

**BULLYING IN SCHOOLS: A VIOLATION OF ARTICLES 28 AND 53 OF THE
CONSTITUTION**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School

By

EVELYN KERUBO MOCHOGE

101076

Prepared under the supervision of
MR JOSEPHAT KILONZO

8 JANUARY 2020
WORD COUNT: 10330

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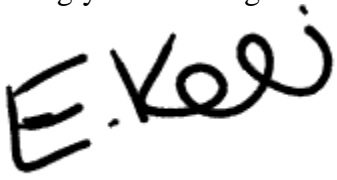
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ACKNOWLEDGMENT

My greatest gratitude goes to the Almighty God for giving me grace and resilience which guided and pulled me through the entirety of my research. I would like to express my special gratitude to my supervisor; Mr Josephat Kilonzo for his unrelenting scholarly advice and his continuous support throughout the writing of this paper. It was his commitment that made the completion of this paper a success. I extend my thanks to the entire teaching staff of the Strathmore Law School for imparting me with knowledge thus making this research a success. I also extend my heartfelt gratitude to my dear parents; Mr and Mrs Mochoge, and my whole family for their motivation, love and positive criticism. Indeed, this research would not have been successful without my friends both at Strathmore University and at home. I am very grateful for their continuous moral support.

DECLARATION

I, EVELYN KERUBO MOCHOGE 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: 

Date: 30th June 2021

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

Signed:

Date:

Mr Josephat Kilonzo

ABSTRACT

Bullying continues to be a grave act that every student is vulnerable to when they are in school. Its effects are beyond brutal. The Alliance High School case in 2017 that saw a student brutally tortured gave a glimpse of what really happens in our schools. Article 53 of the Constitution of Kenya clearly provides a child's right to basic education, right to be protected from abuse and from all forms of violence and inhumane treatment. It also provides for a child's best interest being of paramount importance in any matter concerning a child. The Constitution in Article 28 further provides that every person has a right to have their dignity respected by all. Bullying grossly affects each of these rights in one way or another.

Having this in mind, this study is based on three objectives: to evaluate the current situation and analyse the factors that contribute to bullying in secondary schools; to analyse the rights and freedoms infringed or violated by the incidence of bullying in Kenya and to assess the actions which the government has taken to address bullying and whether the government should take further steps to address the incidence of bullying in schools. For comparative purposes, this paper takes a look into South Africa's legal framework and how it addresses this issue.

LIST OF CASES

A M v Premier Academy (2017) eKLR.

Centre for Human Rights and Rencontre Africaine pour la Défense des Droits de l'Homme v Senegal, ACmERWC Comm. 001/12, Activity Report (2012).

C K and Others v Commissioner of Police / Inspector General of the National Police Service and Others (2013) eKLR.

Dowling v Diocesan College and Others (1999) The High Court of South Africa

Erick Githua Kiarie v Attorney General and Others (2016) eKLR.

Gabriel Nyabola v Attorney General and Others (2012) eKLR.

Knouwds v Administrateur Kaap (1981) The Supreme Court of Appeal of South Africa.

LIST OF ABBREVIATIONS

ACRWC- African Charter on the Rights and Welfare of the Child.

COK- Constitution of Kenya.

CRC- United Nations Convention on the Rights of the Child.

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

An article released by the African Woman and Child Feature Service, revealed bullying in Kenya is higher than the global trend.¹ Bullying alludes to repeated cruelty, either psychological or physical, of a less powerful person by a more powerful one, the key component being a power imbalance making the atrocious act possible.² Bullying is not a phenomenon that is unique to Kenya. Among countries with exorbitant risk of high bullying according to data collected by Dominic Richardson and Chii Fen Hiu in 2018³ are Greenland, South America and Canada.⁴

A study made in 2017 by the Centre for Disease Control in the United States, found that Kenya is among the countries in Africa with highest levels of bullying.⁵ A week prior to this, six Alliance Boys students were arraigned in court and charged with assault. They were accused of unlawfully assaulting a form one, thereby causing him bodily harm.⁶ Shortly afterwards, the Kenyan National Education Sector Strategic Plan of 2018-2020, revealed that in Kenya, fifty-seven percent of students are bullied at least once in a month.⁷

Arguably, there exist a number of factors that contribute to bullying. They include individual, family, peer, social and cultural influences.⁸ Bullying is from compounded interplays between

¹ - < <http://www.awcfs.org/index.php/content-development2/features/item/1474-bullying-in-kenyan-schools-higher-than-world-rate> > on 27 July 2020.

² Rigby K, 'What Children Tell Us About Bullying in School' 22 (2) *Cambridge University Press*, 1997, 29-33.

³ Richardson D and Hiu F C, 'Developing a Global Indicator on Bullying of School-Aged Children' UNICEF Office of Research, Innocenti Working Paper, 2018, 17 - < <https://www.unicef-irc.org/publications/pdf/WP%202018-11.pdf> > on 26 July 2020.

⁴ Richardson D and Hiu F C, 'Developing a Global Indicator on Bullying of School-Aged Children' UNICEF Office of Research, Innocenti Working Paper, 2018, 17 - < <https://www.unicef-irc.org/publications/pdf/WP%202018-11.pdf> > on 26 July 2020.

⁵ Kigotho W, 'Study Puts Kenya Top of Global Bullying Chart' *The Standard Newspaper*, On 11 March 2017 - < <https://www.standardmedia.co.ke/counties/article/2001232254/study-puts-kenya-top-of-global-bullying-chart> > On 28 February 2020.

⁶ Ngechu W, 'Alliance High School Students Charged with Assault' *Citizen Digital*, On 3 March 2017, - < <https://citizentv.co.ke/news/alliance-high-school-bullies-charged-with-assault-159537/> > On 28 March 2020.

⁷ Ministry of Education *Final Draft*, 2018, 26.

⁸ Swearer S.M and Hymel S, 'Understanding the Psychology of Bullying: Moving Toward a Social-Ecological Diathesis–Stress Model' *American Psychological Association*, 2015, 345-347.

persons and the environment in which they function, both distal and proximal. Hence, various institutions must be targeted for bullying prevention and intervention programs to be efficient.⁹

The 2010 Constitution of Kenya is keen to the protection of all children from abuse and all forms of violence, inhumane treatment and punishment.¹⁰ This is in line with Article 16 of the African Charter on the Rights and Welfare of the Child and Article 19 of the United Nations Convention on the Rights of the Child which Kenya is a party to.¹¹

Nevertheless, there is currently no comprehensive anti-bullying statute in Kenya. These cases are mostly dealt with by the school management or board.¹² The only Kenyan policy that tries to tackle this issue is contained in the Safety Standards Manual for Schools in Kenya. It emphasises the need for schools to make sure their students are safe from any emotional, physical and sexual abuse and neglect by community members, parents, peers or teachers.¹³ Unfortunately, this policy does not sufficiently tackle the issue of bullying but instead it groups it in the broad content of child abuse.¹⁴

Hence, apart from the Penal Code, which deals with crimes generally in Kenya, there appears to be no proper legislation dealing with the sanctions of bullying but there only exist the policies. The Penal Code is not a proper statute for dealing with bullying as the crimes' requirement of proof is beyond reasonable doubt which then can be hard to prove if there is no witness when the victim is being bullied in a secluded place. Therefore, the policies in place have proved to be ineffective as there are still plenty of traumatic bullying cases that have arisen in our schools.

1.2 STATEMENT OF THE PROBLEM

Bullying is a violation of a person's basic right of dignity which has been enshrined in Article 28 of the CoK. It is also an immoral action due to its repeated harmful intentions and negative effect

⁹ Rodkin P.C, 'Peer Ecologies of Aggression and Bullying' in Espelage D.L and Swearer S.M (eds) *Bullying in American schools: A social-ecological perspective on prevention and intervention*, 1st ed, Lawrence Erlbaum Associates Publishers, 2004, 87-106.

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

¹¹ United Nations International Children's Emergency Fund Organisation, *Taking child protection to the next level in Kenya*, 2015, 2.

¹² The National Academics of Science, Engineering and Medicine, *Final Book*, 2016, 23.

¹³ Safety Standard Manual for Schools in Kenya: Ministry of Education, *First Edition*, 2008, 1-78.

¹⁴ Kahunga J.M, 'Factors Contributing to Bullying Among Students in Public Secondary Schools in Kiambu District, Kenya' Unpublished LLM Theses, Kenyatta University, 2013, 6.

on a person in a weaker position.¹⁵Therefore, it is expected and needed by children and their parents to be assured that conditions in school guarantee physical safety and psychological security.¹⁶

Bullying in Kenyan secondary schools has not been given much attention by researchers. Most have concentrated on causes and effects of strikes and indiscipline in schools, even though serious cases have been reported regarding this act.¹⁷

This research seeks to review whether the application and effectiveness of the laws and policies that are in place that try to curb this issue or lack thereof, and whether there is need for proper anti-bullying laws that will help better the effectiveness of dealing with the issue.

1.3 SIGNIFICANCE OF THE STUDY

This research is very core especially in the fields of academia and law and policy making. When it comes to law and policymaking, there is need for well-placed legislation and policy to prevent bullying from occurring. Further, there is need to come up with sufficient interventions when it occurs.¹⁸ The State has to make certain that any person whose rights or freedoms have been violated shall have an effective remedy, despite it being committed by persons acting in an official capacity,¹⁹ and shall aid by providing pertinent facilities for the proper handling of the case.²⁰ Hence, this will add a new aspect to the various articles and literature trying to tackle and better the already existing material, for the betterment of students' lives.

In academia, this research sheds light on some of the issues that are still in the dark or have not been appropriately dealt with when it comes to bullying in Kenya. It will also try to contribute to its understanding and how it happens in different cultures and schools and how to effectively view such differences.

¹⁵ Bauman S, 'The role of elementary school counsellors in reducing bullying' *Elementary School Journal*, 2008, 367.

¹⁶ Itegi F.M, 'Bullying and its Effects: Experiences in Kenya Public Secondary Schools' 5(2) *International Journal of Education and Research*, 2017, 23.

¹⁷ Abdullahi A., 'A Study of The Relationship Between Indiscipline Cases and Punishment Given to Secondary School Students in Wajir District' Unpublished LLM Thesis, Kenyatta University, 2006,2.

¹⁸ Sullo B, 'Bullying: The Importance of Defining our Terms' Funderstanding Organisation, 4 November 2011 - < <https://www.funderstanding.com/educators/bullying-the-importance-of-defining-our-terms/> > 2 March 2020.

¹⁹ Article 2 (3)(a), *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171.

²⁰ Article 26(1), *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, 10 June 1998.

The findings will contribute greatly to the benefit of the society considering bullying is and continues to be a prevalent issue in our society. The continuous intakes and studying of students in secondary schools justifies the need for a better and safe environment in schools. Hence, schools that employ effective mechanisms that curb this situation have a greater chance of moulding better and efficient students.

