

**CHILD MAINTENANCE IN KENYA: AN APPRAISAL OF THE STATE'S
LEGAL OBLIGATION IN PROVIDING MAINTENANCE TO VULNERABLE
CHILDREN**

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DECLARATION

Declaration by Candidate

To the best of my knowledge, this thesis is my original work and has not been presented for any degree in any university.

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Recommendation

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DEDICATION

I dedicate this work to my dad and role model, the late Prof. Isaiah Masinde Tabu. Dad, you were excited about this journey. Unfortunately, you are not here to witness it. To my mother, Jane Masinde, your strength and prayers kept me going; I am forever grateful.

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ABSTRACT

Children's rights in Kenya are guaranteed in the *Constitution of Kenya 2010*. These rights are also protected by a substantive and procedural statute: *The Children's Act 2022*. However, the realization of these rights is impaired by various complexities, such as the push and pull between private rights and state intervention in the family unit. The right to child maintenance is similarly plagued. This study set out to identify and analyse key theoretical concepts on the state's responsibility towards child maintenance and the legal framework governing it, interrogates the legal framework governing child maintenance in Kenya, explore the existing barriers that hinder state realization of child maintenance through a comparative analysis of South Africa and to come up with recommendations based on these findings. In doing so, this thesis, therefore, interrogates the nature and content of these rights and brings out the core obligations of the state as well as the parents or guardians of a child. The research was based on the assumption that child maintenance is a socio-economic right, and the barriers to their enforcement, such as progressive realization and minimum core obligations, are also stipulated. The right to child maintenance is reviewed in light of the best interests of the child principle, the principle of subsidiarity, and the doctrine of private ordering. In addition, this research explores the burden of child support in Kenya. The study further investigates the relationship between the parents/guardians and the state concerning child support. Finally, there is a review of child maintenance enforcement mechanisms in which a comparison is made between judicial, administrative, and mixed systems for child maintenance enforcement. Under each system, state obligations and public policy measures are reviewed. This study adopted a doctrinal legal research methodology, also called "black letter" methodology that focuses on the letter of the law rather than the law in action as a means of synthesising legal facts. This study found that Kenyan laws align with international instruments touching on child Maintenance. However, we noted a difference in the enforcement mechanism. We also noted that both the state and the parents play a crucial role in contributions toward child maintenance through a hybrid system. Finally, family formation and poverty were the barriers identified during the study. This study concludes that though parents' primary responsibility for child maintenance is vested, the state must come in when parents fail or cannot provide for their children. The study recommends a review of the Children's Act 2022 to bring it in line with constitutional principles to cover the obligations of the state in the maintenance of children whose parents or primary caregivers are unable or unwilling to do so and also the enactment of legislation to provide material support for those children. The findings will add to the scholarly literature on child maintenance in general and the scope of child maintenance in Kenya in particular. It is an increasingly contentious but little-studied field in Kenya today.

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ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Committee on the Rights of the Child
ECOSOC	Economic and Social Council
EU	European Union
IDPs	Internally Displaced Persons
ILO	International Labour Organisation
NGO	Non-Governmental Organisation
UN	United nations
UNCRC	United Nations Committee on the Rights of the Child

LIST OF COURT CASES

1. *Bannatyne v Bannatyne (Commissioner for Gender Equality, as Amicus Curiae)* 2003 2 SA 363 (CC) *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).
2. *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
3. *James Odemba Akong'o v Attorney General & 3 others* [2013] eKLR, Petition No. 104 of 2009.
4. *John Mbatia Kibebo & Another v Eliud Kibebo Mbatia Nakuru* HCCC No. 169 of 2008.
5. *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & another* [2013] eKLR, Petition 574 of 2012.
6. *Micah Kigen & 2 Others v Attorney General & 2 Others* [2012] eKLR, Petition 268 & 398 of 2012
7. *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC), para 31.
8. *Mitu-Bell Welfare Society v Attorney General & 2 Others* [2013] eKLR, Petition 164 of 2011.
9. NAI High Court Civil Case No. 1351 of 2002.
10. NAI High Court Divorce Cause No. 154 of 2008.
11. NKRU High Court Civil Appeal Number 40 of 2004.
12. *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, Petition No.65 of 2010.

13. The High Court of Kenya at Busia H.C. Civil Appeal No.21 of 2009
14. The High Court of Kenya at Machakos Civil Appeal 185 of 2007
15. *Z W v M G W NAI* High Court Misc. Case No. 108 of 203, para 12.
16. *Zipporah Wambui Mathara*, Bankruptcy Cause No. 19 of 2010
17. *Commissioner for Gender Equality, as Amicus Curiae* 2003 2 SA 363
(CC)*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46
(CC) and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721
(CC).
18. *Bannatyne v Bannatyne and Another* (CCT18/02) [2002] ZACC 31
19. High Court of Kenya at Nairobi Civil Appeal N0.16 of 2012
20. Nairobi HCCC No. 1351 of 2002 (OS), Judgment dated 1st December 2006.

STATUTES AND CONSTITUTIONAL PROVISIONS

1. Article 2(6) of the Constitution of Kenya, 2010.
2. Article 21 (3), Constitution of Kenya, 2010
3. Article 21, Constitution of Kenya, 2010
4. Article 27 (3), Constitution of Kenya, 2010
5. Article 45, Constitution of Kenya, 2010.
6. Article 53 of the Constitution of Kenya 2010.
7. Article 53(1)(d), Constitution of Kenya 2010
8. Article 53(1)I, Constitution of Kenya, 2010.
9. Article 53, Constitution of Kenya, 2010
10. Section 27(1) I The South African Constitution
11. Section 28(1) I, Constitution of South Africa.
12. Section 28(1)I The South African Constitution
13. Section 39, The South African Constitution.
14. Convention on the Rights of the Child, Article 1.

