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Reflections on the status of protection of the rights of persons
with intellectual and psychosocial disabilities in Kenya

*Keynote address by Hon. Lady Justice Grace Ngenye, JA,
Chairperson, National Committee on Criminal Justice Reforms
delivered on 8 June 2023 at Kabarak University,
Bethel Auditorium.....*

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Foreword

16 June is a special day set aside for celebrating the child in Africa and, by extension, understanding and enforcing the rights of the child in Kenya. On this day, we remember our brothers and sisters who were killed and injured in Soweto, South Africa, in 1976 as they fought for some of the rights we freely enjoy today. I would like to thank the Kabarak University and Save the Children International for making a great stride in reinforcing the rights of the child with this initiative to celebrate the Day of the African Child 2023.

This year's theme of the Day of the African Child was 'The rights of the child in the digital environment'. On this day, Kabarak University and Save the Children hosted the First Model African Committee of Experts on the Rights and Welfare of the Child Moot Competition. The importance of the moot court competition cannot be gainsaid as it brought together state and non-state justice sector actors, practitioners, academicians and persons of interest at all levels to promote the rights of the child.

This year's celebration granted us an opportunity to engage in conversations on how to enhance the rights of the child. We shared unique experiences and best practices, reflecting on challenges impeding the realisation of children's fundamental rights, and collaboratively generating workable solutions towards the reform and generation of practical strategies and approaches aimed at addressing the identified challenges. With a cause as serious as the safety and well-being of our children, we cannot afford to close ourselves off from new ideas. I am optimistic that we will continue to use such fora to learn from each other.

It is no secret that we are firmly in the digital age, with increased internet access and usage globally within the last decade. With the rise of what has been termed as the 'digital age' have risen new threats to human rights and especially children's rights. The vulnerability of children exposes them to abuse by online predators, which usually takes the following forms: child trafficking, cyberbullying, infringement of data privacy and online child pornography.

The African Child has been included, as children are more adept at internet usage than the older generations, meaning they are more exposed to the virtual environment. The exposure, in effect, has fundamentally changed the manner in which children exercise their rights and has indeed brought to the fore the need to enforce additional measures to ensure their rights are well protected. For that reason, we celebrate this edition of the *Kabarak Journal of Law and Ethics* (Volume 7, 2023), with its special focus on child rights.

The liberalisation of telecommunication markets in Africa has heralded increased availability of wireless technologies and broadband capacity. Internet penetration and ICT access on the continent has grown remarkably over the last few years. In Kenya, it was projected that the country had 23.35 million internet users as of January 2023, with the penetration rate standing at 42.0%. The *Disrupting harm in Kenya report* (2021) found that 67% of Kenyan children are internet users; 7% have been offered money or gifts in return for sexual images or their own videos; 3% have been threatened or blackmailed online to engage in sexual activities; 7% have had their sexual images shared to third parties without permission.

To address this, Kenya has put in place laws such as the Computer Misuse and Cybercrimes Act, the Penal Code, and the Children Act to address online child abuse. The Kenya Communications Authority has also drafted the Industry Guidelines for Child Online Protection and Safety in Kenya, 2022. The enactment of the Children Act of 2022 (the Act) sought to address the new challenges in the realisation of the rights of the child, among which are those brought about by the increased internet penetration within the country and across the globe. The Act

has included explicit provisions on protecting children from online abuse, harassment or exploitation.

More specifically, the Act seeks to protect children by criminalising and imposing stiff penalties on perpetrators of cyberbullying, child trafficking, prostitution, child pornography, early-age exposure to alcohol advertising, and identity theft. The National Council on the Administration of Justice and Department of Children Services have also both developed guidelines and manuals to combat Online Child Sexual Exploitation and Abuse (OCSEA). The development of these important documents was out of the realisation that we cannot run away from technology, but we can only seek avenues of protecting our children in this digital age. These legislative developments, amongst others, set the stage for internet service providers to implement appropriate child online protection and safety policies and strategies before making their services accessible to children.

I am very optimistic that with the efforts put in so far and those being constantly made by the various government agencies and partners in the child justice system, we shall be able to achieve the desired results. The moot competition acted as a reminder of our common interests and concerns in protecting the rights of the child. We therefore must become each other's keepers, given that failure by one of us affects nearly all of us. A constant dialogue between all stakeholders in this direction would be required to fill in the gaps and update our understanding of the issues that impede the children's best interests. This calls for:

1. The strengthened protection of children from online abuse, violent extremism, trafficking and other emerging risks by all actors.
2. Support for moot courts across universities, and initiatives in universities, high schools and primary schools, such as the Wakili wa Watoto Initiative and Mtoto na Sheria by students.
3. Supporting and promoting awareness on the rights of children in the digital age by highlighting the importance of

the curriculum on children and the law in universities so as to shape the future of human rights and children's advocates.

I am optimistic that your dedication will serve the child in Kenya well. In this regard, the authors in this Special Edition of the *Kabarak Journal of Law and Ethics* are the champions of implementing the best practices towards ensuring that the child in Kenya is protected. The policy suggestions herein should guide all child rights advocates in Kenya in significantly shaping the future of the child-friendly justice system agenda.

Hon. Lady Justice Teresia Mumbua Matheka, MBS
Judge of the High Court of Kenya & Chairperson of the NCAJ
Standing Committee on the Administration of Justice for Children
in Kenya

June 2023

Editorial

We are pleased to present the seventh volume of the *Kabarak Law Journal of Law and Ethics* (KJLE), which focuses on the Kenyan Children Act of 2022.

In the lead up to this publication, Kabarak University in collaboration with Save the Children (Kenya and Madagascar) successfully organised a hybrid half-day conference to commemorate the Day of the African Child on 16 June 2023. The conference brought together child law scholars and practitioners to reflect on the theme 'The rights of the child in the digital environment'. Professor Robert Nanima, Expert Member of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), and Justice Heston Nyaga, Judge of High Court of Kenya, were among the chief guests. We are proud to publish Professor Nanima's keynote address in this volume.

It is a singular privilege to have Justice Teresia Matheka's Foreword that revitalises the success of the conference and ushers the conversations in this volume.

Achach Jamaranda opens the discussion with a social commentary packaged in a poem, *In the Matter of TT minor*. The poem satirically depicts the contradictions that manifest in litigating the best interest of the child principle. Personifying a child who muses over the absurdities that make up court proceedings, the poem ultimately concludes that parents' interests tend to trump the child's best interests.

Four full-length articles expound the conversation. Cedric Kadima's piece titled *Raising the minimum age of criminal responsibility in Kenya* interrogates how Kenya arrived at the ages of 12 and 14 as the minimum age of criminal responsibility in the Children Act of 2022.

Through a critical examination of the domestic and international legal instruments and scientific foundations of the minimum age of criminal responsibility, Kadima finds that the Children Act of 2022 adopts a position on the minimum age that the Committee on the Rights of the Child abandoned. The various stakeholders, in Kadima's view, missed the opportunity to resolve this during the drafting stages.

In the second piece, *The nexus between the best interest of the child and detention of children in conflict with the law*, Terry Moraa and George Gor contend that the Children Act of 2022 reaffirms the best interest of the child principle. For children in conflict with the law, this principle urges custodial sentencing as a measure of last resort. The authors advocate rights-based and diversionary measures to child justice especially family group conferencing as the two maximise the potential for rehabilitation and reintegration of children in conflict with the law.

The third article by Julie Lugulu, *The child's right to a nationality in Kenya under the Children Act of 2022*, examines the adherence of the Act's provisions on nationality to the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Lugulu narrows her analysis to the silence of the 2022 Children Act on illegal deprivation of nationality. She puts forward that the lack of safeguards against revocation of a child's nationality places the child at risk of statelessness. This does not align with the Convention on the Rights of the Child, which obliges the Government of Kenya to assist children whose nationality has been arbitrarily and unlawfully deprived.

Finally, Christine Njane and Vianney Seyabiga write about *Enhancing child participation in family disputes through child inclusive mediation in Kenya*. Recognising the enactment of the Children Act of 2022 as a new dawn for amplifying children's voices generally, the authors criticise the functions of the Office of the Secretary of Child Services within the Act as vague and insufficient to protect the best interests of children in family mediations. This leads to child-focused as opposed to child-inclusive mediation, which has been mainstreamed by South Africa's Office of the Family Advocate. Njane and Seyabiga, therefore, propose measures that could prioritise child-inclusive mediation including mass

media awareness campaigns about the benefits of involving children's self-expression in family mediation.

The volume concludes with two speeches. The first as mentioned earlier features Professor Robert Nanima's keynote address on the commemoration of the Day of the African Child. The speech first congratulates Kabarak University School of Law and Save the Children for inaugurating the First Model ACERWC Moot Competition centred on the tool of state reporting in empowering child rights in the digital space. Secondly, the speech urges State Parties of the African Charter on the Rights and Welfare of the Child to broaden their protection of children through a multi-environmental approach, signalling that the digital age proves that children in Africa do not occupy a homogenous space.

Lastly, Justice Grace Ngenye's keynote address titled 'Reflections on the status of protection of the rights of persons with intellectual and psychosocial disabilities in Kenya', closes the volume. The speech was delivered during the launch of three publications on mental health rights on 8 June 2023 at Kabarak University, co-sponsored by the Kenya National Commission on Human Rights (KNCHR) and Validity Foundation. First the keynote address lauds the efforts of Kabarak University School of Law for its scholarly contributions in its book *Mental health and the criminal justice system*. Likewise, the speech congratulates the KNCHR for publishing two reports namely: *Mapping of organisations of and for persons with psychosocial and intellectual disabilities*; and *Still silenced: A quality rights assessment of selected mental health facilities in Kenya assesses*. Justice Ngenye then outlines select initiatives of the National Committee on Criminal Justice Reforms, which she chairs. In doing so, the speech describes the Committee's efforts in transforming the criminal justice system into a fair, inclusive and effective guarantor of the rights of persons with intellectual and psychosocial disabilities.

We would like to express our heartfelt gratitude to all those who participated in the editing and reviewing of this volume, led by Sam Ngunire who served as Editor-in-Chief of this volume, and Sandra Musoga, Dr Sam Mburu, Melissa Mungai and Hilda Chebet.

In the Matter of TT (minor)

Achach Jamaranda

Toto is my name,
In court they call me TT (minor)
An anonymous specimen
Over which parents haggle
As they disagree on what is in my best interest
Why do they fight over me?
They begot me together
Me, a public manifestation of their private endeavours
They called me a blessing when born
Now, in difficult vocabulary and through hired voices
They address each other with new names
Over my best interest!
We start with court five matters
In the matter of TT (minor)
Under certificate of urgency
TT esquire?
TT LLP?

Your honour
Best interest of the minor
I act for the Claimant
The Claimant deserves custody
At the cost of the Respondent
She is an irresponsible mother

* Social commentator

She forgot my birthday last year
We need one year to file our supporting documents

Your honour
Best interest of the minor
I act for the Respondent
The Respondent deserves custody
At the cost of the Claimant
He is an irresponsible father
He squeezes the toothpaste tab in the middle
He does not complement my new *matutas*
We need two years to file our supporting documents

Best interest of the minor
Court five not sitting this month
Just like we did not last month
Just like court seven will not next month
Seminars in Mombasa
On how to clear backlog
Matter adjourned
Till December, 31st, 2064
Parties at liberty to apply

Best interest of my parents
Best interest of the court
Best interest of the advocates
Much obliged!
Next matter?
In the matter of my parents (major)?

Raising the minimum age of criminal responsibility in Kenya

Cedric Kadima*

Abstract

This paper investigates why and how Kenya reviewed its minimum age of criminal responsibility while enacting the Children Act of 2022. The Act creates a range; a lower level of the minimum age of criminal responsibility of 12 years and a higher level of 14 years. In the preceding regime of laws, the minimum age for criminal responsibility was 8 and 12 years, respectively. The paper interrogates how Kenya arrived at the ages of 12 and 14. In doing so, the paper will examine the foundations of the minimum age of criminal responsibility and some of the international legal instruments affecting the minimum age of criminal responsibility.

Keywords: children, criminal responsibility, minimum age, *doli incapax*, child rights

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Introduction

Under the Penal Code (Cap 63 Laws of Kenya), a child aged eight could be criminally liable for any act or omission.¹ Such a child was presumed to have understood that their actions were wrong. Thus, such a child could be subjected to investigations, tried and convicted, potentially resulting in them having a criminal record for life. This regime of law coexisted with the Children Act of 2001.²

However, Section 221(1) of the Children Act of 2022 prescribes the minimum age of 12 years for a child to be held criminally responsible for any act or omission, but not more than 14 years.³ This means that between the age of 12 and 14, there is a rebuttable presumption that the child was incapable of differentiating between a wrong and a right. Though the provisions on consequential amendments in the Act fail to list Section 14 of the Penal Code,⁴ the doctrine of implied repeal could be invoked to presume that Section 14 of the Penal Code was amended consequentially. Be that as it may, Section 4 of the 2022 Act which declares its supremacy over all other legislation on children's matters makes the provision in Section 221(1) outrank the Penal Code.

The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child encourage states parties to establish a minimum age for criminal responsibility.⁵ In General Comment No 10 of 2007, the Committee on the Rights of the Child (Committee) concluded that a minimum age lower than 12 years *to be internationally unacceptable*.⁶ Further, the Committee encouraged states parties to adopt 12 years as the absolute minimum age and continue

¹ Penal Code (Cap 63), Section 14(1).

² Children Act (No 141 of 2001).

³ Children Act (No 29 of 2022), Section 221(2).

⁴ Penal Code (Cap 63), Section 14.

⁵ Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, Article 40(3); African Charter on the Rights and Welfare of the Child, 1 July 1990, CAB/LEG/24.9/49, Article 17.

⁶ Committee on the Rights of the Child (Committee), General Comment No 10: Article 32 on Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, para 32.

increasing it to a higher age level. General Comment No 10 was later replaced by the Committee's General Comment No 24 of 2019, which set the minimum age at 14 and abandoned 12.

The Children Act of 2022, which was passed three years after General Comment No 24, affirmed 14 years as the internationally acceptable minimum age of criminal responsibility. This begs the question: did the drafters of the 2022 Act consider recommendations of international bodies seriously, or did they engage in empirical research and comparisons in law before setting the minimum age at 12 years?

This paper will interrogate the developments in the law that informed the drafters to revise the minimum age of criminal responsibility from 8 to 12 years. In doing so, the paper will interrogate domestic decisions before courts of law, international treaties and international treaty bodies' reports and recommendations that are relevant, and importantly, the preparatory documents of the drafters. It will adopt the structure below.

First, the paper will conceptualise the basis for the minimum age of criminal responsibility. Second, it will interrogate how the minimum age of criminal responsibility entered Kenya's legal system. Third, it will expose the existing acceptable standards on the minimum age of criminal responsibility. Fourth, it will document the path towards harmonisation of the minimum age of criminal responsibility and enacting the Children Act of 2022. Lastly, the paper will summarise its conclusions and give recommendations.

Basis of the minimum age of criminal responsibility: The *doli incapax* rule

The age of criminal responsibility can be conceptualised as the age at which the law considers that a person '*has the capacity and a fair opportunity or chance to adjust his behaviour to the law*'.⁷ This conceptualisation

⁷ Mathew Hale, *History of the pleas of the Crown*, Volume 1, 1736, 17-19.

presupposes three things, as summarised by Thomas Crofts.⁸ One, the age of criminal responsibility is when a child is considered old enough to be processed within the criminal justice system as an adult. Two, it is the age at which a child can be punished like an adult. Three, it is the age at which a child is thought to have the capacity required for criminal responsibility. This connotes that they could be charged, tried and convicted of a criminal offence.⁹ Notably, the base indicator is the specific treatment of children and adults in the criminal justice system.

The law treats adults and children differently when it comes to criminal responsibility. Andrew Von Hirsch fronts two arguments for this justification.¹⁰ First, children may be deficient in capacity to appreciate the consequences of their actions, unlike adults. Second, children may be less capable to resist impulses than adults. James Dold attributes the differential treatment to a scientific explanation. For instance, he made a submission that:

Studies have shown that children's brains are not fully developed. The pre-frontal cortex, which is responsible for the temporal organisation of behaviour, speech, and reasoning, continues to develop into early adulthood.

As a result, children rely on a more primitive part of the brain known as the amygdala when making decisions. The amygdala is responsible for immediate reactions, including fear and aggressive behaviour. This makes children less capable than adults of regulating their emotions, controlling their impulses, evaluating risk and reward, and engaging in long-term planning. This also makes children more vulnerable, more susceptible to peer pressure, and heavily influenced by their surrounding environment.¹¹

The Committee notes the distinction between children and adults.¹² It comments that their physical and psychological development are

⁸ Thomas Crofts, 'The common law influence over the age of criminal responsibility in Australia' 67(3) *Northern Ireland Legal Quarterly* (2016) 4-6.

⁹ Crofts, 'The common law influence over the age of criminal responsibility' 4-6.

¹⁰ Andrew von Hirsch, 'Proportionate sentences for juveniles: How different than for adults?' 3(2) *Punishment and Society*, 223-226.

¹¹ James L Dold, Testimony in support of HB 2238 before the Hawaii House Committee on Human Services & Homelessness, submitted on 7 February 2020.

¹² Committee, General Comment No 10, Children's Rights in Juvenile Justice, Article 32 on 25 April 2007, CRC/C/GC/10.

different. Further, their emotional, educational and other needs are also distinct. Therefore, such differences act as basis for the lesser culpability of children in conflict with the law compared to adults.¹³

On the other hand, adults are deemed to make mature judgements, have reasoning, abstract thinking and planning, better impulse control, avoid risks likely to accrue by a commission of a crime, a rational process and avoidance of self-harm among many others.¹⁴

Therefore, physical, cognitive, and emotional development between adults and children is different, and so should their treatment regarding criminal liability.

Basis of the minimum age of criminal responsibility in common law

Under common law, the doctrine of *doli incapax* presumes that a child does not possess the necessary knowledge to have criminal intent.

The *Black's Law Dictionary* defines *doli incapax* as 'incapable of criminal intention or malice; not of the age of discretion; not possessed of sufficient discretion and intelligence to distinguish between right and wrong to the extent of being criminally responsible for his actions'.¹⁵ The capability to possess the intelligence to comprehend intention and malice is called *doli capax*.¹⁶

The doctrine had two approaches in its development: a lower age of criminal responsibility and a higher age of criminal responsibility.¹⁷ In the former, a child was excused from criminal responsibility and culpability. In the latter, criminal responsibility was a rebuttable

¹³ Committee, General Comment No 10.

¹⁴ Rolf Loeber and David P Farrington, 'Introduction', in Rolf Loeber and David P Farrington (eds), *From juvenile delinquency to adult crime criminal careers, justice policy, and prevention*, Oxford University Press, 2012, 4.

¹⁵ Black's Law Dictionary, Fourth Edition, 646.

¹⁶ Black's Law Dictionary, Fourth Edition, 646.

¹⁷ Crofts, 'The common law influence over the age of criminal responsibility', 4-6. Hale, *History of the pleas of the Crown*, 14-15.

presumption with evidence proving that the child knew what they did was seriously wrong in the criminal case.¹⁸

Common law set the lower age of criminal responsibility at 7 and 14 years on the higher side. England transferred the applicability of this doctrine to most of its colonies, for example, India and Australia. An example where the principle was tested in India was *Shyam Bahadur Koeri v State of Bihar*.¹⁹ In this case, the High Court determined that a child under the age of 7 years was incapable of bearing criminal responsibility. A highlight of the facts was that a child, Thomas, aged below 7 found a gold plate and did not report this to the Collector. The Collector knew the fact later. He prosecuted Thomas under the Indian Treasure Trove Act of 1878. Thomas' advocates filed an application to the High Court challenging the order of the Collector to prosecute him as he was below 7 years. The Court acquitted Thomas based on the doctrine of *doli incapax*.

Notably, in England, the *doli incapax* rule was abolished by the 1998 Crime and Disorder Act.²⁰ The Act marked a radical reorganisation of the English juvenile justice system, emphasising children taking more responsibility for criminal actions as its clarion call.²¹ The then Home Secretary Jack Straw spearheaded the juvenile justice system reform that led to the abolition of the *doli incapax* rule. Straw was evident in his agenda that the principle had to be abolished. Lord Williams of Mostyn published a White Paper titled 'No more excuses' supporting Straw's position. In his paper, he stated:

Young people, too, should face up to the consequences of their offending. The rule of *doli incapax* can stand in the way of holding properly to account 10 to 13-year-olds who commit crimes. Young people of that age know it is wrong to steal, vandalise or commit an assault. We will abolish this archaic rule to ensure they are answerable for their offences.

¹⁸ Matthew Johnston, 'Doli incapax: The criminal responsibility of children' Presentation at Sydney for the Children's Magistrates' Conference, 1 February 2006, 1.

¹⁹ *Shyam Bahadur Koeri and others v State of Bihar*, Patna High Court, Judgement, 20 September 1965.

²⁰ United Kingdom Crime and Disorder Act (No 37 of 1998).

²¹ Leanne Munro Gibson, 'The abolition of *doli incapax* and the alternatives to raising the age of criminal responsibility', *Northumbria Legal Studies Working Paper Series* (2019) 4-5.

Final Warning: firm action is needed when young people begin to offend. But this has yet to happen. So we will replace repeat cautions with a new reprimand and final warning scheme to provide a consistent, graduated police response to youth crime, within a clear statutory framework.²²

The government at the time agreed with them. The stated reason was that the child had a much better education and could distinguish between right and wrong even at a very young age.²³ Therefore, they could be held responsible for the crimes that they commit. This led to the enactment of Section 34 of the 1998 Crime and Disorder Act that abolished the *doli incapax* rule.²⁴

Background on Kenyan law on the minimum age of criminal responsibility

When Kenya became a British protectorate, the Laws of England became applicable in Kenya.²⁵ When Kenya gained independence in 1963, the existing legal regime was retained through re-enactment.²⁶ Also, Kenya adopted into its legal system common law applicable in the United Kingdom as of 12 August 1897.²⁷ Consequently, since common law had a fixed age of criminal responsibility, it became applicable in Kenya.²⁸

Kenya adopted the *doli incapax* rule on the minimum age of criminal responsibility. Kenya needed comprehensive legislation on children's

²² Lord Williams of Mostyn, 'No more excuses: A new approach to tackling youth crime in England and Wales', Youth Justice White Paper, HL Deb 27 November 1997 vol 583 cc 1121-32, para 1123.

²³ Gibson, 'The abolition of *doli incapax* and the alternatives to raising the age of criminal responsibility', 4-5.

²⁴ Gibson, 'The abolition of *doli incapax* and the alternatives to raising the age of criminal responsibility', 4-5.

²⁵ Michael Nyongesa Wabwile, 'The place of English law in Kenya' 3(1) *Oxford University Commonwealth Law Journal* (2003) 1-3.

²⁶ Wabwile, 'The place of English law in Kenya' 1-3.

²⁷ Judicature Act (No 16 of 1967) Section 3.

²⁸ William Blackstone, 'Commentaries on the Laws of England' Clarendon Press, 1765, 58.

rights, specifically on juvenile justice. The Children Act of 2001 was the first comprehensive legislation. However, it failed to set a minimum age of criminal responsibility. This meant the age continued to be set by the Penal Code (Cap 63).²⁹

Section 14(1) of the Penal Code provides for the minimum age of absolute immunity from criminal responsibility to be 8 years. Section 14(2) sets 12 years as the age at which a child could be held criminally liable if proven otherwise. Notably, Kenya adopted the common law approach but reduced the upper limit from 14 to 12 while increasing the minimum age of criminal responsibility from 7 to 8 years.

The reason that propelled Kenya to modify the minimum and upper age limits is unclear. Mohammed Hussain and Clement Mashamba suggest the modification was because the United Kingdom had also changed their legislation. First in 1932, through the Children and Young Persons Act and later, the 1989 Children Act.³⁰

Regarding Section 14 of the Penal Code, children between 8 and 12 years old are considered immature. Under the provision, a court of law had an obligation to assess the child's capacity and knowledge of the subject and make a finding on the same.³¹

An example is the appellate case of *Republic v JO and another*.³² In the appeal, Justice Majanja reasoned that Section 14(2) of the Penal Code captures the common law rebuttable presumption of the *doli incapax* rule. He opined that the rule operated to deem a child between the prescribed age group incapable of committing a criminal act. The respondents, the accused persons, were between 9 and 12 years old. The trial court had rejected the charges because of the age of the accused persons. However, on appeal, Justice Majanja recognised the applicability of *doli*

²⁹ Penal Code (Cap 63), Section 14.

³⁰ Mohammed S Hussain and Clement Mashamba, *Child rights and the law in East Africa*, LawAfrica, 2014, 390.

³¹ *Republic v EM*, Criminal (Revision) Case 14 of 2015, Ruling of the High Court at Embu, 24 June 2015, [eKLR], para 4.

³² Criminal Appeals 135 and 136 of 2014 (consolidated), Judgment of the High Court at Homabay, 19 October 2015, [eKLR].

incapax rule, and that it meant that criminal responsibility is a question of fact. Given that the accused children were between 9 and 12 years old, the Judge ruled that the prosecution was entitled to disprove the presumption of a lack of capacity to commit an offence by marshalling appropriate evidence.³³

Therefore, under the *doli incapax* rule, an accused child aged between 8 and 12 years can only be held liable for an offence if the prosecution can rebut the presumption of incapacity by showing that, at the relevant time, the child had the requisite mental capacity.

However, courts have had an unsettled interpretation of Section 14(3) of the Penal Code that relates to criminal responsibility for some sexual offences. The Section states, ‘a male person under the age of twelve is presumed to be incapable of having carnal knowledge.’

The Section could be interpreted in two ways: first, a male child under the age of 12 is incapable of having carnal knowledge. Therefore, an irrebuttable presumption that no criminal responsibility arises.³⁴ Second, it could mean that the presumption that a male child under the age of 12 is incapable of having carnal knowledge is a rebuttable presumption that can be disproved by evidence.