The findings will also contribute to the efforts of the Ministry of Education to develop proper execution of school preventative guidelines that would be expected to enhance a safe learning environment in schools in Kenya.

1.4 OBJECTIVES

The aim of the study is to investigate the policies and mechanisms put in place to curb bullying in Secondary Schools in Kenya by:

- i) Evaluating the current situation and analyse the factors that contribute to bullying in secondary schools.
- ii) Analysing the rights and freedoms infringed or violated by the incidence of bullying in Kenya.
- iii) Assessing the actions which the government Kenya and South Africa have taken to address bullying and whether the government of Kenya should take further steps to address the incidence of bullying in schools.

1.5 RESEARCH QUESTIONS

- i) What is the current situation in Kenya and what factors contribute to bullying in Kenyan Secondary Schools?
- ii) What rights and freedoms have been contravened by the incidence of bullying in Kenya?
- iii) What are the actions the government of Kenya and South Africa have taken to address bullying and is there need for the government of Kenya to formulate laws and policies for proper action and redress for the student victims?

1.6 HYPOTHESIS

It is hypothesised that; Kenya's legal and redress system that deals with bullying is not effective hence the victims continue to suffer as perpetrators go unpunished. Therefore, rights under Articles 28 and 53 are grossly violated.

1.7 RESEARCH METHODOLOGY

The study will use doctrinal methodology. This will involve the review of primary sources for example, statutes and law and secondary for example, books and journals. Other relevant sources include treaties case law, newspapers, online resources from the internet, research papers, reports, and dissertations. Materials will be analysed to assist on key and core information on the study. The study will also do a comparative research on South Africa's legal framework.

1.8 THEORETICAL FRAMEWORK

This paper will examine three theories namely, Social Learning theory, Social Capital theory and Social Ecology theory. Social Capital theory proponents are Pierre Bourdieu and James Coleman.²¹It views capital as the resource contained in social networks for individual or mutual benefit.²²This theory is relevant as it relates how people with low social capital are usually the victims and those with high social capital are usually the bullies²³and how this dynamic applies to each.

Albert Bandura proposed the Social Learning theory.²⁴ It proposes that a man can grasp new behaviours by watching others.²⁵Lastly is the Social Ecology theory which was founded by Murray Bookchin.²⁶It states that the beginning of today's ecological and social problems can be traced to different ranks of social organization.²⁷In relation to bullying, it hypothesises that behaviour leading to this act is influenced mostly by the social systems more than anything.²⁸These theoretical frameworks will be discussed further in chapter two.

1.9 LITERATURE REVIEW

When analysing the literature, this study looks at why the focus is on schools and not any other institution. How different researchers place a higher obligation to different institutions and

²¹ - < <https://files.eric.ed.gov/fulltext/EJ1128914.pdf> > on 21 December 2020.

²² Leenders R, 'Social Capital' in Alhaji R and Rokne J (eds) *Encyclopedia of Social Network Analysis and Mining*, Springer, New York, 2014, 1759.

²³ Bagwell C.L and Schmidt M.E, *Friendships in Childhood and Adolescence*, 1st ed, Guilford Press, New York, 2011,121.

²⁴ - < <https://www.simplypsychology.org/bandura.html> > on 21December 2020.

²⁵ - < <https://www.verywellmind.com/social-learning-theory-2795074> > on 21 December 2020.

²⁶ - < <https://www.socialworkdegreeguide.com/faq/what-is-social-ecology/> > on 21 December 2020.

²⁷ - < <https://www.definitions.net/definition/social+ecology> > on 21 December 2020.

²⁸ Espelage D and Low, S. M, 'Bullying among children and adolescents: Social-emotional learning approaches to prevention' in K. Nader (ed.), *School Rampage Shootings and Other Youth Disturbances: Early Preventive Interventions*, New York: Routledge, 2012, 211.

parties in the country to fight bullying. It will also highlight the current situation as it is. Finally, it tackles the issue on importance of having well placed policy and mechanisms.

Literature on bullying mainly focuses on the schools. Itegi does state that it is because bullying is usually likely in groups from which the potential victim cannot readily escape.²⁹ Schools have this kind of environment because schooling is normally mandatory and school transfers or home-schooling are not easy options especially in areas where learners are faced with issues of access to basic education like in remote areas.³⁰To add, it is also in a school setting where you find a peer in charge of another, that is, prefects and captains. They are more likely to abuse their power as was seen in the case of Alliance.

Kahunga, addresses the issue of bullying using qualitative and quantitative research where in his findings, he shows how it is prevalent in the country. Therefore, he tackles this issue by placing the obligation on the state. He states that the Ministry of Education should provide staff development training in prevention of bullying to ensure that there is a safe and healthy learning atmosphere.³¹The Ministry of Education is in a proper position to address this issue as it has a direct link to schools as compared to other ministries.

Bullying is not only an issue to be left to the Education Ministry. The Ministry of Health also plays a huge role. Smith, Cousins and Stewart argue that research evidence also indicates that bullying greatly affects a child's mental and physical health.³²Victimized children internalise symptoms such as anxiety, depression and low self-esteem. The bullies also have negative health risks as they are susceptible to violence and delinquency.³³ Wingren and Sahlqvist in their article emphasised this by stating that bullying is linked with dire symptoms of mental health problems, including self-harm.³⁴Students should not be exposed to such risks as it violates their rights.

Bullying can be actively and properly dealt with via a number of school-based actions and measures. Indeed, societal and home factors play a notable role both in giving rise to but also in preventing bullying. However, the role of the school in preventative work is also pivotal and

²⁹ Itegi F.M, 'Bullying and its Effects: Experiences in Kenya Public Secondary Schools'24

³⁰ Itegi F.M, 'Bullying and its Effects: Experiences in Kenya Public Secondary Schools', 25.

³¹ Kahunga J.M, 'Factors Contributing to Bullying Among Students in Public Secondary Schools in Kiambu District, Kenya' Unpublished LLM Theses, Kenyatta University, 2013, 34, 35, 45, 46, 55.

³² Smith D.J, Cousins B.J and Stewart R, 'Antibullying Interventions in Schools: Ingredients of Effective Programs' 28(4) *Canadian Journal of Education*, 2005, 740.

³³ Smith D.J, Cousins B.J and Stewart R, 'Antibullying Interventions in Schools: Ingredients of Effective Programs', 740-741.

³⁴ Maria E.A, Wingren L and Sahlqvist G, 'A Cross-Sectional Study of Victimization of Bullying Among School Children in Sweden: Background Factors and Self-Reported Health Complaints' 42(3) *Scandinavian Journal of Public Health*, 2014, 270.

should not be underrated.³⁵When it occurs, the first respondents are the teachers and the management of the schools. Hence, they play a major role.

The Government of Kenya released a ‘Government Questionnaire: United Nations Study on Violence Against Children’, which stated that the issue of bullying is dealt with through the Board of Governors recognized in the Education Act who take disciplinary action against errant students by either suspending or expelling the child. However, it does recognise lack of a specific legislation against bullying. No disciplinary or penal action may be taken except if there is proof of harm in which case will be treated as assault under the Penal Code.³⁶This makes it harder for students to take their cases to the court especially where they are unable to prove harm as to the standards required by the Penal Code.

A study done by Ndetei *et al*, revealed that between 63% to about 82% of students in Nairobi secondary schools had experienced bullying.³⁷A further study done in Kisumu by Okoth revealed that among those who took part, 31% had experienced bullying.³⁸ Another study was also done in Uasin-Gishu by Lugulu and Katwa and among the participants, 46% had been bullied by prefects in the name of discipline and punishment.³⁹These statistics further emphasis on the need to not entertain bullying anymore as it does affect a vast majority of the students in school.

Laas and Boezaart reveal that in South Africa, a number of constitutional rights are violated when this act happens. South Africa has the Child Justice Act and the Protection from Harassment Act which give proper redress to victims. The former goes a step further to advocate for restorative justice.⁴⁰ Both parties in a bullying situation are children hence there is need to focus on the victim’s healing as well as the perpetrator’s reintegration to society.

³⁵ Department of Education and skills, *Final Article, Anti-Bullying Procedures for Primary and Post Primary Schools*, 2013, 3.

³⁶ United Nations Study on Violence Against Children, ‘*Government Questionnaire: United Nations Study on Violence Against Children*’ 26.

³⁷ Ndetei M.D, Ongecha F.A, Khasakhala L, Syanda J, Mutiso V, Othieno J.C, Odhiambo G and Kokonya D.A, ‘Bullying in public secondary schools in Nairobi, Kenya’ 19(1) *Journal of Child and Adolescent Mental Health*, 2007.

³⁸ Okoth J.O, ‘Teachers’ and Students’ Perceptions on Bullying Behaviour in Public Secondary Schools in Kisumu East District, Kisumu County, Kenya’ 4(6) *Journal of Educational and Social Research*, 2014.

³⁹ Lugulu J.M.A and Katwa J, ‘Bullying in Public Secondary Schools in Uasin-Gishu County, Kenya Appraisal of Administrative Interventions’ 12(1) *Journal of African Studies in Educational Management and Leadership*, 2020.

⁴⁰ Laas A and Boezaart T, ‘The Legislative Framework Regarding Bullying in South African Schools’17(6) *Potchefstroom Electronic Law Journal*, 2014.

Research has uncovered that bullying is now a significant problem in the education sector and if it continues unchecked, the school environment can be negatively affected.⁴¹ The education sector is a key sector in our country as that is where the future of our country lies. Having this in mind and seeing the necessity to curb the situation, this research will carefully analyse how bullying and the lack of having a proper legislation, has mercilessly led to the gross violation of children's rights. It will also address the need of having anti-bullying legislation for protection of children in schools.

1.10 DELIMITATIONS

This study will mainly focus on Kenya. Further, this research will look at secondary schools. Hence, kindergartens, primary schools and universities will not form a core part of this research.

1.11 CHAPTER BREAKDOWN

The paper will be divided into five chapters:

Chapter one gives an introduction by stating the background of the study and the problem statement. Further it highlights the objectives and aims of the research, hypothesis and literature review. Finally, it states the methodology and the literature review used for the purpose of this research.

Chapter two discusses the theoretical framework that is applicable for the purpose of this research.

Chapter three looks at research questions number one and two which will discuss the current situation in Kenya and the rights and freedoms violated by the incidence of bullying.

Chapter four discusses research question three which will analyse the actions the government has taken and analyse if there is a need to formulate laws and policies to help further curb bullying in schools. This chapter will also include a comparative study focusing on South Africa.

Chapter five will then summarize the findings of the research and gives a conclusion by answering the research questions and giving solution and recommendation from the problem highlighted in the problem statement.

⁴¹ Glasner A.V, 'On the Front Lines: Educating Teachers about Bullying and Prevention Methods' 6(4) *Journal of Social Sciences*, 2010, 536.