INTERNATIONAL LEGAL INSTRUMENTS

1. Article 11(2) (a) African Charter on the Rights and Welfare of the Child.
2. Article 11(2) (b) African Charter on the Rights and Welfare of the Child.
3. Article 11(2) I African Charter on the Rights and Welfare of the Child.
4. Article 11(3) (a) African Charter on the Rights and Welfare of the Child.
5. Article 11(3) (b) & (c) African Charter on the Rights and Welfare of the Child.
6. Article 11(3) I African Charter on the Rights and Welfare of the Child.
7. Article 11(6) African Charter on the Rights and Welfare of the Child.
8. Article 18 (2), The United Nations Convention on the Rights of the child (CRC).
9. Article 18 African Charter on the Rights and Welfare of the Child.
10. Article 2 of the African Charter on the Rights and Welfare of the Child.
11. Article 20(3) of the Convention on the Rights of the child (CRC) and Article 25(3) of the African Charter on the Rights and Welfare of the child (ACRWC).
12. Article 25(2) (b) of the ACRWC.
13. Article 25(2) of the African Charter on the Rights and Welfare of the child (ACRWC).
14. Article 38, Supra n 23.
15. Child Rights and the Law in East Africa. Law Africa Publishing (2014)
16. Constitutional and International Protection of Children's Rights 185.
17. Convention on the Rights of the child (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990), Article 27(1).
18. Convention on the Rights of the Child, Article 1.
19. CRC, article 2(1).
20. CRC, Articles 21 and 23.

21. CRC, Articles 28(3) and 39.

22. Kenya ratified the UN Convention on the Rights of the child in 1990 and the African Charter on the Rights and Welfare of the child in 2001.

CHAPTER ONE: INTRODUCTION

“The child is a vulnerable creature, in danger, a pendant to the family more than an agent in its own right.”¹

1.1 Background of the Study

Kenya's Constitution guarantees individuals the right to parental care and support ². On the other hand, the Children's Act stipulates that every child has an intrinsic right to life and that it is the responsibility of both the government and the family to ensure the Child's growth and survival in instances where the parents are unable or unwilling to raise their children. According to the Act, the Child's Best Interest (CBI) must be prioritised in all activities involving children, whether public or private social welfare organisations, courts of law, administrative authorities, or legislative bodies. The State's obligation for the Child's upkeep is split into two. On the one hand, the State enforces the Child's rights by requiring both parents to provide based on the CBI; on the other, the State must provide education, health and other socio-economic rights.³

However, despite these safeguarding measures, poverty, fast population expansion, poor economic development, growing urbanisation, a changing family structure, and an increase in the number of orphaned and refugee children have all put children in Africa at a greater risk than in other areas.⁴ Challenges such as those led to the drafting of the African Charter on the Rights and Welfare of the child (ACRWC). The Charter was drafted and adopted in response to the need to address children's socio-economic rights in an African setting.⁵ Unlike the Convention on the Rights of the Child, which places

¹ Behind Closed Doors: Exploring the Institutional Logic of Child Protection Work, (2009).

² Article 53, Constitution of Kenya, 2010

³ Wabwile, M.N. *Legal Protection of Social and Economic Rights of Children in Developing Countries: Reassessing International Cooperation and Responsibility*: Intersentia, 2010. <https://books.google.co.ke/books?id=oEQ-YgEACAAJ>.

⁴ The condition of young children in Sub-Saharan Africa, 64 (1996).

⁵ Wabwile, M.N. *Legal Protection of Social and Economic Rights of Children in Developing Countries: Reassessing International Cooperation and Responsibility*: Intersentia, 2010. <https://books.google.co.ke/books?id=oEQ-YgEACAAJ>.

parental duties on parents as "child custodians," the ACRWC extends parental responsibility to anybody who has custody of the Child.⁶ This is in recognition of the African idea of extended family.

This paper will, therefore, discuss the concepts of state obligation in ensuring that children are maintained by their parents. It also discusses the State's role in ensuring that children's needs are cared for when parents fail and/or cannot meet their needs or the children have no parents. To do so, the paper will use the standards set in the ACRWC as a guide in the debates concerning child maintenance.

1.2 Problem Statement

Child maintenance is an emotive issue in our society which requires the participation of all actors. The State has an obligation to ensure that children's rights are upheld and that the best interest in respect to the welfare of the child is adhered to. However, there have been challenges in ensuring these obligations have been met. It is evident that Children in low-income households suffer the most because of their peculiar need for physical and mental development.⁷ The suffering worsens in situations where survival is key and one or both parents are unavailable. As a provider of economic support, the role of the family has declined as the number of absent fathers who do not take up responsibility for their children continues to increase.⁸

There has been an increase in the number of school-going children, a dropping infant mortality rate, an increase in the nutrition status of children, a reduction in child hunger deaths, child labour and an increase in learner's completion rate.⁹ Despite these

⁶ African Charter on the Rights and Welfare of the Child, OAU Doc CAB/ (1990) (entered into force 29 November 1999). (1990).