Majanja J supports the latter – that the presumption is rebuttable. He interpreted Section 14(3) of the Penal Code in the case of *Republic v JO and another*.³⁵ He reasoned that Section 14(3), just like Section 14(2), creates a rebuttable presumption. He supports his reasoning by introducing a conjectural scenario that only removing the phrase ‘presumed to be’ from Section 14(3) would have made it clear that the presumption was irrebuttable.³⁶

In the High Court case of *Republic v EM*,³⁷ Justice Muchemi supports the former, that Section 14(3) creates an irrebuttable presumption for

³³ *Republic v JO & another*, para 8.

³⁴ William Musyoka, *Criminal law*, LawAfrica, 2013, 100; *Republic v EM*, para 11.

³⁵ *Republic v JO & another*, para 8.

³⁶ *Republic v JO & another*, para 8.

³⁷ *Republic v EM*, para 11.

a male child under 12 relating to carnal knowledge. In the case, the respondent was charged with an unnatural offence contrary to Section 162(a)(i) of the Penal Code before the Magistrates Court (trial court). The trial court ascertained the age of the accused from the birth certificate. It established that at the commission of the crime, the accused was 11 years old.

It then made an order acquitting the accused while reasoning that Section 14(3) creates an irrebuttable presumption that any male under the age of 12 is incapable of carnal knowledge.

The prosecution decided to invoke the revisionary jurisdiction of the High Court. However, the High Court fully agreed with the trial court, upheld the acquittal, and held that Section 14(3) provided an irrebuttable presumption.

These divergent interpretations by courts of concurrent jurisdiction could be resolved by setting one minimum standard that will not be open to interpretation. In case of room for interpretation, then precise cannons in legislation should provide the parameters.

International standards on the minimum age of criminal responsibility

International law has several instruments that incorporate the minimum age of criminal responsibility. Kenya is party to both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and is bound by their obligations.

Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child

At the time of adoption of the CRC, there was a need to have a comprehensive statement on children's rights that bound states under international law. The CRC has four overarching principles to aid its interpretation as a whole and guide national implementation

programmes. The principles include, non-discrimination, the right to life, survival and development, the right to be heard and, most relevant to juvenile justice, the child's best interest.³⁸

The best interest of the child is founded on Article 3 of the CRC. It dictates that when state authorities make decisions which affect children, the best interests of children must be a primary consideration.³⁹ It relates to decisions by courts of law, administrative authorities, legislative bodies and public and private social welfare institutions. The principle of non-discrimination guarantees that every child, without exception, enjoys their rights without any distinction on status.⁴⁰ The principle of survival and development grants the child the right to life and guarantees their socio-economic rights.⁴¹ The principle of inclusion and participation dictates that every child can express their views and be respected.⁴²

Article 40(3)(a) of the CRC requires states to set a minimum age of criminal responsibility. The wording of Article 40(3)(a) is mirrored in Article 17(4) of the African Charter on the Rights and Welfare of the Child. However, both provisions fail to prescribe the minimum age of criminal responsibility among member states. Sharon Detrick and Godfrey Odongo have observed that during the drafting of Article 40(3)(a) of the CRC, there were no discussions on age and criminal responsibility. They note further that the only reference was the states' acknowledgment of 'the right of children accused or recognised as conflicting with the penal law not to be considered criminally responsible before reaching a certain age.'⁴³

³⁸ CRC Article 3; United Nations Child Fund (UNICEF), 'Four principles of the Convention on the Rights of the Child' *UNICEF*, 29 June 2019, --<<https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child>> on 3 March 2024 .

³⁹ CRC, General Comment No 14: Article 3 on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC /C/GC/14, para 1.

⁴⁰ Convention on the Rights of the Child, Article 2.

⁴¹ Convention on the Rights of the Child, Article 6.

⁴² Convention on the Rights of the Child, Article 12.

⁴³ Sharon Detrick and others, *The United Nations Convention on the Rights of the Child: A guide to the "Travaux préparatoires"* Kluwer Academic Publishers, Dordrecht, 1992, 492-494. Godfrey Odongo Odhiambo, 'The domestication of international law standards

The failure to prescribe a uniform standard made different states have disparities in the minimum age of criminal responsibility. For example, Kenya maintained the minimum age of criminal responsibility at between 8 years and 12 years. However, Uganda had a different standard. Uganda depended on the *doli incapax* rule as it was a former British colony, just like Kenya, and set the minimum age of criminal responsibility at 7 and 14 years.

However, after the CRC came into force, Uganda became a party to the Convention and enacted the Ugandan Children Act of 1996. In this Act, the minimum age of criminal responsibility increased from 7 years to 12 years.⁴⁴ Consequently, the Act abolished the *doli incapax* rule.⁴⁵ Conversely, Kenya's minimum age of criminal responsibility at the time was 8 years and 12 years, a disparity within the same existing international standards. This demonstrates that the ability of children to understand and comprehend their actions differs widely across cultures and even within a given society.⁴⁶

The path towards a homogenous minimum age of criminal responsibility

The Committee is a treaty body of experts with the mandate to monitor and report on the implementation of the CRC.⁴⁷ Over the years, it has developed jurisprudence on the obligation of states to establish a minimum age for criminal responsibility.

First, the Committee has set out clearly that failure by a state to establish a minimum age of criminal capacity is a violation of the CRC.⁴⁸

on the rights of the child with specific reference to juvenile justice in the African context', LLD Thesis, University of the Western Cape, 2005, 146.

⁴⁴ Uganda Children Act (Chapter 59), Section 88.

⁴⁵ Hussain and Mashamba, *Child rights and the law in East Africa*, 390.

⁴⁶ Odongo, 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' 146.

⁴⁷ Convention on the Rights of the Child, Article 43.

⁴⁸ Esther Waitherero King'ori, 'Strengthening access to justice of a child in conflict with the law: A case for law reform' LLM Thesis, University of Nairobi, 2015, 50.

For example, in its concluding observations to Guatemala in 1996, the Committee noted that Guatemala had no national legislation that prescribed the minimum age of criminal responsibility, hence, it was incompatible with the CRC.⁴⁹ Second, the Committee has concluded that certain minimum ages set by states as very low and, hence, a violation of the CRC. For instance, in 2016, Kenya's minimum age of criminal responsibility was set at 8 years. The Committee lamented that the age was unacceptable by international standards.⁵⁰ Third, the Committee has maintained that abolishing the *doli incapax* rule would violate the CRC.⁵¹ Thus, it recommends a lower limit and an upper limit for the minimum age of criminal responsibility.

On the other hand, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), in Aspiration 8 of Agenda 2040 aspires that every member state, including Kenya, should adjust the minimum age for criminal responsibility to a minimum of 12 years. During its 35th Ordinary Session, the ACERWC considered the Second Periodic Report from Kenya on implementing the African Children's Charter. In its concluding observations,⁵² the ACERWC recommended that Kenya should amend its Penal Code and increase the minimum age of criminal responsibility to internationally accepted standards.⁵³ Thus, Kenya raised the minimum age of criminal responsibility from 8 years to 12 years.⁵⁴

⁴⁹ CRC, Concluding observations: Guatemala, 7 June 1996, CRC/C/15/Add.58, paras 15, 29.

⁵⁰ CRC, Concluding observations on the combined third to fifth periodic reports of Kenya, 21 March 2016, CRC/C/KEN/CO/3-5, paras 75-76.

⁵¹ CRC, Concluding observations: Isle of Man (United Kingdom of Great Britain and Northern Ireland), 16 October 2000, CRC/C/15/Add.134, paras 18-19.

⁵² Concluding observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Second Periodic Report of the Republic of Kenya, 2020, para 12.

⁵³ Report of the African Committee of Experts on the Rights and Welfare of the Child, AU Executive Council 33rd Ordinary Session, December 2021, para 12.

⁵⁴ Concluding recommendations by ACERWC on the Kenya 1st Periodic Report on the status of implementation of the African Charter on the Rights and Welfare of the Child, 2014, para 13.

General Comment No 10 of 2007

In 2007, the Committee noted from reports submitted by states that there was a wide disparity in the minimum age of criminal responsibility.⁵⁵ The ages were as low as 7 years or 8 years, and as high as 14 years or 16 years.⁵⁶ The Committee also commended states' use of the two minimum ages of criminal responsibility. The Committee interpreted that if a child in conflict with the law, who at the time of the commission of the crime is at or above the lower minimum age, but below the higher minimum age, the child is assumed to be criminally responsible only if they have the required maturity in that regard.⁵⁷ Further, the assessment of this maturity is left to the court, often without the requirement of involving a psychological expert. The Committee pointed out a danger that when courts have discretion, it often results in using the lower minimum age in cases of serious crimes.⁵⁸

The Committee recommended that states parties refrain from setting too low the minimum age for criminal responsibility.⁵⁹ It also recommended that the low ages be increased to an internationally accepted minimum. It boldly concluded that 12 years should be the minimum age internationally acceptable.⁶⁰

At this point, states had a direction that the minimum age is 12 years. The silence and uncertainty that existed before were erased. States had a new obligation to set and adjust the minimum age for criminal responsibility to 12 years, not below.

⁵⁵ Committee, General Comment No 10, para 30.

⁵⁶ Committee, General Comment No 10, para 30.

⁵⁷ Committee, General Comment No 10, para 30. The CRC also relied on United Nations Standard Minimum Rules for the Administration of Juvenile Justice 'Beijing Rules': Resolution adopted by the General Assembly, 29 November 1985, A/RES/40/33, Rule 4.1 stating that the minimum age 'should not be fixed at too low an age level, bearing in mind the facts of a child's emotional, mental and intellectual maturity.'

⁵⁸ Committee, General Comment No 10, para 30

⁵⁹ Committee, General Comment No 10, para 32.

⁶⁰ Committee, General Comment No 10, para 32.

General Comment No 24 of 2019

General Comment No 24 of 2019 replaced General Comment No 10. The Committee acknowledged developments since 2007 when General Comment No 10 was published. Such developments included trends and jurisprudence relating to the minimum age of criminal responsibility.⁶¹

In the General Comment, the Committee took a step further; instead of maintaining 12 years as the minimum age for criminal responsibility, it recommended that states increase the minimum age to 14 years. This was the second time the Committee set the minimum age of criminal responsibility after General Comment No 10 of 2007. The reasoning behind the recommendation was purely based on scientific reasons. In particular, the Committee reasoned that:

Documented evidence in child development and neuroscience indicates that maturity and the capacity for abstract reasoning are still evolving in children aged 12 to 13 years because their frontal cortex is still developing. Therefore, they are unlikely to understand their actions' impact or comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its General Comment No 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterised by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses.⁶²

Further, the Committee commented on states using a range of the lower and upper minimum age of criminal responsibility. The range has a rebuttable presumption that a child who is at or above the lower age but below, the higher age lacks criminal responsibility unless sufficient maturity is demonstrated.⁶³ This is similar to the *doli incapax* rule. It discouraged states from using the range and recommended that states set up one appropriate minimum age.⁶⁴ That range leaves courts with too much discretion and results in discriminatory practices.⁶⁵

⁶¹ Committee, General Comment No 24 of 2019, Children rights in the child justice system, 18 September 2019, CRC/C/GC/24, para 1.

⁶² Committee, General Comment No 24, para 22.

⁶³ Committee, General Comment No 24, para 26.

⁶⁴ Committee, General Comment No 24, para 26

⁶⁵ Committee, General Comment No 24, para 26.

Considerations in the enactment of the Children Act of 2022

In leading the debate on the Children Bill on 22 March 2022, the Leader of the Majority Hon Amos Kimunya appreciated the many reforms in Kenya's legal system after promulgating the Constitution of Kenya 2010.⁶⁶ The August House agreed that children's matters had been dragged and reform in the legislative and policy sector was overdue. The House also appreciated that the Children Act of 2001 failed to be at par with the new aspirations in the Bill of Rights of the Constitution of 2010 and in other progressive pronouncements and developing jurisprudence on children's matters. Thus, there was need for immediate reforms.

Report on the consideration of the Children Bill, 2021

The National Assembly published a Report on the consideration of the Children Bill, 2021. In the Report,⁶⁷ the United Nations Children's Fund (UNICEF) was among the stakeholders/proposers that were captured to have made proposals on the minimum age of criminal responsibility.⁶⁸ Nonetheless, there may have been other organisations and persons that made similar proposals that were not captured in the report specifically.

UNICEF offered the following proposals:

- a. That the minimum age for criminal responsibility be set at 14 years and the existing *doli incapax* rule in the Kenya legal regime be abolished.
- b. That Section 14 of the Penal Code be amended to align with its proposal in (a) above.

UNICEF justified its proposals by citing General Comment No 24 of 2019 that recommended states adopt 14 years as the minimum age for criminal responsibility and abandon the double range created by the *doli*

⁶⁶ National Assembly, 'Hansard Report' 22 March 2022, 22.

⁶⁷ National Assembly, Departmental Committee on Labour and Social Welfare, Report on the consideration of the Children Bill, 2021 (Vol I) April 2022.

⁶⁸ Report on the consideration of the Children Bill, 406.

incapax rule. UNICEF pointed out clearly to the Departmental Committee that General Comment No 24 based its findings and recommendations on scientific grounds; adolescent development and neuroscience.⁶⁹

Although the Bill had raised the minimum age of criminal responsibility from 8 to 12 years, UNICEF criticised that the increase was still below the minimum of 14 years recommended by the Committee as the acceptable standard internationally.⁷⁰ It also lamented that the Bill retained the range maintained by the *doli incapax* rule by setting a lower age of 12 and a higher minimum age of 14.⁷¹ It based its lamentations on the fact that judges were given unchecked discretion regarding the criminal capacity of a child subjectively and without proper expert advice. It reiterated that this scenario breeds discriminatory practices.⁷²

When the Bill came up in the National Assembly for a second reading, the Leader of the Majority, appeared to have not benefitted from General Comment No 24 of 2019. The Leader of the Majority informed the House that the CRC and ACRWC provide that the correct age of criminal responsibility for a child is 12 years. True to his word, this was the standard between 2007 and 2019 when General Comment No 10 of 2007 was still effective. The General Comment had recommended 12 years. However, General Comment No 24 had replaced it with 14 years. The misinformation of the Leader of the Majority in the National Assembly may have steered the country to an outdated legal position. Moreover, the National Assembly failed to interrogate proposals by UNICEF, which were consistent with General Comment No 24.

A prosecutor's guide to children in the criminal justice system, 2020

The National Assembly was not the only government institution that was misinformed. The Office of the Director of Public Prosecutions (ODPP) seemed uninformed of General Comment No 24 when it

⁶⁹ Report on the consideration of the Children Bill, 2021.

⁷⁰ Report on the consideration of the Children Bill, 2021, 406.

⁷¹ Report on the consideration of the Children Bill, 2021, 407.

⁷² Report on the consideration of the Children Bill, 2021, 408.

developed a guide called *A prosecutor's guide to children in the criminal justice system* in 2020.⁷³ The Guide sets out what is expected of all prosecutors regarding how they should deal with children in conflict with the law and children who come into contact with it.

The Guide prescribes that the prosecutor should ascertain the child's age before deciding to charge. The purpose is to discern whether the child has attained the minimum age of criminal responsibility. However, the Guide relies on CRC General Comment No 10 which was replaced by General Comment No 24.⁷⁴ Therefore, prosecutors are likely to conclude that a child between 12 and 13 years is criminally liable instead of a child of 14 and above.

Status report on children in the justice system in Kenya, 2019

The National Council on the Administration of Justice (NCAJ), in its Status report on children in the justice system in Kenya,⁷⁵ may have needed to be made aware of General Comment No 24. The Report was launched on 20 November 2019, and it appraised that, at the time, the Children Bill 2018 had far-reaching reforms. These reforms included increasing the age of criminal responsibility from 8 to 12 years. This was the correct position at the time. However, if the Report had had the benefit of General Comment No 24, then it would have criticised the draft Bill. Section 221 of the Children Act 2021 could have been worded differently. The Report had an opportunity to appraise General Comment No 24 but failed to do so. General Comment No 24 was published on 18 September 2019. The Report was published on 20 November 2019. It referenced materials that were available as late as 10 November 2019.⁷⁶

⁷³ Office of the Director of Public Prosecution (ODPP), *A prosecutor's guide to children in the criminal justice system*, 2020, 14-22.

⁷⁴ ODPP, *A prosecutor's guide to children in the criminal justice system*, 14-22.

⁷⁵ National Council on the Administration of Justice (NCAJ) Special Task Force on Children Matters, *Status report on children in the justice system in Kenya*, 19 November 2022.

⁷⁶ NCAJ, *Status report on children in the justice system in Kenya*, (see page 63 when the Report referred to material available on 4 and 10 November 2019).

However, General Comment No 24 was reissued for technical reasons on 11 November 2019. Therefore, the NCAJ may not have had sight of it before publishing the Report. One could also question why the NCAJ failed to contribute to, as an interested party, the review of General Comment No 10 of 2007 on children's rights in juvenile justice. The Committee reported that only 65 entities contributed to the Comment.⁷⁷ None of them includes an entity from Kenya.

Implied repeal of Section 14(1) & (2) of the Penal Code

One of the mechanisms through which a provision of a statute ceases to have an effect is implied repeal. This is where a law is repealed by the enactment of a subsequent inconsistent provision in a new statute, even if there is no express provision in the new statute as to repeal of the former. It is a principle of construction of laws that if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act.

Schedule 6 of the Children Act outlines consequential amendments. Conspicuously missing are Sections 14(1), (2) or (3) of the Penal Code where the minimum age of criminal liability was housed. Technically, there exists a concurrent standard on the minimum age of criminal responsibility between Section 221 of the Children Act and Section 14 of the Penal Code. However, the doctrine of implied repeal could be invoked to presume that Section 14 of the Penal Code was amended consequentially.

Therefore, if the doctrine is to be applied, Section 14 of the Penal Code could be presumed as amended and ceases to have an effect. However, one can easily argue that if the doctrine of implied repeal is to go by, then only Sections 14(1) and 14(2) of the Penal Code stand to be amended and not 14(3). This is because the wording of Section 221 of

⁷⁷ CRC, General Comment No 24 of 2019, Office of the High Commissioner for Human Rights, 18 September 2019.

the Children Act 2022 only affects Sections 14(1) and 14(2) of the Penal Code. The minimum age of criminal responsibility for a male child regarding carnal knowledge was not altered by the Children Act of 2022. This means that confusion and differential treatment will persist unless the issue is clarified.

Conclusion

This paper has achieved four objectives. First, it conceptualised the basis for the minimum age of criminal responsibility. Second, it interrogated how the minimum age of criminal responsibility was incorporated into Kenya's legal system. Third, it outlined the existing acceptable standards on the minimum age of criminal responsibility under international law. Lastly, it documented the path towards harmonisation of the minimum age of criminal responsibility and enactment of the Children Act, 2022.

The differential treatment between adults and children regarding criminal liability is justified. This paper concludes that the basis for differential treatment is scientific, universally. Their physical, cognitive and emotional characteristics are still under development. And at the development period, they are less capable than adults of regulating their emotions, controlling impulses, and evaluating risks. Further, they are more susceptible to peer pressure and heavily influenced by the surrounding environment. Therefore, they should be given preferential treatment compared to adults regarding criminal liability.

The paper also put forward that preferential treatment regarding criminal liability is an old concept. It is as old as common law. Common law anchored it under the *doli incapax* rule, which presumed a child incapable of possessing the necessary knowledge to have a criminal intent. When common law developed the rule, it set a lower and a higher minimum age for criminal responsibility. The lower minimum put an absolute immunity from criminal liability while the higher minimum left room for presumption provided that the facts support that the child knew what they did was seriously wrong.

However, the paper noted that England abandoned the *doli incapax* rule. Even international bodies such as the Committee preferred a single minimum age of criminal responsibility to the range created by common law.

The paper also documented how the common law rule of *doli incapax* traced its way to Kenya's legal system. When Kenya gained independence, it retained the existing legal regime at the time but re-enacted them. Therefore, many legislations were modelled to be similar to those of England. Section 14 of the Penal Code was no different. That is where the minimum age of criminal responsibility was housed.

However, the paper also noted a challenge in Section 14 of the Penal Code. It introduces the minimum age of criminal responsibility for a male child to have carnal knowledge. The paper notes that the High Court has been unsettled on whether the presumption that a male child under the age of 14 cannot have carnal knowledge is rebuttable or not.

Further, the paper identified that, under international law, instruments such as CRC and ACRWC do not provide for an actual minimum age of criminal responsibility. This uncertainty led to different states imposing different measures on children. However, General Comment No 24 of 2019 rescued the situation by recommending to member states that 14 years should be the minimum age of criminal responsibility for children. The Committee arrived at this age based on scientific research.

The Committee has criticised having a range on the minimum age of criminal responsibility, a system that Kenya uses. Its lamentations are pegged on the reasoning that courts will have too much discretion to determine criminal responsibility, resulting in differential treatment. This is contrary to the principle of non-discrimination under the CRC.

Lastly, the paper documented how Kenya arrived at a minimum age of 12 and 14 on the lower and higher side of criminal responsibility, respectively. The paper notes that Kenya has maintained the range in the *doli incapax* rule, a range that the Committee has abandoned and criticised. Parliament had an opportunity to implement the recommendations of

the Committee, abolish the range, and set the minimum age of criminal responsibility at 14 years. However, it failed to do so despite meaningful contributions from stakeholders at the drafting stages.

Parliament should not carry the cross alone. Other vital stakeholders had an opportunity to capture and publicise General Comment No 24 in their reports and guiding documents. This could have influenced Parliament to legislate according to internationally-accepted standards. They also appeared to be silent on the recommendations of General Comment No 24 at the time.

The paper summarises its recommendations as follows:

- a Kenya should abandon the range under Sections 221(1) & (2) of the Children Act, 2022, as per the recommendations of the Committee, to avoid judicial officers' unchecked discretion that could lead to discriminatory treatment.
- b Kenya should work on a legislative amendment to Section 221 of the Children Act 2022 and adopt age 14 as the absolute minimum age for criminal responsibility.
- c To avoid differential interpretations of Section 14(3) of the Penal Code, one minimum standard of criminal responsibility should be used to determine criminal responsibility even in sexual offences.
- d Alternatively, Parliament should repeal Section 14(3) of the Penal Code.
- e Another option is that the High Court, properly moved, should seize jurisdiction and issue an interpretative statement of the position of Section 14(3) of the Penal Code in light of the Children Act, 2022.

The nexus between the best interests of the child and detention of children in conflict with the law

Terry Moraa* and George Gor**

Abstract

The principle of the best interests of the child is a universally recognised norm of the Convention on the Rights of the Child (CRC). While there is no consensus on the definition of this principle, various soft law documents, academic literature, and judgments demonstrate its centrality in both private and public spheres. The Children Act of 2022 provides a detailed articulation of this principle, facilitating its application in the Kenyan context. This paper examines the Kenyan and international legal and normative framework on the detention of children in the child justice system. It explores the nexus between the detention of children in conflict with the law and the principle of the best interests of the child. The authors contend that the detention of children in conflict with the law should be guided by the principle of the best interests of the child, as enshrined in Article 53(2) of the Constitution of Kenya, 2010 and international law. It reaffirms the position, adopted by courts of law, that there should be a limit to the institutionalisation of children in Kenya. The authors further advocate diversionary measures to judicial proceedings, such as family group conferencing, as suitable options.

Keywords: best interests of the child, children in conflict with the law, Children Act of 2022, diversionary measures

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Introduction

Children constitute a vital component of the social fabric as they embody the prospective destiny of the collective. They ensure the perpetuation of the familial lineages and heritages, manifesting the aspirations and visions of the milieu in which they are nurtured. Hence, it is imperative that their welfare is prioritised, even in circumstances where they are incapable of articulating their own preferences. The global recognition of children's rights is evidenced by the ratification of the Convention on the Rights of the Child (CRC) by 196 states. Constitutions that encompass a broad spectrum of rights under their bill of rights, such as those of Kenya and South Africa, also attest to the centrality of children's rights within them.¹ Therefore, both domestic and global legislation acknowledge the pivotal role of these rights, and the duties on states and individuals they impose.

The African Charter on the Rights and Welfare of the Child (ACRWC) of 1990 establishes the legal framework on children's rights in the continent.² One of the initial milestones in the juridical evolution of children's rights was the ratification of the Geneva Declaration on the Rights of the Child by the League of Nations in 1924.³ This document established a set of principles and norms to safeguard and promote the well-being and dignity of children across the world. Among these developments, which are relevant to the discussion of this paper, was the codification of four significant principles attached to the CRC namely: the best interest of the child principle; non-discrimination principle; the right to survival and development; and the views of the child.⁴

The best interest of the child is premised on the idea that while making any decision involving a child, the interests of the child take

¹ Constitution of Kenya (2010), Article 53; Constitution of South Africa (1996), Section 28.

² 11 July 1990, CAB/LEG/24.9/49.

³ United Nations Children's Fund (UNICEF), 'History of child rights' UNICEF--<<https://www.unicef.org/child-rights-convention/history-child-rights>> on 4 March 2024 .

⁴ Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, Article 3.

priority.⁵ For instance, where there is a custodial dispute, the best interest of the child is considered paramount as opposed to those of the state, parents or any other person. Article 3 of the CRC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

Accordingly, it is evident from the above provision of the CRC that the best interest of the child applies to children in conflict with the law who have been detained in the criminal justice system. A comprehensive consideration of the best interest of a child who is in conflict with the law would encompass the entire process of legal involvement, from the initial contact with the law enforcement authorities, to the appearance in court as a witness or a victim, to the sentencing and subsequent reintegration into the community. Moreover, the best interest of the child would also entail diverting the child from the criminal justice system whenever possible.

A paramount principle in various legal instruments at the international and national levels, such as the African Charter on Human and Peoples' Rights (African Charter), is the principle of non-discrimination.⁶ Constitutions of states such as Kenya and South Africa proscribe discrimination on the basis of an open-ended list of grounds.⁷ In relation to children, the CRC stipulates that no child shall be subjected to discrimination on the basis of the status of the child or the parents.⁸ Kenya has recently even extended the rights of intersex children, who endure marginalisation and discrimination.⁹ The Children Act of 2022 imposes a penalty of 'imprisonment for a term not exceeding twelve months or to a fine not exceeding two hundred thousand shillings or to

⁵ CRC, Article 3.

⁶ African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, Article 2.

⁷ Constitution of Kenya (2010), Article 27(4); Constitution of South Africa (1996), Section 9(3).

⁸ Convention on the Rights of the Child, Article 2.

