requiring a parent to fulfil their duty in one way or another.

⁹⁷ *CKM & KUM(Children suing through NGMN) v RMK*(2024) eKLR.

⁹⁸ *MAK v RMAA & 4 others* (2023)eKLR.

⁹⁹ *Child Welfare Society of Kenya v Republic and 2 others ex-parte Child in Family Focus Kenya* (2017)eKLR.

¹⁰⁰ Article 14(2), *Convention on the Rights of the Child* (1989) 1577.

¹⁰¹ Article 4, *African Charter on the Rights and Welfare of the Child* (1990).

¹⁰² Article 3, *Convention on the Rights of the Child* (1989) 1577.

2.3.3 Legal foundation as a reflection of the balancing act in the Kenyan context

The previous parts of this chapter have established that parental discretion exists and this part will establish the ends to which parental discretion can go, both generally and narrowed down to the Kenyan understanding.

Generally, legal rules are set that limit how a parent can treat their child and when the state can intervene. Various authors have established different scenarios where parental discretion can be limited. Michael Wald is an example, where he set the standard that intervention should happen where neglect occurs and harm is serious and coercive intervention will do more harm than good¹⁰³. Abuse and neglect have set the bar too low, allowing for a large number of other harms to slip through the cracks¹⁰⁴. What most authors have agreed on is that parental discretion should be unlimited unless there is a violation of the child's interests, in which case, there should be limitations to ensure the protection of their best interests. Regardless of the sacred nature of the family that entitles it to rights such as the right to privacy, this is limited in its very nature¹⁰⁵. Fundamentally, the parent-child relationship is limited and directed towards a common good and, should be limited to develop the interests of the child in the first instance¹⁰⁶.

In the Kenyan context, the courts have been very insistent on upholding the best interests of the child, in some situations even considering both the short term and long term best interests of the child¹⁰⁷. These interests have been considered the metric against which parental discretion is measured¹⁰⁸. While acknowledging the strides that have been made in continuing to develop this idea, specificity as to the position of the best interests is unclear.

As discussed in the sub section above, The Convention and The Charter are used hand in hand when it comes to decision making as regards the best interests of the child. However, the wording of the bodies is different when it comes to the place of the best interests; The Convention has the interests as *a* paramount consideration¹⁰⁹ while The Charter has them as *the* paramount consideration¹¹⁰. In the application of these laws, only a few cases have determined

¹⁰³ Wald M, 'Redesigning state intervention on behalf of 'neglected' children' 32 Research on Social Work Practice 5, 2022, 508.

¹⁰⁴ Brighthouse H and Swift A, 'Parents' Rights and the Value of the Family' 105.

¹⁰⁵ Schoeman F, 'Rights of Children, rights of parents, and the moral basis of the family' 10.

¹⁰⁶ Brighthouse H and Swift A, 'Parents' Rights and the Value of the Family' 95.

¹⁰⁷ *MAA v ABS* (2018)eKLR.

¹⁰⁸ *RA v JNO (Suing as the next friend and mother to the minors IO and MM)* (2024)eKLR, *MAA v ABS* (2018)eKLR, *USA v IAO* (2024)eKLR.

¹⁰⁹ Article 3, *Convention on the Rights of the Child* (1989) 1577.

¹¹⁰ Article 3, *Convention on the Rights of the Child* (1989) 1577.

the best interests as the primary consideration¹¹¹, while the majority of the cases have no particular standing¹¹², usually stating that the best interests shall be of primary consideration.

It may be the case that the general language or the failure to acknowledge the difference in wording in the statutes may be prevalent because the objective of the court, which is to protect the child, has been met in the decision making. Judges may lack the inclination to be decisive enough on the matter because the end can be met without the need for specificity as to the position of the interests of the child. While this is an issue that can easily be overlooked, it is important that the paramountcy of the best interests of the child be acknowledged and enforced to make it the absolute consideration in matters involving them. This is especially achievable in the Kenyan context because the ratification of covenants, and especially The Charter into Kenyan law¹¹³ sets a very good foundation for this emphasis because of its superior wording.

That being said, the general consensus in the Kenyan courts is that following the provisions of Article 53(2) of the Constitution is that the children's rights are paramount and should be at the centre of all the decisions, this is ranging from issues of custody to those of divorce¹¹⁴. The rights of the child are considered in line with their other rights¹¹⁵ such that they are able to give superiority to the right that would serve the interests of the child best.

2.4 Conclusion

In this chapter, the focus was on the various influences that have led to the different understandings of the kind of discretion the parents have over their children, which is either wide or narrow. The chapter further assesses the influences to determine the understanding of what kind of discretion is actually practised, particularly in the Kenyan context. The findings of the chapter were that the position on what kind of discretion actually exists is wide but must be practised in line with the best interests of the child in consideration.

¹¹¹ *MAK v RMAA & 4 others* (2023)eKLR, *MAA v ABS* (2018)eKLR, *EAO v SON* (2023)eKLR.

¹¹² *CMM(suing as the next friend on behalf of CWM)and 6 others* (2023)eKLR, *CKC & another(suing through their mother and next friend JWN) v ANC* (2019)eKLR, *AF v HA & another* (2004)eKLR, *In re E M(child)* (2017)eKLR, *OGM v FG and another* (2020)eKLR, *JKM v POT & another* (2023)eKLR, *IMM V JMN* (2024)eKLR, *KKPM v SWW* (2019)eKLR, *MWM v MVM* (2020)eKLR.