⁷ The Effects of Poverty on Children, 55-71 2 (1997). <http://www.jstor.org/stable/1602387>

⁸ Comparative legal developments in child maintenance and their possible effect on South Africa, 376-384 3 (1993).

⁹ UNICEF, The State of the World's Children: A Fair Chance for Every Child (2016)

significant improvements and increases in the attainment of children's socio-economic rights, the success story has not been universal. Most developing countries still face immense violations of children's rights.

The violations are attributed to the lack of proper governance, weak policies, weak institutions, mismanagement of public funds, misplaced priorities by the State and ignorance of the rights by the public.¹⁰

This situation has led to an escalation in the number of low-income families despite the increase in the “value of social welfare as an economic pillar”, which escalation has resulted in the rise of child abandonment cases.¹¹ This has exposed the children to a lot of danger.

1.3 The Study Rationale

A child can be defined as every human being below the age of eighteen years.¹² Due to children's unique place in society, they are accorded special treatment and protection by the law since they cannot assert their rights. The legislation prioritises the protection of children on both a national and international level. The 2010 Constitution changed Kenya's State from dualist to monist by stating that every treaty or Convention accepted by Kenya becomes part of Kenyan law.¹³

Kenya¹ has¹ ratified¹ the¹ ACRWC and¹ the¹ Convention¹ on¹ the¹ Rights¹ of¹ the¹ Child¹(CRC) on¹ a¹ regional¹ and¹ international¹level.¹⁴ Article¹ 27 of¹ the¹

¹⁰ Corruption, good governance and the African state: a critical analysis of the political-economic foundations of corruption in Sub-Saharan Africa, 300 (2013). <https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/index/index/docId/6664>

¹¹Ibid

¹² Article 2 of the African Charter on the Rights and Welfare of the Child.

¹³ Article 2(6) of the Constitution of Kenya, 2010.

¹⁴ Kenya ratified the UN Convention on the Rights of the Child in 1990 and the African Charter on the Rights and Welfare of the Child in 2001.

Convention¹ on¹ the¹ Rights¹ of¹ the¹ Child, provides that every¹ child¹ has¹ the¹ right¹ to¹ a¹ quality¹ of¹ living¹ that¹ is¹ sufficient¹ for¹ his¹ or¹ her¹ bodily, spiritual, mental, moral¹ and¹ social¹ development.¹⁵ Furthermore, the Convention mandates that state parties adopt adequate steps to help parents and other caregivers secure the living circumstances required for the Child's development. According to Article 27(4) of the Convention, states parties must take all reasonable steps to recover the Child's maintenance from the parents or other people who are financially responsible for the child.¹⁶

Thus, the State has a crucial role to play in child maintenance. It has a duty to respect, protect and fulfil human rights.¹⁷ The obligation to respect requires states to refrain from interfering or limiting the enjoyment of human rights; the responsibility to protect requires states to protect individuals or groups against human rights violations by others or the State itself; and the obligation to fulfil requires states to take action to facilitate the enjoyment of the guaranteed rights. Kenya has criminalised child marriages, established children's courts, officers, and created foster homes and children's institutions. In as much as all these have been done, early marriages and the employment of children still exist, which has led to criticism of the efficiency of the implementation methods involved. This research seeks to analyse Kenya's measures and implementation vis-à-vis South Africa to recommend how best child maintenance as an obligation by the State can be adequately implemented.

¹⁵ Convention on the Rights of the Child (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990), Article 27(1).

¹⁶ Ibid, Article 27(3).

¹⁷ Article 21 (3), *Constitution of Kenya*, 2010

1.4 Research Questions

1. What are the developed concepts of the State's responsibility and the legal framework governing child maintenance in Kenya?
2. What are the implications of the state's failure to perform its legal obligation in enforcing child maintenance?
3. What barriers hinder the State realisation of child maintenance in other jurisdictions in Africa, including South Africa?
4. What conclusions and recommendations can be deduced from the overall findings?

1.5 Research Objectives

The specific objectives of this study will be: -

1. To identify and analyse key theoretical concepts on the State's responsibility towards child maintenance and the legal framework governing it.
2. To interrogate the legal framework governing child maintenance in Kenya.
3. To explore the barriers that hinder state realisation of child maintenance through a comparative analysis of South Africa.
4. To develop recommendations based on findings.

1.6 Literature Review

Child Maintenance in Kenya: The Scope of State Responsibility analyses the State's obligation to ensure respect, protection and fulfilment of children's rights; various literary work is reviewed to guide the research study.

In their work, Prof. Mohammed S. Hussain and Dr Clement Mashamba state that a child's deprivation of a family environment should be applied as a last resort in the

CBI.¹⁸ They further note that once a child is placed in alternative care, the State must ensure that the child grows up in an environment similar to a family set-up. The researcher shares this particular view in this study. Further, the researcher emphasises that the State should implement measures to ensure alternative care facilities are similar to a family lifestyle and environment. Prof Mohammed et al. further noted that under international law, where a child is placed under alternative care, due regard should be paid to the need for continuity in the Child's development and the Child's ethnic, religious, cultural and linguistic background.¹⁹ This study emphasises that under international law, where a child is deprived of his or her family environment, the State should accord special protection and assistance to that Child, preferably through alternative family care placement.²⁰

Usang Assim, on her part, notes that children who lack the security of a family are more vulnerable to infringement and/or violations of all other rights that they are entitled to. As such, Assim postulates that States have an obligation to maintain such children by providing alternative care since, violating the rights of these vulnerable children particularly impacts their growth and development from childhood through adolescence to adulthood. The researcher agrees with these key observations. Such children in need of care and maintenance by the State include orphans, street children and abandoned children generally, whether or not in institutional care.²¹

¹⁸ Child Rights and the Law in East Africa. Law Africa Publishing (2014)

¹⁹ Article 20(3) of the Convention on the Rights of the Child (CRC) and Article 25(3) of the African Charter on the Rights and Welfare of the Child (ACRWC).