⁹ Children Act (No 29 of 2022), Section 21.

both' on persons who discriminate a child.¹⁰ Such legislative sanctions that foster equality and non-discrimination are in conformity with the international standards embedded in, for example, the African Charter and CRC.

Thirdly, the right to survival and development relates to the achievement of children's social and economic rights.¹¹ Article 6(2) of the CRC provides that states ought to 'ensure to the maximum extent possible the survival and development of the child'. This is tied to a child's inherent right to life.¹² States, therefore, are obligated to ensure that its citizens (including children) are well-equipped to develop physically and psychologically.

Finally, the principle on the views of the child is founded on Article 12(1) of the CRC, which requires State parties to guarantee children's liberty and space to express themselves. Such views should be 'given due weight in accordance with the age and maturity of the child'.¹³ In doing so, the capability of a child to develop their independent views on matters that affect them is safeguarded.

Among the four principles outlined above, the best interest of the child is the most commonly applied and studied. This paper critically explores the concept of the best interests of the child as a normative framework for the detention of children in conflict with the law. It examines how the Children Act of 2022 incorporates this concept into its provisions and evaluates the extent to which it is applied in practice. The paper also identifies the main gaps and challenges that hinder the effective implementation of this principle and offers some recommendations for improvement. The paper argues that the best interests of the child should not be seen as a mere rhetorical device, but as a substantive and procedural standard that guides all decisions and actions affecting children in detention.

¹⁰ Children Act (No 29 of 2022), Section 9.

¹¹ United Nations Children Fund (UNICEF), 'Four principles of the CRC', UNICEF, 24 June 2019.

¹² Convention on the Rights of the Child, Article 6(1).

¹³ UNICEF, 'Four principles of the CRC'.

Having introduced some of the principles and contexts affecting children in conflict with the law, this article proceeds as follows: Part II outlines the different approaches that have defined best interest of the child since its inception and details on the tripartite classification of the best interest of the child, applied as a working definition of best interest of the child in this paper. Part III explores the legal and normative framework on detention of children in conflict with the law. This section investigates the intersection between the principle of the best interest of the child and the role of the child justice system in applying the principle during the detention of a child in conflict with the law. In Part IV, the paper explores the possibility of implementing non-custodial interventions for juvenile offenders, as a way to avoid the negative consequences of incarceration on their development and well-being. Part V concludes and makes some recommendations.

Scholarly perspectives on the definition of the best interest of the child principle

First codified in the 1959 United Nations Declaration of the Rights of the Child,¹⁴ the best interest of the child principle has metamorphosed to become a 'distinct right and rule of procedure'.¹⁵ Despite its universal recognition and codification, lack of a definite definition of the best interest of the child has been a challenge.¹⁶ Philip Alston argues that the best interest of the child principle should not be applied in a uniform way across different contexts.¹⁷ He claims that the best interest of the child is a vague and confusing concept that can be interpreted

¹⁴ UN General Assembly, Declaration of the Rights of the Child, 20 November 1959, A/RES/1386(XIV), Principle 13.

¹⁵ Fambasayi Rongedzai and Moyo Admark, 'The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe' 36(1) *South African Journal on Human Rights*, 3.

¹⁶ Aron Degol and Shimelis Dinku, 'Notes on the principle "best interest of the child": Meaning, history and its place under Ethiopian law' 5(2) *Mizan Law Review* (2011) 325.

¹⁷ Philip Alston, 'The best interest principle: Towards a reconciliation of culture and human rights' 8(1) *International Journal of Law, Policy and Family* (1994) 1.

differently depending on the social values and norms of each society. In his view, the best interest of the child should be given a wide and flexible interpretation that takes into account the national, regional and international circumstances of each case.

In essence, defining the principle requires consideration of ‘the particular realities of a given state’.¹⁸ This open-ended definition allows pluralistic morals and values to be applied. To give context, for instance, is the different morals and values applied in traditional Africa and the West due to communalism and individualism respectively.¹⁹ Traditional African cultures tend to emphasise the interdependence and solidarity of the community, while Western cultures tend to value the autonomy and achievement of the individual.

This difference may have implications for how the best interest of the child principle is applied in different contexts as we shall illustrate. For instance, in some African societies, the child’s welfare may be seen as inseparable from the family’s or the community’s well-being, while in some Western societies, the child’s interests may be prioritised over those of others. It is crucial to note, however, that communalism in Africa, as Peter Bisong observes, ‘will be dysfunctional or more properly has been dysfunctional for contemporary societies’.²⁰ Therefore, the binary opposition between communalism and individualism, which informs the present analysis, may not be valid for the long-term perspective of cultural evolution. Thus, the interpretation of the principle remains subjective,²¹ leaving decision-making bodies such as courts of law with wide discretion over the task.

Meanwhile, commentaries on the implications of best interest of the child’s subjective definition abound. In the early days of CRC, scholars

¹⁸ Degol and Dinku, ‘Notes on the principle “best interest of the child”: Meaning, history and its place under Ethiopian law’ 325.

¹⁹ Peter Bisong Bisong, ‘Between communalism and individualism: Which way Africa?’ 2(2) *RAIS Journal for Social Sciences* (2018) 1.

²⁰ Bisong, ‘Between communalism and individualism: Which way Africa?’ 3.

²¹ Alston, ‘The best interest principle: Towards a reconciliation of culture and human rights’ 1.

such as Michael Freeman and Philip Alston grappled with best interest of the child from the outlined angles. Alston illustrates the complexity of a fixed meaning of the best interest of the child by comparing highly industrialised countries to traditional societies. He notes that the highly industrialised societies tend to favour an approach that emphasises a child's individuality and autonomy while traditional societies route the child's interests in favour of the family, since family and community ties may be considered to be more essential.²² Freeman, whose core is from a criminology perspective, adds that it should also be taken into consideration that the definition of the best interest of the child is closely linked to culture.²³

Marit Skivenes analyses how the Norwegian Supreme Court applies the best interest of the child test to reach judicial decisions. She cites a 2007 case involving a nine-year-old boy named Benjamin, who was placed in foster care at the age of one year and eight months after suffering a brain haemorrhage caused by physical abuse from his biological parents.²⁴ The court decided that it was in Benjamin's best interests to be adopted by his foster parents, since he needed a safe and stable environment and he had expressed his wish to be adopted.

On the other hand, Sarah Elliston reviews the best interest of the child test in the context of healthcare, especially when parents refuse treatment for their children. She observes that one of the most contentious areas is the refusal of blood transfusions, often based on religious grounds. She also notes that many times the decisions of the parents do not meet the threshold for compromising significant interests of the child.²⁵

²² Alston, 'The best interest principle: Towards a reconciliation of culture and human rights' 1.

²³ Michael Freeman, 'The James Bulger tragedy: Childish innocence and the construction of guilt', *The moral status of children: Essays on the rights of the child*, Martinus Nijhoff, 1997, 235-253.

²⁴ Marit Skivenes, 'Judging the child's best interests: Rational reasoning of subjective presumptions?' 53(4) *Acta Sociologica* (2010) 346.

²⁵ Sarah Elliston, *The best interests of the child in healthcare*, Routledge-Cavendish, 2007, 14.

The best interest of the child has also been understood as considering the needs of a child while making determinations affecting the child. Yvonne Dausab defines the principle as ‘considering the child before a decision concerning the child’s life is made’.²⁶ The best interest of the child is determined by the circumstances of each case.²⁷ This has been the approach taken by the courts as they primarily determine the best interests of specific children.²⁸

Degol and Dinku prefer taking a rights-based approach towards the principle, reasoning that in order for the best interest of the child to be fulfilled, it should be examined in light of other rights of the child.²⁹ Similarly, the African Child Policy Forum (ACPF) puts forward that the best interest of the child embodies all the rights of the child as well as everything that is of benefit to a child, comprising the moral, mental, physical and material well-being of the child.³⁰

Even though the best interest of the child principle is widely recognised, it lacks ‘binding content’.³¹ State parties to the CRC are, therefore, tasked with developing a meaning suitable to them and to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best interests assessment by any decision-maker tasked with ascertaining the principle.³² Under the CRC and the ACRWC, there is no definition of the best interest of the child, but a declaration under article

²⁶ Yvonne Dausab, ‘The best interests of the child’ in Oliver Ruppel (ed) *Children’s rights in Namibia*, Macmillan Education Namibia, 2009, 147.

²⁷ Bernard Bekink and Mildred Bekink, ‘Defining the standard of the best interest of the child’ 37 *De Jure*, 12.

²⁸ *CK v TKM*, Civil Appeal 41 of 2016, Judgment of the Court of Appeal at Malindi, 30 September 2016 (eKLR) para 4; *MA v ROO*, HC Civil Appeal 21 of 2009, Judgment of High Court at Busia, 27 June 2013 (eKLR) para 3.

²⁹ Degol and Dinku, ‘Notes on the principle “best interest of the child”: Meaning, history and its place under Ethiopian law’ 325.

³⁰ African Child Policy Forum, ‘In the best interest of children: Harmonising laws on children in West and Central Africa’ 2011, 82.

³¹ Degol and Dinku, ‘Notes on the principle “best interest of the child”’ 324.

³² Committee on the Rights of the Child (CRC Committee) General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1), 14 January 2013, CR/C/GC/14, para 51.

3 of the CRC and article 4 of the ACRWC that 'the best interest of the child shall prevail'.³³

Therefore, the standard approach by courts of law has been to consider all the rights and welfare questions afforded to the child in order to determine their best interests. The United Nations High Commissioner for Refugees describes best interest of the child as the wellbeing of a minor in a broad sense. Wellbeing, in turn, is defined in view of individual circumstances such as age, level of development of a child, relations with parents, environment and experience of a minor.³⁴

Kenya's position on the best interest of the child principle

The High Court of Kenya has upheld the universal requirements that make up the best interest of the child. In *MA v ROO* for instance,³⁵ the High Court singled out the right to education, welfare of the child, having a favourable environment to live in and the right to parental responsibility, as some of the constituents of the best interest of the child principle. In *NMN v JOW*,³⁶ the High Court observed that there are common aspects in the best interest analysis constituting a child's views and the need for a stable home environment. Further, it asserted that the ultimate goal of the best interest of the child principle is to protect and promote the happiness, security, mental health and emotional development of the child.³⁷

Furthermore, Section 2 of the Children Act, 2022 defines the best interest of the child as:

³³ Convention on the Rights of the Child, Article 3; African Charter on the Rights and Welfare of the Child, Article 4.

³⁴ United Nations High Commissioner for Refugees, 'UNHCR guidelines on determining the best interest of the child', 2008, 14.

³⁵ *MA v ROO*, para 3.

³⁶ *NMN v JOW*, Civil Appeal No 30 of 2016, Judgment of High Court at Kakamega, 27 September 2016, (eKLR), para 67.

³⁷ *NMN v JOW*, para 69.

the principles that prime the child's right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53 (1) of the Constitution and Section 8 of the Act.

The tripartite classification of the best interest of the child

This paper adopts a tripartite classification of the best interest of the child, expressed in detail by the Committee on the Rights of the Child's (Committee) in General Comment No 14.³⁸ The principle has been classified into three: a substantive right; a fundamental interpretative legal principle; and a rule of procedure.³⁹

As a substantive right, the best interest of the child is self-executing, meaning it is directly applicable and can be invoked before a court.⁴⁰ Debates arose – as is apparent from the preparatory works of the CRC – whether the best interest of the child is 'a' or 'the' primary consideration. The former connotes that there would be room for other interests (majorly state or parents' interests) to be taken into consideration, while the latter would mandate the strict application of the principle. While the wording of Article 3 of the CRC adopts the former,⁴¹ care has been taken to give significant priority to the interest of the child in matters where the child is affected.⁴²

Secondly, best interest of the child as a fundamental interpretative legal principle signifies that interpretative bodies have the obligation of ensuring that their decisions are weighed against the best interest of the child. Further, where a provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be taken.⁴³

³⁸ CRC Committee, General Comment No 14, para 9.

³⁹ Nikolett Takács, 'The threefold concept of the best interests of the child in the immigration case law of the ECtHR' 62(1) *Hungarian Journal of Legal Studies*, 96, 100.

⁴⁰ CRC Committee, General Comment No 14, para 6(a).

⁴¹ 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

⁴² CRC Committee, General Comment No 14, paras 39-40.

⁴³ CRC Committee, General Comment No 14, para 6(b).

Thirdly, the best interests of a child as a rule of procedure entails a procedural guarantee that whenever a decision that will affect a child or an identified group of children is to be reached, the process of decision-making should include an assessment of the possible impact – whether positive or negative – on the child or children concerned. The justification of the decision must also show that the child’s interests have been explicitly taken into account, how the child’s best interests have been respected, the criteria in which it is based on, and how the best interest of the child has been weighed against other considerations.⁴⁴

The next section of this paper discusses the general principles on detention of children in conflict with the law. It seeks to analyse diversionary measures as an alternative to the detention of children in conflict with the law.

Detention of children in conflict with the law

Children in conflict with the law who have been detained are often subjected to psychological and physical abuse, especially in countries that have deplorable justice systems.⁴⁵ The abuse emanates from adults with whom children are detained, police officers and staff in the institutions of detention. Several legal developments call for the protection of detained children which also prescribe rights such as not to be detained, except as a measure of last resort, for the shortest appropriate period of time and to be held separately from adults.⁴⁶

The Constitution of Kenya, 2010 under Article 53(1)(f) provides for the rights of a child while in detention. Since Articles 2(5) and 2(6) of the 2010 Constitution allow for the application of international law, a set of international legal instruments relating to detention of children are relevant to this discussion. The CRC under Article 37 provides that

⁴⁴ CRC Committee, General Comment No 14, para 6(c).

⁴⁵ National Council on the Administration of Justice, ‘Status report of children in the justice system in Kenya’, 2019, 43.

⁴⁶ Constitution of Kenya (2010), Article 53(1)(f).

a child is only to be deprived of liberty as a measure of last resort.⁴⁷ In addition to this, the CRC reiterates the centrality of a child's dignity and worth despite the child's nature of conflict with the law.⁴⁸ Article 17 of the ACRWC echoes Article 40 of the CRC by reaffirming the right of children to 'special treatment in a manner consistent with the child's sense of dignity and worth'.

The Committee through its General Comment No 24 requires state parties to 'systematically' apply the general principles contained in the CRC together with dignity in the administration of justice.⁴⁹ Regardless of the severity of crime that a child may have committed, the best interest of the child remain the primary consideration.⁵⁰ The Committee has recommended further that children need a separate child justice system that treats children differently from adults.⁵¹

A similar view was taken by the South African Constitutional Court in *Centre for Child Law v Minister for Justice*, where the Court held that the best interest of the child is applicable to child offenders, even when they commit the most heinous crimes.⁵² The Court also noted the physiological and physical vulnerability of children and their better capability of rehabilitation than adults as the premises on which the South African Constitution requires the courts and Parliament to differentiate child offenders from adults. The Court opined thus:

...the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgement, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because

⁴⁷ CRC, Article 37(b).

⁴⁸ CRC, Article 40(1).

⁴⁹ CRC Committee, General Comment No 24 (2019) on children's rights in the child justice system, 18 September 2019, CRC/C/GC/24, para 8.

⁵⁰ CRC Committee, General Comment No 24, para 13.

⁵¹ CRC Committee, General Comment No 24, para 13.

⁵² *Centre for Child Law v Minister for Justice and Constitutional Development and others*, CCT98/08, Judgment of the Constitutional Court, 15 July 2009, para 29.

they are not yet adults. Hence, we afford children some leeway of hope and possibility.⁵³

The Committee has interpreted the concept of best interest of the child, in the context of child justice, to mean that the traditional objectives of criminal justice like repression must give way to rehabilitation and restorative justice objectives when dealing with children in conflict with the justice system.⁵⁴ The ACRWC, with regard to administration of juvenile justice, also notes that the aim of child justice is to promote reformation and reintegration into society and family.⁵⁵ The Children Act of 2022 defines restorative justice as ‘an approach to justice that focuses on the needs of the victims and the offenders, as well as involving the community’.⁵⁶ The Constitutional Court of South Africa in *J v National Director of Public Prosecutions* held that an imperative aspect in realising the reformative aims of child justice is for child offenders to be given a chance to be reintegrated into the society.⁵⁷

The High Court of Kenya in *MWK v Attorney General* noted that the police are mandated to arrest a child through the lens of the Bill of Rights under the Constitution of Kenya 2010 and afford special attention to the best interest of the child; otherwise, such arrest, search or detention would be inconsistent with the Constitution and consequently unlawful.⁵⁸ The Court, appreciating the inclusion of the best interest of the child in the Bill of Rights, held that it was an ‘important development for Kenyan children, many of whom have suffered and continue to suffer long imprisonment and detention in harsh conditions’.⁵⁹ Further, the Court held that the rule on best interest of the child considers

⁵³ *Centre for Child Law v Minister for Justice and Constitutional Development and others*, para 28.

⁵⁴ CRC Committee, General Comment No 24, para 13.

⁵⁵ African Charter on the Rights and Welfare of the Child, Article 17(3).

⁵⁶ Children Act (No 29 of 2022), Section 2.

⁵⁷ *J v National Director of Public Prosecutions and another*, CCT 114/13, Judgment of the Constitutional Court, 6 May 2014, para 44.

⁵⁸ *MWK and another v Attorney General and 4 others*, Constitutional Petition 347 of 2015, Judgment of the High Court at Nairobi, 2017 (eKLR), para 75.

⁵⁹ *MWK and another v Attorney General and 4 others*, para 92.

‘the developmental age of the child and the desirability of the child’s reintegration in [society] and assumption of a constructive role in society’ as per the principles of restorative justice.⁶⁰

Fambasayi and Moyo contend that treating the best interests of a child as a substantive right requires courts to give effect to law and policies that intersect with all the rights of the child, including the right to be detained only as a measure of last resort and for the shortest appropriate period of time giving due regard to the age, maturity and evolving capacities of the child.⁶¹ This was illustrated by South Africa’s Supreme Court of Appeal in *Director of Public Prosecutions Kwazulu-Natal v P*. By giving due regard to the best interest of the child of children in conflict with the law, the Court considered that the age of the child – who was only twelve years and five months old at the time of committing the offence of murder – mitigated the sentence and thus ordered the trial court to consider a suspended custodial sentence that would promote the child’s reintegration into society.⁶²

The CRC has founded the primary principles in regards to the detention of children. These are: arrest, detention or imprisonment as a measure of last resort, detention for the shortest appropriate period of time, and that no child shall be deprived of his or her liberty unlawfully or arbitrarily.⁶³ The Constitution of Kenya, 2010, similarly safeguards the best interest of the child in conflict with the law by providing the right not to be detained, except as a measure of last resort, and when detained, to be detained for the shortest period of time.⁶⁴ Notably, the ACRWC is silent on the principle of detention of the child as a measure of last resort and for the shortest appropriate period of time. The best interest of the child can also be read into the Beijing Rules provision which provides that child justice shall emphasise the wellbeing of the

⁶⁰ *MWK and another v Attorney General and 4 others*, para 92.

⁶¹ Rongedzayi Fambasayi and Admark Moyo, ‘The best interest of the child offender in the context of detention as a measure of last resort’ 8.

⁶² *Director of Public Prosecutions Kwazulu-Natal v P*, 363/2005) [2005] ZASCA 127, Judgment of the Supreme Court of Appeal, 1 December 2005, para 20, 28.

⁶³ CRC, Article 37(b).

⁶⁴ Constitution of Kenya (2010), Article 54(f)(i).

child in conflict with the law.⁶⁵ All the rights contained in the CRC are in the 'child's best interests'.⁶⁶

From the foregoing, it is clear that protecting the right of the child not to be detained, except as a measure of last resort and for the shortest appropriate period of time protects the fundamental principle of best interest of the child. The following subsections further explore the principles encompassing detention of children.

Non-arbitrariness and lawfulness in the detention of children

The Constitution of Kenya 2010 in acknowledging the right of every person to freedom and security, guarantees in Article 29(a) that the right shall also include the right not be deprived of freedom arbitrarily or without just cause.⁶⁷

The CRC safeguards the right of the child to be protected from arbitrary or unlawful interference with his or her privacy.⁶⁸ The first part of Article 37(b) of the CRC provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily'. The Committee does not however elaborate on the lawfulness and non-arbitrariness of a child's detention.⁶⁹

Thus, a reference to Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) suffices.⁷⁰ Article 9(1) of the ICCPR provides that deprivation of liberty is only permissible when it is not arbitrary and when it is in accordance with the procedure established by law.⁷¹ This provision can be interpreted through a parliamentary statute

⁶⁵ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 29 November 1985, A/RES/40/33, Rule 5.1.

⁶⁶ CRC Committee, General Comment No 14, para 4.

⁶⁷ Constitution of Kenya (2010), Article 29(a).

⁶⁸ CRC, Article 16. See, also, Children Act, Section 27(1).

⁶⁹ CRC Committee, General Comment No 24, para 96.

⁷⁰ Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, 1999, 629.

⁷¹ International Convention on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Article 9(1).

or the equivalent, or an unwritten norm of common law available to individuals who are subject to the relevant jurisdiction. It also implies that any deprivation of liberty provided for by law should be just, proportionate, non-discriminatory and suitable to the circumstances of the case.

The principle of proportionality requires that any reaction to children in conflict with the law shall be proportionate to the circumstances of the offenders and the offences.⁷² Notably, the Children Act of 2022 similarly obliges that orders imposed on a child on conviction shall be proportionate to the nature of the offence and the circumstances of the child.⁷³ The Committee notes that in the case of children, such considerations must be weighed in favour of the child's right to have his or her best interests considered as a primary consideration and to promote his or her reintegration.⁷⁴

Courts in Kenya have affirmed the position that in the detention of a child, leave of the court ought to be sought. A detention conducted with leave of the court is, therefore, deemed reasonable and lawful in the event that the child in custody has been presented before court within 24 hours.⁷⁵ Similarly, the Committee, commenting on the degrading effect of strip searching, insisted that it should be used only as a last resort and should be conducted in a manner that respects the privacy and dignity of the child.⁷⁶

International standards such as the Havana Rules⁷⁷ and the Standard Minimum Rules for the Treatment of Prisoners⁷⁸ limit the use of restraint and of force in all forms of detention. These provisions

⁷² Beijing Rules, Rule 17.1(a).

⁷³ Children Act (No 29 of 2022), Section 239(6).

⁷⁴ CRC Committee, General Comment No 24, para 90.

⁷⁵ *DMO & another v Republic*, High Court Petition No 396 and 397 of 2012, Judgment of the High Court at Nairobi, 13 May 2013, para 31.

⁷⁶ CRC Committee, General Comment No 24, para 113.

⁷⁷ United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), 14 December 1990, A/RES/45/113, Rule 63.

⁷⁸ UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 8 January 2016, A/RES/70/175, Rules 47, 48 and 82.

on detention should not only be applicable while the child is held in police custody, during pre-trial detention or after receiving a custodial sentence but also during the apprehension or arrest stage. This is owed to the fact that the arresting authority is dealing not with an adult but with a child who is more susceptible to violence. The Committee in discussing the principle and rules that need to be observed in all cases of children deprived of liberty, stated that force may only be used when the child possesses a forthcoming threat of injury to him or herself or others and only when all other means of control have been exhausted. It further rules that restraint should never be used to secure compliance and should never involve deliberate infliction of pain.⁷⁹

In certain circumstances, detention may be deemed lawful and non-arbitrary. It becomes arbitrary in the event that the detention is prolonged and without justification. Where a child has been arbitrarily detained, such detention violates the principle of detention for the shortest appropriate period of time.⁸⁰ The Committee observes that many children suffer in pre-trial detention for months or even years,⁸¹ which ultimately leads to violation of a child's right to development⁸² and does not promote the reintegration of the child into the society to assume a constructive role as is the objective of child justice.⁸³

Detention for the shortest appropriate period of time

This rule follows Article 37(b) of the CRC, which provides that restraint on the personal liberty of the child should be imposed only after careful consideration (as measure of last resort) and should be limited to the shortest appropriate period of time. It is similarly contained in the Beijing and Havana Rules.⁸⁴ The Committee recommends that the

⁷⁹ CRC Committee, General Comment No 24, para 113. See also, Havana Rules, Rule 64.

⁸⁰ Constitution of Kenya (2010), Article 53(1)(f)(i). CRC, Article 37(b).

⁸¹ CRC Committee, General Comment No 24, para 92.

⁸² CRC, Article 6.

⁸³ CRC, Article 40(1).

⁸⁴ Beijing Rules, Rule 17.1(c). Havana Rules, Rule 2.

duration of pre-trial detention should be limited by law and subject to regular review.⁸⁵ It further requires that every child arrested and deprived of his or her liberty should be brought before a competent authority to examine the legality of the deprivation of liberty or its continuation within 24 hours.⁸⁶

As noted earlier, the High Court of Kenya in *DMO & another JB v Republic* affirmed that the 24-hour rule can be prolonged with leave of the court.⁸⁷ The Beijing Rules require that after being arraigned in court, the judge or any other competent body or authority should consider the release from custody of the child without delay.⁸⁸

In *AOO & 6 Others v Attorney General & another*, the High Court held that indeterminate imprisonment does not conform with the provisions of Article 53(1)(f)(i),(ii) and Article 53(2) of the Constitution requiring the best interest of the child to be of paramount importance in every matter concerning the child.⁸⁹ The Court further declared that Sections 25(2) and (3) of the Penal Code that allows detention of a child at the President's pleasure was unconstitutional for violating Article 53(f)(i) and (ii), 53(2) and Article 160(1) of the Constitution, and international conventions governing the rights of children.⁹⁰ The Court cited with approval the decision in the South African case of *DPP KwaZulu-Natal v P* to highlight that in every case involving a child offender, the scope of sentencing should be a measure of last resort and for the shortest appropriate period of time.⁹¹

In the spirit of the principle of detention of children for the shortest appropriate period of time, sentencing of children should be compliant to the aims of child justice and with the principle of best interest of

⁸⁵ CRC Committee, General Comment No 24, para 103.

⁸⁶ CRC Committee, General Comment No 24, para 107.

⁸⁷ *DMO and another JB v Republic*.

⁸⁸ Beijing Rules, Rule 10.2.

⁸⁹ *AOO & 6 others v Attorney General & another*, Petition 570 of 2015, Judgment of the High Court at Nairobi, 12 May 2017 (eKLR) para 74(a).