¹¹³ *Child Welfare Society of Kenya v Republic and 2 others ex-parte Child in Family Focus Kenya* (2017)eKLR

¹¹⁴ *KKPM v SWW*(2019)eKLR, *DMM v PMN & FKK*(2020)eKLR.

¹¹⁵ Moraa T, Gor G 'The nexus between the best interests of the child and detention of children in conflict with the law' 7 *Kabarak Journal of Law and Ethics* 2023, 32.

3.0 How Sharing Audio-Visual Material of Children Can Lead to Harm

3.1 Introduction

This chapter will address some of the major harms that the sharing of audio-visual material of children by parents may cause. Scholars have generally addressed similar harms in their work, and in this analysis of the harms, they shall be divided into three kinds in three different parts of the chapter. The first part will focus on psychosocial effects of the sharing, delving into the different harmful effects on the mind of the child. The second part will focus on digital kidnapping, the third part will focus on misuse of the child's image, and lastly, stalking and kidnapping. The chapter's end goal is to show how the potential harms brought about by exposure justify the limitation of parental rights in this regard.

3.1 Psychosocial effects of exposure of the children

This part will be developed to show the psychological effects of exposure on the child's identity that may cause issues such as challenges with self esteem and emotional distress.

Exposure of children on the internet can have a big impact on their development into adulthood. At times, when posting, the parents do not think of how the information may be interpreted by others, which may be as embarrassing¹¹⁶. This may be the case even when the motive of the parent's exposure of material on their child is, as various work has shown, just to get support during the raising of their children¹¹⁷ or any other well-intentioned reason. An adult who grew up with a chronic disability stated that she was thankful her parents let her make the choice as to whether or not she wanted to share her story, stating that she would be 'mortified' if her parents shared her story publicly, whether as a child or an adult¹¹⁸, noting that many parents with disabled children share their stories widely. This buttresses the point that even where the parents of a child might believe that their intention is good, it may not come off as so, either to the child, viewers or both. Keeping in mind that the content posted on the internet is perpetual, it is

¹¹⁶ Brosch A, 'When the child is born into the internet: Sharenting as a growing trend among parents on Facebook' 43 *The New Educational Review* 1, 2016,227.

¹¹⁷ Lavorgna A, Tartari M, Ugwidike P, 'Online sharenting: identifying existing vulnerabilities and demystifying media reported crime risks' *Crime, Media, Culture Journal*, 2023, 8.

¹¹⁸ Carly Findlay, 'When Parents Overshare Their Children's Disability', <http://www.dailylife.com.au/news-and-views/dl-opinion/when-parents-overshare-their-childrensdisability-20150724-gjtw6.html>. Sydney Morning Herald on July 27, 2015.

possible that children would grow to find information about them on the various sites, which may cause them shame¹¹⁹.

There are different kinds of individuals, some motivated by interpersonal relatedness and others who are not, and those motivated by relatedness are more vulnerable when it comes to feedback¹²⁰. This sets the foundation for the development of the case on identity because some children fall in the more vulnerable category therefore would be more affected by responses to matters to do with themselves. When parents make the decisions to represent their children online, they have a greater impact on their identity¹²¹ because a primary way to learn about ourselves is through the stories we tell others as well as what we hear about ourselves¹²². Feeding into the idea that parents create an indelible narrative through the internet, then this becomes a way through which the children can develop their identities. The persistent nature of online material will have an impact on the identity of the child and this is not only at the time but also in the future because the information can resurface at any time¹²³.

Sharing audio-visual material of the children exposes their self worth and identity to the feedback and approval of others¹²⁴. As social media is another place where representation happens aside from the mainstream media, then the content seen or posted on social media is subject to the same harsh critiques that mainstream media is¹²⁵. This definitely has an effect on the child's identity formation, an example being where the child is a victim of gender stereotypes, backlash on sexuality and such issues¹²⁶. The children have a changing relationship with various aspects such as their bodies, friendships and even relationships with their parents¹²⁷

¹¹⁹ Ferrara P, et al, 'Online "sharenting": The dangers of posting sensitive information about children on social media' 257 *The Journal of Paediatrics* 2023, 2.

¹²⁰ Jackson C and Luchner A 'Self-presentation mediates the relationship between self-criticism and emotional response to Instagram feedback' 133 *Personality and Individual Differences* 2018, 2.

¹²¹ Choi Y and Lewallen J, "'Say Instagram, kids!': Examining sharenting and children's digital representations on Instagram' 29 *Howard Journal of Communications* 2, 2018,145.

¹²² Reese E, Yan C, Jack F and Hayne H, 'Emerging Identities: Narrative and Self from Early Childhood to Early Adolescence' in McLean K and Pasupathi M(ed) *Narrative Development in Adolescence*, Springer New York, New York, 23.

¹²³ Davidson-Wall N, "'Mum. seriously!': Sharenting, the new social trend with no opt-out' Debating Communities and Social Networks 2018 OUA conference, Virtual, 23 April 2018-11 May 2018, 5.

¹²⁴ Davidson-Wall N, "'Mum. seriously!': Sharenting, the new social trend with no opt-out' Debating Communities and Social Networks 2018 OUA conference, Virtual, 23 April 2018-11 May 2018, 5.

¹²⁵ Choi Y and Lewallen J, "'Say Instagram, kids!': Examining sharenting and children's digital representations on Instagram', 145.

¹²⁶ Zhu L, Wang Y and Chen Y, 'Sharenting in China: Perspectives from mothers and adolescents' Emerald Insight Internet Research, 2024, 4.