²⁰ Article 25(2) of the African Charter on the Rights and Welfare of the Child (ACRWC).

²¹ Inferring a right to permanent family care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and selected scientific literature (2008)

Similar ideas were expressed by Kruger, who said that if children are not first aided in developing into logical individuals inside a secure home context, it is pointless to strive to protect their rights to autonomy and self-sufficiency.²²

Parental responsibility, as provided by the *Children's Act*, is an important tenet of this research. It is defined as all parent's responsibilities, rights, powers, responsibilities, and authority concerning a child.²³ According to Article 45(1) of the Constitution, the family is the natural and basic unit of society and the essential foundation of social order, and it is entitled to the state's recognition and protection.²⁴ Article 53(1) (e) of the constitution stipulates that every child has the right to parental care and protection, which includes the equal obligation of the mother and father to provide for the child, regardless of whether they are married.²⁵

However, in other cases, a child's own family may be unable or unwilling to provide help. When a child's own family is unable to provide adequate care for the child, even with appropriate support, or abandons or relinquishes the child, the State, with or through competent local authorities and duly authorized civil society organizations, is responsible for protecting the child's rights and ensuring appropriate alternative care.²⁶ The state has a duty to safeguard the safety, well-being and development of any child put in alternative care, as well as a frequent examination of the efficacy of the care measures given, via its relevant agencies.²⁷

²²Kruger Judicial Interference with Parental Authority 507.

²³ Section 23, *Children Act Cap 141*

²⁴ Article 45, Constitution of Kenya, 2010.

²⁵ Article 53(1)(e), Constitution of Kenya, 2010.

²⁶ UNICEF, Definitions; <https://www.unicef.org/eca/definitions>

²⁷ Guidelines for the Alternative Care of Children, note 1 above, para 5.

While a child should remain under the care and protection of his/her parents until he/she attains the age of majority, it is recognised under law that this cannot always be achieved. Thus, the maintenance of children placed in alternative care is a duty of the State, which should, as such, adopt measures to ensure that the child grows up in an environment akin to a family lifestyle.

According to Article 20(1) of the Convention on the Rights of the Child, a child partially or entirely removed from their home environment or who cannot stay in that environment in their best interests is entitled to particular protection and help from the State.²⁸ As such, the primary duty of care, protection and maintenance of a child placed in alternative care rests squarely on the State. Further, the State should take legislative, administrative or policy measures to ensure regular contact between such a child and their parents; this provides a follow-up on the measures directed and avoids giving directions without proper implementation. Further, where the separation is due to by factors such as internal or external displacement arising from armed conflict, which then renders persons refugees or Internally Displaced Persons (IDPs) or as a result of natural disasters, then the State must take measures to ensure the tracing and re-unification of displaced children with their parents.²⁹

The United Nations Committee on the Rights of the child (UNCRC) monitors child rights implementation. It has commended measures state parties in the CRC have taken to prevent and remedy child abuse and neglect. However, measures such as criminalising child abandonment as a remedy to avoid child neglect may have unintended consequences on economically and socially disadvantaged parents or

²⁸ Convention on the Rights of the Child (CRC) (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989) entry into force 2 September 1990.

²⁹ Article 25(2) (b) of the ACRWC.

families, particularly those living in poverty. Such criminalisation would also negatively affect the State's efforts to trace parents or guardians for family reunification purposes.³⁰ This study also takes the view that while the State must take a firm stand against child abuse, neglect and abandonment, such efforts should be made, giving due regard to the effects of criminalisation measures. Indeed, while the State has a responsibility to intervene where parents do not honour or fail to meet their obligations of maintenance of their children, of paramount importance to take such measures in the CBI and not the need to punish the parents.

According to Jean Koh Peters, there is an inherent relationship between Article 9 of the CRC, which requires the State to guarantee that children are not separated from their parents, and Article 12, which protects a child's freedom to express herself.³¹ According to Peters, the CRC requires that the Child's opinions be given proper weight in line with the Child's age and maturity, but it also seems to demand that the Child's views be recorded, whether or not they are honoured.³² This is a viewpoint that the researcher in this study shares. When the State chooses to put a child in alternative care as a last option, proper consideration must be given to the child's requests and opinions. As a result, the CRC does not need a child to be old enough to voice a reasoned argument for Article 12 of the Convention to be invoked. The youngster must be "capable" of generating their own opinions. After that, a state party to the CRC shall adopt legislative, administrative, or policy steps to guarantee that children's voices are heard

³⁰Committee on the Rights of the Child, concluding observations on the third and fourth periodic reports of Rwanda, adopted by the Committee at its sixty-third session (27 May–14 June 2013).

³¹ How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study. *Yale Law Faculty Scholarship Series*. Available at https://digitalcommons.law.yale.edu/fss_papers/2146

³²Ibid.

in procedures leading to their removal from their parents' care and placement in alternative care.