⁹⁰ *AOO & 6 others v Attorney General & another*, para 74(a).

⁹¹ *AOO & 6 others v Attorney General & another*, para 34.

the child.⁹² The CRC provides that neither capital punishment nor life imprisonment without possibility of release should be imposed for offences committed by children.⁹³ It is important to note that the ACRWC is silent regarding the imposition of life imprisonment on children. However, it provides for the inherent right to life and prohibits the death penalty for crimes committed by children.⁹⁴

The Committee, on the imprisonment of children with parole, notes that sentencing of children should have the possibility of release and should be realistic and regularly considered. It further observes that meting out life imprisonment on children makes it impossible to achieve the goals of child justice – even where there is a possibility of release. Consequently, it is contrary to the best interest of the child.⁹⁵ Kenya has restricted punishment of children in conflict with the law who are found guilty of committing an offence and further prohibiting death penalty.⁹⁶

Detention as a measure of last resort

The expression ‘measure of last resort’ means that the detention of a child should happen when all else has failed, in its ordinary meaning.⁹⁷ The principle does not differentiate between children convicted of serious offences and children convicted of minor offences.⁹⁸ The Committee notes that use of deprivation of liberty has very negative aftermaths for a child’s harmonious development and gravely hinders his or her reintegration in society.⁹⁹ Paulo Pinheiro notes that institutionalisation of children can result in poor physical health, severe developmental delays, disability and potentially irreversible physiological damage.¹⁰⁰

⁹² CRC Committee, General Comment No 24, para 97.

⁹³ CRC, Article 37(a).

⁹⁴ African Charter on the Rights and Welfare of the Child, Article 5.

⁹⁵ CRC Committee, General Comment No 24, para 97.

⁹⁶ Children Act (No 29 of 2022), Section 238.

⁹⁷ *MWK & another v Attorney General & 4 others*, para 76.

⁹⁸ *AOO & 6 Others v Attorney General & another*, para 12.

⁹⁹ CRC Committee, General Comment No 24, para 14.

¹⁰⁰ Paulo Sérgio Pinheiro, ‘World report on violence against children’, United Nations Secretary-General’s Study on Violence against Children, Geneva, 2006, 189.

The International Committee of the Red Cross in outlining the negative effects of detention on children stated that:

No matter what kind of detention facility it is and how well it separates adults from children, when children are detained, there is always a risk to their health, wellbeing and security not only in the present, but also in the future. Children face an uphill struggle to become well-adjusted adults if they grow up in detention. They are at increased risk of violence, neglect or exploitation, which for many will be a further hardship to bear.¹⁰¹

Similarly, the High Court of Kenya in pronouncing itself on the effects of detention had this to say:

It is a known fact that our detention centres, be it police holding cells or correctional centres, are not ideal places. They are not homes. They are bereft of most facilities which one requires for raising children. It is worse for children. The atmosphere is not conducive to their normal growth, healthy psycho-emotional development and nurturing as children.¹⁰²

The Preamble to the CRC states that state parties recognise that the child should grow up in a family environment. In observing the situation of children behind bars, Meuwese notes that children are excluded from a family environment, from school and the society, and their situation is 'unknown' to the general public and politicians.¹⁰³ In addition, the Children Act of 2022 limits the institutionalisation and detention of children in conflict with the law as only a measure of last resort.¹⁰⁴ The Beijing Rules also require that 'careful consideration' be given before the passing of a sentence that limits the child's personal liberty and that such a sentence be imposed only when the child is found to have committed a serious act involving violence against another person or has persisted in committing other serious offences, and only if there is no other appropriate response.¹⁰⁵

¹⁰¹ International Committee of the Red Cross, *Children and detention*, November 2014, 5.

¹⁰² *MWK & another v Attorney General & 4 others*, para 77.

¹⁰³ Stan Meuwese (ed), 'Kids behind bars. A study on children in conflict with the law: Towards investing in prevention, stopping incarceration and meeting international standards' Defence for Children International, 2003, 9.

¹⁰⁴ Children Act (No 29 of 2022), Section 223(1). See also the Judiciary Sentencing Policy Guidelines.

¹⁰⁵ Beijing Rules, Rule 17.1(b) and (c). See also, Havana Rules, Rule 2.

The import of the principle of detention as a measure of last resort is that alternative measures to detention must be used at all stages of the administration of criminal justice.¹⁰⁶ Non-custodial measures should be employed to reduce pre-trial detention except where community placement is apparently not possible.¹⁰⁷ The Committee notes that the use of pre-trial detention is a violation of the right to be presumed innocent and that state parties to the CRC should use it only as a measure of last resort for instance, in cases where the child is an immediate danger to himself or herself, or others.¹⁰⁸ The Children Act of 2022 similarly limits pre-trial detention 'as far as is reasonably practicable' and should only be a measure of last resort.¹⁰⁹

Children in conflict with the law should be dealt with in a manner that promotes reintegration into the society and assumption of their constructive role into the society rather than seeking to punish the child.¹¹⁰ The next section explores the possibility of implementing non-custodial interventions for juvenile offenders, as a way to avoid the negative consequences of incarceration on their development and well-being.

Diversionsary measures as an alternative to detention of children: The legal framework and application

One of the fundamental tenets inherent in a comprehensive framework pertaining to the equitable administration of justice for minors entails the implementation of diversionsary practices. Diversion, as it is defined, denotes a set of measures adopted by authorised entities to address the involvement of children in criminal activities, without

¹⁰⁶ United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), 14 December 1990, A/RES/45/110, Rule 2.1.

¹⁰⁷ CRC Committee, General Comment No 24, para 86.

¹⁰⁸ CRC Committee, General Comment No 24, para 103.

¹⁰⁹ Children Act (No 29 of 2022) Section 223(1). See also the Havana Rules, Rule 17.

¹¹⁰ CRC, Article 40(1). See also the Beijing Rules, Rules 5 and 17.1 and the accompanying commentary to both rules.

necessitating resort to formal legal proceedings.¹¹¹ In the course of deliberating on the significance of diversion and its applicability to children entangled in the criminal justice system, a comprehensive analysis of various legal provisions supporting the utilisation of diversionary approaches for such children shall be undertaken in this section of the paper.

The legal framework on diversionary measures

The Constitution of Kenya, 2010 encompasses provisions safeguarding the rights of children embroiled in unlawful activities, as elucidated in Article 53. Of particular relevance to the diversion of children within the criminal justice system is the constitutional guarantee that children ought not to be subjected to detention except as a measure of last resort. Our previous discussion on the principle of detention as a measure of last resort has underscored that confinement should only be employed when all other alternative options have been exhausted. Furthermore, the Constitution emphasises the paramountcy of the child's best interests. In relation to diversionary measures, as previously discussed, it is noteworthy that detention deprives children of a familial environment. Despite the clarity of the law regarding the detention of children solely as a last resort, some minors find themselves incarcerated for minor offences, such as petty theft, where diversionary measures would be adequate.¹¹²

Significantly, the Children Act of 2022 has introduced diversion as an alternative to judicial proceedings for children involved in criminal activities.¹¹³ The Act encompasses diverse objectives pertaining to diversion, including the utilisation of alternative methods for holding children accountable for their unlawful acts or omissions, facilitating the rehabilitation of children, and mitigating the stigmatisation that may

¹¹¹ Constitution of Kenya (2010), Article 53(1)(f)(i).

¹¹² National Council on the Administration of Justice, Special Taskforce on Children Matters, *Status report on children in the child justice system in Kenya*, 2019, 2.

¹¹³ Children Act (No 29 of 2022), Section 224.

arise from subjecting them to the criminal justice system.¹¹⁴ However, the Act specifies certain eligibility criteria for a child in conflict with the law to be considered for diversion, including the voluntary admission of responsibility and the exclusion of capital offences, among other factors.¹¹⁵

The Act further establishes three tiers of diversion. The initial tier encompasses options such as an oral or written apology, a formal caution, placement under a reporting order not exceeding three months, symbolic restitution to an individual or group, counselling or psychotherapy for a period not exceeding three months, and other comparable measures.¹¹⁶ The second tier incorporates the initial tier options but extends their duration to six months, and introduces additional measures such as community service, referral to appear at a family group conference, or providing a specified sum or benefit to a designated victim or victims.¹¹⁷ The third tier encompasses the second tier options but extends their duration to twelve months, and introduces further measures like non-remunerated community service, among others.¹¹⁸ Courts, as part of their range of potential orders, may employ diversion when handling children involved in criminal activities.¹¹⁹

The Children Act of 2022 stipulates that courts may employ a 'restorative justice order' as a means of addressing children in conflict with the law.¹²⁰ Furthermore, Article 40(3)(b) of the CRC urges states to promote laws and procedures for handling children in conflict with the law, avoiding resort to judicial proceedings. The adoption of restorative justice programmes for children serves to alleviate the burden on the criminal justice system¹²¹ by providing practical and effective alternatives

¹¹⁴ Children Act (No 29 of 2022), Section 226.

¹¹⁵ Children Act (No 29 of 2022), Section 227(2).

¹¹⁶ Children Act (No 29 of 2022), Section 230(2)(a).

¹¹⁷ Children Act (No 29 of 2022), Section 230(2)(b).

¹¹⁸ Children Act (No 29 of 2022), Section 230(2)(c).

¹¹⁹ Children Act (No 29 of 2022), Section 230(1)(n).

¹²⁰ Children Act (No 29 of 2022), Sections 239(1), 29(7).

¹²¹ United Nations Office on Drugs and Crime (UNODC), *Handbook on restorative justice programmes*, United Nations, 2006, 2.

to formal, and often stigmatising measures, thereby significantly contributing to the reintegration and rehabilitation of children involved in criminal activities.¹²² The Act also incorporates the use of family group conferencing as a diversionary method for children in conflict with the law, which will be explored in subsequent discussions.

Although the ACRWC does not explicitly address diversion, it underscores that the primary aim in adjudicating matters involving children accused of violating the law is their reformation and subsequent reintegration into their families and society.¹²³ The CRC imposes obligations upon state parties to establish laws, procedures, authorities, mechanisms, and institutions concerning children in conflict with the law, with a specific emphasis on measures that obviate the need for resorting to judicial proceedings.¹²⁴ The Committee advocates the application of restorative approaches at every stage of the legal process, as outlined in the best interests of the child principle.¹²⁵ Additionally, the Committee recommends that diversion from the criminal justice system should be the preferred approach in the majority of cases, encouraging state parties to progressively expand the range of offences eligible for diversion, including serious offences when appropriate,¹²⁶ and establish facilities that provide a less restrictive environment.¹²⁷

The Beijing Rules establish a minimum standard for the treatment of children within the criminal justice system. In order to prevent stigmatisation and the detrimental effects associated with formal criminal proceedings resulting in a child's conviction, the Beijing Rules advocate non-intervention as the most suitable response.¹²⁸ Rule 11 emphasises

¹²² UNODC, *Handbook on restorative justice programmes*, 26.

¹²³ African Charter on the Rights and Welfare of the Child, Article 17(3).

¹²⁴ CRC, Article 40(3)(b).

¹²⁵ CRC Committee, General Comment No 24, para 19.

¹²⁶ CRC Committee, General Comment No 24, para 28.

¹²⁷ Beijing Rules, Explanatory note to Rule 19.1 para 2; According to this requirement, precedence should be given to so-called 'open' institutions over 'closed' institutions. Moreover, the Committee in General Comment No 24 strongly favours the application of alternative dispositions rather than resorting to court proceedings and the deprivation of liberty.

¹²⁸ Beijing Rules, commentary to Rule 11.

the necessity of empowering police, prosecution, and other relevant agencies to handle such cases at their discretion, without resorting to formal hearings, while adhering to the norms and regulations of the respective legal system. Consent from the child and/or parent should be obtained regarding the recommended diversionary measure.¹²⁹

The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) call for measures that avoid criminalising and penalising children, prioritising the safeguarding of their well-being and interests.¹³⁰ Governments bear the responsibility of enacting and enforcing specific laws and procedures that promote and protect the rights and well-being of children involved in criminal activities.¹³¹

The United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) are founded on the premise that alternatives to imprisonment can effectively address offender treatment within the community.¹³² The Tokyo Rules advocate the use of non-custodial measures without resorting to court proceedings, highlighting the necessity for a broad range of non-custodial options within the criminal justice system, from pre-sentencing to post-sentencing dispositions.¹³³

The Children Act of 2022 lists family group conferencing as a diversionary measure. The discussion below will also include police cautions, which can be borrowed as a best practice from Australia since it has been incorporated into their law.

Family group conferencing

The primary function of the family group conference is to discuss the offence committed by a child in conflict with the law, so that the child may understand the impact of their offence, acknowledge it and

¹²⁹ Beijing Rules, Rule 11.3.

¹³⁰ United Nations Guidelines for the Prevention of Juvenile Delinquency, (Riyadh Guidelines), 14 December 1990, A/RES/45/112, Guideline 5.

¹³¹ Riyadh Guidelines, Guideline 52.

¹³² Tokyo Rules, Rule 1.

¹³³ Tokyo Rules, Rule 2.

obtain support for the reform of his or her behaviour.¹³⁴ It involves a children officer who facilitates a meeting attended by the offender and their family; the victim and their family; and such other persons significant in their lives, police and advocates.¹³⁵

Diversionsary measures have also been applied in certain jurisdictions and have been successful. For instance, in New Zealand, family group conferences have been regarded as successful diversionsary measures and have been applied on moderately serious offences with an exception to murder and manslaughter.¹³⁶ The proceedings at a family group conference are confidential and no statement made therein may be used as evidence in court proceedings.¹³⁷

Police cautions

This is an unconditional diversion that has not been included in the Kenyan legislation. However, best practice can be borrowed from Australia, which has notable success on the use of police cautions. The Young Offenders Act of Australia in Sections 18 to 30 sets out police cautions as a measure for diverting children in conflict with the law. Among the conditions for considering whether it is appropriate to issue cautions is the seriousness of the offence.

Despite this means of diversion not being outlined in Kenya, the police system is the first point of contact for children in conflict with the law. Many children in Kenya alleged to have committed minor offences still face psychological abuse from exposure to the criminal justice system.

¹³⁴ Children Act (No 29 of 2022) Section 232(5).

¹³⁵ Children Act (No 29 of 2022) Section 232(2),(3).

¹³⁶ Yin Ha NG and Gabriel Tsz Wah Wong, 'An alternative to prosecution: A comparative study between restorative service provision in Queensland and Hong Kong' 1 *SS student e-journal*, 2012, 267. See also, New Zealand's Children, Young Persons and their Families Act (1989), whose aim is to reform the law relating to child and young offenders by making provisions for family group conferencing (Sections 20-38).

¹³⁷ Children Act (No 29 of 2022) Section 232(12).

Conclusion

This paper has examined the application of the best interests of the child principle in the context of juvenile detention. It has argued that the principle is a subjective and context-dependent concept that requires legal guidance and judicial discretion. It has reviewed the Kenyan legal framework, especially the Children Act of 2022, which provides a clear definition and operationalisation of the principle in both private and public spheres. It has also advocated a rights-based and diversionary approach to child justice, which minimises the use of detention and maximises the potential for rehabilitation and reintegration of children in conflict with the law. It has suggested that diversionary measures, such as family group conferences, should be adopted as early as possible in the legal process and expanded to cover a wider range of offences. The paper concludes that the best interests of the child principle is a fundamental and flexible tool that can enhance the protection and development of children in conflict with the law, if implemented effectively and consistently by all relevant actors.

The child's right to a nationality in Kenya under the Children Act of 2022

Julie Lugulu*

Abstract

Every child's right to a nationality is well entrenched in the international human rights legal framework. The Children Act of 2022 safeguards the right of a child to a name and nationality and adopts preventive measures protecting children from statelessness. This paper examines first, the extent to which the Act's provisions on the child's right to a name and nationality aligns with the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. It later assesses whether the Act has sufficient safeguards against the deprivation of a child's nationality as provided for under international law.

Keywords: name and nationality, birth registration, Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, deprivation of nationality

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Introduction

Nationality is the legal bond between a state and its nationals, which enables the national to enjoy their rights and is bound by the obligations set by the state.¹ Each sovereign state has the right to determine its own citizens through its domestic laws in accordance with international law.² Consequently, every state has the discretion to determine its nationals in accordance with its citizenship laws. States codify nationality laws, which individuals need to satisfy in order to become citizens. Once one becomes a citizen, this status enables them to enjoy the privileges associated with citizenship. While states have the right to decide their nationals in accordance with their nationality laws, states need to comply with international law principles on acquisition, loss and deprivation of nationality.

Nationality is a fundamental right which unlocks the enjoyment of other rights. However, not every person possesses nationality. In reality, millions of adults and children around the world are stateless. The Constitution of Kenya, 2010 and the Kenya Citizenship and Immigration Act (No 12 of 2011) govern the acquisition and revocation of Kenyan citizenship. The repealed Children Act of 2001³ stipulated on all matters affecting children in Kenya. Presently, the Children Act of 2001 has been amended and replaced with the Children Act of 2022 (Children Act), which provides for the child's right to a name and nationality at Section 7.

United Nations human rights instruments recognise every individual's right to a nationality.⁴ Since 1961, a child's right to acquire a nationality has been guaranteed in the following six treaties: the

¹ *Nottebohm case (Liechtenstein v Guatemala)* (Judgement of 6 April 1955) ICJ Reports 20.

² *Nottebohm case (Liechtenstein v Guatemala)* 20.

³ Children Act (No. 8 of 2001) (Repealed).

⁴ Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 15; Convention on the Nationality of Married Women, 29 January 1957, A/RES/1040, Articles 1 and 2; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, Article 5(iii); Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13, Article 9; Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106, Article 18.

1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention),⁵ the International Covenant on Civil and Political Rights (ICCPR),⁶ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁷ Convention of the Rights of the Child (CRC),⁸ the International Covenant on Civil and Political Rights (ICCPR),⁹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁰ the International Convention on the Protection of All Migrant Workers and their Families,¹¹ the Covenant on the Rights of Persons with Disabilities.¹² In addition, Article 8 of the 1961 Statelessness Convention prohibits the deprivation of one's nationality.¹³

The African Charter on the Rights and Welfare of the Child (ACRWC) affirms every child's right to a name and nationality and to be registered immediately after birth.¹⁴ This right is reaffirmed in the European Convention on Nationality,¹⁵ the American Convention on Human Rights¹⁶ and the Covenant on the Rights of the Child in Islam.¹⁷

⁵ Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175, Articles 1-4.

⁶ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 24.

⁷ Convention on the Elimination of All Forms of Discrimination against Women, Article 9.

⁸ Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Article 7.

⁹ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 24.

¹⁰ Convention on the Elimination of All Forms of Discrimination against Women, Article 9.

¹¹ International Convention on the Protection of All Migrant Workers and their Families, A/RES/45/158, 18 December 1990, Article 29.

¹² Convention on the Rights of Persons with Disabilities, Article 18.

¹³ Convention on the Reduction of Statelessness, Article 8.

¹⁴ African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49, Article 6.

¹⁵ European Convention on Nationality, 6 November 1997, ETS 166, Article 7.

¹⁶ American Convention on Human Rights, Pact of San Jose, Costa Rica (B-32), 22 January 1969, Article 20.

¹⁷ Covenant on the Rights of the Child in Islam, June 2005, OIC/9-IGGE/HRI/2004/Rep. Final, Article 7.

Statelessness is a global concern because it occurs in all the continents of the world and affects adults and children alike.¹⁸ This can be attributed to the dissolution of states, unfair administrative practices, discrimination and arbitrary deprivation of nationality among others.¹⁹ In Africa, statelessness may be attributed to its colonial history, migration, discrimination and pastoralism.²⁰

Childhood statelessness is caused by a number of factors, including inherited statelessness from a parent to a child, nationality laws that discriminate on gender,²¹ and a lack of proper safeguards to grant nationality to foundlings in countries where nationality is granted through descent.²²

In addition, foreign children born in exile may face challenges accessing any form of identification.²³ In *Yean and Bosico Children v Dominican Republic*, the Inter-American Court of Human Rights held that statelessness deprives an individual from fully enjoying civil and political rights and puts them in a place of vulnerability.²⁴ Additionally, statelessness results in marginalisation, discrimination and exclusion; the lack of documentation impedes the access to education and health

¹⁸ United Nations High Commissioner for Refugees, 'About statelessness' -<<https://www.unhcr.org/ibelong/about-statelessness/>> on 1 February 2024.

¹⁹ Hélène Lambert, 'Comparative perspectives on arbitrary deprivation of nationality and refugee status' 64(1) *International and Comparative Law Quarterly* (2015) 3. See also Carol Batchelor, 'Statelessness and the problem of resolving of nationality status' 10(1) *International Journal of Refugee Law* (1998) 156.

²⁰ African Commission on Human and Peoples' Rights, 'The right to nationality in Africa' 2015, 7.

²¹ Julie Lugulu, 'Gender discriminatory nationality laws and childhood statelessness in Africa: A reflection on legislative interpretations' in Aderomola Adeola and Makau Mutua (eds) *The Palgrave handbook of democracy, governance and justice in Africa*, Springer Nature, 2022, 110.

²² Institute of Statelessness and Inclusion, 'Statelessness and human rights: The Convention on the Rights of the Child', 2018. This article uses the words nationality and citizenship interchangeably to mean the legal bond between an individual and a state, which requires results in obligations from both parties.

²³ Luquerna Ana 'The children of ISIS: Statelessness and eligibility for asylum under international law' 21(1) *Chicago Journal of International Law* (2020) 169.

²⁴ *Case of the girls Yean and Bosico v Dominican Republic* (Preliminary objections, merits, reparations and costs) IACtHR (2007), para 142.

care and predisposes children to trafficking, early marriage, sexual exploitation and poverty.²⁵

Childhood statelessness hinders a child from enjoying socio-economic rights and if left unresolved contributes towards intergenerational statelessness. In the *Children of Nubian descent v Kenya*, the African Committee of Experts on the Rights and Welfare of the Child asserted that statelessness is antithetical to the best interests of the child.²⁶

The purpose of this paper is to, first, examine the extent to which the provisions on the child's right to a nationality in the Children Act align with the CRC and the ACRWC. Secondly, this paper discusses the deprivation of nationality under international law and examines whether the Children Act has sufficient safeguards against the deprivation of a child's nationality.

This article advances as follows. Section I discusses the acquisition and revocation of citizenship in Kenya. Section II examines the child's right to be registered immediately after birth and to acquire a nationality under the CRC and the ACRWC. Section III discusses deprivation of nationality under the 1961 Statelessness Convention, the CRC and domestic law. Section IV examines the extent to which the Children Act complies with the ARWC in upholding the child's right to a nationality. Finally, this paper concludes that the Children Act is silent on the deprivation of a child's nationality, therefore does not comply with international law standards.

²⁵ Bridget Wooding 'Contesting Dominican discrimination and statelessness' 20(3) *Peace Review, A Journal of Social Justice* (2008) 366. See also Brad K Blitz, 'Neither seen nor heard: Compound deprivation among stateless children' in Jacqueline Bhabha (ed) *Children without a state: the scope of child statelessness in the 21st Century*, MIT Press (2011) 44.

²⁶ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011. See also Julie Ingrid Lugulu 'Update on Kenya's implementation of the decision in the Nubian Minors' case' 6 *Kabarak Journal of Law and Ethics* (2022) 208.

Acquisition and revocation of a child's citizenship in Kenya

As previously discussed, each sovereign state has the discretion to determine its nationals under its domestic laws. Similarly, most nationality laws provide for the acquisition of nationality and the conditions for loss or deprivation of nationality.²⁷ This section highlights how children may acquire Kenyan citizenship and the instances in which their Kenyan citizenship may be revoked in accordance with the citizenship laws in Kenya.

Kenyan citizenship may be acquired through descent (*jus sanguinis*). The 2010 Constitution provides for the acquisition of Kenyan citizenship through birth or registration.²⁸ A child may acquire Kenyan citizenship through birth if he or she is born in Kenya or abroad to a Kenyan mother or father.²⁹ Kenyan citizenship may also be acquired through registration. If a person is married to a Kenyan citizen for at least seven years, they may register for Kenyan citizenship.³⁰ Secondly, an applicant may register for Kenyan citizenship if they have lawfully resided in Kenya for at least seven years.³¹ A child born to an applicant before the application for Kenyan citizenship through lawful residence is eligible to apply for citizenship through registration as a dependant of the applicant, as long as the child lawfully resides in Kenya. Children born to a parent or parents who have attained Kenyan citizenship through registration, after the attainment of registration, acquire Kenyan citizenship through birth.

Thirdly, a foreign child who is adopted by a Kenyan citizen, may acquire Kenyan citizenship through registration.³² In addition, a

²⁷ Laura Van Waas, 'Foreign fighters and the deprivation of nationality: National practices and international law implications' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds) *Foreign fighters under international law and beyond*, TMC Asser Press (2016) 471.

²⁸ Constitution of Kenya (2010), Article 13(2).

²⁹ Constitution of Kenya (2010), Article 14(1).

³⁰ Constitution of Kenya (2010), Article 15(1).

³¹ Constitution of Kenya (2010), Article 15(2).

³² Constitution of Kenya (2010), Article 15(3). See also, Kenyan Citizenship and Immigration Act (Chapter 172), Section 14.

child found in Kenya who appears to be less than eight years old, of unknown parentage and whose nationality is unknown (also referred to as foundlings) is presumed as a Kenyan citizen by birth.³³

Kenya citizenship laws also provide for instances when a child's citizenship can be revoked. Section 21 of the Kenyan Citizenship and Immigration Act provides for the revocation of Kenyan citizenship acquired through registration. A foundling's citizenship may be revoked if acquired through fraud, false representation, or concealment of a material fact.³⁴ It may also be revoked if the nationality or the parentage of the child becomes known, and the parentage reveals that child is a citizen of another country, or if the age of the child becomes known and it reveals that the child was older than eight years old.³⁵

The child's right to be registered immediately after birth and to acquire a nationality

The child's right to be registered immediately after birth and to acquire a nationality is extensively provided for under United Nations and African human rights legal framework. While the child has a right to a nationality, the only effective way of implementing this right is through allowing the child to be registered immediately after birth.³⁶ The next part discusses the child's right to be registered immediately after birth and to acquire a nationality under international and domestic law.