CHAPTER 2: THEORETICAL FRAMEWORK

2.1 INTRODUCTION

Theories in general are important as they are used to explain and understand various phenomenon that exist in our society.⁴²The use of theories is particularly important to explain and illuminate and most importantly, understand social processes like school bullying.⁴³Bullying is a very complex behaviour and given its nature, a number of theories ought to be analysed to fully understand this social dynamic. This chapter analyses and discusses three theories. They are: Social Capital theory, Social Learning theory, and Social-Ecology theory.

2.2 SOCIAL CAPITAL THEORY

Bhandari and Yasunobu both used this theory as a collective asset in the form of values, beliefs, shared norms, networks, social relations, trust and institutions that enhance cooperation and collective action for mutual benefits.⁴⁴The two main proponents of this theory are Pierre Bourdieu and James Coleman.⁴⁵This theory reveals that there is benefit derived from sociability once relationships are formed.⁴⁶

Social Capital can be broken down into two.⁴⁷ Bonding social capital consisting of relationships between two people who are alike and belong to an equivalent group which in turn creates a feeling of inseparability and mutual belonging. Second, is bridging social capital consisting of social ties with persons in a different but comparable group that creates an opportunity broader social network.⁴⁸

⁴² Dubin, R, *Theory building*, 2nd ed, Free Press, New York, 1978, 17.

⁴³ Evans C and Smokowski P, 'Theoretical Explanations for Bullying in School: How Ecological Processes Propagate Perpetration and Victimization' *Child and Adolescent Social Work Journal*, 2015,2.

⁴⁴ Bhandari H and Yasunobu K, 'What is Social Capital? A Comprehensive Review of the Concept' 37(3) *Asian Journal of Social Science*, 2009, 482.

⁴⁵ Hauberer J, 'The Founding Concepts of Social Capital-Bourdieu's Theory of Capital and Coleman's Rational Choice Approach to Social Capital' Springer Link, 2006, 37.

⁴⁶ - < <https://www.socialcapitalresearch.com/guide-to-social-capital-the-concept-theory-and-its-research/#1569713314126-2817bb0f-4057> > on 22 September 2020.

⁴⁷ Putnam, R. D, 'Bowling alone: The collapse and revival of American Community' Simon & Schuster, 2000, 13.

⁴⁸ Beugelsdijk S and Smulders S, 'Bridging and Bonding Social Capital: Which Type is Good for Economic Growth?' European Regional Science Association, 2003, 5.

Most victims of bullying hardly have friends hence have a low social status which then results to a low social capital.⁴⁹ Even in instances where they have friends, these friends also do not provide the needed social capital as they are also usually not accepted in the larger peer group with the high social capital.⁵⁰ Victims, because they are perceived to have low social capital, are usually isolated and not invited to social functions and gatherings where they would have the opportunity to interact and perhaps bond with peers who could provide more social capital.⁵¹ Sadly, victims are frequently viewed as unacceptable friends because of their low social status consequently making it harder for them to make friends consequently lacking acquaintances who can protect them against bullying.⁵²

Perpetrators on the other hand do not have a problem obtaining social capital and even amass this social capital through their bullying antics hence forming some sort of social status.⁵³ They exert their power over their seemingly weaker peers hence relegating them to a lesser spot in the social hierarchy.⁵⁴ There are also the perpetrators who were once victims but become bullies to end their victimisation and increase their social capital.⁵⁵

Bullies are often seen as popular. Popularity does hold a high social status and hence a higher social capital because their peers then see them as socially prestigious and having power.⁵⁶ Therefore, perpetrators having this power protects them from being victims.⁵⁷ The perpetrators then have a group of people rallying behind them which increases their sense of self-worth and sense of belonging which boils down to an increased social capital. Also, being a leader of a group gives one the opportunity to interact and create social connections with other

⁴⁹ Bagwell C.L and Schmidt M.E, *Friendships in Childhood and Adolescence*, 1st ed, Guilford Press, New York, 2011, 121.

⁵⁰ Scholte R.H.J, Overbeek, G, Brink T.G, Rommes, de Kemp R.A.T, Goossens L and Engles R.C.M.E, 'The Significance of Reciprocal and Unilateral Friendships for Peer Victimization in Adolescence' 38(1) *Journal of Youth and Adolescence*, 2008, 96.

⁵¹ Evans C and Smokowski P, 'Theoretical Explanations for Bullying in School: How Ecological Processes Propagate Perpetration and Victimization' *Child and Adolescent Social Work Journal*, 2015,4.

⁵² Evans C and Smokowski P, 'Theoretical Explanations for Bullying in School: How Ecological Processes Propagate Perpetration and Victimization' *Child and Adolescent Social Work Journal*, 2015,5.

⁵³ Pellegrini A.D, 'Bullying, Victimization, and Sexual Harassment During the Transition to Middle School' 37(3) *Educational Psychologist*, 2002, 157.

⁵⁴ Rodkin P.C and Berger C, 'Who Bullies Whom? Social Status Asymmetries by Victim Gender' 32(6) *International Journal of Behavioural Development*, 2008, 479.

⁵⁵ Evans C and Smokowski P, 'Theoretical Explanations for Bullying in School: How Ecological Processes Propagate Perpetration and Victimization' *Child and Adolescent Social Work Journal*, 2015,4.

⁵⁶ Evans C and Smokowski P, 'Theoretical Explanations for Bullying in School: How Ecological Processes Propagate Perpetration and Victimization' *Child and Adolescent Social Work Journal*, 2015,5.

⁵⁷ Pellegrini A.D, Bartini M and Brooks F, 'School Bullies, Victims, and Aggressive Victims: Factors Relating to Group Affiliation and Victimization in Early Adolescence, 91(2) *Journal of Educational Psychology*, 1999, 220.

group leaders thus enlarging one's social status.⁵⁸ Eventually, when a group obtains the social power, members gain from it and will endeavour to maintain it usually by using bullying antics as means to stay on top.⁵⁹

2.3 SOCIAL LEARNING THEORY

The founder of this theory is one Albert Bandura.⁶⁰ It is premised on the idea that we learn from our interactivities and interplays with others in the social world.⁶¹ By observing peoples' conducts, we consequently assimilate, develop and then imitate the same behaviour.⁶² Hence, observing others will increase the chance of performing the observed action.⁶³

One does not have to have necessarily see a perpetrator bully a victim. It can be behaviour adopted from other family members, the media or any other environment.⁶⁴ Children that observe and get to experience hostile behaviours back at home end up having conflicting feelings of safety and love thus having a likelihood of becoming bullies.⁶⁵ Parents who tolerate their child's aggressive behaviours towards other children even if they should not, may encourage physical hostility for conflict resolution with other children.⁶⁶ However, Bandura explains that acquiring and performing an observed behaviour does not take place immediately but goes through four processes.⁶⁷

The first process is when a child acquires new responses to perform the behaviour. In this case a bully might have acquired a response to cause pain to another.⁶⁸ After a child has already acquired the behaviour, he or she learns whether or not to perform the behaviour in a given situation.⁶⁹

⁵⁸ Beugelsdijk S and Smulders S, 'Bridging and Bonding Social Capital: Which Type is Good for Economic Growth?'

European Regional Science Association, 2003, 5.

⁵⁹ Evans C and Smokowski P, 'Theoretical Explanations for Bullying in School: How Ecological Processes Propagate Perpetration and Victimization' Child and Adolescent Social Work Journal, 2015,6.

⁶⁰ Bandura A and Walters R.H, 'Social Learning and Personality Development', Holt Rinehart and Winston, 1963,329

⁶¹ Nabavi T.R, 'Bandura's Social Learning Theory & Social Cognitive Learning Theory' ResearchGate, 2012, 6.

⁶² Huston A, 'Social Learning Theory: Bullying in Schools' CORE, 2018, 69.

⁶³ Hill W.F, *Learning: A Survey of Psychological Interpretation*, 7th ed, Allyn and Bacon, Boston, 2001, 139.

⁶⁴ Huston A, 'Social Learning Theory: Bullying in Schools' CORE, 2018, 69.

⁶⁵ Ross, D, 'Bullying' in Sandoval J (ed.)2nd ed, *Hanbook of crisis counselling, intervention, and prevention in the schools*, pp. 105-135): Mahwah NJ: L. Erlbaum Associates, 2002, 111.

⁶⁶ Ross D, 'Bullying' 111.

⁶⁷ Bandura A, 'Social Learning Theory' Department of Psychology, Stanford University, 1977, 247.

⁶⁸ Huston A, 'Social Learning Theory: Bullying in Schools' CORE, 2018, 70.

⁶⁹ Huston A, 'Social Learning Theory: Bullying in Schools' CORE, 2018, 70.

The third process is elicitation where one person performs a behaviour and then bystanders join in the behaviour even when they had no intention to do so. This can be better seen when a group of student gang up on one vulnerable student.⁷⁰ Last is the process of vicarious enforcement whereby if the model is not punished but is instead praised for the behaviour, then, that behaviour is likely to be imitated. If the bully is not punished for his behaviour but is instead ‘worshipped’ a child is more likely to imitate him out of admiration.⁷¹

2.4 SOCIAL ECOLOGY THEORY

It was founded by Murray Bookchin who in his time felt that a number of environmentalists were trying to resolve ecological issues by focusing on the symptoms of the problems instead of the underlying root causes.⁷² Later on, Bronfenbrenner’s highlighted that classic ecological theory is a theory used as a framework to review the documented risk and protective factors associated with involvement in school-related bullying during childhood and adolescence.⁷³

Migliaccio and Raskauskas state that bullying encompasses a lot more than just the relationship that exists between the bully and the victim. It also involves the relationships that are developed within the several layers of social forces that create the culture that creates the space for bullying to occur.⁷⁴ These forces work hand in hand and give rise to the now bullying culture by defining and maintaining paths to power among students. Thus, it is key to factor in these layers, both in trying to understand bullying and in the development of prevention for bullying, and how power exists throughout the entirety of the system.⁷⁵

Understanding bullying from a socio-ecological point of view inspires us to think about how an individual, peer, family, school and all societal factors interplay to contribute to the same.⁷⁶

⁷⁰ Hill W.F, *Learning: A Survey of Psychological Interpretation*, 141.

⁷¹ Crain W, *Theories of Development: Concepts and Applications*, 5th ed, VA: Prentice Hall, Alexandria 2004, 98.

⁷² - < <https://www.socialworkdegreeguide.com/faq/what-is-social%20ecology/#:~:text=Founded%20by%20activist%20Murray%20Bookchin,factors%20while%20promoting%20direct%20democracy>. > on 23 August 2020.

⁷³ Bronfenbrenner U, ‘Toward an Experimental Ecology of Human Development’ 32(1) *American Psychologist*, 1977, 513-531.

⁷⁴ Migliaccio D and Raskauskas J, *Bullying as a Social Experience: Social Factors, Prevention and Intervention*, 1st ed, Farnham, Surrey: Ashgate Publishing Limited, New Zealand, 2015, 102.

⁷⁵ Migliaccio D and Raskauskas J, *Bullying as a Social Experience: Social Factors, Prevention and Intervention*, 105.