¹²⁷ Walrave M, Verswijvel K et al, 'The Limits of Sharenting: Exploring Parents' and Adolescents' Sharenting Boundaries Through the Lens of Communication Privacy Theory' 7 *Frontiers in Education* 2022, 2.

and this kind of criticism will likely have a negative impact on their development. This embarrassment may snowball into bigger challenges such as when this content is seen by other children who are around the same age as those posted, which may lead to bullying and other negative reactions which have a stunting impact on the child's self esteem¹²⁸.

Exposure of the child on social media may have a long standing impact on their autonomy and sense of self. The loss of agency through their online presence can easily translate into the inability to create boundaries with others, which could have a negative effect on their self esteem¹²⁹. This exposure may also cause distress in the parent-child relationship¹³⁰ which, keeping in mind the primary role of the parent in the developmental stages of the child, is problematic to the formation of their identity.

A child begins to form their identity from a very young age, and from about the age of three and a half years, can tell a story about what has occurred around them¹³¹. Erik Erikson, in his work, outlines eight stages of development influenced by the interactions they have with people. The fifth stage 'Identity vs Confusion' is the most relevant in this study and takes a centre stage when the children begin to get into their teenage years and develop a personal identity¹³². Adolescence is characterized by important transitions and parental involvement can impact young people as they experience these developments¹³³.

It is Erikson's case that the children inheriting their online presence from the one already created by their parents could inhibit their full development in this stage because of the possibility of a crisis as to who they are, leading to feelings of insecurity¹³⁴. Furthermore, a study showing that adolescents work hard to curate their online presence in a certain way came to the conclusion that parental disclosure about their children might not match how they have built their

¹²⁸ Kopecky K, Stozowski R, Aznar-Díaz I and Romero-Rodríguez J 'The phenomenon of sharenting and its risks in the online environment' 110 *Children and Youth Services Review* 2020, 3.

¹²⁹ Rahayu M, 'Sharenting in the Digital Age: Investigating Motives and Examining Consequences for Children' International Conference on Integrated Holistic Early Childhood Education, 2023 185.

¹³⁰ Siibak A and Traks K, 'The dark sides of sharenting' 11 *Catalan Journal of Communication & Cultural Studies* 1, 2019, 117-118.

¹³¹ Reese 'Emerging Identities: Narrative and Self from Early Childhood to Early Adolescence' 25.

¹³² Hamming K, 'A Dangerous Inheritance: A Child's Digital Identity' 43 *Seattle University Law Review*, 2019, 1046.

¹³³ Walrave M, Verswijvel K et al, 'The Limits of Sharenting: Exploring Parents' and Adolescents' Sharenting Boundaries Through the Lens of Communication Privacy Theory' 7 *Frontiers in Education* 2022, 2.

¹³⁴ Hamming K, 'A Dangerous Inheritance: A Child's Digital Identity' 1047.

presence¹³⁵. This kind of clash may contribute to the failure of successful creation of a personal identity and lead to challenges in areas such as making friends. It is important to note that in the adolescent years, friends have a predominant place and their perception of each other matters to them¹³⁶.

Parental exposure of the life of the child, even as they grow into adulthood, can lead to comparison and judgement from others and this may be a big blow to their self worth especially when there are experiences of teasing and bullying¹³⁷. When we consider other issues such as internet shaming, which is where a parent publicly disciplines their child, the ‘disciplining’ affects the child’s self esteem. As it seems to attack their personality rather than their mistakes, this can be a cause of psychological issues¹³⁸. Building on Erikson’s theory, this shaming definitely has an impact on the child’s identity formation and may lead to emotional underdevelopment.

3.2 Digital kidnapping

While the definition of ‘identity’ is elusive, the concept of personal identity has been well established through the different constitutions across the world which consist of almost similar defining characteristics such as a person’s name and their date of birth¹³⁹. Exposure of a child through audio-visual material most, if not all, times exposes personal information such as the child’s age and more commonly, the child’s name to the random person on the internet¹⁴⁰. Identity theft can have very wide reach, manifesting itself in other ways such as criminal identity theft and medical identity theft¹⁴¹. Childhood has become a site of ‘datafication’ and ‘dataveillance’ sometimes even before birth because some parents begin to post material of their children before they are even born, for example through posting ultrasounds and gender reveals,

¹³⁵ Walrave M, Verswijvel K et al, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Theory’ 3.

¹³⁶ Walrave M, Verswijvel K et al, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Theory’ 2.

¹³⁷ Kumar S, Ramachandran P and Arun J, ‘Psychological Impact of Sharenting: A Comprehensive Review’ 9 *EPR International Journal of Multidisciplinary Research* 11, 2023, 267.

¹³⁸ -<<https://www.vbpsychology.com/the-dark-side-of-public-shaming-parenting/>>- on 4 December, 2024.

¹³⁹ Ferrara P, et al, ‘Online “sharenting”: The dangers of posting sensitive information about children on social media’ 2.

¹⁴⁰ Steinberg S, ‘Children Seen But Not Heard’ 66 *Arizona Law Review* 2024, 149.

¹⁴¹ Ferrara P, et al, ‘Online “sharenting”: The dangers of posting sensitive information about children on social media’ 2.

resulting in the loss of privacy of the child¹⁴². The availability of the child's face and personal details on the internet makes replication of their identity an easy task, leading to the rising issue of digital kidnapping.