Under the international framework

The CRC provides the child with the right to be registered immediately after birth, the right to a name and to acquire a nationality.

³³ Constitution of Kenya (2010), Article 17(2).

³⁴ Constitution of Kenya (2010), Article 17(2)(c).

³⁵ Constitution of Kenya (2010), Article 17(2)(b) and (c).

³⁶ Jaap Doek, 'The CRC and the right to acquire and preserve a nationality' 2(3) *Refugee Survey Quarterly* (2006) 27.

Article 7 (1) of the CRC states, 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality...'. While Article 7 of the CRC upholds the child's right to a nationality and to be registered immediately after birth, this provision does not strongly guarantee against childhood statelessness.³⁷

During the drafting of this provision, proposals were made to allow a child to acquire nationality based on where they were born.³⁸ This proposal was rejected in favour of the provision to allow a child to acquire a nationality through descent or through birth based on the domestic laws.³⁹ Therefore, Article 7 of the CRC confers a child with the right to acquire a nationality and not the right to a nationality. Moreover, during the drafting of the provision, states declined the unqualified obligation to grant nationality to all children born on their territory irrespective of the circumstances.⁴⁰

Article 7 of the CRC aims to recognise the child's enjoyment of their nationality from birth through establishing the right to a nationality and through preventing statelessness. Registering a child at birth is important because it is an enabling right which is vital to access education, health care and social security.⁴¹ Kenya is a state party to the CRC, therefore has an obligation to register the birth of every child immediately after birth.

Article 6 of the ACRWC provides for the child's right to a name, to be registered immediately after birth and to acquire a nationality whose

³⁷ Adem Arkadem-Thibert and Gerison Lansdown, 'Article 7; The right to a name, nationality and to know and be cared for by parents' in Vaghri Ziba, Zermatten Jean, Lansdown Gerison, Ruffiero Roberta (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child, children's well-being: An analysis of attributes*, Springer Nature (2022) 52.

³⁸ Thibert and Lansdown, 'Article 7: The right to a name, nationality and to know and be cared for by parents', 52.

³⁹ Thibert and Lansdown, 'Article 8; The right to a name, nationality and to know and be cared for by parents', 52.

⁴⁰ Doek 'The CRC and the right to acquire and preserve a nationality', 26.

⁴¹ Adem and Lansdown, 'Article 8; The right to preservation of identity' 55.

main aim is to prevent statelessness⁴² and childhood statelessness.⁴³ State parties should ensure that their constitutional legislation accords children born in their territory a nationality.⁴⁴ Ensuring that a child has nationality from birth is in their best interests and promotes their full participation in the political and social life within the territory where they are born.⁴⁵

Therefore, state parties to the ACRWC have an obligation to ensure that they grant nationality to children born in their territory if the children do not have any other nationality and would otherwise be stateless.⁴⁶ Kenya being a state party has obligations to ensure that its domestic laws provide for children to be registered immediately after birth. Another obligation is to grant nationality to children in their territory who lack any other nationality to prevent statelessness.

Under domestic law

All children born in Kenya to Kenyan citizens or to asylum seekers or refugees are entitled to be registered at birth and be issued with a birth certificate used to apply for Kenyan citizenship upon attaining adulthood. A birth certificate is not proof of Kenyan citizenship. Nonetheless, registering the birth of a child provides the child with proof of a legal identity establishing a genuine link between the child and the state, hence reducing the risk of childhood statelessness. In addition, birth registration provides the official evidence of a child's parentage and birthplace without which the child may face difficulties

⁴² African Charter on the Rights and Welfare of the Child, Article 6(4).

⁴³ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, 16 April 2014, ACERWC/GC/02 (2014) para 83.

⁴⁴ African Charter on the Rights and Welfare of the Child, Article 6(4).

⁴⁵ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC*, para 89.

⁴⁶ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC*, para 87.

in proving their nationality under the law and might become stateless.⁴⁷ The ownership of a birth certificate unlocks the enjoyment of a child's right to education and health.⁴⁸

Article 14(4) of the 2010 Constitution states: 'A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.'⁴⁹ Therefore, the 2010 Constitution, Section 7(4) of the Children Act and Section 9 of the Kenyan Citizenship and Immigration of 2011 set a presumption for foundlings to be recognised as Kenyan citizens.⁵⁰ As already mentioned, Kenya mainly grants citizenship through descent. These presumptions safeguard against child statelessness due to the inability of proving their existing legal links with Kenya. Hence, the presumptions comply with the best interests of the child in protecting a child against statelessness.

Deprivation of nationality

Deprivation of nationality is not a new concept in international law. For example, it has been used as a counter-terrorism measure in jurisdictions around the world.⁵¹ Deprivation or revocation of nationality refers to the withdrawal of nationality or the denial of conferral of nationality. International law allows for the deprivation of nationality when the deprivation conforms to domestic law, complies with proportionality, serves a legitimate aim and complies with non-

⁴⁷ Institute of Statelessness and Inclusion, 'Statelessness and human rights: The Convention on the Rights of the Child' Institute of Statelessness and Inclusion (2018), 6.

⁴⁸ Lindsey N Kingston, Elizabeth F Cohen and Christopher P Morley, 'Debate: Limitations on universality: the "right to health" and the necessity of legal nationality' 10(11) *BMC International Health and Human Rights* (2010) 12.

⁴⁹ Kenyan Citizenship and Immigration Act (Cap 172), Section 9.

⁵⁰ Kenyan Citizenship and Immigration Act (Cap 172), Section 9.

⁵¹ Tom Boekestein, 'Deprivation of nationality as a counter-terrorism tool: A comparative analysis of Canadian and Dutch legislation' 5 *Transnational Human Rights Review* (2018) 24.

discrimination, equality and due process.⁵² While states have the discretion to grant nationality to its citizens, this discretion should be exercised in compliance with international law, which prohibits arbitrary deprivation of nationality and upholds the state duty to prevent statelessness and discrimination.⁵³

International law

The 1954 Statelessness Convention and the 1961 Statelessness Convention make for the international legal framework for the protection of stateless persons. Article 8 of the 1961 Statelessness Convention stipulates:

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless. Therefore, state parties to the 1961 Convention have an obligation not to deprive a person of their nationality if this act would result in statelessness, the aim of this provision was to avoid creating new forms of statelessness through deprivation.
2. Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State: (a) in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality; (b) where the nationality has been obtained by misrepresentation or fraud.

Article 8 of the 1961 Statelessness Convention prohibits depriving a person of their nationality where the result of such action would be the person becoming stateless. Clauses 2 and 3 of the Article contain exceptions to this prohibition, which include obtaining nationality of the Contracting State by fraud or misrepresentation, conduct that is

⁵² Lambert, 'Comparative perspectives on arbitrary deprivation of nationality and refugee status,' 11.

⁵³ Van Waas, 'Foreign fighters and the deprivation of nationality: national practises and international law implications' 476. See also, Lambert, 'Comparative perspectives on arbitrary deprivation of nationality and refugee status,' 13.

seriously prejudicial to the vital interests of the state. State parties to the 1961 Statelessness Convention have an obligation to avoid depriving an individual of their nationality if it would render the person stateless, however, it allows the deprivation if the nationality was acquired through fraud.⁵⁴

States may deprive their nationals of their citizenship as long as the deprivation is rational and follows a fair procedure. States can also deprive nationality if it was acquired through fraud, or if the applicant served in a foreign military service, or if the citizen acquires another nationality. Only in the most extreme circumstances can a state deprive a national of their nationality if it would result in statelessness.

Regarding deprivation, Article 8(1) of the CRC demands states to respect the right of the child to preserve their identity including nationality, name and family relations without unlawful interference. The intention of this provision is to preserve a child's identity which is important in order to allow a child to exercise and enjoy other rights.⁵⁵ Preserving a child's identity is in the best interests of a child.⁵⁶ Therefore, no child should be deprived of their nationality or lose their nationality for any reason.⁵⁷ Article 8(1) of the CRC mentions nationality as an element of a child's identity. Therefore, state parties have to respect the child's right to preserve their identity which includes nationality and name.⁵⁸

Article 8 (2) of the CRC obligates state parties to offer appropriate assistance and protection, with a view to re-establishing speedily his or her identity, where a child is illegally deprived of some or all of the elements of his or her identity. This provision protects the child's right to a nationality from arbitrary deprivation and against statelessness.⁵⁹ In

⁵⁴ Mónika Ganczer, 'The right to a nationality as a human right?' 1 *Hungarian Yearbook of International Law and European Law* (2014) 19.

⁵⁵ Adem and Lansdown, 'Article 8: The right to preservation of identity' 60.

⁵⁶ Adem and Lansdown, 'Article 8: The right to preservation of identity' 58.

⁵⁷ Institute of Statelessness and Inclusion, 'Statelessness and human rights' 9.

⁵⁸ Doek 'The CRC and the right to acquire and preserve a nationality' 29.

⁵⁹ Mónika Ganczer, 'The right to a nationality as a human right?' 1.

light of the above, state parties to the CRC have an obligation to ensure that where an aspect of a child's identity has been taken away, then the state must make efforts to remedy this and help them to re-establish their identity. In doing this, the state upholds and protects the child's right to a nationality in accordance with Article 2 (non-discrimination), Article 3 (best interests of the child) and Article 12 (life survival and development) of the CRC.⁶⁰

While the ACRWC recognises the child's right to a nationality, it does not explicitly address deprivation of nationality of a child.

Domestic law

It is important to note that Kenya is not a state party to the 1961 Statelessness Convention. As earlier discussed, Kenyan law provides for instances in which one may be deprived of their citizenship through revocation. Kenyan law uses the term revocation, as opposed to deprivation. In this article, deprivation carries a similar meaning with revocation, which means the cancellation of power, authority or thing initially granted.⁶¹

Revocation is the official cancellation of a decree. Therefore, citizenship acquired through registration may be revoked by the Kenyan government if acquired through fraud, false representation or concealment of a material fact.⁶² Another ground involves assisting Kenya's enemy during a war.⁶³ Citizenship acquired through registration may also be revoked if, first, the Kenyan citizen is convicted within five years of registration of committing an offence and is sentenced to imprisonment of three years or longer.⁶⁴ Secondly, citizens by registration may have their citizenship revoked if convicted of treason.⁶⁵ These

⁶⁰ Institute of Statelessness and Inclusion, 'Statelessness and human rights' 7.

⁶¹ *Black's Law Dictionary*, Ninth Edition, Thomson Reuters, 2009, 1435.

⁶² Constitution of Kenya (2010), Article 17(1)(a).

⁶³ Constitution of Kenya (2010), Article 17(1)(b).

⁶⁴ Constitution of Kenya (2010), Article 17(1)(c).

⁶⁵ Constitution of Kenya (2010), Article 17(1)(d).

provisions are in compliance with the 1961 Statelessness Convention, which recognises that one can legally be deprived of their nationality in the above circumstances.

A child who has acquired their Kenyan citizenship through a presumption of birth, may lose their Kenyan citizenship if it was acquired through fraud, false representation, or concealment of a material fact.⁶⁶ This provision complies with international law which allows citizenship to be revoked if acquired through fraud. Citizenship through presumption of birth may also be revoked if the nationality or the parentage of the person becomes known and reveals that they are citizens of another country, or if the age of the person becomes known and reveals that he or she was older than eight years old.

Section 21 of the Kenyan Citizenship and Immigration Act provides for the revocation of Kenyan citizenship acquired through registration. Section 11 of the repealed Children Act, 2001 stated, '[e]very child shall have a right to a name and nationality and where a child is deprived of his identity, the Government shall provide appropriate assistance and protection, with a view to establishing his identity.'

Compliance of the Children Act with the CRC and ACRWC in upholding the child's right to nationality

This paper has examined in detail the acquisition and revocation of a child's citizenship in Kenya, the child's right to be registered immediately after birth and to acquire a nationality and the deprivation of a nationality under international law. This part examines the extent to which the Children Act aligns with international human rights law obligations on the child's right to a nationality and the protection from unlawful deprivation of nationality.

Kenyan law recognises the importance of registering every child immediately birth. For instance, the Births and Deaths Registration Act,

⁶⁶ Constitution of Kenya (2010), Article 17(2).

stipulates the compulsory registration of births of children both born in Kenya⁶⁷ and abroad,⁶⁸ and compulsory registration of abandoned children.⁶⁹ Similarly, Section 7(2) of the Children Act addresses the importance of registering the birth of a child immediately after birth.⁷⁰ Consequently, the Children Act complies with the CRC and the ACRWC to ensure that children are registered immediately after birth and acquire a nationality, thereby preventing childhood statelessness at birth.

Kenyan citizenship may be acquired through descent and foundlings may be presumed (legally) to be Kenyan citizens. Therefore, the Children Act aligns with the ACRWC in preventing childhood statelessness through granting Kenyan citizenship to foundlings who would otherwise be stateless.

It is noteworthy that Section 7 of the Children Act is silent on the state's obligation to help the child to re-establish their identity after being deprived of their nationality. Section 11 of the repealed Children Act of 2001 obligated the government to help a child regain their lost identity, hence, protecting a child from deprivation of nationality. This omission may create new causes of childhood statelessness in situations where a foundling's nationality is revoked under the domestic laws or where one does not possess a dual nationality.⁷¹

Deprivation of a child's nationality leaves them prone to human rights violations and is a cause of childhood statelessness especially when a child does not have another nationality. If a foundling, without dual citizenship is deprived of their nationality, under Article 17 of the 2010 Constitution, this child would be rendered stateless. This contravenes Article 8 of the 1961 Statelessness Convention, which

⁶⁷ Births and Deaths Registration Act (Cap 149), Section 9.

⁶⁸ Births and Deaths Registration Act (Cap 149), Section 10.

⁶⁹ Births and Deaths Registration Act (Cap 149), Section 13.

⁷⁰ It is important to note that, the Children Act, 2001 was silent about the registration of children immediately after birth; the Children Act, 2022 provides for children to be registered immediately after birth.

⁷¹ The Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, *The right to nationality in Africa*, African Commission on Human and Peoples' Rights (ACHPR), 2015, 35.

prohibits the deprivation of nationality if it would make someone stateless. In addition, Article 8(1) of the CRC obliges state parties to respect the right of the child to preserve their identity, which includes nationality. Also, Article 8(2) of the CRC requires state parties to assist and protect children whose identity is illegally deprived.

Therefore, the Children Act does not fully uphold the child's right to a nationality because it does not have a provision on deprivation of nationality. Omitting to safeguard the child's nationality against deprivation may increase the number of stateless persons particularly among children who do not possess any other nationality. Moreover, the Inter-American Court of Human Rights observed that states have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons.⁷²

Conclusion

The Children Act has made commendable efforts in providing, protecting and safeguarding the child's right to nationality through providing every child with a right to a nationality and through providing children with the right to be registered immediately after birth. Secondly, while Kenya mainly grants nationality through descent, the Children Act prevents childhood statelessness by granting children of unknown parentage with Kenyan citizenship.

However, the Children Act is silent on the deprivation of a child's nationality, although the repealed Children Act of 2001 covered it. To this extent, the Children Act fails to fully comply with international law, which prohibits the revocation of one's nationality if it would render the person stateless, as well as the CRC, which obliges the Government of Kenya to assist children whose nationality has been illegally deprived.

⁷² *Case of the girls Yean and Bosico v Dominican Republic*, para 142.

Enhancing child participation in family disputes through child inclusive mediation in Kenya

Christine Njane* & Vianney Sebayiga**

Abstract

Despite the fact that children are directly affected by the outcome of family disputes, they are rarely given the opportunity to express their views. When an opportunity arises, children's voices are manipulated by parents due to the adversarial litigation system that turns parents against each other. Consequently, the child's best interests are not adequately considered during and post-divorce. In view of the increasing case backlog and promoting the best interests of the child, this paper advocates child inclusive mediation by demonstrating how it can be entrenched in the resolution of family disputes. The paper argues that this form of mediation enables children to participate in the decisions affecting their future. Secondly, involving children to voice their wishes helps in refocusing on the children's needs. Using the Office of Family Advocate in South Africa as a case study, the paper illustrates how Kenya can enhance child participation in family mediation through the newly created Office of Secretary of Children's Services under Section 37 and 38 of the Children Act of 2022.

Keywords: Child-inclusive mediation, family disputes, best interests of the child, Secretary of Children Services, Office of the Family Advocate, Children Act of 2022

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Introduction

Family disputes are one of the ways in which children come into contact with the law.¹ Such disputes usually concern property disputes, financial support, child maintenance, child custody, and child visitation disputes, among others.² Notably, litigation has been the dominant method of resolving family disputes. While litigation is the prevailing dispute resolution mechanism, it has more demerits than benefits where children are involved.³ For instance, children may find it difficult to communicate their views owing to the adversarial nature of litigation, which agitates tensions between parents.⁴ As a result, children may fear giving their views leading to emotional and psychological harm which impairs their growth and development.⁵

For parents, litigation worsens the psychological and mental stress of separating couples because of its winner-loser attribute.⁶ Likewise, divorce proceedings take a long time to conclude due to delays and case backlog.⁷ In most cases, the excessive emphasis on the individual interests of parents disregards the interests of children yet they are the most affected by the separation.⁸ To a child, the divorce is a dreadful

¹ African Child Policy Forum (ACPF), 'Spotlighting the invisible: Justice for children in Africa' 2018, 3.

² Vini Singh, 'Compulsory mediation for family disputes' 2(9) *Indian Institute of Arbitration and Mediation* (2010) 2.

³ Jawad Ahemd and Nissahant Carota, 'Mediating family disputes' in Gracious Timothy (ed), *Conciliation and mediation in India: Global trends in dispute resolution*, Kluwer Law International, 2021, 264.

⁴ Marli Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' Unpublished LLM thesis, Stellenbosch University, 2021, 12.

⁵ Janet Maleson Spencer and Joseph Zammit, 'Mediation-arbitration: A proposal for private resolution of disputes between divorced or separated parents' (5) *Duke Law Journal* (1976) 919.

⁶ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 8.

⁷ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 12.

⁸ Tara Black and others, 'The intersection of child custody disputes and child protection investigations: Secondary data analysis of the Canadian incidence study of reported child abuse and neglect (CIS-2008)' 4(1) *International Journal of Child and Adolescent Resilience* (2016) 144.

life-changing event which impacts various aspects of a child's life.⁹ For example, where the child will live, which parent will take custody, schooling, contact between the child and the non-custodial parent, and the choice of religious upbringing of the child.¹⁰ It follows that divorce has a life-long impact on children.¹¹

The drawbacks of litigation have provided opportunities for family mediation as a preferred avenue of resolving family disputes.¹² Family mediation involves an independent neutral third party who facilitates negotiations between separating parties to reach a mutually satisfactory settlement.¹³ It enables parties to have a broader perspective of the dispute including other people likely to be affected by their dispute, for instance, children.¹⁴ Family mediation has the potential to restore relationships between the separating parties.¹⁵ In addition, it is flexible and affords parties a greater autonomy in determining the outcomes of their divorce.¹⁶ Further, family mediation is confidential and private – this protects parties from public embarrassment arising from disclosure of their private intimate details as well as expressions of their emotions.¹⁷

⁹ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 3.

¹⁰ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 4.

¹¹ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 12.

¹² Thomas W Miller and Lane J Veltkamp, 'Disputed child custody: Strategies and issues in mediation' 15(1) *Journal of the American Academy of Psychiatry and the Law* (1998) 48.

¹³ Anita White, 'Mediation in child custody disputes and a look at Louisiana' 50(5) *Louisiana Law Review* (1990) 1124.

¹⁴ Razia Nordien-Lagardien, Blanche Pretorius and Susan Terblanche, 'Family mediation: The perceptions and experiences of unmarried parents and mediators' 57(2) *Social Work* (2021) 153.

¹⁵ Nordien-Lagardien and others, 'Family mediation: The perceptions and experiences of unmarried parents and mediators' 153.

¹⁶ Sharon Muller, 'The role of social work practice intervention in divorce mediation' Unpublished Master of Social Work Degree thesis, University of Western Cape, 2020, 1.

¹⁷ Adesina Bello, 'Arbitration as a template for resolving family disputes' 84 *International Journal of Arbitration, Mediation, and Dispute Management* (2018) 240.

In family mediation, there are opportunities to allow children to participate in the mediation process.¹⁸ To begin, they may be included at the end of the final session to be informed about what their parents have agreed.¹⁹ Alternatively, children may be consulted by the mediator and parents after agreements have been reached to give their views about the agreement.²⁰ In other circumstances, children may be interviewed by the mediator in the early stages of the mediation to gather their views, concerns, and feelings. Then, the mediator shares this information with the parents as they negotiate.²¹ Children may also occasionally attend the mediation sessions whenever an issue concerning them arises.²² Lastly, children, especially adolescents may be present throughout the mediation process and participate in decision making as an equal party to the proceedings.²³

Child participation is a crucial principle of children's rights outlined in the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).²⁴ It is interrelated with the principle of the best interests of the child, which is also guaranteed under the Constitution of Kenya 2010. The Constitution recognises that in every matter concerning the child, a child's best interests should be of paramount importance.²⁵ To

¹⁸ Amanda E Boniface, 'Resolving disputes with regards to child participation in divorce mediation' 1 *Speculum Juris* (2013) 143.

¹⁹ Donald Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 8(4) *Mediation Quarterly* (1991) 329.

²⁰ Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 329.

²¹ Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 330.

²² Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 330.

²³ Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 330.

²⁴ Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, Article 12. See the African Charter on the Rights and Welfare of the Child (ACRWC), 1 July 1990, CAB/LEG/24.9/49 where Article 4 provides that 'in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration. In all proceedings affecting a child who is capable of communicating their own views, an opportunity shall be provided for the views of the child either directly or indirectly through a representative as a party to the proceedings. Those views shall be taken into consideration by the relevant authority'.

²⁵ Constitution of Kenya (2010) Article 53(2).

give effect to the Constitution, the Children Act of 2022 was enacted on 6 July 2022 and commenced on 27 July 2022.²⁶ It repealed the Children Act of 2001, which was deficient in promoting children's rights in conformity with the Constitution and international instruments.²⁷ The 2022 Act enshrines children's rights and makes provision for parental responsibility, care and protection, alternative care, and children in conflict with the law.²⁸ In addition, it establishes the office of the Secretary of Children Services whose roles include promoting family reconciliation and mediating family disputes involving children and parents with parental responsibility.

Following this introductory part, this paper is divided into six parts. Part Two conceptualises child participation highlighting the levels of participation, and the connection between child participation and the best interests of the child principle. In Part Three, the paper discusses child inclusive mediation and evaluates its advantages and disadvantages. In addition, it highlights instances where it may not be suitable for children to participate in family mediation. Part Four focuses on the functions of the Office of the Secretary of Children's Services (OSCS), specifically, promoting family reconciliation by mediating disputes where children and parents are involved. The paper argues that this function is vague and inadequate in promoting the best interests of the child in family mediations. Using a case study of the Office of Family Advocate (OFA) in South Africa in Part Five, the paper highlights how child-inclusive mediation can be promoted better by the OSCS. Part Six makes recommendations while Part Seven concludes the paper.

²⁶ Children Act (No 29 of 2022).

²⁷ Children Act (No 29 of 2022) Section 249.

²⁸ Children Act (No 29 of 2022).

Conceptualising child participation

Generally, the term participation is a process of sharing views and ideas on decisions which impact one's life.²⁹ In terms of children, participation can mean 'to speak, to participate, and to have the child's views taken into account'.³⁰ As a right, every child is free to take part, express their views, and be informed in matters concerning them.³¹ Child participation is one of the four core principles of the CRC.³²

According to the CRC, state parties are obligated to ensure that children who are capable of forming their own views are allowed to express them freely, and that such views are given due weight while considering the age and maturity of the child.³³ In this regard, free expression means that children have a choice to share their views or not. They should not be coerced or subjected to any manipulation.³⁴

In order for children to participate, they should be equipped with all the necessary information needed to give an informed view that aligns with their best interests.³⁵ Children also need to be informed about the conditions under which they will be asked to express their views.³⁶ Furthermore, child participation requires that where it is not possible to act in accordance with the child's wishes, the child must be

²⁹ Ruth Sinclair, 'Participation in practice: Making it meaningful, effective and sustainable' 18(2) *Children and Society* (2004) 111.

³⁰ Laura Lundy, 'Voice is not enough: Conceptualising Article 12 of the UNCRC' 33(6) *British Educational Research Journal* (2007) 927.

³¹ ACERWC, 'Child participation guidelines' 2022, 4.

³² Committee on the Rights of the Child (Committee), General Comment No 12 of 2009: The right of the child to be heard, 20 July 2009, CRC/C/GC/12, UNCRC, para 2.2. The other principles are non-discrimination, the right to life, development, and the primary consideration of the child's best interests.

³³ CRC, Article 12.

³⁴ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 21.

³⁵ Committee, General Comment No 12, para 15.

³⁶ Clare Feinstein and Clare O'Kane, 'Children's and adolescents' participation and protection from sexual abuse and exploitation' Innocenti Working Paper, UNICEF Innocenti Research Centre (2009) 6.

given an explanation as to the consideration given to their views and the justification for non-implantation.³⁷

In expounding on giving due weight to the views of the child considering the child's age and maturity, the Committee on the Rights of the Child (Committee) observed that this clause relates to the capacity of the child. This capacity must be assessed in order to give due account to children's views as well as explaining to them their view's influence on the outcome of the process. Remarkably, simply listening to the child is not enough; the children's views must be seriously considered especially when the child is capable of forming their views.

The Committee has also been categorical that biological age alone cannot be used to determine the significance of a child's views.³⁸ Instead, age should be considered alongside maturity of the child which refers to the ability to understand and assess the implications of a particular act.³⁹ In such considerations, non-verbal forms of communication such as play, facial expressions, gestures, mannerisms and drawing must be recognised and respected because very young children demonstrate understanding, choices, and preferences through such forms.⁴⁰ From the foregoing, children must be heard by decision-makers during the mediation process in family disputes.⁴¹

For child participation to be successful, it requires a form of partnership between children and adults in order to ensure that these views are considered.⁴² On the one hand, adults should be willing to listen and learn from the child, readjust their attitudes towards them, and consider solutions which address the child's concerns. On the other

³⁷ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 23.

³⁸ Committee, General Comment No 12, para 29.

³⁹ Committee, General Comment No 12, para 30.