⁷⁶ - < <https://www.guilford.com/excerpts/swearer.pdf?t> > on 22 August 2020.

2.6 CONCLUSION

After analysing the above, it becomes clearer that bullying is a deep-rooted issue that can be advanced by an individual, and also, by the society as whole.⁷⁷ These theories have tried to analyse why bullying occurs. Hence, when making policies and laws, the state should consider these and other theories.⁷⁸ However, no single theory is the best or offers a better solution than the other. Therefore, in applying antibullying procedures the schools and the State should take into consideration the strengths and weaknesses of each theory and the appropriateness of its application to a particular bully or victim.⁷⁹

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https://www.academia.edu/21305402/A_socio_ecological_model_for_bullying_prevention_and_intervention_in_early_adolescence > on 22 August 2020.

⁷⁸ Ken R, 'Addressing bullying in schools: theory and practice' Australian Institute of Technology, 2003, 5.

⁷⁹ Ken R, 'Addressing bullying in schools: theory and practice' Australian Institute of Technology, 2003, 6.

CHAPTER 3: BULLYING IN KENYA: A CRISIS OR A NORM?

3.1 INTRODUCTION

When parents take their children to school, they hope that the wellbeing and security of their child is ensured. However, this is often not the case especially with the rising cases of school bullying.⁸⁰ Bullying in Kenya has been a continuing problem and it has consequently caused physical and psychological effects to a number of students.⁸¹ This chapter first seeks to analyse the Kenya's current trend and later analyses the various national and international legal frameworks adopted by Kenya to address this issue.

3.2 CURRENT SITUATION IN KENYA

A study was made in 2007 and the findings revealed that bullying has been a problem not just affecting today's society but also the past.⁸² A questionnaire was administered to 1012 students in Nairobi public schools.⁸³ It revealed that around 63.2% to 81.8% had experienced different types of bullying in school.⁸⁴ It was concluded that bullying was most common in national schools than any other classification of schools offered in the country.⁸⁵ It was noted by the researchers that bullying not only affects the students attentiveness in class and their preparedness to learn but also it interferes with their academic performance and also destroys their self-esteem.⁸⁶

In 2014, a study was made focusing on 447 students in Kisumu County.⁸⁷ 31.1% of the students admitted to having been bullied in school.⁸⁸ Another study was made in 2017 focusing on Kenya

⁸⁰ Njeru B, 'Exposed: The Inhumanity of Nairobi School Bullies' The Standard, 9 July 2019 - < <https://www.standardmedia.co.ke/nairobi/article/2001333197/bullying-how-nairobi-school-boy-was-battered> > on 20 September 2019.

⁸¹ Misigo J I, Kay J, Kibor E, 'The Relationship between Emerging Forms of Bullying and Self-Esteem among Secondary Schools Students in Bungoma County, Kenya' 1(3) *Editon Consortium Journal of Psychology, Guidance, and Counseling*, 2019, 77.

⁸² Ndetei M.D, Ongecha F.A, Khasakhala L, Syanda J, Mutiso V, Othieno J.C, Odhiambo G and Kokonya D.A, 'Bullying in public secondary schools in Nairobi, Kenya' 2007.

⁸³ Ndetei M.D, Ongecha F.A, Khasakhala L, Syanda J, Mutiso V, Othieno J.C, Odhiambo G and Kokonya D.A, 'Bullying in public secondary schools in Nairobi, Kenya', 45.

⁸⁴ Ndetei M.D, Ongecha F.A, Khasakhala L, Syanda J, Mutiso V, Othieno J.C, Odhiambo G and Kokonya D.A, 'Bullying in public secondary schools in Nairobi, Kenya', 49.

⁸⁵ Ndetei M.D, Ongecha F.A, Khasakhala L, Syanda J, Mutiso V, Othieno J.C, Odhiambo G and Kokonya D.A, 'Bullying in public secondary schools in Nairobi, Kenya', 54.

⁸⁶ Ndetei M.D, Ongecha F.A, Khasakhala L, Syanda J, Mutiso V, Othieno J.C, Odhiambo G and Kokonya D.A, 'Bullying in public secondary schools in Nairobi, Kenya', 53.

⁸⁷ Okoth J.O, 'Teachers' and Students' Perceptions on Bullying Behaviour in Public Secondary Schools in Kisumu East District, Kisumu County, Kenya' 2014.

⁸⁸ Okoth J.O, 'Teachers' and Students' Perceptions on Bullying Behaviour in Public Secondary Schools in Kisumu East District, Kisumu County, Kenya' 130.

public secondary schools. After collecting data from 300 students, the study found that 98.3% of the boys and 97.6% of the girls affirmed to have been bullied.⁸⁹ An important factor that was brought about in the research is that bullying decreased with the increase in class level. This is seen as 64% did acknowledge being bullied in form one, 24% in form 2, 10% in form 3 and 2% in form 4.⁹⁰ In 2018, a study done in Kajiado West focusing on girls' public secondary schools reflected the negative impacts of bullying.⁹¹ Stress, poor performance, low self-esteem and depression are among the effects associated with bullying.⁹²

One of the biggest perpetrators of bullying in Kenya are prefects. In Uasin-Gishu County, a study released in 2020, among 158 students, showed that 46% of them listed prefects as the top perpetrators.⁹³ In 2017, the media revealed that Alliance High School had a long-standing bullying culture.⁹⁴ More than ten students reported being beaten with sticks and electricity cables, slapped and forced to lie on the graves of the school's founders for hours on end at night and to 'swim' on grass. At least one of the students has been reduced to walking on crutches as a result of a severe beating.⁹⁵ It was further alleged that all this happened with the full knowledge of teachers and the administration.⁹⁶ Following from this, in the same year, a student from Lenana High School alleged to have been brutally beaten by prefects consequently suffering injuries in his private parts.⁹⁷

Another case is of a student in Nairobi School, who alleged in 2019, that he underwent the cruelty and brutality of prefects which consequently led him to getting a condition known as

⁸⁹ Itegi F.M, 'Bullying and its Effects: Experiences in Kenyan Public Secondary Schools', 27.

⁹⁰ Itegi F.M, 'Bullying and its Effects: Experiences in Kenyan Public Secondary Schools' 29.

⁹¹ Manyibe K.E and Anyona J, 'Effects of Bullying on Victims' Behaviour among Girls in Public Secondary Schools in Kajiado West, Kenya' 5(2) *African Research Journal of Education and Social Sciences*, 2018, 9.

⁹² Manyibe K.E and Anyona J, 'Effects of Bullying on Victims' Behaviour among Girls in Public Secondary Schools in Kajiado West, Kenya' 9.

⁹³ Lugulu J.M.A and Katwa J, 'Bullying in Public Secondary Schools in Uasin-Gishu County, Kenya: Appraisal of Administrative Interventions', 48.

⁹⁴ - < <http://www.kaeam.or.ke/articles/V12/V12C3.pdf> > on 20 September 2020.

⁹⁵ - < <https://nairobi.news.nation.co.ke/life/chilling-details-bullying-torture-alliance-high-school-photos> > on 20 September 2020.

⁹⁶ Kigotho W, 'We are breeding a generation of bullies at home and school' *The Standard*, 18 March 2017 - < <https://www.standardmedia.co.ke/commentary/article/2001233105/we-are-breeding-a-generation-of-bullies-at-home-and-school> > on 20 September 2020.

⁹⁷ Lenny L, 'Schools with the Worst Bullying Histories in Kenya' *Who Owns Kenya*, 11 April 2020 - < <https://whownkenya.com/index.php/2020/04/11/schools-with-the-worst-bullying-histories-in-kenya/> > on 20 September 2020.

hydrocephalus.⁹⁸In the same year, another student from Nyabondo Secondary School alleged that he was physically assaulted by his school mate to a point where his eye was damaged beyond repair.⁹⁹

The above analysis shows how deep rooted this issue is. This reality present in these secondary schools is beyond awful especially for the victims who live with the trauma for most of their lives.

3.3 FACTORS CONTRIBUTING TO BULLYING IN KENYAN SECONDARY SCHOOLS

Bullying is an old problem that dates as far back as the 1970s and is perceived as “ritual of passage” in schools.¹⁰⁰ It has been allowed in schools as part of a life experienced by students¹⁰¹and tolerated from a societal and cultural point of view.¹⁰² This culture is especially accommodated when it comes to what is known as “monolization” (bullying in Kenyan slang).¹⁰³

This is the bullying of students who have just joined the first year in high school by the senior students. The bullying is often severe and widespread but still considered a rite of passage.¹⁰⁴

A study done in Uasin-Gishu county among 158 students found that 65% of them did not report the matter because, judging from other victims, the schools rarely intervened or when they did, there was no substantive change.¹⁰⁵ This action furthers this problem as the perpetrators face no consequence. Also, prefects are allowed to administer punishments under supervision of deputy

⁹⁸ Lenny L, ‘Schools with the Worst Bullying Histories in Kenya’ Who Owns Kenya, 11 April 2020 - < <https://whownskkenya.com/index.php/2020/04/11/schools-with-the-worst-bullying-histories-in-kenya/> > on 20 September 2020.

⁹⁹ Lenny L, ‘Schools with the Worst Bullying Histories in Kenya’ Who Owns Kenya, 11 April 2020 - < <https://whownskkenya.com/index.php/2020/04/11/schools-with-the-worst-bullying-histories-in-kenya/> > on 20 September 2020.

¹⁰⁰ Misigo J I, Kay J, Kibor E, ‘The Relationship between Emerging Forms of Bullying and Self-Esteem among Secondary Schools Students in Bungoma County, Kenya, 76.

¹⁰¹ Itegi F.M, ‘Bullying and its Effects: Experiences in Kenyan Public Secondary Schools’ 28.

¹⁰² Kigotho W, ‘We are breeding a generation of bullies at home and school’ The Standard, 18 March 2017 - < <https://www.standardmedia.co.ke/kenya/article/2001232254/study-puts-kenya-top-of-global-bullying-chart> > on 20 September 2020.

¹⁰³ - < <https://www.kenyaforum.net/investigative/has-bullying-taken-a-new-turn-as-student-is-sexually-harassed-in-kenyan-school/> > on 20 September 2020.

¹⁰⁴ - < <https://www.kenyaforum.net/investigative/has-bullying-taken-a-new-turn-as-student-is-sexually-harassed-in-kenyan-school/> > on 20 September 2020.

¹⁰⁵ Lugulu J.M.A and Katwa J, ‘Bullying in Public Secondary Schools in Uasin-Gishu County, Kenya: Appraisal of Administrative Interventions’, 48.

principles who are generally responsible for discipline, but these powers have been widely abused.¹⁰⁶ This then perpetrates the school's stance on the vice further contributing to the problem.