Digital kidnapping is defined as a situation where a person takes pictures of the children from the internet and gives them new identities as if they were their own¹⁴³. There are two examples that bring life to this idea. The first is of a mother who posted her daughter's picture on Facebook and received a like from a user who she did not know. Upon scrutinizing the account further, she found that the stranger had made her child's image their own profile picture and was fronting as the child's parent¹⁴⁴. A second example is of a mother who posted her two daughters' pictures and the pictures that she posted were shared by another account that was not hers but the owner posted as if they knew the children personally, even linking the pictures to the mother's account¹⁴⁵. These are just some of the ways to show that a child's identity can easily be taken over by another person.

Digital kidnapping is lucrative because the children's merchandise market is very well established and thus a lot of revenue comes from there. An example of this is in the United States where the market is in the hundreds of billions of dollars¹⁴⁶. The sheer number of child brand ambassadors for various companies speaks to the lucrative nature of the business¹⁴⁷. Seeing as there is so much information available on the internet, it is possible for the brokers to start a profile on the child that they keep developing as they grow, which would be supported by the parents' consistent posting of information about the child¹⁴⁸. This is a growing recognizable challenge with increased potential for unauthorized access due to the use of stolen identities¹⁴⁹. This harm has been recognized by institutions such as banks where there is a fear that due to all

¹⁴² Siibak A and Traks K, 'The dark sides of sharenting' 11 *Catalan Journal of Communication & Cultural Studies* 1, 2019, 117-118.

¹⁴³ Brosch A, 'When the child is born into the internet: Sharenting as a growing trend among parents on Facebook' 227.

¹⁴⁴ Steinberg S, 'Sharenting: Children's privacy in the age of social media' 847.

¹⁴⁵ Steinberg S, 'Sharenting: Children's privacy in the age of social media' 847.

¹⁴⁶ Steinberg S, 'Children Seen But Not Heard', 149.

¹⁴⁷ Nottingham E, "Dad! Cut that part out!": Children's right to privacy in the age of 'generation tagged': Sharenting, digital kidnapping and the child micro-celebrity" 189.

¹⁴⁸ Steinberg S, 'Children Seen But Not Heard' 149.

¹⁴⁹ Rahayu Y, 'Sharenting in the Digital Age: Investigating Motives and Examining Consequences for Children' 1st International Conference on Integrated-Holistic Early Childhood Education (ICIHECE), Asia, 8 July, 2023, 184.

the accessible information out there, and the continued growth of digital kidnapping, banking systems could be at risk of digital fraud¹⁵⁰.

3.3 Misuse of the child's image

Another possible harm arising from the use of audio-visual material posted on the internet is its use on illicit websites such as pornography pages. This content can be manipulated, repurposed and fall into the wrong hands leading to undesirable outcomes¹⁵¹. A large amount of this content that is used is gotten from parents' accounts that have no privacy settings and therefore the paedophiles are able to trawl the accounts and extract whatever information they would like¹⁵². While there are guidelines dictating how different social media platforms should be used particularly with regard to age, there are parents who bypass these provisions by making accounts on behalf of their children, as one parent did, stating that they were pseudonyms of her personal account¹⁵³. This kind of action leaves the children exposed to various risks.

This comes into manifestation through various ways such as paedophiles, particularly through the use of deep fake, making morphed child pornography. Morphed child pornography is pornography created using an innocent photo of a child that is edited to make it seem as though the child is engaging in a sexual act¹⁵⁴. The innocent picture used often originates on social media and blogs where the content appearing regular to any person would be intriguing to a paedophile¹⁵⁵. There are two main kinds of child pornography, virtual or fictitious and real pornography and this falls in the crossroads between the two kinds. While it has been likened to

¹⁵⁰ Nottingham E, "Dad! Cut that part out!": Children's right to privacy in the age of 'generation tagged': Sharenting, digital kidnapping and the child micro-celebrity" 188.

¹⁵¹ Rahayu Y, 'Sharenting in the Digital Age: Investigating Motives and Examining Consequences for Children' 1st International Conference on Integrated-Holistic Early Childhood Education (ICIHECE), Asia, 8 July, 2023, 185.

¹⁵² Battersby L, 'Millions of social media photos found on child exploitation sharing sites' The Sydney Morning Herald, 30 September, 2015

-<<https://www.smh.com.au/national/millions-of-social-media-photos-found-on-child-exploitation-sharing-sites-2015-0929-gjxe55.html>>- on 30 September, 2015.

¹⁵³ Meakin N, 'The pros and cons of 'sharenting'' The Guardian, 18 May 2013

-<<https://www.theguardian.com/lifeandstyle/2013/may/18/pros-cons-of-sharenting>>- on 18 May, 2013.

¹⁵⁴ Beacham C, 'Metamorphosis: Changing Oklahoma Law to Protect Children from Morphed Child Pornography' 55 *Tulsa Law Review* 2, 2020, 316.

¹⁵⁵ Steinberg S, 'Changing Faces: Morphed Child Pornography Images and the First Amendment' 68 *Emory Law Journal* 5, 2019, 912.

fictitious pornography, there is a distinction and it lies in the use of an actual child¹⁵⁶. For the morphed child pornography, the child is not actually involved in the work itself and is only added in by slicing and splitting the photos together until the images reveal children appearing to engage in sexual activity¹⁵⁷.

While children are not harmed in any real way during the creation of the work, they can potentially suffer harm once an image is circulated¹⁵⁸. An example of this would be an image of a child eating an ice cream cone, which is then edited to have a penis in the place of the cone. While this is a hypothetical example, a real life scenario happened where a mother posted her twins during toilet training and a stranger accessed the pictures, downloaded them and altered the pictures to fit a site that was used by paedophiles¹⁵⁹.