Bekink Mildred points out that the South African Constitution's inclusion of Section 28 on children's rights was done in awareness of children's fragility.³³ Section 28 is comparable to Article 53 of the Kenyan Constitution. Bekink continues the argument that just about every child has a right to parental protection and care, which is aimed at maintaining a healthy parent-child relationship. Therefore, this puts the administration's responsibility to respect the current relationship or child rearing by restricting any intervention to carefully warranted conditions.³⁴ Thus, according to Bekink, the primary duty of care, protection, and maintenance of a child is on the parents, and the obligation of the State in child maintenance is limited only to situations where the parents are unable to provide such caregiving due regard to the best interest of the Child. An example of a justifiable infringement on this right would be in situations of ongoing child abuse. This is the same position that the researcher takes in this study. This study postulates that in determining the scope of state responsibility in child maintenance, the appropriate approach is the child-centred approach rather than a parent's or state's perspective, as the child's right is at stake.

Bekink also points out that Section 28(1) of the South African Constitution (similar to Article 53 of the Kenyan Constitution) has direct horizontal application, meaning that the responsibilities these rights impose are primarily the responsibility of the Child's parents and family, and only pass to the State if the Child's parents or family fail or are unable to care for the Child. As a result, it is the State's job to guarantee that legal

³³ Child Divorce: A Break from Parental Responsibilities and Rights Due to the Traditional Socio-Cultural Practices and Beliefs of the Parents (2012).

³⁴ Constitutional and International Protection of Children's Rights 185.

requirements exist to force parents and families to carry out their parental responsibilities. To fulfil this role, the State must also offer the appropriate environment for parents and families to provide good child care.³⁵ In the absence of such care, the State is responsible for providing alternative care for children who have been separated from their families.

Bekink argues that the State is responsible for guaranteeing that children under its care are not maltreated, neglected, mistreated, or humiliated.³⁶ In addition, the State has an affirmative obligation to interfere in cases of continuing neglect, ill-treatment, or abuse, such as by removing a child from a dangerous setting.

According to the above, the significance of children growing up in a healthy atmosphere where they may build strong psychological relationships with family members cannot be overstated. The above authors have given wide-ranging views on the scope of state responsibility in child maintenance. This study seeks to adopt and further those views to identify the extent of the State's duty in child maintenance in Kenya.

To this end, the Draft Guidelines for the Alternative Care of Children note that:

[...] because¹ the¹ family¹ is¹ the¹ foundation¹ of¹ society¹ and¹ the¹ natural¹ environment¹ for¹ children's¹ development, well-being¹ and¹ safety, attempts¹ should¹ be¹ made¹ to¹ allow¹ the¹ child to¹ stay¹ in¹ or¹ return¹ to¹ the¹ care¹ of¹ his¹ or¹ her¹ parents, or¹ other¹ close¹ relatives, as¹ appropriate. The¹ state¹ should¹ guarantee¹ that¹ families¹ that¹ are¹ caring¹ for¹ others¹ have¹ access¹ to¹ various¹ sorts¹ of¹ assistance.³⁷

³⁵ *Commissioner for Gender Equality, as Amicus Curiae* 2003 2 SA 363 (CC) *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

³⁶ Above note 14, p. 188.

³⁷ Guidelines for the Alternative Care of Children, 11th Session, Resolution 11/7 Annex to Human Rights Council, para 3.

1.7 Theoretical Frameworks

1.7.1 Introduction

Child maintenance is a concept anchored upon the 'best interest principle'. Under this principle, the CBI is paramount in every matter concerning the Child.³⁸ While the term child maintenance is widely used to refer to child support, there is no single agreed-upon definition of the term child maintenance. No child should be denied support because of the parent's marital status, according to the African Charter on the Rights and Welfare of the Child.³⁹ It does, however, propose that nations signatories to the Charter make necessary efforts to guarantee that spouses have equal rights and obligations concerning children during and after marriage. Provisions must be made clear in a divorce for the Child's protection.⁴⁰

Child maintenance is described as a "regular payment by a non-resident parent toward the financial expense of raising a child, normally given to the parent with whom the child spends most of their time."⁴¹ Child maintenance can also be defined as compensating a parent needing financial assistance for raising and sheltering a child by the other parent who can cater to the expenses of raising a child. The need for child maintenance may arise when the parent required to pay the maintenance amount does not enjoy physical custody of the Child, so that parent's income does not benefit the child directly. Conceptual frameworks for child maintenance decision-making are discussed below:

³⁸ Article 53 of the Constitution of Kenya 2010.

³⁹ Article 18(3), African Charter on the Rights and Welfare of the Child

⁴⁰ Article 18 (2), African Charter on the Rights and Welfare of the Child

⁴¹ Child Maintenance and Child Poverty: A Comparative Analysis (2011)

1.7.2 An economic consumer choice decision-making framework

The well-established consumer choice model in economics is a familiar framework for how individuals make decisions, often applied to decisions about child care and maintenance. According to this model, individuals aim to maximize their satisfaction by weighing the tradeoffs between available options and their own preferences. This approach acknowledges that people face constraints (like budget or time limitations), where one might have limited funds for a choice or restricted time to explore alternatives. People, therefore, consider these tradeoffs when deciding on aspects such as the kind, quality, and amount of a product or service, following a theory of constrained optimization.⁴²

1.7.3 Heuristics and biases framework

The heuristics and biases framework plays a role in comprehending the elements that disrupt logical decision-making, deviating from the deliberate and thoughtful decisions advocated by an economic model of consumer choice. This framework stems from psychological studies investigating how fundamental psychological processes influence judgment and behavior. Extensive psychological research over many years has highlighted the significant impact of subjective interpretation in decision-making, elucidating various typical psychological processes that influence how individuals perceive and interpret information, particularly when making decisions amidst uncertainty.⁴³

⁴² Chaudry, A., Henly, J., & Meyers, M. (2010). ACF-OPRE White Paper. Conceptual Frameworks for Child Care Decision-Making. Office of Planning, Research and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services. Washington, DC.