The environment of the school also plays a significant role. In instances where the institution's high standards of treatment of others is not given a key importance, it has seen to have raised the chances of bullying.¹⁰⁷ Students in schools with a negative environment and atmosphere are negatively influenced by peers.¹⁰⁸ Bullying is also associated with schools that do not have a nurturing environment.¹⁰⁹ Additionally, substandard leadership, poor management styles, lack of supervision and lack of preventive measures seem to culture this vice.¹¹⁰ Positive perceptions of school climate promotes high self-esteem among learners and predicts lower levels of bullying.¹¹¹

Finally, the home environment is also a big player. Children from homes having severe and harsh styles of parenting and aggressive behaviour in the family usually have substandard role models who exhibit inappropriate and aggressive behaviour. Consequently, when they are in school, they then tend to imitate the behaviour they see at home.¹¹² Also, in an environment where parents use authoritarian method of discipline, their children become easily intimidated.¹¹³ In an environment where punishment is crueller and more violent than peaceful and positive interactions, children tend to be easily victimized.¹¹⁴

¹⁰⁶ Lugulu J.M.A and Katwa J, 'Bullying in Public Secondary Schools in Uasin-Gishu County, Kenya: Appraisal of Administrative Interventions' 48.

¹⁰⁷ Mugove K, 'Causes of Bullying in Boarding High Schools in Zimbabwe' 7(12) *International Journal of Scientific and Research Publications*, 2017, 653.

¹⁰⁸ Itegi F.M, 'Bullying and its Effects: Experiences in Kenyan Public Secondary Schools' 26.

¹⁰⁹ Gendron B, Kirk R, Nancy G Gendron, B., Kirk, R. and Nancy, G. (2011). An Analysis of Bullying Among Students within Schools: Estimating the Effects of Individual Normative Beliefs, Self-Esteem, and School Climate' 10(2) *Journal of School Violence*, 2013, 160.

¹¹⁰ Suckling A and Temple C, *Bullying: A Whole School Approach*, 1st ed, Jessica Kingsley Publishers, London, 2000.

¹¹¹ Itegi F.M, 'Bullying and its Effects: Experiences in Kenyan Public Secondary Schools' 26.

¹¹² Simuforosa M and Veronica N, 'Factors Leading to Bullying among Learners: A Case Study of Khami District Primary Schools, Zimbabwe 5(4) *Educational Research International*, 2016, 66.

¹¹³ Papanikolaou M, Chatzikosma T and Kleio K, 'Bullying at School: The role of family' 29(1) *Social and Behavioural Sciences*, 2011, 440.

¹¹⁴ Craig W, Peters R, and Konarski R, 'Bullying and Victimization among Canadian School Children', Human Resources Development Canada, 1998, 130.

3.4 LEGAL FRAMEWORK

It is a foundational human right for every child to feel sheltered and safeguarded in school and most importantly, to be protected from the ruthlessness and continuous intentional humiliation implied in bullying.¹¹⁵ The legal frameworks discussed in this subsection try to do this.

3.4.1 National Legal Framework

The CoK provides that everyone has a right to have their inherent dignity safeguarded and respected.¹¹⁶ Every individual has the quality of being worthy and honourable. It gives human life value and emphasises on a person's self-worth.¹¹⁷ Hence, when students are being bullied in schools, they are not treated honourably and thus their dignity is disrespected.

Article 29 states that no person should be subjected to torture in any manner, whether physical or psychological and secondly, no person shall be treated or punished in a cruel, inhumane or degrading manner.¹¹⁸ This freedom is upheld by taking responsibility for not hurting, bullying or intimidating others and even in cases of conflict, they should be solved in a peaceful manner.¹¹⁹ In cases where prefects are given so much power to punish the students; and easily abuse that power, they are contravening this Article grossly as they put their fellow students in inhumane conditions.

Article 53 provides for the protection of every child from abuse, all forms of violence and inhumane treatment and violence.¹²⁰ Moreover, the Basic Education Act Article 36(1), echoing the constitution, prohibits torture and cruel, inhuman or degrading treatment or punishment whether physical or psychological.¹²¹ In the case of *C K and Others v Commissioner of Police / Inspector General of the National Police Service and Others*¹²² the court stated that Article 53 entitles one to a fundamental inalienable right to be protected from all forms of violence, inhuman treatment and punishment and hazardous or exploitive behaviour. Bullying is a form of abuse and in some instances also constitutes violence which is prohibited. Also emphasized in the same Article is that the best interest of a child is of paramount importance in matters

¹¹⁵ Olweus, 'Peer harassment: A critical analysis and some important issues' in Juvonen J and Graham S, eds, *Peer Harassment in School*, New York: Guilford, 2001, 11.

¹¹⁶ Article 28, *Constitution of Kenya* (2010).

¹¹⁷ Laas A and Boezaart T, 'The Legislative Framework Regarding Bullying in South African Schools' 2676.

¹¹⁸ Article 29(d and f), *Constitution of Kenya* (2010).

¹¹⁹ - < <https://www.gov.za/about-government/government-programmes/bill-responsibilities> > on 23 September 2020.

¹²⁰ Article 53, *Constitution of Kenya* (2010).

¹²¹ Article 36(1), *Basic Education Act* (Act No 14 of 2013).

¹²² *C K and Others v Commissioner of Police / Inspector General of the National Police Service and Others* (2013) eKLR.

concerning them.¹²³ This is also echoed in the Children's Act, section 4(b).¹²⁴ Bullying gravely goes against the child's best interest and impairs their learning capacity and their development especially if it is left unhandled and the victim suffers.¹²⁵

Article 53 (1)(b) provides the right of every child to free and compulsory education.¹²⁶ What this means is that the State should provide an environment for the enjoyment of this right and eliminate whatever might hinder the full enjoyment.¹²⁷ In the case of *Erick Githua Kiarie v Attorney General and Others*¹²⁸ the court stated that the central role education plays is that it motivates and encourages positive change in society and it empowers everyone to realize their full potential. It is also essential for the enjoyment of our other rights.¹²⁹ Bullying interferes with this right especially if a victim cannot perform well in school or chooses not to go all together because of fear.

There is also the Computer and Cybercrimes Act which protects against cyber harassment.¹³⁰ This section safeguards victims from online bullies. Finally, we have the Penal Code that criminalizes a person who assaults another causing actual bodily harm¹³¹ as can occur in instances where bullying involves violence.

3.4.2 Regional and International Legal Framework

Kenya has ratified regional and international legal frameworks which according to Article 2(6) of CoK, constitutes part of Kenyan law. Importantly, these regional and international frameworks provide obligations Kenya must adhere to. For instance, the ACRWC states that a child's education shall be geared towards the promotion and development of the child's talents, mental and physical abilities and to their fullest potential fostering respect for human rights and fundamental freedoms.¹³² The same is also emphasized in the United Declaration of Human Rights¹³³ and the CRC¹³⁴. States should make certain that their schools implement and further

¹²³ Article 53 (2), *Constitution of Kenya* (2010).

¹²⁴ *Children Act*, (Act No. 8 of 2001).

¹²⁵ Laas A and Boezaart T, *The Legislative Framework Regarding Bullying in South African Schools*, 2676.

¹²⁶ Article 53(1)(b), *Constitution of Kenya* (2010).

¹²⁷ Laas A and Boezaart T, *The Legislative Framework Regarding Bullying in South African Schools*, 2677.

¹²⁸ *Erick Githua Kiarie v Attorney General and Others* (2016) eKLR.

¹²⁹ *Erick Githua Kiarie v Attorney General and Others* (2016) eKLR.

¹³⁰ Section 27, *Computer and Cybercrimes Act* (Act No.5 of 2018)

¹³¹ Article 251, *Penal Code* (Chapter 63).

¹³² Article 11(2) (a, b), *African Charter on the Right and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

¹³³ Article 26(2), *United Declaration of Human Rights*, 10 December 1948, 217 A(III).

¹³⁴ Article 29(1)(a), *United Nations Convention on the Rights of the Child*.

human rights for all students.¹³⁵In the case of *Centre for Human Rights and Rencontre Africaine pour la Défense des Droits de l'Homme v Senegal*¹³⁶ the African Committee stated that education should be geared towards the moulding of a child's personality, talents and mental and physical abilities to their fullest potential. Bullying incapacitates the child's full potential as it causes grave negative consequences both mentally and physically thus rendering this right unable to be achieved.

The Charter also states that Parties shall take all suitable steps to make certain any child subjected to the disciplinary measures of the school is treated with humanity and their dignity respected.¹³⁷This is also echoed in the CRC.¹³⁸ When prefects bully their peers in form of 'punishment' and schools take no action to provide a remedy, this Article is violated.

The CRC provides for the four cardinal principles of child protection. First is the obligation to provide equal opportunities among children.¹³⁹ It states that the Convention does apply to all hence giving no room for non-discrimination.¹⁴⁰ This principle can help highlight the biases that lead to unfair treatment. This principle protects the marginalised from being vulnerable to inhumane acts such as bullying.

Second is the participation principle which ensures that every child is in a position to express themselves and communicate their thoughts in matters concerning them.¹⁴¹ There are various reasons why this right is very important. First, it conveys the recognition of children as an active and influential matter and further expresses the child's right to dignity.¹⁴² Secondly, it clearly distinguishes the specific ability of each child and their needs.¹⁴³ Lastly, it places a child's concern at the centre when it comes to the decisions that affect them.¹⁴⁴ Thus, because bullying affects the child directly, they should be involved in the process of making better laws and policies.

¹³⁵ Greene M.B and Ross R, 'The Nature, Scope and Utility of Formal Laws and Regulations that Prohibit School-Based Bullying and Harassment' The National Conference of the Hamilton Fish Institute on School and Community Violence, 2005, 97.

¹³⁶ *Centre for Human Rights and Rencontre Africaine pour la Défense des Droits de l'Homme v Senegal*, ACmERWC Comm. 001/12, Activity Report (2012) 8.

¹³⁷ Article 11(5), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

¹³⁸ Article 28(2), *United Nations Convention on the Rights of the Child*.

¹³⁹ - < <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child> > on 7 December 2020.

¹⁴⁰ Article 2, *United Nations Convention on the Rights of the Child*.

¹⁴¹ Article 12, *United Nations Convention on the Rights of the Child*.

¹⁴² Lansdown G, 'Promoting Children's Participation in Democratic Decision-Making' Innocenti Insights, 2001, 1.

¹⁴³ Lansdown G, 'Promoting Children's Participation in Democratic Decision-Making' Innocenti Insights, 2001, 3.

¹⁴⁴ Lansdown G, 'Promoting Children's Participation in Democratic Decision-Making' Innocenti Insights, 2001, 2.

Third is the principle of survival and development. The Convention states that all children have a right to life, survival and develop physically, mentally, spiritually, morally, psychologically and socially to their full potential.¹⁴⁵ Indeed, bullying affects a child's well-being, their education and their health and is also associated with long-term negative effects.¹⁴⁶ Unlike adults, children go through a rapid and vulnerable process of development¹⁴⁷ thus should be protected from acts that might have an undesirable effect on them in the long run.