Keeping in mind the irreversible nature of content posted to the internet and the high level of facial recognition brought about by the steadily increasing rate of technological advancements, identification of the person is an easy task¹⁶⁰. This could disproportionately affect the child as they mature into adulthood particularly when they would need to apply for college positions or jobs. When a background check is run, such content coming up would quickly disqualify them from the position, even when highly qualified, potentially leading to stagnation or failure to achieve certain milestones.

3.4 Stalking and kidnapping

One of the biggest traits that distinguish the physical from the online world is the searchability¹⁶¹. In the physical world, people can be able to exist without being found but in the online world, a deep dive into the internet can give a person immense knowledge on another. A parent sharing information about their child consistently makes the child an easy target for stalking and kidnapping¹⁶². Seeing as the parents sharenting are posting audio-visual material of the children,

¹⁵⁶ Smith E, 'Perverted or Protected?: The Battle Between Morphed Child Pornography and the First Amendment' 54 *UIC Law Review* 4. 2021, 969.

¹⁵⁷ Beacham C, 'Metamorphosis: Changing Oklahoma Law to Protect Children from Morphed Child Pornography', 317.

¹⁵⁸ Steinberg S, 'Changing Faces: Morphed Child Pornography Images and the First Amendment' 912.

¹⁵⁹ Steinberg S, 'Sharenting: Children's privacy in the age of social media' 847.

¹⁶⁰ Steinberg S, 'Changing Faces: Morphed Child Pornography Images and the First Amendment' 936.

¹⁶¹ Hamming K, 'A Dangerous Inheritance: A Child's Digital Identity' 1044.

¹⁶² Meilani F, Hidayati N, Sulaeman E, 'Sharenting: Sharing Moments or Violating Children's Privacy?' 2 *Scientia: Social Sciences and Humanities* 2, 2023, 44.

this information can be used to track and stalk children particularly based on their location¹⁶³. This particularly applies where the content posted of the child is consistent in showing the day to day life of the child in particular or the family. Stalking begins from the point of searching for highly visible persistent data about a person who another is interested in¹⁶⁴. If the content that is available consists of ‘days in the life’ and such material, it is easy for a potential stalker to observe the patterns that the person has and intercept the child at any given moment.

An example that shows the simplicity of gaining information about one’s location is a TikTok user who is able to find out where a fellow user’s hotel is by simply using pictures they have posted¹⁶⁵. By running the images through sites such as Google Lens, this user is able to cross-reference something as small as a bed’s headboard to find the exact standard of the hotel room. Furthermore, using a picture from the balcony, the user was not only able to locate the general location of the hotel and the side of the hotel in which the person was sleeping in but also the floor that the room was in. The ease of access of the person’s location during the singular visit to the hotel compared to a consistent routine speaks to how risky consistent exposure is because familiar locations will be comparatively easier to pick out. Additionally, some parents use geotags during the sharing of information that puts their children in an even more disadvantaged situation in terms of being accessed and possibly kidnapped. Bringing the harm even closer home, a number of perpetrators of the crimes are people who know the victims, whether personally or not¹⁶⁶, further emphasizing the risk in question.

3.3 Conclusion

In this chapter, the objective was to assess the possible harms that could come out of exposure of children on social media by their parents. Following the discussion on parental discussion in Chapter 2 as to how some parents might interpret their position as giving them unlimited freedom over their children, this chapter sought to shed light on the negative effects of unbridled exposure. The findings of the chapter have shown a good number of potential harms, both lasting

¹⁶³ Plunkett L, ‘To Stop Sharenting & Other Children’s Privacy Harms, Start Playing: A Blueprint for a New Protecting The Private Lives of Adolescents and Youth(PPLAY) Act’ 44 *Seton Hall Legislative Journal* 3, 2020, 468

¹⁶⁴ Hamming K, ‘A Dangerous Inheritance: A Child’s Digital Identity’ 1044.

¹⁶⁵ -< <https://www.tiktok.com/@yuvaltheterrible/video/7328153498950847790?lang=en> >- on 6 December, 2024.

¹⁶⁶ Plunkett L, ‘To Stop Sharenting & Other Children’s Privacy Harms, Start Playing: A Blueprint for a New Protecting The Private Lives of Adolescents and Youth(PPLAY) Act’ 468.

long term, such as the psychosocial effects and short term effects such as stalking and kidnapping.

4.0 How The Law Should Intervene To Limit Parental Discretion

4.1 Introduction

In the previous chapters, there has been an assessment of the relationship between parents and their children, focusing on the factors that influence parental discretion as well as the place of this understanding in their decision making as regards exposure through audio-visual material. The focus on harms arising from this exposure in Chapter Three sets the foundation for this chapter that proposes a two-pronged conjunctive test that borrows from the test set out for proving the tort of public disclosure of private facts. The original test has four main elements: public disclosure, of a private fact, which would be offensive and objectionable to the reasonable person and which is not of legitimate public concern¹⁶⁷.

4.2 The suggested test for limitation of parental rights

In order to limit parental discretion, this paper proposes a two-pronged test stating that the limitation of parental rights shall occur where the audio visual material is shared publicly, and results in embarrassment or harm to the child.

4.3 Understanding the test

4.3.1 The tort of public disclosure of private facts as the basis of the test

To understand the inspiration behind the suggested test for limitation of parental rights, it is important to understand the tort itself. In this subsection, I will briefly describe the tort of public disclosure of private information so as to give a background to the test.