⁴⁰ Committee, General Comment No 12, para 30.

⁴¹ Committee, General Comment No 12, para 52.

⁴² Feinstein and O'Kane, 'Children's and adolescents' participation and protection from sexual abuse and exploitation' 26.

hand, children should be willing to respect, listen, and learn from the adults to ensure effective engagement between the two parents.⁴³

Kenyan courts have recognised the importance of child participation. The High Court in *JO v SAO* held that the court must consider the wishes of the child while making custody orders.⁴⁴ While showing the connection between the child's best interests and child participation in custody disputes, the court in *BK v EJH* held that the test for the best interests of the child in custody disputes should be objective, rather than subjective to the selfish whims of the child. If a child's wishes to stay with a particular parent is not in their best interests in the long run, the court may disregard those wishes.⁴⁵

Recently, the Supreme Court has expounded on the parameters of promoting the best interests of the child against the parental rights and responsibilities. These considerations include: the existence of a parental responsibility agreement between the parties; past performance of each parent; each parent's presence and ability to guide the child and care for their wellbeing; the ascertainable wishes of the child who is capable of expressing their opinion; financial status of each parent; individual needs of each child; quality of the available home environment; the need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child; ensuring children are not placed in alternative care unnecessarily; mental health of the parents and the totality of the circumstances.⁴⁶ In the apex court's view, the listed guidelines must be considered by courts while making a decision affecting a child.

⁴³ Centre for Human Rights, 'Study on child participation in development frameworks in Africa' Pretoria University Law Press (2022) 25.

⁴⁴ *JO v SAO*, Civil Appeal No 87 of 2015, Judgment of the Court of Appeal at Kisumu, 29 July 2016 (eKLR), para 14.

⁴⁵ *BK v EJH*, Civil Appeal No 13 of 2012, Ruling of the High Court at Nairobi, 23 July 2012 (eKLR). See also *AB and CB v Pridwin Preparatory School and others*, CCT294/18 [2020] ZACC 12, 17 June 2020, para 43, where the Supreme Court of Appeal of South Africa allowed an appeal on the basis that a private school had terminated a Parent Contract for their child's education without giving due consideration to the views of the affected children.

⁴⁶ *MAK v RMAA & 4 others*, Petition 2 (E003) of 2022, Judgment of the Supreme Court of Kenya, 24 February 2023 (eKLR), para 87.

Hart's ladder of child participation

Apart from the guidance by the CRC and General Comment No 12, Hart's Ladder of Child Participation has been the most influential model in shaping the discourse on child participation.⁴⁷ Hart presents eight steps of the ladder ranking from the lowest to the highest degree of measuring participation.⁴⁸ These are manipulation, decoration, tokenism, assigned but informed, consulted and informed, adult initiated-shared decisions with children, child initiated and directed, and child-initiated, shared decisions with adults.⁴⁹ According to him, the first three steps are collectively named levels of non-participation. They demonstrate how adults can easily manipulate children's participation for their own benefit.⁵⁰ Contrastingly, the last five steps constitute the genuine forms of participation.

Levels of non-participation

According to Hart, manipulation is the lowest form of participation. In this level, the child involved does not understand the matter at hand and therefore they do not understand their actions.⁵¹ Children are asked their views, some of which may be taken into account by adults. However, children are not told about the influence of their views on the final decision.⁵² In other instances, children share their views, but they are not listened to.

Manipulation can arise in divorce proceedings where the opinion of a child who is too immature or uninformed to form an opinion is

⁴⁷ Harry Shier, 'Pathways to participation: Openings, opportunities and obligations' 15(1) *Children and Society* (2001) 107.

⁴⁸ Roger Hart, 'The right to play and children's participation' in Harry Shier (ed) *Article 31 Action Pack children's rights and children's play: Resources for action to implement Article 31 of the United Nations Convention on the Rights of the Child*, PLAY-TRAIN, Birmingham, 1995, 25.

⁴⁹ Roger Hart, 'Children's participation from tokenism to citizenship' UNICEF, Florence, 1992.

⁵⁰ Shier, 'Pathways to participation' 108.

⁵¹ Hart, 'Children's participation from tokenism to citizenship' 9.

⁵² Shier, 'Pathways to participation' 109.

used in favour of a specific parent.⁵³ The second step is decoration where children are only used to further a cause in an indirect way. In the context of divorce, a parent informs the decision maker of the child's view, but only for the purpose of furthering their own interest in the matter.⁵⁴

The third step is tokenism where children are asked to say what they think about an issue but they have little or no choice about the way to express those views or the scope of the ideas they can express.⁵⁵ Tokenism is also apparent in instances where children are sometimes used on conference panels.⁵⁶ To illustrate, expressive and charming children may be selected by adults to sit on a panel with little or no substantive preparation on the subject and no consultation with their peers who, it is implied, they represent.⁵⁷

Genuine levels of participation

In the fourth rung of the ladder is assigned but informed, which is the first level of genuine participation. In this level of participation, there are four requirements to be considered for a project to be truly participatory. These are: first, the children understand the intentions of the project; second, they know who made the decisions concerning their involvement and why; third, they have a meaningful (rather than 'decorative') role and fourth, they volunteer for the project after the project was made clear to them.⁵⁸ In the context of divorce, children are assigned but informed when their parents ask them questions after they are provided with the necessary information to answer the questions.⁵⁹

⁵³ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 43.

⁵⁴ Hart, 'Children's participation from tokenism to citizenship' 9.

⁵⁵ Hart, 'Children's participation from tokenism to citizenship' 9.

⁵⁶ Hart, 'Children's participation from tokenism to citizenship' 10.

⁵⁷ Hart, 'Children's participation from tokenism to citizenship' 10.

⁵⁸ Hart, 'Children's participation from tokenism to citizenship' 11.

⁵⁹ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 43.

Under the fifth step, children are consulted and informed. Here, the project is designed and run by adults, but children understand the process and their opinions are treated seriously.⁶⁰ Principally, children's views are considered more critically than in the fourth step of the ladder, but they do not make any decisions.

The sixth step is adult-initiated, shared decisions with children. This level is regarded as true participation. At this level, the process is designed and run by adults, however, the views of children are considered, and they participate in the decision-making.⁶¹

Child-initiated and directed is the seventh step. Under this level, children have the initial idea and decide how the project is to be carried out; adults are available, but they do not take charge.⁶² Realistically, this level of participation would be difficult to reach in divorce proceedings since the process is ultimately directed by parents, advocates, judges, and professionals such as mental health providers notwithstanding cases where the children's views are completely considered and implemented.⁶³

The last step of the ladder is child-initiated, shared decisions with adults. The process is initiated by children and the decision-making is shared between adults and children.⁶⁴ Just like the previous step, this level of participation seems impossible to reach in divorce proceedings. This is because it is the adults who initiate divorce and come up with the ideas and process.⁶⁵

⁶⁰ Hart, 'Children's participation from tokenism to citizenship' 12.

⁶¹ Hart, 'Children's participation from tokenism to citizenship' 12.

⁶² Hart, 'Children's participation from tokenism to citizenship' 14.

⁶³ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 43.

⁶⁴ Hart, 'Children's participation from tokenism to citizenship' 14.

⁶⁵ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 43.

Factors limiting child participation

In most cases, adults fail to recognise children's abilities because they assess children from an adult perspective.⁶⁶ Their acceptance of generalised conceptions of children and what is in their best interests, fails to consider how important it is for the wellbeing of a child to have their views listened to and be taken seriously.⁶⁷ This is attributable to religious and cultural practices coupled with the strong parental control over children.⁶⁸

In many African settings, children are involved for the sake of being 'seen' as opposed to being 'heard'.⁶⁹ In addition, adults make assumptions about children's participation, such as: that it will make children disrespectful towards adults; and that it may burden children with responsibility.⁷⁰ As a result, parents fail to acknowledge the evolving capacities of children as capable of participating in the decision-making.⁷¹

Lack of access to information is another barrier to child participation. Being able to access appropriate information can reduce children's anxiety and fears.⁷² This in turn boosts their confidence to participate. Inversely, a lack of information can impede children's sense of control in mediations since they are unaware of their rights in relation to their participation.⁷³ It follows that children need to be informed about the possible changes in their living arrangements, school, and other

⁶⁶ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 23.

⁶⁷ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 23.

⁶⁸ Andrew Woolford and Robert Ratner, *Informal reckonings: Conflict resolution in mediation, restorative justice and reparations*, Routledge, 2008, 35.

⁶⁹ Centre for Human Rights, *Study on child participation in development frameworks in Africa*, 74.

⁷⁰ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 24.

⁷¹ Elvis Fokala, 'Gains and challenges in achieving child participation rights in Africa', Paper presented during the Pan-African Child-Rights Forum, Addis Ababa, 2020, 4.

⁷² Fern Gillon, *Children's views and experiences of their participation injustice*, Centre for Youth and Criminal Justice, June 2019, 6.

⁷³ Gillon, *Children's views and experiences of their participation injustice*, 6.

activities.⁷⁴ Notably, parents should take great care in how they disclose the cause of the divorce to the children.⁷⁵ They must consider the age and maturity of the child as well as the sensitivity of the case because an insensitive way of informing the child may change their perception of the either parent.⁷⁶

Link between the principle of best interests of the child and the child's right to be heard

The Committee has observed that the principle of best interests and child participation play a complementary role.⁷⁷ The child's best interests principle establishes the objective of achieving the best interests of the child. Child participation provides the methodology for reaching the goal of hearing the child or children.⁷⁸ In the Committee's view, there can be no correct application of the child's best interest principle where the components of child participation in Article 12 of the CRC are not respected.⁷⁹ Similarly, the best interest principle in Article 3 reinforces the functionality of Article 12 by facilitating the essential role of children in all decisions affecting their lives.⁸⁰

Child inclusive mediation

The child-inclusive approach to family mediation originated from two pilot studies conducted by Jennifer McIntosh in Darwin and Melbourne, Australia.⁸¹ In this approach, the main aim is to embrace

⁷⁴ Gillon, *Children's views and experiences of their participation injustice*, 6.

⁷⁵ Gillon, *Children's views and experiences of their participation injustice*, 6.

⁷⁶ Gillon, *Children's views and experiences of their participation injustice*, 6.

⁷⁷ Committee, General Comment No 12, para 74.

⁷⁸ Committee, General Comment No 12, para 74.

⁷⁹ Committee, General Comment No 12, para 74.

⁸⁰ Committee, General Comment No 12, para 74.

⁸¹ Brunilda Pali and Sandra Voet, *Family mediation in international family conflicts: The European context*, Institute of Criminology, Katholieke Universiteit Leuven, 2012, 40.

all aspects of children's concerns and interests.⁸² This is achieved by ensuring that the voice of the child is heard directly; children are consulted about their experiences of the family separation and dispute in a supportive way, taking into account their level of maturity.⁸³ As a result, children have more autonomy and direct input on the decision-making process.⁸⁴

The main objectives of child-inclusive mediation are: first, to learn about the child including something about their friends, hobbies, sports and interests; second, to afford the child an opportunity to talk about their feelings; third, to encourage the child to take an independent role, for example by giving ideas for a solution or a partial solution to the problem; fourth, to carefully support the child's chance to restore contact to the absent parent in circumstances where contact was interrupted for a long time; fifth, to validate children's experiences and provide basic information to assist their present and future coping.

Sixth, to form a strategic therapeutic conversation with the children's parents, supporting them to reflect on their children's experiences and needs. In turn, motivating the parents to reconsider their behaviour, attitudes, and the goals of the mediation in light of those needs; to ensure that the ongoing mediation agenda and the agreements reached reflect the psycho-developmental needs of each child; and lastly, to release the child from feeling co-responsible for what is going on between their parents – this is the sole responsibility of the parents.⁸⁵

The process of child-inclusive mediation

In child-inclusive mediation, a specialist in children matters (child consultant), mediator, parents, and children are involved. There are four

⁸² Pali and Voet, *Family mediation in international family conflicts*, 40.

⁸³ Hewlett Bill, 'Accessing the parental mind through the heart: a case study in child-inclusive mediation' 13(1) *Journal of Family Studies* (2007) 94.

⁸⁴ Pali and Voet, 'Family mediation in international family conflicts', 40.

⁸⁵ Pali and Voet, 'Family mediation in international family conflicts', 41.

stages of child-inclusive mediation.⁸⁶ The first stage is early focusing of parents on children's needs. In the first session, the mediator advises the parents to focus on and identify the needs of their children as well as the likely impact of decisions on them.⁸⁷ Where the parents and mediators appraise the situation as appropriate for consultation with the children, parents can be asked to discuss this possibility with their children.⁸⁸

The second stage is consulting directly with children, which occurs during the first or second session. Before the child consultant talks to the children, both parents must give consent, and at least one child should be of school-going age.⁸⁹ The content of the discussions will vary from child to child and family to family, but the objective of child-inclusive mediation is not solely to ascertain the 'wishes' of the children.⁹⁰ Rather, it is to explore broadly their perspectives and experiences of the current living and visiting arrangements, parental conflict, and their hopes for the future.⁹¹ Through play, drawings, and discussion, the child consultant then explores the child's response to the family's situation as well as their fears and wishes.⁹² During the discussion, the child consultant asks the child whether there is any specific information or questions that they may want to be conveyed to the parents.⁹³

The third stage is communicating the child's needs and views to the parents. In this stage, the child consultant meets with the mediator and parents to give them feedback from the children's session.⁹⁴ They

⁸⁶ Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 18(1) *Mediation Quarterly* (2002) 55.

⁸⁷ McIntosh, 'Child inclusive divorce mediation' 57.

⁸⁸ Jennifer McIntosh, Caroline Long and Lawrie Moloney, 'Child-focused and child-inclusive mediation: A comparative study of outcomes' 10(1) *Journal of Family Studies* (2004) 88.

⁸⁹ Felicity Bell, Judy Cashmore, Patrick Parkinson and Judi Single, 'Outcomes of child-inclusive mediation' 27(1) *International Journal of Law, Policy and the Family* (2013) 117.

⁹⁰ Bell and others, 'Outcomes of child-inclusive mediation' 117.

⁹¹ McIntosh, 'Child inclusive divorce mediation' 57.

⁹² Bell and others, 'Outcomes of child-inclusive mediation' 117.

⁹³ McIntosh and others, 'Child-focused and child inclusive mediation' 88.

⁹⁴ Brianna Nelson, 'Divorce mediation and its impact on children' Unpublished Master's Degree of Social Work clinical research paper, St Catherine University, 2013, 13.

share their general assessment of the impact of the separation on the children.⁹⁵ This is coupled with any specific concerns or questions that the child had wanted to be raised.⁹⁶ At this stage, the child consultant is also readily available to support the parents' ability to provide a secure emotional base for their children.⁹⁷ They provide a supportive space for parents to reflect on their conflict through their child's eyes, and to consider how best the child's unique needs can be addressed in a parenting agreement.⁹⁸

The last stage is integrating the child's view and needs into the negotiations between the parents. In this part, the child consultant may excuse the parties and the mediator to continue with the mediation, incorporating the child's agenda into it.⁹⁹ Alternatively, the child consultant may stay on for the remainder of the sessions to advocate the best wishes of the child.¹⁰⁰ Where agreements are reached between the parents, the resulting plan should lay out the needs of the child and the manner in which the parents have agreed to address them.¹⁰¹

Distinguishing child-inclusive mediation from child-focused mediation

Another form of mediation that emerged in Australia alongside child-inclusive mediation is child-focused mediation. In child-focused mediation, the divorce mediation is modified to focus on the needs of children.¹⁰² The aim is to help parents reach agreements that reflect those needs, but the children are not directly involved. In essence, the

⁹⁵ Bell and others, 'Outcomes of child-inclusive mediation' 117.

⁹⁶ McIntosh, 'Child inclusive divorce mediation' 58.

⁹⁷ Amy Holtzworth-Munroe, Amy G Applegate, Brian D'Onofrio and John Bates, 'Child informed mediation study (CIMS): Incorporating the children's perspective into divorce mediation in an American pilot study' 16(2) *Journal of Family Studies* (2010) 118.

⁹⁸ McIntosh, 'Child inclusive divorce mediation' 58.

⁹⁹ McIntosh, 'Child-inclusive divorce mediation' 59.

¹⁰⁰ McIntosh and others, 'Child-focused and child-inclusive mediation' 88.

¹⁰¹ McIntosh, 'Child-inclusive divorce mediation' 59.

¹⁰² Holtzworth-Munroe and others, 'Child informed mediation study (CIMS)' 118.

child consultant does not meet with the children.¹⁰³ Instead during the mediation, parents are informed by the mediator about common concerns of children in divorcing families and the impact of parental conflict on children.¹⁰⁴ In this form of mediation, the mediator asks parents about the likes and dislikes of the child, requests them to bring in pictures of the child, or makes questionnaires touching on children matters for the parents to fill.¹⁰⁵ Whenever it is considered relevant, the mediators encourage the parents to take into account the children's needs and developmental stages when making parenting agreements.¹⁰⁶

In 2006, McIntosh and Long conducted a study involving 257 parents, 364 children, 193 of which were aged between 5-16 years. The study compared the effectiveness of child-inclusive mediation and child-focused mediation. In the child-focused process, the psychological and relational elements of parents' separation were prioritised. Parenting arrangements that would best support the developmental needs of the children were also made.¹⁰⁷ The children were not directly involved in the mediation. On average, the mediator spent about 5.1 hours with the parents.¹⁰⁸

Concerning the child-inclusive process, there was a direct assessment of children's wishes and their experiences about the separation as well as their relationships with each parent.¹⁰⁹ The children's details were meticulously formulated and considered by parents while incorporating their key concerns into the negotiations. The average duration of the

¹⁰³ Holtzworth-Munroe and others, 'Child informed mediation study (CIMS)' 118.

¹⁰⁴ Holtzworth-Munroe and others, 'Child informed mediation study (CIMS)' 118.

¹⁰⁵ Pali and Voet, 'Family mediation in international family conflicts' 40.

¹⁰⁶ Jennifer McIntosh, Yvonne Wells, Bruce Smyth and Caroline Long, 'Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustment' 46(1) *Family Court Review* (2008) 105.

¹⁰⁷ Jennifer McIntosh, 'Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors' 1 *Australian Family Relationships Clearinghouse* (2007), 11.

¹⁰⁸ McIntosh and others, 'Child focused child-focused and child-inclusive divorce mediation', 110.

¹⁰⁹ McIntosh, 'Child inclusion as a principle and as evidence-based practice' 11.

process with parents, including intake and feedback of the children's material, was 6.2 hours and an additional 1.5 hours with children.¹¹⁰

Both processes reduced interparental dissonance and child distress about parent strife.¹¹¹ Similarly, both processes improved the child's mental health. However, over the years, following the mediation, children that took part in child-inclusive mediation experienced better outcomes.¹¹² For instance: greater stability of care and contact patterns; greater child satisfaction with care and contact arrangements and less propensity desiring to change them; children's reports of improved emotional availability of their fathers and better intimacy with them; greater satisfaction of fathers with care and contact arrangements of their children; and significantly more durable and workable agreements over a year, as rated by mothers and fathers.¹¹³ However, child-focused mediation appeared to be more preferable for toddlers below 2 years of age as they may not have been able to express themselves in ways that would help adults consider their views.

Advantages of involving children in family mediation

Child-inclusive mediation provides a forum where children's needs are addressed formally rather than casually.¹¹⁴ This can be a source of empowerment for children and gives them a greater sense of control over their lives thus reducing anxiety.¹¹⁵ It also enhances their communication and negotiation skills with their family, especially adolescents.¹¹⁶

¹¹⁰ McIntosh and others, 'Child focused and child-inclusive divorce mediation' 111.

¹¹¹ Hewlett Bill, 'Accessing the parental mind through the heart: A case study in child-inclusive mediation' 13(1) *Journal of Family Studies* (2007) 94.

¹¹² Holtzworth-Munroe and others, 'Child informed mediation study (CIMS)' 118.

¹¹³ McIntosh, 'Child inclusion as a principle and as evidence-based practice' 12.

¹¹⁴ Ministry of Attorney General (Family Justice Services Division), *The involvement of children in divorce and custody mediation: A literature review*, March 2003, 7.

¹¹⁵ Woolford and Ratner, *Informal reckonings: Conflict resolution in mediation, restorative justice, and reparations*, 6.

¹¹⁶ Pali and Voet, 'Family mediation in international family conflicts' 38.

Second, where children are involved in the mediation process, it presents an opportunity for them to be referred to a therapist in appropriate situations. It is therapeutic for children to talk to someone about how they are feeling which improves their emotional wellbeing after parental separation.¹¹⁷

Third, involving children in family mediation improves their coping skills.¹¹⁸ This is because they are able to understand what their parents are going through. As a result, there is easier adaptation by the child to post-divorce conditions.¹¹⁹

Fourth, involving children can improve child-parent communication which often suffers during divorce and after separation. If children are present during their parents' mediation, it can help them appreciate that love and concern for the child are the primary motivations for their parents' participation in mediation. This opens up more channels of communication between children and their parents.¹²⁰ Besides, focusing on the needs of children early in the process of parental conflict can reduce both the intensity and duration of the conflict. This enhances conciliation between the parents to communicate more effectively on behalf of their children.¹²¹

Potential drawbacks of involving children in mediation

The first is loyalty conflicts, where each parent seeks to win the attention of the child in most cases. Children may therefore be exposed

¹¹⁷ Mariska Botha, 'The voice of children in divorce proceedings: A critical consideration of the provisions in the Mediation in Certain Divorce Matters Act 24 of 1987 and the role of Family Advocate in divorce proceedings. Is it not time for an overhaul of this Act?' Unpublished Masters Degree in Family Law mini-dissertation, University of KwaZulu-Natal, 2021, 14. See also Bell and others, 'Outcomes of child-inclusive mediation' 137.

¹¹⁸ Botha, 'The voice of children in divorce proceedings' 14.

¹¹⁹ Botha, 'The voice of children in divorce proceedings' 14.

¹²⁰ Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 7.

¹²¹ Pali and Voet, 'Family mediation in international family conflicts' 38.

to continued volatile and negative dynamics between the parents.¹²² Consequently, children may not express their true feelings due to fear that their parents' may get angry at their disclosure causing loyalty conflicts.¹²³

Second, a child's view can sometimes be used as a 'trump card' by one or both parents which then marks the end of the consensual decision-making process.¹²⁴ To illustrate, either parent may claim that the child is being 'traumatised' in the mediation and use this as a tactic against the other parent. Such situations can arise because children often frankly express their feelings, and a mediator may lack the skills or willingness to respond to these emotions.¹²⁵ Furthermore, once a child has been asked to express their views, they may be disappointed when their views are not determinative of the outcome. This can lead to feelings of anger and hurt.¹²⁶

The third setback is parents' unwillingness to allow, accept, and respect children's views. Direct involvement of children is only possible where parents demonstrate some intent to consider their children's interests.¹²⁷ In addition, child-inclusive mediation can only thrive where the parents are able (at least in part and with support) to consider and respect the needs of children, as distinct from their own. Also, where the child has suffered abuse, child-inclusive mediation is unsuitable.¹²⁸ This is because of the already existing fear in the child to speak freely.¹²⁹

¹²² Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 8.

¹²³ Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 8.

¹²⁴ Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 8.

¹²⁵ Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 8.

¹²⁶ Pali and Voet, 'Family mediation in international family conflicts' 37.

¹²⁷ McIntosh and others, 'Child-focused and child inclusive mediation' 89.

¹²⁸ Robert E Emery, *Renegotiating family relationships divorce, child custody, and mediation*, Guilford Press, New York, 2012, 139.

¹²⁹ Pali and Voet, 'Family mediation in international family conflicts' 36.

Fourth, divorce involves high conflict levels which are likely to negatively affect children. This weakens their relationships with one or both parents and may force children to grow up too quickly which could impact their adjustment and resilience.¹³⁰ Also, delegating too much authority to children instead of helping them develop coping strategies during times of parental separation may burden them with too much power.¹³¹ Likewise, it is difficult and unfair to expect children, at a time of crisis, to make informed judgements about what is in their own best interests.¹³²

Lastly, there is uncertainty as to the appropriate age of participation. Generally, only children who are capable to form well-informed views about separation should be included.¹³³ This raises concerns about the suitable age for a child to participate in mediation proceedings. Some scholars opine that seven years is the most suitable age by which children should be able to formulate opinions about issues affecting their lives.¹³⁴ The rationale is that children under the age of seven generally comply with the joint decisions of their parents and seldom need to be included in the mediation process.¹³⁵ As for adolescents, there is consensus that they should be interviewed because of their cognitive ability to formulate abstract plans and the relative independence of their lives.¹³⁶ The downside of setting seven years as the minimum age of participation is that it may fail to recognise other forms of expression

¹³⁰ Siun Kearney, 'The voice of the child in mediation' 2(1) *Journal of Mediation and Applied Conflict Analysis* (2014) 154.

¹³¹ Pali and Voet, 'Family mediation in international family conflicts' 35.

¹³² Pali and Voet, 'Family mediation in international family conflicts' 35.

¹³³ See South Africa Children's Act (No. 38 of 2005) Section 10. See also Children Act (No 29 of 2022) Section 8(3).

¹³⁴ See Donald Saposbek, 'Working with children' in Jay Folberg, Ann Milne and Peter Salem (eds), *Divorce and family mediation: Models, techniques, and applications*, Guilford Press, 2004, 160. See also Ernest Sanchez and Sherrie Kibler-Sanchez, 'Empowering children in mediation: An intervention model' 42(3) *Family Court Review* (2004) 556.

¹³⁵ Allan Wolk, 'Divorce mediation: Today's rational alternative to litigation' 51(1) *Dispute Resolution Journal* (1995) 40.

¹³⁶ Madelene De Jong, 'Child focused mediation' in Trynie Boezaart (ed), *Child law in South Africa*, Juta, Cape Town, 2009, 112, 125.

by children below that age. Sometimes children express themselves through silence, drawings, emotions, and facial expressions.

While the drawbacks of involving children in mediation exist, they cannot be used as justifications for denying children opportunities to share their views and opinions. Instead, parents and mediators should aim at providing a conducive environment for children to express themselves and address the barriers that limit child participation.

The next section focuses on the function of the Office of the Secretary of Children's Services (OSCS) in Kenya, specifically, to promote family reconciliation by mediating disputes where children and parents are involved. The paper argues that this function is too vague and inadequate to achieve the demands of child-inclusive family mediations.