⁴³ Ibid 27

1.7.4 A social network framework for decision making

A decision-making framework within a social network context explores how individual choices are influenced by social interactions and the resources inherent within these interactions. Scholars, mainly sociologists, have developed network-based approaches to comprehend how social structure and individual agency interplay in shaping choices, actions, and results. Social network theorists suggest that personal networks—comprising connections (referred to as "social ties") between relatives, friends, neighbors, colleagues, and various individuals with different levels of closeness—serve at least four crucial functions for their members. These functions include providing information, offering support, conferring social status and acknowledgment, and exerting influence on the individuals within these networks.⁴⁴

1.8 Research Methodology

This research took a qualitative approach to address the outlined research objectives and questions. The qualitative research approach was chosen because it allows focusing on social facets of the child maintenance law and determining through empirical data how the law, legal institutions, and state affect or mould human attitudes towards child maintenance and their impact on the society they create. According to Ishwara Bhat, ‘qualitative legal research aims to study things in their natural settings, understand and interpret their social realities and provide inputs on various aspects of social life.’⁴⁵ The key features of qualitative legal research include a description of social settings, interpretation of social data, verification of assumptions, and evaluation of legal frameworks and policies.⁴⁶

⁴⁴ Ibid 27

⁴⁵ Bhat, P. Ishwara. 359 qualitative Legal Research: A Methodological Discourse. Idea and Methods of Legal Research. Edited by P. Ishwara Bhat: Oxford University Press, 2020.

⁴⁶ Ibid

The legal framework for child maintenance in Africa is still developing, with different jurisdictions having attained different success levels. Therefore, the present study collected empirical data from international legal instruments for Africa and various African jurisdictions to gauge the success or failure of child maintenance in Kenya. This study adopted a doctrinal legal research methodology, also called "black letter" methodology that focuses on the letter of the law rather than the law in action as a means of synthesising legal facts.⁴⁷ Using this method, a descriptive and detailed analysis of legal rules found in primary sources (cases, statutes, or regulations). This methodological approach allows a legal researcher to gather, organize, and describe the law; while shading light or providing a commentary on the primary sources used. The outcome of this legal synthesis method include identification and description of the underlying legal themes or systems and how each law source is connected.⁴⁸ The primary sources that directed this doctrinal legal research included international conventions, domestic legislation and case laws in Kenya, and South Africa . The secondary sources included policy documents, academic journals, books, reports, official data, online and scholarly articles, and conference proceedings. All these qualitative sources of empirical data were helpful in the analysis of the child maintenance problem in Kenya and how to compares with South Africa. They set a framework for the national legislation to ensure human rights protection within its jurisdiction. Government and other organisational reports and publications relevant to the topic were identified and analysed.

⁴⁷ Bhat, P. Ishwara. *143doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles*. Idea and Methods of Legal Research. Edited by P. Ishwara Bhat: Oxford University Press, 2020.

⁴⁸ Ibid

Briefly, the legal framework governing the State's obligation on child maintenance in Kenya was explored with a particular focus on the constitutional provisions of the Children Act. This was compared with international and regional instruments to show the strength and limitations of the State's responsibility for child maintenance. Judicial decisions on child maintenance cases brought before Kenya's courts were also reviewed to determine their appropriateness to the best interest of a Kenyan child. Next, a critical appraisal of the legal framework and the state's responsibility for child maintenance in Kenya was conducted. Towards the end, the legal framework and policies on child maintenance in South Africa were reviewed compared to Kenya's. Finally, conclusions were drawn, and recommendations for improvement were suggested to help Kenya's child maintenance legal framework and the state legal obligations be more practical and more straightforward.

However, concluding the methodological approach by highlighting its important limitations is worthwhile. A doctrinal legal research approach was expected to be too cumbersome for an exhaustive research of the issue, whose scope was expected to be considerably wide. It was difficult to ascertain whether some international or regional legal instruments available online on various websites were up-to-date. It was challenging and time-consuming to contact relevant international institutions or bodies to provide or clarify the most recent legal instruments on child maintenance. Finally, the doctrinal legal research identified key thematic issues in child maintenance. They were then described separately in the results section and later discussed. A brief conceptual framework of this methodological approach is outlined below:

- (a) Assembling relevant legal facts of children's rights;
- (b) Identifying the legal issues surrounding children's rights;
- (c) Analyzing the issues with a view to searching for the law;

(d) Reviewing background materials, including legal dictionaries, legal encyclopedias, textbooks, law reform, policy papers and journal articles.

(e) Locating key primary materials including legislations and case law;

(f) conducting a legal synthesis of all the issues in context; and

(g) Arriving at a tentative conclusion related to the study's research questions and aims. The results section evaluates three thematic issues identified in the surveyed literature, outlined below:

1. Conceptual framework on the normative prescriptions on child maintenance In Kenya
2. State responsibility for child maintenance in Kenya.
3. Legal framework and policies on child maintenance in South africa compared to Kenya.