The tort of public disclosure of private facts has mostly been used to enforce the law as against the media for the exposure of facts on the life of other people¹⁶⁸, such as celebrities. However, with the increasing technological advancements, the scope has increasingly been broadened. This expansion has been driven by the expectation that vast amounts of information can be made available to the public, especially considering individuals such as bloggers who voluntarily share details of their lives¹⁶⁹. As previously stated, the original test has four main elements: public

¹⁶⁷ *Shulman v Group W Productions* (1998), 18 Cal. 4th.

¹⁶⁸ Chemerinsky E, 'Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts' 11 *Chapman Law Review*, 3, 2008, 423.

¹⁶⁹ Abril P, ' "A Simple, Human Measure of Privacy": Public Disclosure of Private Facts in the World of Tiger Woods 10 *Connecticut Public Interest Law Journal* 2, 2010, 394.

disclosure, of a private fact, which would be offensive and objectionable to the reasonable person and which is not of legitimate public concern. The being established in this chapter will be based on the public disclosure and offensive and objectionable prongs therefore, those will be fully expounded on within the chapter. However, to shed some light on the rest of the prongs, the ‘of a private fact’ simply requires the information to be that which would otherwise not be in the knowledge of the others. Lastly, the prong ‘not of legitimate public concern’ requires that the information does not deal with public interest or newsworthy issues and courts have enforced in cases that all information released on a person where there is a public interest violation should be relevant to the violation¹⁷⁰.

4.3.2 Application of the prongs of the test in existing case law

4.3.2.1 On the public nature of the exposure

To sufficiently prove the tort of public disclosure of private facts, one has to prove exposure. In describing how the courts have decided this matter, this section will focus on two aspects- what the public means and the development of the courts in understanding this idea as well as the kind of disclosure that counts to qualify for the tort.

Public disclosure, through the development of case law, has come to bear other meanings aside from its literal meaning. It has been defined as unnecessary publicity to the plaintiff’s conduct which violates their disinterest in having their affairs known by others¹⁷¹. The aggrieved party has to prove that the information was a demonstration of their private affairs¹⁷². Following the idea that it should be public, the courts have, in some cases, held the position that the tortious act can only occur when the information has been communicated to the public at large, rather than to a few individuals¹⁷³. This has since been countered by a number of arguments stating that there may be transitory exposure and there is ambiguity of communication to the general public because information rarely reaches everyone, therefore meeting this threshold would be difficult¹⁷⁴. Many courts have since embraced the idea of giving a wider scope to the meaning of

¹⁷⁰ *Virgil v Time*(1975) The Court of Appeal of the United States, Ninth Circuit, *Haynes v Alfred A Knopf*(1993) The Court of Appeal of the United States, Seventh Circuit, *Briscoe v Reader’s Digest Association*(1971) Supreme Court of California, *Cape Publications v Bridges*(1982(District Court of Florida, Fifth District, *Bonome v Kaysen*(2004) Commonwealth of Massachusetts Superior Court.

¹⁷¹ *Hawley v Credit Bureau Inc* (1956) Supreme Court of Michigan, USA, *Miller v Motorola Inc.* (1990), Illinois Appellate Court, USA.

¹⁷² *Santiesteban v United States* (2016) United States District Court Southern District of Florida, USA.

¹⁷³ *McSurely v McClellan* (1985) Columbia Court of Appeals, USA.

¹⁷⁴ *Baumont v Brown* (1977) Supreme Court of Michigan, USA.

the public, holding that the size of the public is irrelevant to the disclosure itself¹⁷⁵. This has led to qualification of scenarios such as communication to a limited number of people¹⁷⁶ and even to people with whom the aggrieved party has a special relationship¹⁷⁷. It is irrelevant that the person is engaging in an activity in which the public can be said to have a general interest, this should not cause public disclosure¹⁷⁸.

As to the kind of disclosure that is covered under the tort, oral and demonstrative publication apply alongside the conventional written publications. Actions that are publicly done as well as words uttered in front of the public apply in this regard and proof of any of these aspect qualifies the tort¹⁷⁹. There are matters that are considered completely unethical to expose and these include those concerning a person's medical treatment¹⁸⁰. The court is often unswayed by defences supporting the exposure of this information.

4.3.2.2 On the idea of embarrassment

To meet this standard when proving the tort, one must show that there was publication of intimate personal facts where the purpose ceases to be giving information and ends up being sensational prying into the business of others that causes harm¹⁸¹. There is a similarity between the definition given in the previous subsection on the public nature because these two aspects usually go hand in hand.

Exposure of this information can be done in a way that causes severe emotional distress, either intentionally or otherwise¹⁸². This has been decided on as a matter of fact and not of law, with the court being the decision maker on whether or not the matter brought before it is an embarrassing one¹⁸³. However, while the decision is in the court's hands, the standard is that of the ordinary

¹⁷⁵ *Voneye v Turner* (1951) Kentucky Appellate Court, USA.

¹⁷⁶ *Biederman of Springfield, Inc v Wright* (1959) Supreme Court of Missouri, USA, *Santiesteban v United States* (2016) United States District Court Southern District of Florida, USA, *McSurely v McClellan* (1985) Columbia Court of Appeals, USA.

¹⁷⁷ *Miller v Motorola Inc.* (1990), Illinois Appellate Court, USA.

¹⁷⁸ *Doe v Mills* (1995), Michigan Court of Appeals, USA.