Office of the Secretary of Children's Services (OSCS)

The OSCS is a public office established by the Children Act of 2022.¹³⁷ For one to qualify for appointment as the Secretary of Children's Services (Secretary) by the Public Services Commission (PSC), they must possess the following qualities: they must be a citizen of Kenya; they must hold a relevant bachelor's or master's degree in social sciences; they must possess a minimum of ten years' experience in social work, education, administration, and management, public administration, and human resource or finance management; and they must meet the requirements of Chapter Six of the Constitution.¹³⁸

The Secretary is mandated with among other functions to inquire, investigate, assess, and prepare reports as may be directed by a court.¹³⁹ In addition, they are tasked with regulating, coordinating, managing,

¹³⁷ Children Act (No 29 of 2022) Section 37(1).

¹³⁸ Children Act (No 29 of 2022) Section 37(3).

¹³⁹ Children Act (No 29 of 2022) Section 38(g). See also Section 150, which provides that a court before which any child in need of care and protection can require an authorised officer to give a report or professional advice on any aspect relating to the manner in which the child should be dealt.

and supervising children officers in the delivery of the welfare and administration of children services.¹⁴⁰ Furthermore, the Secretary is obligated to provide assistance for a child during a proceeding in court.¹⁴¹ In fact, they can institute proceedings in respect of any contravention relating to child maintenance, child neglect, and abuse.¹⁴² Most relevant, the Secretary is required to promote family reconciliation by mediating disputes involving children, parents, guardians, or persons with parental responsibility.

In fulfilling the above duties, the Secretary is assisted by chief officers appointed by the PSC.¹⁴³ The Secretary is also a member of the National Council for Children Service, established by the 2022 Act.¹⁴⁴ Among other functions, the Council is mandated to facilitate, monitor, and evaluate the enforcement of international obligations on children's rights by Kenya.¹⁴⁵ It is also tasked with monitoring and evaluating the implementation of public education programmes on the rights and welfare of children.¹⁴⁶ Lastly, the Council is obligated to establish, regulate, and manage the activities of County Children Advisory Committees to advise on matters relating to the rights and welfare of children.¹⁴⁷

Comparison between the 2022 Act and repealed 2001 Act in relation to mediation

While the Children Act of 2022 has been commended for introducing new changes, the repealed Children Act of 2001 created the Office of Director of Children's Services, whose Director played similar roles to

¹⁴⁰ Children Act (No 29 of 2022) Section 38(a).

¹⁴¹ Children Act (No 29 of 2022) Section 38(p).

¹⁴² Children Act (No 29 of 2022) Section 39(2).

¹⁴³ Children Act (No 29 of 2022) Section 40.

¹⁴⁴ Children Act (No 29 of 2022) Section 43(g).

¹⁴⁵ Children Act (No 29 of 2022) Section 42(d).

¹⁴⁶ Children Act (No 29 of 2022) Section 42(f).

¹⁴⁷ Children Act (No 29 of 2022) Section 42(r).

those of the Secretary.¹⁴⁸ To highlight a few, the Director was generally obligated to safeguard the welfare of children by assisting in the establishment, promotion, and supervision of services designed to advance the wellbeing of children.¹⁴⁹ This was to be achieved through making as such enquiries, investigations, and assessments as may be required by court.¹⁵⁰ The Director was also obligated with safeguarding the welfare of any child or children placed under care.¹⁵¹

Second, the Director was in charge of supervising children's officers and regulating their work in the provision of children's welfare services.¹⁵² Similar to the Secretary, the Director was obligated to promote family reconciliation by mediating family disputes involving children and their parents, guardians or other persons with parental responsibility in respect of the children.¹⁵³ Therefore, despite the difference in name, both the Secretary in 2022 Act and Director in the repealed 2001 Act play a similar role in mediating family disputes involving children. Furthermore, they are all housed in the Department of Children's Services, a division in the Office of the Attorney General. The Department has offices in 47 counties and 283 sub counties.¹⁵⁴

Absence of child-inclusive mediation

While the repealed and 2022 Children Act call for mediating family disputes involving children and their parents, guardians, or persons with parental responsibilities, they both lack clear guidance on the nature of such mediation and how it can be conducted to cater for the best interests of children. In addition, there is no express provision requiring the Secretary to look out for the best interests of the child

¹⁴⁸ Children Act (Cap 141), Section 37(1).

¹⁴⁹ Children Act (Cap 141), Section 38(1). See also Department of Children's Services, *Child Protection Report*, 2016-2019.

¹⁵⁰ Children Act (Cap 141) Section 38(2)(g).

¹⁵¹ Children Act (Cap 141) Section 39(2)(i).

¹⁵² Children Act (Cap 141) Section 39(2)(a)

¹⁵³ Children Act (Cap 141) Section 39(m).

¹⁵⁴ State of the Judiciary and Administration of Justice, *Annual report, 2018/2019*, 317.

during such mediations. They are presented as a 'neutral' mediator to mediate disputes between parents or guardians involving children.

Be that as it may, it is implicit that in view of the best interest principle outlined in the 2022 Act, the Secretary would be obligated to hear the voices and opinions of children in such disputes.¹⁵⁵ Besides, in any matter affecting a child, the 2022 Act states that the child must be accorded an opportunity to express their opinion.¹⁵⁶ In addition, that opinion should be taken into account in appropriate cases having regard to the child's age and degree of maturity.¹⁵⁷ It follows that children must be given an opportunity to express their opinions in family mediations. The next section, using a case study of the Office of Family Advocate (OFA) in South Africa highlights how child-inclusive mediation can be promoted better by the OSCS.

The OFA in South Africa

The Mediation in Certain Divorce Matters Act 1987 established the OFA to protect the rights of children in situations where their parents could not be together.¹⁵⁸ In order to ensure a holistic and qualitative approach to serve the best interests of the child, the office provides family mediation through multidisciplinary teams comprising lawyers and social workers.¹⁵⁹ Family advocates are appointed for each division of the Supreme Court by the responsible Minister.¹⁶⁰

For one to qualify for appointment, they must possess experience in the adjudication and settlement of family matters.¹⁶¹ Family counsellors are appointed in accordance with Section 3 of the statute to assist family

¹⁵⁵ Children Act (No 29 of 2022) Section 8(3).

¹⁵⁶ Children Act (No 29 of 2022) Section 8(3).

¹⁵⁷ Children Act (No 29 of 2022) Section 8(3).

¹⁵⁸ South Africa Mediation in Certain Divorce Matters Act (No 24 of 1987), Section 4.

¹⁵⁹ Department of Justice and Constitutional Development, Annual report 2008/2009, 92.

¹⁶⁰ Mediation in Certain Divorce Matters Act (No 24 of 1987) Section 2.

¹⁶¹ Felicity Kaganas and Debbie Budlender, 'Family advocate', *Law, Race and Gender Research Unit*, University of Cape Town, 1996, 2.

advocates.¹⁶² Although the statute is ambiguous about the qualifications of family counsellors, in practice, only professionals with specialised knowledge and experience in children and family matters are qualified for appointment.¹⁶³

To assist in getting the child's perspective on what they envision before and after divorce, the family advocate and counsellors may hire additional professionals such as mental health specialists, retired ministers, and religious leaders on a part time basis as required by circumstances.¹⁶⁴ Additionally, Annexure A of the Regulations to the Act provides a template of the information the family advocate must obtain from the parties on the care of an contact of and contact with their child. This aims to ensure that the mediation is centred on the child's best interests rather than being parent centred.¹⁶⁵

The family advocate may institute an enquiry into divorce matters where welfare of children is at stake.¹⁶⁶ An enquiry may be instituted in any of the following ways: first, request by either party involved in the proceedings to institute proceedings; second, request by the judge or magistrate responsible for the case through a court order requesting the family advocate to intervene in the matter, and third, request by the family advocate that an enquiry be instituted if the arrangements made for the children of divorce do not seem to be in their best interests.¹⁶⁷ Furthermore, if there are any allegations of abuse or neglect of the children, the family advocate may request the court to institute an enquiry into the matter.

Once an enquiry is instituted, a written notice is placed on the court file. The parties cannot proceed with the divorce until the matter has been

¹⁶² Kaganas and Budlender, 'Family advocate', 2.

¹⁶³ Kaganas and Budlender, 'Family advocate' 2.

¹⁶⁴ Kaganas and Budlender, 'Family advocate' 2.

¹⁶⁵ Veerashnie Srikison, 'Mandatory child-inclusive mediation - a possibility in South Africa' Unpublished LLM dissertation, University of Pretoria, 2019, 54.

¹⁶⁶ Mediation in Certain Divorce Matters Act (No 24 of 1987) Section 4.

¹⁶⁷ Mediation in Certain Divorce Matters Act (No 24 of 1987) Section 4(1) - 4(3).

investigated and the office submits a written report.¹⁶⁸ All the parties are notified in writing of the date and details of the enquiry unless an urgent investigation is required. When an interested party, a judge or a family advocate has requested an enquiry at the OFA, the parents are requested to attend the enquiry together with their children.¹⁶⁹

On the day of the enquiry, the family advocate and the counsellor explain their role to the parties, which is to safeguard the best interest of the child.¹⁷⁰ Likewise, the purpose of the investigation and the roles played by each participant are disclosed to the participants. Then they are given the opportunity to express their views. The family advocate and counsellor interview the child to obtain their opinions and feelings.¹⁷¹

Initially, the work of the family advocate was based on divorce proceedings or applications to vary, rescind, or suspend orders made under the Divorce Act of 1979 that related to the custody, guardianship, or access to a child.¹⁷² In *Terblanche v Terblanche*, it was held that Section 4 of the Divorce Act should be interpreted to include applications pending trial for interdicts, for interim custody, access, or for payment of maintenance.

The services at the time of the establishment of the office were available to few privileged South Africans who could afford to litigate in the High Courts as prescribed in terms of the Divorce Act of 1979.¹⁷³ Only children born of parents who were parties in the divorce proceedings before the first four High Courts of the then Republic of South Africa were the beneficiaries of the services.¹⁷⁴

¹⁶⁸ Vivian Moraa, 'Situating children in divorce mediation in South Africa and Australia: A comparative study' (1) *Journal of Policy and Development Studies* (2020) 36.

¹⁶⁹ Botha, 'The voice of children in divorce proceedings' 9.

¹⁷⁰ Annelies Du Plessis, 'Disputed custody and the people involved: An exosystemic perspective' Unpublished Masters Degree in Clinic Psychology, University of South Africa, 1995, 57.

¹⁷¹ Du Plessis, 'Disputed custody and the people involved: An exosystemic perspective', 57.

¹⁷² Kaganas and Budlender, 'Family Advocate' 4.

¹⁷³ Department of Justice and Constitutional Development, 'Annual report 2020/2021' 72.

¹⁷⁴ Department of Justice and Constitutional Development, 'Annual report, 2021/2022' 77.

In 2008, the mandate of the office was expanded by the implementation of various legislations including the Children's Act, 2005.¹⁷⁵ These modifications resulted in entitling all children involved in judicial and administrative actions to the office's services regardless of their parents' marital status.¹⁷⁶ Importantly, Section 21 of the Children's Act, 2005 extends the role of the family advocate to mediations in disputes on parental rights of fathers of children born out of wedlock.¹⁷⁷ The introduction of Section 21 has also made the services of the family advocate more accessible, as the parents of children born out of wedlock are no longer compelled to undertake costly litigation to resolve their disputes.¹⁷⁸ In addition, the restriction of the services of the family advocates to children whose parents were married under Section 4 of the Mediation in Certain Divorce Matters Act was rendered unconstitutional as will be discussed later in the paper.¹⁷⁹

Furthermore, where parents, with shared custody in respect of a child, are experiencing conflicts, they must first agree on a parenting plan determining the exercise of the respective responsibilities before seeking the intervention of courts.¹⁸⁰ In preparing the contents of the parenting plan, the parties must seek the assistance of a family advocate, social worker, or psychologist through mediation.¹⁸¹ The mediator is required to submit a certificate of non-attendance where the parties refuse to participate in the mediation process or frustrate it.¹⁸²

The Children's Act also empowers the Children's Court to order a lay-forum hearing before deciding on a matter. A lay-forum hearing

¹⁷⁵ Department of Justice and Constitutional Development, *Annual report, 2021/2022*, 78. These legislations include the Maintenance Act (No 99 of 1998); Recognition of Customary Marriages Act (No 120 of 1998); Domestic Violence Act, 1998; Constitution of the Republic of South Africa (1996) Section 28(2); and the African Charter on the Rights and Welfare of the Child.

¹⁷⁶ Department of Justice and Constitutional Development, *Annual report 2020/2021*, 72.

¹⁷⁷ Children's Act (No 38 of 2005), Section 21.

¹⁷⁸ Department of Justice and Constitutional Development, *Annual report 2007/2008*, 44.

¹⁷⁹ *In the matter of ST and BN and others* [2022] 2 ALL SA 580 (GJ) (2 February 2022).

¹⁸⁰ Children's Act (No 38 of 2005), Section 33(2).

¹⁸¹ Children's Act (No 38 of 2005), Section 33(5).

¹⁸² Srikison, 'Mandatory child inclusive mediation' 30.

may include ‘mediation’ by a family advocate, social worker, social service professional, or mediation by an elder.¹⁸³ However, the use of mediation is subject to considerations like the vulnerability of the child, the ability of the child to participate in the proceedings, the power relations within the family, and the nature of any allegations made by the parties in that matter.¹⁸⁴ In addition, lay-forums may not be used for matters that involve abuse or sexual abuse of the child.¹⁸⁵

Recent developments and criticism about the functions of the OFA

As seen in the previous sections, only married couples in the process of divorcing or those previously divorced would benefit from the services of the OFA. They would sign Annexure B of the Regulations to the Act, and serve it on the other party, and OFA. On the other hand, unmarried parties were unable to use the services of the OFA without a court order directing the office to prepare a report about the best interests of the child involved.

The High Court of South Africa in *ST v BN & Others* declared Section 4(1)(a) and (b) unconstitutional for several reasons.¹⁸⁶ First of all, it unfairly discriminated between married and unmarried parents in accessing the services of the family advocate.¹⁸⁷ Second, the Court found that there was no rational connection to any legitimate purpose of placing an unfair burden on unmarried parents to obtain a court order.¹⁸⁸ Third, the distinction violated the children’s rights to have their best interests of paramount importance since it treated children of married and unmarried parents unfairly.¹⁸⁹

¹⁸³ Children’s Act (No 38 of 2005), Section 49(1).

¹⁸⁴ Children’s Act (No 38 of 2005), Section 49(2).

¹⁸⁵ Children’s Act (No 38 of 2005), Section 71(2).

¹⁸⁶ *In the matter of ST and BN and others.*

¹⁸⁷ *In the matter of ST and BN and others.*

¹⁸⁸ *In the matter of ST and BN and others.*

¹⁸⁹ *In the matter of ST and BN and others.*

The High Court referred the declaration of invalidity to the Constitutional Court of South Africa.¹⁹⁰ It also suspended the declaration of invalidity for a period of 24 months from the date of confirmation by the Constitutional Court to enable Parliament to take steps to cure the constitutional defects identified in the judgement.¹⁹¹ As a temporary measure and pending the decision of the Constitutional Court on the validity of the Act, the court rightly reworded Section 4 of the Mediation in Certain Divorce Matters Act to the effect that both married and unmarried parents can equally use the services of the family advocate.¹⁹² Consequently, children were subjected to less protracted court battles.

The OFA has been criticised for not being in line with the function of the traditional mediator.¹⁹³ To demonstrate, mediation by the family advocate is to some extent, not voluntarily submitted to by both parties.¹⁹⁴ In addition, in developing a report based on facts and information, parties may not be too open to reveal much information for fear that it will be recorded in the report and may be used against them in court.

Furthermore, it has been argued that since counsellors and advocates mediate a matter to determine and report on the child's best interests, this disqualifies them from being mediators and should be regarded as children advocates.¹⁹⁵ Notwithstanding the above valid criticisms, it is justified that family advocates look out for children's best because they merit special attention due to the child's dependency, vulnerability, and need assistance necessary for their positive growth and development.¹⁹⁶

¹⁹⁰ This is pursuant to Article 172 of the Constitution of South Africa, 1996, which provides that an order of constitutional invalidity has no force unless confirmed by the Constitutional Court.

¹⁹¹ *In the matter of ST and BN and others*, para 123(8).

¹⁹² *In the matter of ST and BN and others*, para 123 (9.1).

¹⁹³ Moraa, 'Situating children in divorce mediation in South Africa and Australia' 36.

¹⁹⁴ Botha, 'The voice of children in divorce proceedings' 9.

¹⁹⁵ Moraa, 'Situating children in divorce mediation in South Africa and Australia' 36.

¹⁹⁶ Mariam Adepeju Abdulraheem-Mustapha, *Child justice administration in Africa*, Springer Nature, 2020, 2.

Benefits of the OFA

There are some benefits that have been realised through the services provided by the OFA. The first one is promotion of access to justice. By providing all parents with free mediation services, the OFA's services benefit the underprivileged members of society thus relieving them of the financial burden of litigation costs.¹⁹⁷ In addition, using family advocates reduces case backlog in the courts and less time is spent in the resolution of family disputes involving children.¹⁹⁸

Second, the OFA preserves family relations and integrity through the provision of mediation services at an early stage of the dispute.¹⁹⁹ This can lead to settlement based on the family advocate's recommendations prior to the trial hearing in court.²⁰⁰ Therefore, by settling matters before trial, parties are spared the emotional turmoil of trials.²⁰¹

Third, assisting parents by drawing parenting plans. The family advocates facilitate negotiations between parents and assist them with drawing up of parental plans that stipulate parental rights and responsibilities.²⁰² As a result, parental plans create certainty as to what is expected of each parent in terms of fostering the children's best interests.

Lastly, the family advocate promotes the child's best interests and amplifies their voices. This is possible because the OFA approaches the participation of children in mediation and trials through a multidisciplinary angle.²⁰³ The family advocate in collaboration with the family counsellor conduct an enquiry into the best interests of the children.²⁰⁴ After conducting investigations into the psycho-

¹⁹⁷ Department of Justice and Constitutional Development, *Annual report 2012/2013*, 29.

¹⁹⁸ Department of Justice and Constitutional Development, *Annual report, 2012/2013*, 29.

¹⁹⁹ Department of Justice and Constitutional Development, *Annual report, 2018/2019*, 74.

²⁰⁰ Department of Justice and Constitutional Development, *Annual report, 2018/2019*, 75.

²⁰¹ Department of Justice and Constitutional Development, *Annual report 2019/2020*, 64.

²⁰² Department of Justice and Constitutional Development, *Annual report 2008/2009*, 94.

²⁰³ Department of Justice and Constitutional Development, *Annual report 2019/2020*, 63.

²⁰⁴ Department of Justice and Constitutional Development, *Annual report 2019/2020*, 63.

social functioning of families, they put together a report containing recommendations as to the best interests of children.²⁰⁵

Challenges faced by the OFA

Staff shortages are the most prominent challenge facing the family advocate.²⁰⁶ As of 2022, there were only 26 sub-offices of the OFA servicing over 700 courts including the Maintenance Courts, Divorce Courts and Domestic Violence Courts.²⁰⁷ In addition, there were about 96 family advocates, 46 family law assistants and 126 family counsellors who provide both the litigation and non-litigation services of the office.²⁰⁸ The shortage persists despite the growing demand for the services.²⁰⁹

Another main challenge facing the OFA is limited accessibility. People have to travel long distances to obtain the services. Additionally, increased court adjournments have also been a challenge leading to delays in obtaining reports or the availability of family advocates to appear in court. Such delays compromise the welfare of the child.

The family advocate is also affected by a significant workload. Since the establishment of the OFA, there has been a steady and increasing rate of workload coupled with increased urgency of the work since the lives of children are involved.²¹⁰ Moreover, in cases where an inquiry is pending, the parties cannot proceed with the matter without the family advocate's report.²¹¹ Thus, increasing the family advocates' workload.

²⁰⁵ Department of Justice and Constitutional Development, *Annual Report 2019/2020*, 64.

²⁰⁶ Department of Justice and Constitutional Development, *Annual Report 2008/2009*, 94.

²⁰⁷ Department of Justice and Constitutional Development, *Annual Report 2020/2021*, 28.

²⁰⁸ Department of Justice and Constitutional Development, *Annual Report 2020/2021*, 29.

²⁰⁹ Department of Justice and Constitutional Development, *Annual Report 2020/2021*, 28.

²¹⁰ Department of Justice and Constitutional Development, *Annual Report 2008/2009*, 63.

²¹¹ Department of Justice and Constitutional Development, *Annual Report 2008/2009*, 63.

Differences and similarities between the OFA and OSCS

The main similarity between the OFA and the Secretary of Children's Services is that both offices promote family reconciliation. This is achieved through mediating family disputes involving children, parents, and persons with parental responsibility. Below are some of the distinctions between the two offices.

First, there is a difference in qualifications of the two offices. Under the Mediation in Certain Divorce Matters Act, a family advocate must be a qualified practising lawyer. They must possess experience in the adjudication or settlement of family matters.²¹² Contrastingly, under the Kenyan Children's Act, the OSCS need not be an advocate. In fact, any person with a bachelors and master's degree in social sciences qualifies to be appointed for the office.²¹³ However, such persons must possess at least ten years' experience in either of the following fields: social work; education, administration, and management; public management; and human resource or finance management.²¹⁴ Closely related to the above, the family advocate is appointed by the South African Minister of Justice while the Secretary of Children Services is appointed by the Public Service Commission.²¹⁵

Second, the family advocate is assisted by the family counsellor in conducting mediations between divorcing parties to safeguard the interests of children and obtain their views.²¹⁶ On the other hand, the Secretary of Children's Services is assisted by children's officers throughout the 47 counties in conducting mediations. In practice, children's officers may seek support of mental health professionals and social workers in mediating family disputes involving children.

²¹² Mediation in Certain Divorce Matters Act (No 24 of 1987), Section 2.

²¹³ Children Act (No 29 of 2022), Section 37(2).

²¹⁴ Children Act (No 29 of 2022), Section 37(3).

²¹⁵ See Mediation in Certain Divorce Matters Act (No 24 of 1987), Section 2 and Children Act (No 29 of 2022), Section 37.

²¹⁶ Mediation in Certain Divorce Matters Act (No 24 of 1987), Section 3.

Third, there is also a difference in mediation approaches. It is arguable that the family mediation conducted by the family advocate mirrors the child-inclusive mediation as discussed in the previous section. This is because the child is directly involved in the process and their views and wishes are sought by the family counsellor. In Kenya, it appears that children are occasionally involved in the mediation process. While child participation is guaranteed under Section 8(3) of the Children Act, it is still not yet fully realised because of the cultural attitudes towards children as being incapable of properly sharing their views. As a result, the dominant model of family mediation seems to be child focused mediation where children are not directly involved, but parents are educated about the best interests of children and encouraged to make decisions that best reflect children's interests.

Recommendations

In light of the above discussions, the authors make the following recommendations that will help to enhance child-inclusive mediation in Kenya.

First, there is a need for robust campaigns through mass media such as televisions, radios, and newspapers about family mediation and the benefits of involving children in such processes. This is because there has been a low uptake of alternative dispute resolution mechanisms among Kenyans owing to ignorance about their existence. This is coupled with a widespread litigation mindset that pits parties against each other.

Notably, the awareness should also be extended to rigid cultural values that place limitations on the expression of opinions by children. People should be educated about child participation to distinguish between genuine forms of participation and manipulation. Consequently, children will be empowered to speak up in discussions that affect their welfare.

Second, awareness campaigns for children's self-expression should be developed. Children should be taught how to express themselves

with the help of psychologists and psychotherapists. This will give them courage to speak up and share their opinions in family mediation disputes affecting them. The sensitisation can be through poems, plays, and songs, and the Children's Assembly. The Judiciary and government should collaborate more closely with other stakeholders such as Mtoto News and Cradle to actualise the empowerment of children.

Closely related to the above recommendation, there is a need to train and retrain parents, social workers, lawyers, family mediators, and judges in child-inclusive mediation.²¹⁷ Parents should be sensitised about resolving their custody as well as childcare disputes through mediation. They can be trained in topics such as child participation, best interests of the child, and child-inclusive mediation principles.

Similarly, parents should be sensitised about dealing with grief and pain during divorce. In most mediations, mediators tend to discourage and downplay emotions such as grief experienced by parents who are often told to control their emotions.²¹⁸ Yet, effective mediation would require that the parents' emotions be recognised. Family mediators should therefore be trained in emotional and interpersonal issues to enable them to understand the dynamics of family conflicts.²¹⁹ Such training can focus on various aspects such as family and child development, impact of family conflict on parents and children, and interviewing skills with special focus on the unique language and thinking patterns of children.²²⁰ As a result, there is a need for the development of regulations and manuals on child-inclusive mediation.

Third, in order to address the challenge of inadequate staffing, the Secretary of Children Services and the PSC should recruit more children's officers on an *ad hoc* basis to facilitate child inclusive mediations. Such officers should be professionals trained in family law, children matters, and social sciences such as psychology. The Judiciary, the PSC, and the Secretary of Children's services should consider recruiting some

²¹⁷ Moraa, 'Situating children in divorce mediation in South Africa and Australia' 33.

²¹⁸ Robert, *Renegotiating family relationships divorce, child custody, and mediation*, 19.

²¹⁹ Ahemd and Carioia, 'Mediating family disputes' 270.

²²⁰ Madelene, 'Child focused mediation' 129.

of the qualified professionals accredited by the Mediation Accredited Committee under the court-annexed mediation. The ad hoc system would ensure that enough mediators and counsellors are appointed to assist the Secretary of Children Services in administering child-inclusive mediation across the country.

Fourth, the National Council of Children Services and the Secretary of Children's Services should be adequately funded. This will also facilitate the expansion of awareness programs about child-inclusive mediation. Additionally, it would ensure prompt payment of mediators, social workers, and counsellors. It would also facilitate the provision of support services such as child psychotherapy to children.

Fifth, to strengthen and implement child-inclusive mediation, there is a need for the Secretary of Children Services and National Council of Children Services to benchmark with offices in other countries about the institutionalisation of child-inclusive mediation. The Secretary can borrow lessons from the OFA in South Africa as their roles are similar in terms of looking out for the best interests of children in family disputes affecting them.