CHAPTER TWO: CONCEPTUAL FRAMEWORK ON THE NORMATIVE PRESCRIPTIONS ON CHILD MAINTENANCE IN KENYA

2.0 Introduction

This section interrogates the legal framework governing the State's obligation on child maintenance in Kenya. The Constitution of Kenya and relevant provisions are discussed in detail. Furthermore, the study interrogates international instruments that Kenya has ratified, which form part of the legislation on child maintenance.

2.1 International instruments

2.1.1 The Convention on the Rights of the Child, 1989

The United Nations Convention¹ on¹ the¹ Rights¹ of¹ the¹ Child¹ (CRC) is¹ the¹ most¹ comprehensive¹ instrument¹ addressing¹ children's¹ rights.⁴⁹ The¹ CRC¹ is the longest¹ UN Human rights¹ treaty¹ in operation because of the substantive rights it protects. It is particularly unusual¹ in¹ that¹ it¹ tackles¹ not¹ only¹ the¹ grant¹ and¹ execution¹ of¹ rights¹ in¹ times¹ of¹ peace, but¹ also¹ the¹ treatment¹ of¹ children¹ in¹ armed¹ war¹ circumstances.

The CRC is especially important since this upholds, for the first time, in legally enforceable law, the factors that support adoption from the standpoint of the Child.⁵⁰

The CRC principally addresses four aspects of children's rights: children's involvement in decisions that affect them; prevention of children from discrimination and all types of maltreatment and trafficking; avoidance of damage to children, and provision of necessities assistance to children.⁵¹ In terms of the objectives of the CRC, a person is

⁴⁹ The Convention on the Rights of the Child, with a Preamble and 54 articles, was adopted by the U.N. General Assembly on November 20, 1989, and entered into force on September 2, 1990. See the OHCHR Web site, <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed on 26 July 2021.

⁵⁰ The International Law on the Rights of the Child. 35 International Studies in Human Rights 16 (1995)

⁵¹ Ibid

deemed as¹ any¹ human¹ being¹ under¹ the¹ age¹ of¹ eighteen¹ years, unless¹ maturity¹ is¹ acquired¹ earlier¹ by¹ the¹ laws¹ and¹ regulations¹ applicable¹ to¹ the¹ child.⁵²

Non-binding suggestions, such as protections¹ in¹ adoption¹ processes¹ and¹ handicapped¹ children's¹ rights, were replaced with binding standards in the CRC.⁵³ The CRC also requires governments to prohibit traditional practices that¹ are¹ harmful¹ to¹ children's¹ health¹ and¹ to¹ provide¹ rehabilitative¹ services¹ to¹ neglected children, vulnerable to abuse¹ or¹ exploitation.⁵⁴ Moreover, the CRC requires States Parties not to discriminate against minors exercising their rights under the Convention.⁵⁵ The Commission's main principles include the right of a child to participate in proceedings, and the principles¹ of¹ non-discrimination¹ in¹ Article¹ 2, and¹ the¹ best¹ interests¹ of¹ the¹ child¹ in¹ Article¹ 3.

The CRC places a heavy responsibility on state parties regarding child maintenance. Despite the scarcity of resources, it not only mandates states to provide some services to children but also encourages cooperation between the State and parents, who are primarily responsible for maintaining a child, as demonstrated below.

Article 18 provides that the State shall appropriately assist parents/guardians in child-rearing responsibilities. This may be by way of developing institutions, facilities and services for the care of children. Notably, the Convention does not limit this provision to children needing care and protection, but rather, a general provision. The Article further provides that the children of working parents have a right to benefit from child-

⁵² Convention on the Rights of the Child, Article 1.

⁵³ CRC, Articles 21 and 23.

⁵⁴ CRC, Articles 28(3) and 39.

⁵⁵ The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child (2001) at <<https://www.jstor.org/stable/4489336>.

care services. To this extent, the Convention envisions a modern and economically developed society that would be able to cater for children to this high standard. The Convention provides for progressive realisation of the rights and places the burden of proofing scarcity of resources to the state.

Article 20 of the Convention mandates States to provide alternative care for children deprived of a family environment. Such care could include inter alia, adoption, foster placement, and Kafalah of Islamic law.

Regarding children living with disabilities, Article 23 of the constitution requires that the state provide them with a decent, dignified, and self-reliant life. The support of the state is, however, subject to the financial capability of otherwise of the guardians. Such assistance may include special education, training, health care services, rehabilitation, and recreation services inter alia.

Article 27 recognises the provision of a standard of living adequate for the wholesome growth and development of the Child. Thus, states are mandated to assist parents in providing material assistance and support programs regarding housing, nutrition and clothing.