Lastly is the principle of the best interest of the child.¹⁴⁸ Article 3 emphasises on a child's best interest being the primary concern in decisions affecting them both in public and private.¹⁴⁹ Flowing from this, in the case of *A M v Premier Academy*¹⁵⁰ the court analysed the best interest principle. It stated that the best option in a school environment must consider the welfare and safety of other students and the behaviour of the child in school and the efforts and ability by the teachers to contain the behaviour of the child in school.¹⁵¹ This implies that the best interest of any child should entail their safety and protection from bullies while they are in school.

Additionally, Article 16 of the CRC states that no child shall be subjected to unlawful attacks on his or her honour and reputation and that the child has the right to the protection of the law against such interference or attacks.¹⁵² This further emphasises the protection duty needed for all students while in school.

Finally, the International Covenant on Economic, Social and Cultural Rights also states that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms.¹⁵³ In the case of *Timothy Wafula Makokha and Others v Council for Legal Education and Others*¹⁵⁴ the court stated that the right to education is one of the new generation of rights under the CoK. It added that in the UDHR and in ICESCR, the right is recognised as directed to the full development of

¹⁴⁵ Article 6, *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

¹⁴⁶ Office of the Special Representative of the Secretary-General on Violence Against Children, *Background Paper on Protecting Children from Bullying and Cyberbullying*, 4.

¹⁴⁷ Hodgkin R and Newell P, *Implementation Handbook for the Convention on the Rights of the Child*, 244.

¹⁴⁸ Article 3, *United Nations Convention on the Rights of the Child*,

¹⁴⁹ Article 3, *United Nations Convention on the Rights of the Child*.

¹⁵⁰ *A M v Premier Academy* (2017) eKLR.

¹⁵¹ *A M v Premier Academy* (2017) eKLR.

¹⁵² Article 29(1)(a), *United Nations Convention on the Rights of the Child*.

¹⁵³ Article 13(1), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

¹⁵⁴ *Timothy Wafula Makokha and Others v Council for Legal Education and Others* (2012) eKLR.

the human personality and the sense of its dignity. Further, the court quoted the General Comment Number 13 on the right to education of the Committee on Social, Economic and Cultural Rights where it was stated that Education is both a human right in itself and an indispensable means of realizing other human rights.¹⁵⁵With this, we see the important role education plays in our society. Tying this to bullying, we get to uncover the atrocious role it plays when it comes to hindering the realisation of the victim's other rights which is a grave violation.

3.7 CONCLUSION

Looking at the current trend vis-à-vis the legal frameworks provided to deal with this problem is key in terms of assessing the gap and looking for a solution. In doing so, analysing the frameworks in this chapter helps in distinguishing which rights are being violated, what recourse is given and what should be done. But it is clear that even with very many provisions, bullying continues to be a persistent problem hence begging the need to do more.

¹⁵⁵ *CESCR General Comment No. 13*, 1.

CHAPTER 4 IS THERE A NEED TO DO MORE? AN ANALYSIS OF THE STEPS TAKEN BY THE STATE

4.1 INTRODUCTION

Bullying is conceivably among the key forms of violence children undergo in their childhood and adolescent stages.¹⁵⁶ According to a task force report done by the Ministry of Education on student discipline and unrest in school done in 2001, it was observed that the adolescent age is a volatile one that is heavily characterized by identity crisis.¹⁵⁷ This explains why this stage is met with a lot of chaos and hostility as it is the stage where most children find their sense of belonging which sometimes can be driven with a lot of negativity. The Kenyan Government, through the Education Ministry, banned bullying officially in 2003 because of its violent nature.¹⁵⁸ However, this appalling act continues many years later.

This chapter first looks at the steps taken by the Government to curb bullying. Then, it analyses whether the measures are sufficient or if more has to be done. Finally, the chapter looks at a comparative study focusing on South Africa.

4.2 STEPS TAKEN FROM 2006-2020

During a parliamentary debate in 2006, the issue of bullying was raised. A member of parliament asked the then Minister for Education what he had done to minimize the issue of bullying in boys' secondary schools to which he answered that such matters are handled by the school in accordance with individual school rules.¹⁵⁹ This showed that responsibility befell mainly on the school when it comes to bullying.

In 2008, the Education Ministry issued the Safety Standards Manual for Schools in Kenya.¹⁶⁰ It was keen in pointing out learner to learner violence.¹⁶¹ It pointed out that violence in form of bullying was prevalent mostly and that it was illegal.¹⁶² It indicated that schools needed to ensure

¹⁵⁶ United Nations, *Ending the Torment: Tackling Bullying from the Schoolyard to Cyberspace* 2016, 123.

¹⁵⁷ Kahunga J.M, 'Factors Contributing to Bullying Among Students in Public Secondary Schools in Kiambu District, Kenya' published M. ed, Kenyatta University, Kitui, 2013. 24.

¹⁵⁸ Teachers' and Students' Perception on Bullying Behaviour in Public Secondary Schools in Kisumu East District Kenya. 126.

¹⁵⁹ Parliamentary Hansard Report, 14 June 2006, 1360.

¹⁶⁰ Ministry of Education, *Safety Standard Manual for Schools in Kenya*, 1 April 2008.

¹⁶¹ Ministry of Education, *Safety Standard Manual for Schools in Kenya*, 1 April 2008, 6.

¹⁶² Ministry of Education, *Safety Standard Manual for Schools in Kenya*, 1 April 2008, 6.

learners are safe from any form of physical, emotional and sexual abuse.¹⁶³ However, this particular provision did not adequately address bullying as it grouped it in a broad context of child abuse.¹⁶⁴

In the National Education Sector Plan issued by the Ministry of Education, Science and Technology in 2015, it emphasized on the importance of guidance and counselling.¹⁶⁵ It is important for the overall growth of a child as it builds on healthy character development.¹⁶⁶ This will in turn be very beneficial as counsellors can help bullies become better members of the society by using their professional skills to guide them.

A guidance and counselling section was set up in the Education Ministry in 1970.¹⁶⁷ It pointed out the necessity of strengthening guidance and counselling services as an essential service that should be provided to every student in all educational institutions in Kenya. The Ministry also expected all primary and secondary schools and tertiary institutions to establish and sustain viable guidance and counselling programmes.¹⁶⁸

Later on, in 2017, giving a speech in Mombasa, the then Cabinet Secretary for Education; Mr. Fred Matiangi, ordered investigations into the bullying of form one students.¹⁶⁹ He explained that the action was intolerable assuring parents that the government will do their best to stop the horrible act.¹⁷⁰ This speech was made after the bullying incident that happened in Alliance.¹⁷¹

¹⁶³ Ministry of Education, *Safety Standard Manual for Schools in Kenya*, 1 April 2008, 50.

¹⁶⁴ Kahunga J.M, 'Factors Contributing to Bullying Among Students in Public Secondary Schools in Kiambu District, Kenya' published M. ed, Kenyatta University, Kitui, 2013. 24.

¹⁶⁵ Ministry of Education, Science and Technology, *National Education Sector Plan*, 2015, 119.

¹⁶⁶ < [¹⁶⁷ Wango G.M, 'Curbing Violence in Schools: School and Teacher Preparedness, Kenya Institute of Professional Counseling, 2003, 10.](https://www.nalandaschool.org/importance-of-guidance-and%20counselling#:~:text=With%20regular%20guidance%20and%20counselling.children%20for%20a%20brighter%20future.> on 29 October 2020.</p></div><div data-bbox=)

¹⁶⁸ Wango G.M, 'Curbing Violence in Schools: School and Teacher Preparedness, Kenya Institute of Professional Counseling, 2003, 10.

¹⁶⁹ - <https://www.capitalfm.co.ke/news/2017/03/matiangi-assures-parents-ministry-cares-wont-tolerate-bullying/> > on 30 October 2020.

¹⁷⁰ -<<https://www.capitalfm.co.ke/news/2017/03/matiangi-assures-parents-ministry-cares-wont-tolerate-bullying/> > on 30 October 2020.

¹⁷¹ Kigotho W, 'We are breeding a generation of bullies at home and school' The Standard Media, 18 March 2017 - < <https://www.standardmedia.co.ke/adblock?u=https://www.standardmedia.co.ke/commentary/article/2001233105/we-are-breeding-a-generation-of-bullies-at-home-and-school> > on 2 November 2020.

Shortly afterwards, the Teachers Service Commission issued guidelines that would enhance the safety of learners in school and curb bullying.¹⁷² It emphasized that all forms of bullying should be eradicated.¹⁷³ Further, it also emphasized that prefects should be guided in their roles when it comes to school governance.¹⁷⁴ The inclusion of prefects was very important because, as much as schools allows for them to administer minor punishments under the supervision of the deputy principal, this power is seen to have been continually abused.¹⁷⁵

Nevertheless, given all these positive steps done by the government, cases continue to rise. The biggest question to be addressed then becomes, ‘What more can be done?’

4.3 IS THERE A NEED TO DO MORE?

There is an enormous worry in regard to bullying especially because of its serious repercussions for a student’s safety in school.¹⁷⁶ This has led to the need of having efficient legal framework to help curb bullying. The mandate and having the law itself can aid in shaping attitudes and behaviours.¹⁷⁷ South Africa has put in place different legal concepts, principles and procedures that guide the society when it comes to this matter.¹⁷⁸

4.3.1 WHAT HAS SOUTH AFRICA DONE?

In South Africa, just as in Kenya, the issue of bullying in schools has been in existence for many decades and the severity has been highlighted in various news outlets.¹⁷⁹ An article written in 2005 by Serrao and Russouw revealed an incidence where a father alleged that his sixteen-year-old daughter was sexually and physically abused repeatedly by three girls in her school hostel. Further, they forced her to drink liquid bleach which consequently led to her death.¹⁸⁰

¹⁷² Teachers Service Commission, Safety of Learners in Learning Institutions, 21 March 2017.

¹⁷³ Teachers Service Commission, Safety of Learners in Learning Institutions, 21 March 2017, 2.

¹⁷⁴ Teachers Service Commission, Safety of Learners in Learning Institutions, 21 March 2017, 2.

¹⁷⁵ Lugulu J.M.A and Katwa J, ‘Bullying in Public Secondary Schools in Uasin-Gishu County, Kenya: Appraisal of Administrative Interventions’ 45.

¹⁷⁶ Colvin G, Tobin T, Beard K, Hagan S and Sprague J, ‘The School Bully: Assessing the Problem, Developing Interventions, and Future Research Directions’ 8(3) *Journal of Behavioral Education*, 1998, 293.

¹⁷⁷ Rivara F and Le Menestrel S, *Preventing Bullying Through Science Policy and Practice*, The National Academies Press, Washington DC, 2016, 253.

¹⁷⁸ Mollo T N, ‘The Legal Perspective on the Establishment of Anti-Bullying Policies in Public Schools’ published BEd Dissertation, University of Pretoria, Pretoria, 2009, 38.

¹⁷⁹ De Wet C, ‘Educators’ perceptions on bullying prevention strategies’ 27(2) *South African Journal of Education*, 2007, 191.