¹⁷⁹ *Santiesteban v United States* (2016) United States District Court Southern District of Florida, USA, *Biederman of Springfield, Inc v Wright* (1959) Supreme Court of Missouri, USA.

¹⁸⁰ *Swickard v Wayne Medical Examiner* (1991), Supreme Court of Michigan, USA.

¹⁸¹ *Haynes v Alfred A. Knopf Inc.* (1993), United States Court of Appeals for the Seventh Circuit. leopold, gilbert

¹⁸² *Diaz v Oakland Tribune Inc.* (1983), California Court of Appeal, USA.

¹⁸³ *Beaumont v Brown* (1977) Supreme Court of Michigan, USA, *Miller v Motorola Inc.* (1990), Illinois Appellate Court, USA.

person; on a subject that a reasonable person would find offensive and objectionable¹⁸⁴. Even when guided by this standard, the decision is a very subjective one, and at times, judges have different opinions, with some having the idea that a person's claim of embarrassment is a show of 'super sensitiveness'¹⁸⁵ while others view it as a valid claim.

Be that as it may, there seems to be a general consensus on allowing things that happened in a person's past to be put to rest. The courts have held in a number of cases that there is no relevance in exposure when the purpose is not public interest, such as in situations where there was commission of a crime. Once justice has been served, the matter should be put to bed, a position that the courts have repeatedly enforced¹⁸⁶.

4.4 Application to the Kenyan context

Having set out the application of the elements of the test in other courts, this section will discuss its suggested application in the Kenya legal system, where it is to be applied conjunctively. It is important to keep in mind that in the application of the test, the limitation is not targeted at harmless and ordinary family photographs or audio-visual material. The target of the limitation is parents who consistently share such material, whether for financial or any other kind of gain, such that they can be held accountable for the exposure.

On the issue of the public nature of exposure, the test takes the progressive view that has already been established in jurisprudence, where the definition of 'public' is not only limited to a large number of people, but also a smaller group. It will also take up the concept of the different forms of exposure, such as oral and demonstrative, including any other kind of exposure that may come up and has not yet been anticipated by the courts. The test recognizes different forms of exposure beyond simply social media posts including exposure through livestreams and even oral disclosure in podcasts. The exposure can be on any platform, ranging from the smallest Whatsapp group consisting of school parents, for example, to a widely followed YouTube channel. A child (or their representative) who is able to demonstrate that there was exposure of any kind to any number of people, should be able to meet the first requirement of the test.

¹⁸⁴ *Reed v Ponton* (1968) Michigan Court of Appeals, USA , *McSurely v McClellan* (1985) Columbia Court of Appeals, USA.

¹⁸⁵ *Reed v Ponton* (1968) Michigan Court of Appeals, USA.

¹⁸⁶ *Melvin v Reid* (1931) California Appellate Court, USA, *Briscoe v Reader's Digest Association Inc.* (1971), Supreme Court of California, USA.

On the issue of the embarrassing nature of the material, there is acknowledgement of the subjectivity of the judge(s) on the matter, which makes it a bit challenging to delineate. However, this work advocates for liberalism in the assessment of the claim, especially because embarrassment is a feeling, therefore cannot be objectively quantified. Taking this into account, the decision should be made considering that the aggrieved party is a growing child and ‘smaller’ issues could possibly affect them more. An example is that a toddler’s tantrum may seem humorous or even annoying when the parent shares it, but when revisited by the grown child, could become very humiliating. Keeping in mind the evolving nature of the child as discussed in Section 2.2.2, the embarrassment could have serious psychosocial consequences on them.

This test is a recognition of both the wide and narrow discretion as discussed in Section 2.2 of this work. While the parents have the freedom to raise their children as they wish and share information and audio-visual material of them, their discretion is limited to fit within the boundaries of the test, such that the rights of the child are upheld. This understanding is in line with the parent-child fiduciary relationship where the parents discretion is limited when the interests that are being met are those of the parents rather than those of the child. Lastly, while it is a new test, it is in line with the legal aspects in Section 2.3 of this work. It upholds the idea that children’s interests are the most important and should be treated as such, considering the provisions of statutory bodies such as the Children Act and the Constitution. The foundation of the creation of this test is the idea that child protection should be the main focus, even in audio-visual exposure.

4.4.1 Importance of the suggested test

While the existing laws such as the Data Protection Act provide safeguards for children’s rights and information, there is no consideration of situations where the parents themselves are the source of the exposure. This gap necessitates the creation of a special test to determine the point at which parental sharing should be restricted.

It is important that this standard be embraced given the documented psychosocial, physical and other harms that could come out of unchecked parental sharing as discussed in Chapter 3 of this work. As previously highlighted in this work, there are issues of identity theft and misuse of the child’s image through morphed child pornography, for example. These harms stem from the

child being exposed in the first place, which shows the importance of the first aspect of the test. Qualifying the public nature of exposure validates the limitation which then prevents the occurrence of these harms. Furthermore, excessive exposure on social media could result in long term self esteem issues, emotional distress caused by cyberbullying and even reputational harm. The second prong on embarrassment proves itself useful in this regard when it comes to limitation. By adopting this standard, the law would take an important step in safeguarding children's dignity, privacy and future autonomy in an increasingly digital world.

This test is important because while psychological and reputational harm are well documented effects of public exposure, current legal frameworks do not offer a way to assess when parental actions become harmful. Through the establishment of this test, there is assurance that not all parental sharing is unnecessarily restricted but rather, only in situations where significant harm can be demonstrated. This test takes an approach that balances parental autonomy with the child's right to privacy and dignity, ensuring legal intervention only occurs on a necessity basis.