Conclusion

There is wisdom in the truism 'love is blind'. Love makes people see what they want to see and believe what they hope is true.²²¹ In a divorce and separation, the blinders of love are ripped off. This causes feelings of betrayal, disappointment, grief, hurt, jealousy, and anger, among others.²²² Divorce not only traumatises parents but also negatively impacts the innocent children who are caught in the middle of their parents' conflict. They are rarely given the chance to express their opinions, feelings, and wishes regarding their parents' separation.

²²¹ Robert, *Renegotiating family relationships divorce, child custody, and mediation*, 5.

²²² Robert, *Renegotiating family relationships divorce, child custody, and mediation*, 15.

When an opportunity for children to be heard presents itself, their participation is manipulated or suppressed as they are deemed too young to engage in 'adult stuff'. The paper has extensively discussed the levels of participation of children in family mediation. It recognises the enactment of the Children Act 2022 as a new dawn for children's rights. The OSCS is required to mediate family disputes involving children and parents. Although this function is welcome, it is vague and insufficient to protect the best interests of children in family mediations.

As a result, the authors have advocated child-inclusive mediation as a better approach for resolving family disputes while ensuring that children are positively and genuinely heard. The new, innovative, and promising approach of resolving family disputes involving children is already happening in South Africa. Similar to the OSCS, the OFA conducts family mediation in disputes involving children and parents. However, its primary duty is to protect the children's best interests in such disputes which is achieved by interviewing children to obtain their views, feelings, and wishes about their parental conflict. Consequently, the paper has offered some suggestions on enhancing child participation in the resolution of family disputes through mediation in Kenya.

Keynote address by Hon Professor Robert Doya Nanima

Expert Member, ACERWC,
on the commemoration of the Day of the African Child
and inauguration of the First Model ACERWC Moot Competition
on 16 June 2023

The Right Honourable Judge of the High Court of Kenya, Honourable Judges of the First Model African Committee of Experts on the Rights and Welfare of the Child (First Model Committee), representatives from the state(s), civil society organisations, academia, students, participants, ladies and gentlemen. Good afternoon.

I thank you for extending the invitation to me. I bring you warm regards from the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The Chairperson and the Bureau are away in Zambia celebrating the Day of the African Child. I thank you all for adding value to this First Model Moot Competition premised on the auspices of the ACERWC. It shows that you believe in the work of the ACERWC and that you have taken a dissemination strategy that informs both the students in the competition and the participants here today.

Specially, I thank Save the Children Kenya and Madagascar, and the Kabarak University School of Law for taking this bold step to start the First Model ACERWC Moot Competition. It speaks volumes to your organisational and individual passion for advocacy, research and academic engagements on various child rights issues. In equal measure, I thank Kabarak University School of Law for starting this noble cause.

It reminds us of the adage *if you do not engage your dream, you might be duly engaged or employed by another to do the same.*

To all the universities that have taken part in the Competition, you have added the required spices to the moot barbeque in the spaces of children's rights. I reiterate that you are all winners and you should not drop the plough but continue running with it. You are sowing the seeds of the need for a mainstreaming of the child's agenda and the child rights-based approach in all matters concerning the African child. I do not doubt that history will judge you favourably because you are not simply counting your days but making your days count.

In my remarks:

1. I will set the tone by speaking about the spiral effect that starts with the normative foundations of the African Charter on the Rights and Welfare of the Child (ACRWC), the institutional spaces of the ACERWC and its jurisprudential effects.
2. I will then add value to the sense we have made here today concerning 16 June 2023 as a day which either culminates or starts a process for commemoration.
3. I will reiterate a call to action going forward.

Concerning the ACRWC, institutional spaces and jurisprudential effects

Allow me to speak a little about ACERWC. It is established to monitor the implementation of the African Charter on the Rights and Welfare of the Child (ACRWC) in Africa. The African Union (AU) has created a robust normative framework which if fully implemented, can foster the protection and fulfilment of the rights of children (including those affected by armed conflict) on the continent.

First, the normative guidance by the AU has acted as a critical pillar in the creation of a regional approach to the promotion and protection

of rights. Second, and consequently, this has led to the initiatives and responses of the ACERWC to offer institutional responses. Third, this continues to translate into jurisprudential approaches to the prevention of grave violations and violations of the rights of children affected by armed conflict. While the ACRWC provides that the ACERWC only promotes and protects the rights of the child, the Committee also infuses a preventive role in its promotional and protective mandate.

From a normative perspective, the ACRWC provides a spiral forward-looking effect that translates into the adoption of engagements to prevent child rights violations and offer protection and promotion of the rights of the child. The unambiguous definition of a child as a person below the age of 18 offers added value through guidance on various aspects such as the need for protection and provision of deliberate services to all persons below the age of 18.

The ACRWC recognises the lived realities of the child in Africa such as the harmful practices that place children in vulnerable positions where their rights may be violated. For instance, *ACERWC General Comment No 7 on Article 27 of the ACRWC on Sexual Exploitation* reiterates that these practices are often rooted in harmful gender stereotypical beliefs and practices, patriarchy and the subordinate position of women and girls, gender masculinities that affect socialisation, and restrict the emotional expression of the child. This often heightens the potential for boys and men to engage in general acts of violence both online and offline.

From an institutional perspective, the ACRWC extends this spiral effect in the establishment of the ACERWC to protect and promote the rights of the child. Through its working methods, the Committee has been resolute in the use of research to create a dent in the positive promotion and protection of the child and engage States Parties through state reporting and the use of missions. Examples of such instructive research include the 2018 study on *Mapping Children on the Move within Africa*. They are all testament to the need to deal with child rights violations.

The Committee's appointment of the special rapporteurs on various thematic areas posits a focal thematic mandate to engage issues affecting children. Additionally, the appointment of country rapporteurs creates traction towards children affected by local crises, including armed conflicts. We also religiously use the child rights-based approach that embraces the four principles of the best interest of the child, right to life, survival and development, participation and non-discrimination.

We also embrace the operational and tactical principles that may work in other spaces like the do no harm principle, the presumption of childhood, detention as a matter of last resort and for the shortest time, and the treatment of children as victims first. I will latch on to two principles. First, the do no harm principle requires that stakeholders and duty bearers strive to minimise the harm they may cause by providing several services to children affected in the digital environment that may be in line with the prevention and protection of children's rights violations. The presumption of childhood calls for the need to provide special treatment, care and support for young people whose rights may be violated in the digital environment while they are still children. In this regard, such young people are entitled to be considered victims first.

The second is the development of instructive jurisprudence and the use of General Comment No 7, which calls on stakeholders to take steps to raise awareness and reduce child violations and other pertinent issues, especially in the digital space. The General Comment reiterates that the rights of children can be violated both in the online and offline environment, with the former as the first platform of violations and subsequently leading to violations offline.

Contextualising 16 June

Ladies and gentlemen, this First Model ACERWC Moot Competition comes at a very important time in the history of children in Africa. First, we commemorate the events that happened to the children of Soweto in

1976. Second, it reiterates the critical role that the ACERWC performs in monitoring the implementation of the ACRWC, and the execution of its protection, and promotional mandate. Third, it offers introspection on inward and outward accountability by all stakeholders in the child rights discourse.

Fourth, it builds on a wealth of knowledge on the benefits, impediments and dangers of the online digital environment to the child. Studies by United Nations Children's Fund (UNICEF), Save the Children, and ECPAT International are instructive. Further, it reiterates the Committee's engagement in the use of the digital space to ensure that States Parties amplify the promotion and protection of the rights of the child using digital means. For instance, in its concluding observations on Kenya's First Periodic Report on the Status of Implementation of the ACRWC, the Committee recommended the intensification of the campaign on birth registration, including creating awareness that registration is free, making registration easily accessible in all areas of the country and expediting the process of making registration of vital events digitally.

The question is: how do we continue to attach the right purpose and paint the correct picture concerning the child? Statistics show that out of 1.4 billion people in Africa, 590 million people have access to the internet at home. This accounts for a 43% growth rate, according to 2022 statistics. This is without regard to the school or neighbourhood setting. The 43% growth in Africa is projected against the 68% growth globally.

Africa is home to over 400 million children. A closer look indicates a worrying picture as far as 13% of children have access to the internet in southern and eastern Africa, and 1% in western and central Africa. These statistics do not account for the Saleh Region and North Africa. Another set of statistics show that 5% of people below 25 years in Africa have access to the internet. If one takes the median of 5% and 13%, it gives about 9%- which accounts for 36,000,000 children with access to the internet. This is about the population of Morocco; or the combined population of 18 countries across Africa which include Eswatini, Lesotho, Namibia, Cape Verde, Botswana, Liberia and Sierra Leone, to mention but a few. It is projected that the population of Africa will

have doubled by 2050, and the continent will be home to the world's youngest population.

Ladies and gentlemen, with these figures, the question of the digital age, its benefits, impediments and disadvantages need to be looked at critically to inform policy, legislation and administrative engagements by the state. This is in line with the mandate on States to take all means including administrative, legislative, and other means to ensure the enjoyment of the rights of the child both online and offline, without regard to the nature of the rights.

Call to action

It is important to assign meaning to something. We do this by asking why it is relevant. To attach purpose or meaning to a thought, for it to be remembered, to be engaged to yield fruits. I would like to thank the organisers of this First Model ACERWC Moot Competition for attaching new purpose to moots in Africa and beyond, by adding the child rights agenda. The culmination of the event today started as a thought, which propelled a dialogue and with purpose, the First Model ACERWC Moot Competition was born.

This purpose in my view presents a new way of learning about the working methods of the ACERWC, a new dissemination strategy that employs a bottom-top approach in appreciating the use of missions by the ACERWC and the critical role it plays in engaging with the State. It is important to note that the Competition has reminded us of the need to protect the child, who is the common denominator in these conversations.

A picture paints a thousand words. Often, the narrative is to imagine a beautiful picture of this child in a peaceful environment. The student of literature will accord their explanation with prose and poetry; with the unwavering use of the plot, themes, techniques and style. To the artist, the use of the paintbrush, the nature of the brush and the texture that is accorded speak to the tone of the picture. The law

student will use great words that go beyond conventional English to legalise the heart of the matter. Without prejudice to the foregoing, the opposite side of such a coin may also paint a picture of pain - of a child not receiving his inoculation, or suffering from hunger in a peaceful environment, a child in humanitarian situations, or spaces of armed conflict, tension and strife.

Ladies and gentlemen, it is important to note that apart from the content that a picture presents, the architectural foundations remind us of the common denominator - the child. An emphasis on the common denominator is critical, first, to the picture we see, and secondly, to the picture, we paint or repaint in our spaces of influence. This may be our lecture rooms, our courtrooms, our action plans, our offices, or our mandate. The way we paint will speak to the extent to which we disrupt the normal narrative by attaching a new purpose to the end that the child rights agenda continues to take centre stage in all our engagements.

Conclusion

The key takeaway should be how you, as an organisation or individual, can leverage the use of the digital environment to respect, promote and fulfil the rights of the child, both in the offline and online environment. The advent of the digital age presents both pros and cons without which a critical balance may lead to a tilting of scales to the detriment of the child in various spaces. It should be recalled that just like children are not a homogenous group, they are also not positioned homogeneously in peaceful or desirable environments. Some children are in areas affected by armed conflict, tension and strife, areas of solace as refugees and internally displaced children. As such, we must adopt an approach that recognises the non-homogeneity and multi-environmental spaces of occupation of children in Africa.

Secondly, we must strive to have data to use to inform our initiatives as State Parties and stakeholders. To do so, we must deliberately use a child rights' approach that leverages the four principles of the best

interest of the child - rights to life, survival and development, non-discrimination, and participation of the child.

We should embrace the operational and tactical principles that may work in other spaces like the do no harm principle, the presumption of childhood, detention as a matter of last resort and for the shortest time, and the treatment of children as victims first.

We should deliberately de-institutionalise silos in our spaces of work such that we embrace our energies and get higher returns on the resources we invest in. Finally, we should always place the specific child at the centre of the interventions such that we are alive to their lived realities as we couch interventions. With those few words, I thank you for listening to me.

Reflections on the status of protection of the rights of persons with intellectual and psychosocial disabilities in Kenya

Keynote address by Hon. Lady Justice Grace Ngenye, JA,
Chairperson, National Committee on Criminal Justice Reforms
delivered on 8 June 2023 at Kabarak University,
Bethel Auditorium

Commissioner Prof Marion Mutugi, Kenya National Commission on Human Rights (KNCHR), Prof Ronald Chepkilot, Deputy Vice Chancellor (Administration and Finance), Kabarak University, Dr Harun Hassan, Executive Director, National Council for Persons with Disabilities, Dr Bernard Mogesa, Secretary, KNCHR, Dr Julius Ogato, the Chief Executive Officer, Mathari National Teaching and Referral Hospital, Mr William Aseka, Programme Manager - Africa, Validity Foundation, Representative of the Kenya Prisons Service, Nakuru, Mr Henry Opondo, Chairperson of the Law Society of Kenya, Nakuru Chapter, Representatives of civil society organisations working in the area of mental health rights, faculty and students of Kabarak University, esteemed guests, ladies and gentlemen, good afternoon.

Allow me to start by expressing my gratitude to Kabarak University for inviting me to be part of this significant event, which celebrates the launch of several mental health publications. The importance of research work in the justice sector cannot be gainsaid. It is through rigorous research that we are able to gain insights, identify gaps, and find solutions to the complex challenges that face the realm of justice.

Speaking with reference to the work that the NCAJ Committee on Criminal Justice Reforms (NCCJR) is undertaking as per its mandate to spearhead the review and reform Kenya's entire criminal justice system, the Committee greatly appreciates the indispensable role of research in our ongoing efforts. The Committee has a monumental mandate requiring a deep understanding of the issues at hand and their potential impact on individuals and society. Research plays a pivotal role in this process by providing us with vital data, empirical evidence, and expert analysis that can inform the development of effective laws and policies.

I applaud the members of the faculty and students of the Kabarak University, School of Law, for their remarkable scholarly contribution titled *Mental health and the criminal justice system*. The book meticulously documents the development of criminal justice laws pertaining to individuals with intellectual and psychosocial disabilities, exploring their influence on the entire criminal justice process from the point of arrest to sentencing. It also examines the evolving jurisprudence of the Kenyan courts and offers a comparative analysis with jurisprudence from selected African countries.

I would also like to extend my heartfelt congratulations to KNCHR for their outstanding research endeavours which have resulted in the publication of two significant reports. The first report, titled *Mapping of organisations of and for persons with psychosocial and intellectual disabilities*, provides valuable insights and seeks to create a strong advocacy platform amongst organisations of, and for persons with psychosocial and intellectual disabilities in Kenya. The second report, titled *Still silenced: A quality rights assessment of selected mental health facilities in Kenya* assesses the current state of mental health care units and presents crucial recommendations for necessary improvements.

Let me also congratulate the KNCHR and Validity Foundation for their vision in partnering with Kabarak University School of Law to further innovative relevant research in Kenya, particularly in the field of mental health.

As you recall, in September 2021, we came together at Kabarak University for an extraordinary international conference under the theme, 'Nothing for us without us: Securing the dignity of persons with intellectual and psychosocial disabilities'. During the conference, we engaged in rich discussions, meticulously examining the legal framework around mental health, encompassing all aspects of the criminal justice system, from arrest to investigation, prosecution, sentencing, and post-sentencing practices. And now, as we gather here today for this launch event, our collective commitment to championing mental health rights grows even stronger, resonating with passion and purpose.

Today's event not only brings us together in celebration of milestones made, but it also invites us to make an honest assessment of where we are with regard to our criminal justice system's compliance with the rights and wellness of persons with intellectual and psychosocial disabilities. The important concerns that I raised in my opening remarks during the Conference in 2021 continue to be relevant and significant today, because when individuals with intellectual and psychosocial disabilities enter the criminal justice system, they still face a myriad of challenges that exacerbate their conditions, as opposed to being facilitated with access to appropriate treatment and care.

Although some progress has been made towards enhancing awareness and understanding of mental health issues within the criminal justice system generally, many individuals in conflict with the law are struggling with undiagnosed or untreated mental health conditions which, unfortunately, due to inadequate training and resources, our police officers, prosecutors, and courts and correctional officers may not recognise and appropriately address.

Concerning administrative processes, there are still numerous gaps in practice with regards to the procedure of handling persons with intellectual and psychosocial disabilities within correctional/detention facilities, and facilitating their access to legal aid services.

With particular reference to our criminal laws and procedures, our statutes are yet to embody the rights and protections for persons with

intellectual and psychosocial disabilities as reflected in the Constitution of Kenya, 2010. Derogatory terms referring to persons with intellectual and psychosocial disabilities are yet to be removed from the Penal Code, and mental illnesses in attempted suicide is still criminalised under Section 226 of the Penal Code.

As regards criminal procedures for offenders suffering from a mental illness that amounts to a defence, Section 166 of the Criminal Procedure Code (CPC) makes provision for where the court makes a finding of '*guilty but insane*'. Here, the law provides that the court has the discretion to determine the location and the manner the offender shall be held in custody while awaiting the President's decision. Thereafter, the President may then issue an order for the person to be detained in a mental hospital, prison, or another appropriate place of safe custody with regular reviews being undertaken. The '*guilty but insane*' finding has divided the Judiciary on the legal soundness of such a finding and emerging jurisprudence has called for the urgent reform on this issue.

In the case of *Wakesho v Republic (Criminal Appeal 8 of 2016) [2021] KECA (KLR)*, the Court of Appeal observed that a finding of '*guilty but insane*' is a legal paradox considering the need to prove *mens rea* in the commission of the crime. The Court opined that it must be established beyond reasonable doubt that an offender who committed the offence, whether by commission or omission, acted voluntarily and with a blameworthy mind. Similarly, the Court noted the conflicting decisions emerging from various courts on the legality of some of the provisions of Section 166 of the CPC, for instance, *Republic vs SOM [2017] eKLR* and *Republic v ENW [2019] eKLR*, and directed the Attorney General to take immediate steps to initiate reforms to clarify the position.

In *Republic v ENW (supra)*, a distinction was drawn under Section 166, between the judicial function to pass sentence, a reserve of the judicial process, and the executive responsibility of the President regarding power of mercy. In conclusion, the Court found that it was expedient and judicious to give a determinate sentence in cases concluded under Section 166 (1) of the CPC. After so doing, the Court becomes *functus*

officio, and should let the Executive carry out its responsibility under Section 166 (2) to (7) of the CPC.

The Court of Appeal in *Wakesho v Republic (supra)* essentially followed this approach by ordering the offender, who had been in custody, to be sent to a mental hospital until such time a psychiatrist, responsible for his/her care, certified the offender as no longer a danger to society. However, what happens thereafter remains unclear as regards whether the psychiatrist can order the offender's release, whether the matter requires a referral back to court and whether there is any question of the accused then being sent into custody to serve a sentence.

Further concerns have arisen on the implementation of the review mechanism under Section 166 of the CPC in that it falls short of the standards expected of the treatment of persons with mental illness. A first review coming three (3) years after committal to safe custody is an inordinately long period for an enquiry into the safety and wellbeing of an offender with mental illness.

For accused persons who cannot understand the proceedings against them as a result of a mental illness, Section 167 of the CPC makes similar provisions to Section 166, although notably, the review mechanism is not provided for.

We also note with concern that situations may arise where the courts are sentencing offenders who at the time of sentence, may have an intellectual or psychosocial disability that does not amount to a defence, and equally does not impact their ability to understand the proceedings.

The NCCJR remains deeply committed to advancing the rights and protection of persons with intellectual and psychosocial disabilities among other vulnerable groups in the various ongoing criminal law reforms it is undertaking. I would like to share with you some of the mentionable initiatives that NCCJR has undertaken and is currently advancing towards the realisation of reforms in the criminal justice system that promotes fairness, inclusivity, and facilitates effective support for individuals with intellectual and psychosocial disabilities:

- i) The amendment of our criminal laws to enhance protection of the rights of persons with intellectual and psychosocial disabilities. NCCJR has developed draft amendment bills to the Penal Code and the CPC, which are currently undergoing public participation. The Committee has in the past year engaged with inmates from Naivasha and Nyeri Prisons, and held two expert stakeholder engagements with magistrates and members of the Legal, Constitutional Affairs and Intergovernmental Relations Committees of the Council of Governors. The Bills make the following proposals related to mental health:
 - a. Repeal of Section 266 of the Penal Code which criminalises attempted suicide.
 - b. Amendment of Section 4 of the Penal Code to include the definition of ‘intellectual or psychosocial disability’.
 - c. Deletion of derogatory language (*‘idiot and imbecile’*) in Section 13 and 146 of the Penal Code to refer to persons with intellectual and psychosocial disabilities.
 - d. Decriminalisation and reclassification of petty offences, hence, the repeal of Section 182 of the Penal Code which criminalises *idle and disorderly behaviour*, Section 191 and 192 which criminalise fouling water and fouling air, amongst other provisions.
 - e. Comprehensive review of Sections 162 to 167 of the CPC to make special regulations for the trial and defence of persons with intellectual and psychosocial disabilities.
- ii) Under the auspices of NCAJ, the Committee convened the 2nd National Criminal Justice Reforms Conference in May 2022 bringing together criminal justice sector actors to discuss the reform agenda. One of the key thematic areas of discussion was enhancing access to justice for persons with mental illness in the criminal justice system. We recognise that effective

criminal justice reform requires engagement and input from a wide range of stakeholders, including government agencies, civil society organisations, community representatives, and individuals impacted by the system. By bringing together these actors, we facilitate a comprehensive review of the challenges and opportunities across the entire sector and facilitate discussions on how institutions can complement and reinforce various ongoing reform initiatives.

- iii) In 2022, NCCJR also embarked on the review of the Sentencing Policy Guidelines and proposed updates which were subsequently adopted by the NCAJ Council in February 2023. The Revised Guidelines provide comprehensive guidance on emerging issues with relevance to sentencing, in particular, handling of mandatory and minimum sentences, the attention and care owed to victims of crime, and considerations to be made when addressing the unique vulnerabilities of special categories of offenders in the criminal justice system, including persons with mental illness.
- iv) In particular, the revised Sentencing Policy Guidelines provide guidance on sentencing offenders who are found '*guilty but insane*' – please note the phrasing remains so until amendment is made to Section 166 of the CPC to provide for a finding of '*not guilty by reason of inability to understand the nature or consequences of one's acts or omissions pursuant to an intellectual or psychosocial disability or mental illness*' –
 - The revised Sentencing Policy Guidelines indicate that the court must be guided by relevant expert opinion based on the thorough examination of the offender. Among other things, courts should specifically request for advice on the treatment and care regime suitable for the offender.
 - The court should then determine where the offender should be placed and give a direction that he or she be so detained, until a psychiatrist responsible for that facility

certifies the offender as no longer a danger to society. The court should expressly state that upon making such a finding, the psychiatrist responsible for the facility must refer the matter back to the court before any release is made, for further directions/order. This would also apply where treatment is failing, whereupon the court may make further orders on treatment.

For offenders with mental illness who do not understand the proceedings against them:

- The revised Sentencing Policy Guidelines make reference to Section 167 (4) of the CPC which gives an opportunity for the court to make recommendations on a suitable intervention. This provision should be utilised to address the lack of any review mechanism expressed under Section 167. The court should in such a case recommend a more responsive review timeline and care regime for implementation by the relevant care agency based on a comprehensive expert report from a psychiatrist responsible for the facility. Similar directions as outlined in above should also be given.

For all other cases that do not fall within Sections 166 or 167:

- Where it appears that the offender is, or, appears to be, suffering from a mental disorder at the time of sentencing, the court must obtain a medical report before passing a sentence unless the court considers it unnecessary to do so, for instance, if existing, reliable and up to date information is available. Where conditions are progressive, the impact of sentencing may also require expert opinion particularly where custody is being considered.
- In determining the sentence, courts will naturally assess culpability, which may be reduced if at the time of the offence the offender was suffering from a mental disorder and provided that there is a sufficient connection between the offender's disorder, and the actual offending behaviour. If the

court considers that culpability should be reduced, it must give the reasons and the extent of that reduction.

- If the court considers a custodial sentence is merited, the court must consider the impact of the mental disorder when assessing the length of sentence. This is because the sentence may exacerbate the effects of the disorder. When a custodial sentence is passed, the report and any other relevant information concerning the offender's physical and mental health should be forwarded to the prison to ensure they have the appropriate information and can ensure the welfare of the offender.
- Courts must take particular care to ensure that the offender understands the sentence and what will happen if they reoffend or breach the terms of a community service or probation or suspended sentence order.

It is anticipated that the revised Sentencing Policy Guidelines will be gazetted by the Hon Chief Justice and Chairperson of the National Council on the Administration of Justice in the coming days. Thereafter, NCCJR purposes to embark on a rigorous training and sensitisation campaign to ensure implementation of these Guidelines.

As evidenced by the extensive work we are undertaking, the NCCJR steadfastly maintains its dedication to advocating, and enhancing the protection of individuals with intellectual and psychosocial disabilities in the criminal justice system.

It is delighting that KNCHR, Kabarak University and Validity Foundation have amplified the clarion call for legal and institutional reform regarding treatment of persons with intellectual and psychosocial disabilities. Indeed, the launch of the three publications is a clear manifestation that it takes concerted efforts to expose and oppose the continuous violations meted against persons with intellectual and psychosocial disabilities.

I am certain that these collaborations will inform current and future reform, sensitisation and advocacy strategies, not only at government level, but also at non-state levels such as in our communities. I am also certain that these partnerships are crucial in translating the significant aspirations outlined in the Convention on the Rights of Persons with Disabilities (CRPD) and the 2010 Constitution into practical application within our Nation.

Once again, I extend my deepest gratitude and appreciation to the authors, experts, and partners whose tireless efforts have given rise to these three very important pieces of work on mental health, which serve as a catalyst for dialogue and action.

Let us champion reforms that break down the walls of stigma and ensure that mental health receives the attention it warrants in the criminal justice system. And, this is the clarion call to action for all of us; to strive to protect and uphold the dignity of persons with intellectual and psychosocial disabilities.

Thank you for your attention and God bless you all.

Hon. Lady Justice Grace Ngenye, JA,
Chairperson, National Committee on Criminal Justice Reforms



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