¹⁸⁰ Serrao A and Russouw S, ‘Dad Mourns Needless Death’ Saturday Star, 9 April 2005, 1.

In the same year, another article was then written by Narran pleading a reclamation of lawless schools in South Africa because the issue had become very serious and rampant.¹⁸¹

To curb the challenge of bullying schools, South Africa has taken several steps and adopted various laws. This is demonstrated in the sections below.

4.3.1.1 The South African Constitution¹⁸²

Just like Kenya's case, the Constitution of South Africa recognizes human dignity which is both a right and a constitutional value.¹⁸³ In cases of bullying, the dignity of the victim is usually breached.¹⁸⁴ In addition, the Constitution provides for protection against violence, torture and cruel and inhumane treatment.¹⁸⁵ This provision safeguards the physical and psychological well-being of everyone including learners.¹⁸⁶

Children are accorded special constitutional protection. Section 28(1)(d) states that children have the right to be protected from, among the list, abuse. It also emphasizes on the paramountcy of the best interest of a child.¹⁸⁷ Not only does bullying go against the best interest of a child, but also endangers the lives of learners which should not be tolerated.¹⁸⁸ Lastly, it provides for the right to education.¹⁸⁹ Bullying infringes on this right because learners can barely enjoy it as it hinders their potential to perform well in school.¹⁹⁰

4.3.1.2 The South African Schools Act¹⁹¹

Section 8 states that all public schools must adopt a code for the learners after proper consultation with the various role-players.¹⁹² It should contain a set of rules that set a level for learners' behaviour and motivate them to have self-discipline and mutual respect. It also indicates how misbehaviour should be handled.¹⁹³ Lastly, this code provides the proper

¹⁸¹ Naran J, 'Reclaiming our Lawless Schools' Sunday Tribune, 12 June 2005.

¹⁸² *Constitution of the Republic of South Africa* (1996).

¹⁸³ Section 1, *Constitution of the Republic of South Africa* (1996).

¹⁸⁴ Laas A and Boezaart T, 'The Legislative Framework Regarding Bullying in South African Schools' 17(6) *Potchefstroom Electronic Law Journal*, 2014, 2676.

¹⁸⁵ Section 12, *Constitution of the Republic of South Africa* (1996).

¹⁸⁶ Laas A and Boezaart T, *The Legislative Framework Regarding Bullying in South African Schools*, 2676.

¹⁸⁷ Section 28(2), *Constitution of the Republic of South Africa* (1996).

¹⁸⁸ Laas A and Boezaart T, *The Legislative Framework Regarding Bullying in South African Schools*, 2676.

¹⁸⁹ Section 29, *Constitution of the Republic of South Africa* (1996).

¹⁹⁰ Laas A and Boezaart T, *The Legislative Framework Regarding Bullying in South African Schools*, 2677.

¹⁹¹ *The South African Schools Act* (Act No. 84 of 1996).

¹⁹² Section 8(1), *The South African Schools Act* (Act No. 84 of 1996).

¹⁹³ Section 8(5), *The South African Schools Act* (Act No. 84 of 1996).

framework within which a secure, disciplined, safe learning environment may be established.¹⁹⁴ This shows a need for the involvement of the school beyond the classroom. However, as much as this code is a step towards curbing this atrocity, bullying is rarely ever explicitly mentioned as a crime,¹⁹⁵ which would be helpful to highlight the relationship between other forms of misconduct and bullying.¹⁹⁶

The Act also provides a list of prohibited initiation practices. Bullying is not expressly mentioned but its elements are featured in some of the practices that are not to be tolerated such as endangerment of mental or physical wellbeing, undermining human dignity and humiliation.¹⁹⁷

Finally, Section 60 provides that a State can be liable for the damage, loss or injury incurred by a learner through the activities of a public school.¹⁹⁸ This means where a student is being bullied and the school is aware but does not act upon the same, they can be held liable in court and can be ordered to pay damages.¹⁹⁹

4.3.1.3 The Children's Act, 2005²⁰⁰

One of its aims is to give effect to the constitutional right of each child such as protection against abuse and promotion of a child's best interest.²⁰¹ Another goal of the Act is to provide structures and means for promoting and monitoring the physical, psychological, intellectual, emotional and social development while protecting them from physical and emotional harm.²⁰²

Secondly, the importance of dignity is pointed out.²⁰³ The section emphasises the importance of children to be treated as people and to be taken seriously and are to be acknowledged as right-

¹⁹⁴ Section 8(2), *The South African Schools Act* (Act No. 84 of 1996).

¹⁹⁵ Mollo N, 'A Legal Perspective on the Establishment of Anti-Bullying Policies in Public Schools' Published M. ed

Thesis, University of Pretoria, Cape Town, 2009, 93.

¹⁹⁶ Laas A and Boezaart T, *The Legislative Framework Regarding Bullying in South African Schools*, 2680.

¹⁹⁷ Section, 10A (3) (a, b and c), *The South African Schools Act* (Act No. 84 of 1996).

¹⁹⁸ Section 60, *The South African Schools Act* (Act No. 84 of 1996).

¹⁹⁹ Laas A and Boezaart T, *The Legislative Framework Regarding Bullying in South African Schools*, 2680.

²⁰⁰ *The Children's Act* (Act No. 38 of 2005).

²⁰¹ Section 2 (b) (iii and iv), *The Children's Act* (Act No. 38 of 2005).

²⁰² Section 2(d) and (f), *The Children's Act* (Act No. 38 of 2005).

²⁰³ Section 6(2)(b), *The Children's Act* (Act No. 38 of 2005).

bearers.²⁰⁴ This in turn, gives bullying the seriousness it deserves and not even given the status of normalcy.

Section 14 states that a child has the right to bring and to be assisted in bringing a matter to court. The State is required to put in place proper procedures which uphold the rules of natural justice,²⁰⁵ and also, these procedures should appropriately cover the rights of the victims and also the bullies.²⁰⁶ Section 15 then provides a list of people that have a right to approach a competent court on behalf of the child and does not limit it to the child, child's parents or their guardians.²⁰⁷

4.3.1.4 The Child Justice Act, 2008²⁰⁸

This Act establishes a criminal justice system for a child accused, separate from the normal system for adults.²⁰⁹ Its objective is to keep children away from detention and formal criminal justice system.²¹⁰ The Act refers to restorative justice by proposing its use in child justice while still guaranteeing and facilitating accountability and responsibility of the offender for his acts.²¹¹

The focus is more on rehabilitation rather than excluding the offender from society.²¹² Bullying, in some instances, does contain elements of a criminal offence such as grievous bodily harm. Hence, this Act provides a distinct justice system for a child found guilty of a crime.²¹³

The Act states that those above ten but below fourteen cannot be capable of forming an intent to commit a crime.²¹⁴ However, this can be rebutted if it is found that beyond reasonable doubt the child had the necessary criminal capacity.²¹⁵ Nonetheless, a child older than fourteen has full criminal capacity.²¹⁶

Bullying in itself has not been criminalised in South Africa hence not annexed in any of the schedules in this Act.²¹⁷ Nevertheless, this Act can properly cater for bullying by holding the

²⁰⁴ Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2682.

²⁰⁵ Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2683.

²⁰⁶ Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2683.

²⁰⁷ Section 15, *The Children's Act* (Act No. 38 of 2005).

²⁰⁸ *The Child Justice Act* (Act No. 75 of 2008).

²⁰⁹ Terblanche SS, 'The Child Justice Act: a detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders' 15(5) *Potchefstroom Electronic Law Journal*, 2012, 427.

²¹⁰ Terblanche SS, The Child Justice Act: a detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders, 428.

²¹¹ Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2685.

²¹² Gallinetti J, 'Getting to know the Child Justice Act' Child Justice Alliance, 2009, 12.

²¹³ Gallinetti J, 'Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime' in Boezaart T (ed) *Child Law in South Africa*, Juta and Company, Cape Town, 2009, 635-664.

²¹⁴ Section 7(2), *The Child Justice Act* (Act No. 75 of 2008).

²¹⁵ Section 11, *The Child Justice Act* (Act No. 75 of 2008).

²¹⁶ Section 7(3), *The Child Justice Act* (Act No. 75 of 2008).

²¹⁷ Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2689.

perpetrator accountable without ostracising them. This will enable them to learn from the situation through counselling and therapy and act better.²¹⁸

4.3.1.5 The Protection from Harassment Act, 2011²¹⁹

The Act defines harassment as behaviour aimed at causing harm or the belief that harm is imminent through; following or watching the victim or communicating with the victim.²²⁰ The similarity between harassment, as per this definition, and bullying is that in both, there is the undesirable conduct of the perpetrator, who aims at causing harm or fear of harm.²²¹ The differences between the two as per the definition is that bullying involves the show of force and continuous torment, which is not a prerequisite of harassment.²²² Hence, it can then be concluded in circumstances where harassment includes bullying, this act can apply.

Following from this, in situations where harassment includes bullying, anyone one who has material interest in the matter could bring an application for a protection order on behalf of the victim.²²³ However, the child can still apply for one without the help of parents.²²⁴ In this case, this section goes beyond by reducing common law limitations on a child's capacity to litigate and have access to a court of law.²²⁵ In such a situation, the clerk of the court must inform the complainant of his right and also lodge criminal charges against the respondent for *crimen injuria* or any other offence.²²⁶ The protection order will aid in prohibiting the perpetrator from bullying the victim further.

²¹⁸ Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2689.

²¹⁹ *The Protection from Harassment Act* (Act No.17 of 2011).

²²⁰ Section 1(1), *The Protection from Harassment Act* (Act No.17 of 2011).

²²¹ Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2672.

²²² Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2672.

²²³ Section 2(3)(a), *The Protection from Harassment Act* (Act No.17 of 2011).

²²⁴ Section 2(4), *The Protection from Harassment Act* (Act No.17 of 2011).

²²⁵ Laas A and Boezaart T, The Legislative Framework Regarding Bullying in South African Schools, 2690.

²²⁶ Burchell J M, *Principles of Criminal Law*, Juta and Company, 4th ed, Cape Town,2013, 746.

An interim protection order can be served to the child respondent even in his absence or even without notice.²²⁷ This order can be followed by an arrest warrant should the bully violate any terms set out in the order.²²⁸

4.3.1.6 Other Significant Measures

In 2012, the Department of Basic Education in South Africa released a workbook addressing the issue of bullying. It provides measures such as increasing supervision in hot spots and also an insistence on responding adequately to bullying incidents.²²⁹ Further, it gives example of when bullying can become an offence such as physically attacking another student and harassing.²³⁰

The Learner Attendance Policy puts a requirement on the School Governing Bodies to take a keen interest in the frequency of attendance of students at its school.²³¹ It states that a student is considered absent school when not present in the classroom or not taking part in a school activity when the register is marked.²³² This policy places a responsibility on the school to follow up on attendance and uncover student absenteeism caused by bullying.