4.5 Conclusion

In this chapter, the focus was on setting a standard to limit the discretion of parents when it comes to sharing audio-visual material of their children. Through an assessment of the tort of public disclosure of private facts, there has been extraction of elements that have influenced the creation of a different, two-pronged, conjunctive test that should be applicable in the Kenyan context to limit the rights of the parent.

5.0 Recommendations And Conclusion

5.1 Conclusion

This study looks into the interaction between parents and children, where the parents are responsible for exposing their children through audio-visual material with the end goal of restricting parents' freedom to expose their children on social media.

To develop the study, there are three main research questions. The first question deals with what informs the discretion parents have over their children. It is divided into two underlying research questions: the first focusing on the philosophical ideologies informing this discretion, and the second focusing on the legal ideologies. The second research question delves into the potential harms that could come out of the audio-visual exposure and the last question deals with the limitation of parental rights when it comes to sharing audio-visual material.

The findings for the first question were that generally, the idea held by a large majority of parents is that because of their capacity as parents, they have unlimited power over all the decisions to do with their children. Specifically focusing on the philosophical ideologies, there was division into narrow and wide discretion, which were used as foundations to understand the positions of parents. Based on the narrow discretion, which is where parents have less discretionary power over their children, there is analysis of different philosophical standpoints that influence this position such as the ideas of John Locke and Immanuel Kant. Understanding their ideas shows how they would influence this kind of discretion. Wide discretion gives more discretionary power to the parents and is heavily influenced by ideas of philosophers such as Thomas Hobbes. The second underlying research question deals with the legal basis of these ideas such as statute and case law, and through the case law, shows the actual position of the understanding of parental discretion in Kenya.

The second research question's findings are based on the harms that could come out of this audio-visual exposure and is divided into psychosocial effects, digital kidnapping, misuse of the child's image and stalking and kidnapping. Psychosocial effects manifest themselves through ways such as low self esteem coming from criticism after the parents post their children, and this goes hand in hand with issues such as emotional distress. Digital kidnapping, stemming from the exposure, deals with situations where the child's information and identity is used by another person or other people, a situation that currently plagues a lot of people, especially given the lucrative nature of the children's merchandise market. The subsection on the misuse of the

child's image through manipulation by way of morphed child pornography shows how simple and innocent images of children can be used to propagate a certain sexual agenda through editing, something that is completely out of the hands of the parents once the audio-visual material has been released. Lastly, the section on

The final research question explores how to limit parental rights to constrain their exercise in this regard. In its development, there is the suggestion of a two part conjunctive test based on the tort of public disclosure of private information. The test establishes that the parents' rights should be limited when the audio-visual material is shared publicly and results in embarrassment to the child. The end goal of this limitation is to discourage parents from posting material that could have adverse effects on the children, considering the harms discussed in the third research question.

5.2 Recommendations

To make the solution offered in this work effective, there has to be a restructuring of the laws of the country, and especially the Data Protection Act. The Act, while being a good starting point for combating issues to do with personal information of the child, only focuses on the role of the data processors and data controllers. It does not anticipate a situation where the parent would be responsible for irresponsible exposure of their child's information. The Act would, therefore, need to be amended to create boundaries around which the rights of the parents can be limited through amendment to include the standard suggested in this work. An example of this would be integration as a part of children's rights provisions. If parents have a clear demarcation of audio-visual material that could result in repercussions, then they would be more wary of the kind of content that they post of their children. This amendment can be made in line with the other provisions of the Act that determine whether the data of the child should be processed to bring a more wholesome limitation section.

In line with the first recommendation, there should be education of members of the legislature, the judiciary and the public to show the importance of this limitation as well as the dangers that come with excessive exposure. This is important because it gives them a sense of the problem which allows them to appreciate the need for limitation. In this digital age, it is possible for education to be done in various ways that accommodate all people. For the members of the legislature and the judiciary, education can be done through hosting webinars and seminars

where the harms of audio-visual exposure are taught, and through this sensitization, they will be able to understand the need for limitation of parental rights. For the members of the general public, this can also be done in various ways. There can be seminars and webinars held as well, where they are taught about the effects of the exposure. Alternatively, in areas where there is no capacity to do this or information dissemination is done differently, there may be barazas, or meetings with the chief, all to sensitize them on how best to protect children. This education should be done in places where the target audience will be able to access and participate. As for the people who should teach, this can be a joint effort between the many people who have seen the potential for harm that this exposure has. Equally, if the members of the judiciary and legislature are taught first, it is easier for them to have the information spread wider because of their reach in the different parts of the country.

Lastly, the Data Protection Act should generally be amended to include a section dealing with social media as this is a growing area that requires more attention and governance as the world becomes more technologically centred. As other issues such as these arise, then there would be room for further amendment to deal with whatever issues would arise from the unforeseen challenges.

In practice, this would look like a section or a part of the law that has the general limitations that many countries have placed on social media companies such as care when it comes to children's age and regulation of content such that there is no tolerance for harmful or offensive material. Once that has been established, in the same way that many statutory bodies have 'catch-all' clauses such as "any other action that is relevant and reasonable", the same should apply here. There should be a clause that notes the ever evolving nature of social media and therefore provides for any and all other possible violations that could occur that were not anticipated by the drafters. This will go a long way in protecting all users of social media, children's rights and discouraging potential offenders.