4.3.1.7 Case Law

a) *Knouwds v Administrateur Kaap*²³³

This case involved an injury of a girl which happened in the school grounds as she was playing with her friend on a lawnmower. Consequently, the plaintiff initiated a claim for damages from the school.²³⁴ It was held that most children act carelessly and irrationally and can easily become unaware of their surroundings. The judge went further and stated that these attributes should have been known by the school principal as he interacts with the children everyday thus should have envisaged an injury to a young child and as a result was held liable.²³⁵ This case shows that educators should always take precautionary steps in order to minimize the occurrence of

²²⁷ Section 3(2), *The Protection from Harassment Act* (Act No.17 of 2011).

²²⁸ Section 9(6), *The Protection from Harassment Act* (Act No.17 of 2011).

²²⁹ - < http://www.cjcp.org.za/uploads/2/7/8/4/27845461/addressing_bullying_in_schools_workbook.pdf > on 6 December 2020.

²³⁰ - < http://www.cjcp.org.za/uploads/2/7/8/4/27845461/addressing_bullying_in_schools_workbook.pdf > on 6 December 2020.

²³¹Section 21, *National Education Policy Act: Policy on Learner Attendance* (Notice 360 of 2010).

²³² Section 13, *National Education Policy Act: Policy on Learner Attendance* (Notice 360 of 2010).

²³³ *Knouwds v Administrateur Kaap* (1981) The Supreme Court of Appeal of South Africa.

²³⁴ *Knouwds v Administrateur Kaap* (1981) The Supreme Court of Appeal of South Africa.

²³⁵ *Knouwds v Administrateur Kaap* (1981) The Supreme Court of Appeal of South Africa.

avoidable injuries²³⁶ This can be implied also in bullying cases especially where the school was aware of the situation but failed to act, they should be held liable.²³⁷

b) *Dowling v Diocesan College and Others*²³⁸

The plaintiff sued the school and two prefects for damages arising out of assaults allegedly perpetrated by the prefects on his son at school. The school had the right to control the performance of prefects' duties and the assaults had been carried out in the course and scope of those duties. It was held that a case of vicarious liability could be made out against a school for delicts committed by its prefects.²³⁹ When one learner causes another learner harm, especially in the capacity as a prefect, there should be answerability and personal liability both on the school and the perpetrator.²⁴⁰

4.4 CONCLUSION

From the above, we see a comparison between both jurisdictions. First, both their constitutions provide for similar rights and protections. They both have provisions on respect of dignity, on best interest of the child, right to education and protection from abuse and all forms of violence and inhumane treatment. All these provisions speak against bullying when applied effectively.

South Africa has gone a step further and adopted The Child Justice Act. This puts South Africa a step ahead as this Act seeks to ensure that child justice matters are managed in a rights-based manner and to aid children suspected of committing crime to change for the better and become fruitful members of society by engaging with the child in restorative justice measures among other options.²⁴¹ Kenya on the other hand has the Children Act.²⁴² Nevertheless, it does not go further into providing ways of counselling and rehabilitation of child offenders. Thus, when it

²³⁶ Molokela D.M, 'Supervision of Learners as an Aspect of School Safety' published BEd Dissertation, Rand Afrikaans University, Johannesburg, 2003, 32.

²³⁷ Laas A, 'Combating Bullying in Schools: A South African Legal Perspective' published LLB Dissertation, University of Pretoria, Pretoria, 2012, 151.

²³⁸ *Dowling v Diocesan College and Others* (1999) The High Court of South Africa.

²³⁹ *Dowling v Diocesan College and Others* (1999) The High Court of South Africa.

²⁴⁰ Laas A, 'Combating Bullying in Schools: A South African Legal Perspective' published LLB Dissertation, University of Pretoria, Pretoria, 2012, 153.

²⁴¹

https://www.youthpolicy.org/library/wp%20content/uploads/library/2008_Child_Justice_Act_2008_Information_Booklet_Eng.pdf > on 5 January 2021.

²⁴² Part VI, *Children Act* (Act No. 8 of 2001).

comes to bullying, it lacks a proper legal backing of how to deal with the offenders aside from sanctions and punishment which might not always be effective.

South Africa has also adopted the Protection from Harassment Act. This Act provides a remedy in the form of a protection order which would prohibit a person from harassing another person and when violated constitutes an offence.²⁴³ Hence, where bullying constitutes harassment, which is the case most times, a protection order can be sought by the victim. In Kenya, there is the Computer and Cybercrimes Act which protects against cyber harassment.²⁴⁴ This is effective for cyber bullying but not physical bullying. As it stands, there is no Act that provides for protection orders except the Protection Against Domestic Violence Act. Therefore, adopting such an Act would widen the spectrum and protect victims of bullying too.

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[https://www.justice.gov.za/forms/form_pha.html#:~:text=Protection%20from%20Harassment%2%20Act%2C%202011%20\(Act%2017%20of%202011\),-The%20Protection%20from&text=The%20Act%20aims%20to%20provide,or%20a%20period%%20of%20imprisonment.](https://www.justice.gov.za/forms/form_pha.html#:~:text=Protection%20from%20Harassment%2%20Act%2C%202011%20(Act%2017%20of%202011),-The%20Protection%20from&text=The%20Act%20aims%20to%20provide,or%20a%20period%%20of%20imprisonment.) > on 5 January 2021.

²⁴⁴ Section 27, *Computer and Cybercrimes Act* (Act No. 5 of 2018).

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

The research paper sought to establish whether the act of bullying is an infraction of Articles 28 and 53 of the Constitution. The first chapter introduced the research problem, highlighted the research questions to be answered and the hypothesis upon which the research would be based on. The second chapter assessed different theoretical frameworks that try to explain bullying.

The first objective was analysed in chapter three which discusses the current situation in Kenya and the different legal frameworks present. Chapter four discusses the steps taken by government to address bullying. It also looks at a comparative study between the Kenyan and South African Laws put in place to help curb bullying. The final chapter discusses the conclusions arrived at during the study and finally gives recommendations that might help remedy the issue.

5.2 CONCLUSION

This research established the existence of various legal frameworks that address the issue brought out in this paper. These body of laws give references mainly to; the right to education, the best interest of a child and the right of every child to be protected from all forms of violence and inhumane treatment and punishment. Nevertheless, these frameworks have not specifically addressed bullying in of itself and this presents a problem because it is not adequately dealt with. Indeed, it can be concluded that this grave act needs to stop. Not only is it a violation of Article 53, but also the long-term negative effects drawing from it is beyond acceptable. Having laws and proper mechanisms that are set out will be part of a greater advancement in the bid of ending bullying. This, in turn, will help create a sane environment for all children while in school; thus, being able to reach their maximum potential without hinderance.

5.3 RECOMMENDATIONS

5.3.1 Enact Legislation that Deals Expressly with Bullying

From the findings of the research, we see a lack of robust legislation that deals with this issue. Having proper legislation will not only make it easier for victims to get redress, but also the perpetrators wrong doings are expressly spelt out, hence having proper legal sanction

Legislation is an essential building block in the system of child protection. It sends a message to the society about how to properly guarantee the protection of each child and also provides a

proper foundation for a well needed culture of respecting the rights of children.²⁴⁵ This in turn encourages an action of social change in attitude and behaviour that overlook brutality against children.²⁴⁶

5.3.2 Schools to adopt Proper Mechanisms and Measure to Curb Bullying

Proper mechanisms and measures need to be adopted by schools to help in the curbing of bullying. Early initiatives by the school will help prevent future patterns of bullying and lessen the probability of a child reacting with violence or falling victim to the same.²⁴⁷

Having bullying prevention programmes is important. Most programmes begin with a baseline assessment of levels and patterns of bullying to inform programme design and against which to monitor effects.²⁴⁸ It includes training for all school staff and parents on how to effectively deal with bullying, and training for teachers on how to deliver the Programme and how to manage relationships and behaviour in the classroom. Teachers learn to instruct students about the basics such as what bullying is; how to recognize it; what to do in cases of bullying; effective relationship skills, and skills for bystanders.²⁴⁹

Schools should offer mental health and other supportive services to victims and perpetrators by ensuring that there is access to child sensitive counselling which in turn helps to build resilience and provide avenues for seeking redress and finding safety within the school.²⁵⁰ Hence, having proper mechanisms put in place will act as a preventive tool before it is too late.

5.3.3 Adoption of Restorative Justice in Dealing with Perpetrators

Bullying has serious negative consequences and using retaliatory and punishing methods proves futile mostly as this adds salt to the already painful injury.²⁵¹ Using restorative justice will help in

²⁴⁵ Office of the Special Representative of the Secretary-General on Violence Against Children, *Background Paper on Protecting Children from Bullying and Cyberbullying*, 9-10 May 2016, 19.

²⁴⁶ Office of the Special Representative of the Secretary-General on Violence Against Children, *Background Paper on Protecting Children from Bullying and Cyberbullying*, 9-10 May 2016, 19.

²⁴⁷ Office of the Special Representative of the Secretary-General on Violence Against Children, *Background Paper on Protecting Children from Bullying and Cyberbullying*, 9-10 May 2016, 24.

²⁴⁸ World Health Organisation, *Preventing Youth Violence: An Overview of the Evidence*, 2015, 30.

²⁴⁹ World Health Organisation, *Preventing Youth Violence: An Overview of the Evidence*, 2015, 30.

²⁵⁰ Office of the Special Representative of the Secretary-General on Violence Against Children, *Background Paper on Protecting Children from Bullying and Cyberbullying*, 9-10 May 2016, 24.

²⁵¹ Laas A, 'Combating Bullying in Schools: A South African Legal Perspective' published LLB Dissertation, University of Pretoria, Pretoria, 2012,167.

not focusing on the misbehaviour but on consequences.²⁵² This is because it addresses issues not from a criminal lens but rather from a lens of trying to make sure there is no repeat of the act.²⁵³ Restorative justice requires the perpetrator to be part of the process that plays a role in restoring the victim's dignity.²⁵⁴ This will help teach the perpetrator a valuable lesson as they reflect on the negative effects their behaviour caused on the victim.²⁵⁵ Schools should avoid using retaliatory measures that only seek to punish the bullies as this does not offer a good response to the problem. In actual fact, both the victim and the perpetrator are children who need equal love and care.²⁵⁶ Restorative justice recognises this by advancing solutions that will be very beneficial to both parties at the end of the day.

²⁵² Reyneke M, 'The Right to Dignity and Restorative Justice in Schools' 14(6) *Potchefstroom Electronic Law Journal*, 2011, 138.

²⁵³ Laas A, 'Combating Bullying in Schools: A South African Legal Perspective' published LLB Dissertation, University of Pretoria, Pretoria, 2012, 164.

²⁵⁴ Reyneke M, 'The Right to Dignity and Restorative Justice in Schools', 140.

²⁵⁵ Reyneke M, 'The Right to Dignity and Restorative Justice in Schools', 140.

²⁵⁶ Office of the Special Representative of the Secretary-General on Violence Against Children, *Background Paper on Protecting Children from Bullying and Cyberbullying*, 9-10 May 2016, 26.

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