2.2 Regional instruments

2.2.1 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the child (African Children's Charter) has received near universal ratification in Africa.⁵⁶ There has been considerable progress in ensuring that member states comply with the provisions of the Charter. For¹example, the¹ African¹ Committee¹ of¹ Experts¹ on¹ the¹ Rights¹ and¹ Welfare¹ of¹ the¹Child,

⁵⁶ As of June 2019, 49 out of 54 member states of the African Union had ratified or acceded to the African Children's Charter.

which is in charge¹ of¹ monitoring¹ states' compliance¹ with¹ the¹ legal¹ obligations¹ under¹ the¹ African¹ Children's¹ Charter, issued¹ its¹ first¹ adjudicative¹ decision, in which it found that the Kenyan government had violated the rights of children of Nubian descent to nationality.⁵⁷

The duty of state parties is established in Article 1 of the Charter. Governments that are signatories to the Charter must acknowledge the rights, freedoms, and responsibilities that the Article entails. They should also use their legislative procedure to domesticate them. This Charter, on the other hand, does not prevent the need for a more effective system within the State to guarantee the rights and welfare of children as stated by international law. However, the government shall discourage habits, traditions, cultural, or religious practices incompatible with the rights, responsibilities, and obligations set out in this Charter.

Article 5, which is particularly important for child maintenance, ensures the Child's survival and growth. Because the Child's right to life must be safeguarded by law, governments must take all necessary steps to ensure the Child's survival, protection, and growth.

Article 11 establishes the right to education, stating that every child has this right.⁵⁸ This education should inspire children to respect other people's human rights, as well as their own and other cultures, and to develop each Child's personality, skills, and abilities to their greatest potential. Positive African principles, traditional values, and traditions

⁵⁷*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, available at: <https://www.refworld.org/cases/ACERWC/4f5f04492.html>

⁵⁸ Article 11(2) (a) African Charter on the Rights and Welfare of the Child.

should all be preserved and strengthened via education.⁵⁹ Children have a special obligation to respect their parents' rights, and education should seek to instil respect for their parents' beliefs and traditions.⁶⁰

To lower drop-out rates, the State must offer free and obligatory basic education,⁶¹ stimulate secondary education growth, and make higher education more accessible. In addition, specific efforts must be made to assure equitable access to education for female, talented, and underprivileged pupils.⁶² Female children who get pregnant should also be permitted to complete their studies.⁶³ Also crucial is child discipline at home and school, which must be based on the child's best interests as well as their dignity and humanity.⁶⁴

Article 13 provides that the State shall ensure, subject to available resources, assistance to disabled children to achieve their full potential by way of education, training, recreation, health care, and rehabilitation is provided.

The Charter emphasises the role of the State in providing primary health care for children, provision of nutrition, and community education on healthcare.

The Charter further states that the government shall take necessary steps to guarantee that spouses have equal rights and duties regarding child protection during and after marital breakup. The Charter stipulates that no child will be denied support because of their parents' marital status.⁶⁵

⁵⁹ Ibid, Article 11(2) (b).

⁶⁰ Ibid, Article 11(2) (c).

⁶¹ Ibid, Article 11(3) (a).

⁶² Ibid, Article 11(3) (b) & (c).

⁶³ Ibid, Article 11(3) (e).

⁶⁴ Ibid, Article 11(6).

⁶⁵ Ibid, Article 18.

Parental care and protection are provided for under Article 19. In the event of parental separation or as determined by the State, governments should defend the Child's right to parental care and protection and maintain frequent contact with parents.

Article 20 mandates states to assist parents in their child-upkeep responsibilities materially and through support programs when needed, especially in providing nutrition, shelter and clothing.

2.3 Domestic Laws

2.3.1 The Constitution of Kenya, 2010

Children's rights were raised to constitutional status in Kenya's 2010 Constitution. However, due to economic discrepancies, the Kenyan Children have not fully realised their full potential, notwithstanding the constitutionalising of the Children's rights in Article 53.⁶⁶

Kenya's Constitution, which came into effect on August 27, 2010, has a progressive Bill¹ of Rights¹ that¹ is largely based¹ on¹ international¹ human¹ rights¹ norms.⁶⁷ It¹ includes¹ civil¹ and¹ political¹ rights¹ such¹ as¹ the¹ rights¹ to¹ life, liberty, and¹ security¹ of¹ the¹ person, privacy, freedom¹ of¹ conscience, religion, belief, and¹ opinion, freedom¹ of¹ expression, and¹ freedom¹ of¹ association, as¹ well¹ as¹ economic, social, and¹ cultural¹ rights¹ such¹ as¹ the¹ rights¹ to¹ nourishment, accommodation, hygiene, water, wellbeing⁶⁸ (including reproductive health care), skills training, and social protection as adoption and enforcement. The Bill of Rights also protects special groups' rights,

⁶⁶Child Law Resources, Volume 2: Reporting Status of African States (2012) <www.africanchildinfo.net/clr/vol2> accessed on 19 July 2021.

⁶⁷The Constitution of Kenya, 2010, chapter IV.

⁶⁸Ibid, Article 43.

including protections for minorities, people with disabilities, the elderly, youth, and children.⁶⁹

Every child has the right to a free and compulsory basic education, nutrition, shelter and health care; to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor; and to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, regardless of their marital status

Article 53 (2) states that the CBI principle is crucial in all matters concerning the Child. In the case of a denial of any of the rights in the Bill of Rights, whether civil, political, economic, social, or cultural, the Constitution affirms the right of every individual, including minors, to seek redress in the courts. The inclusion of justiciable socio-economic rights in the Bill of Rights ensures citizens' access to legal remedies and allows them to hold the government accountable for the provision of these rights.⁷⁰ The State is required by the Constitution to "observe, respect, promote, and fulfill" the Bill of Rights' rights and freedoms, as well as to create and execute laws to meet its international duties in respect of human rights and freedoms.⁷¹

2.3.2 Children's Act 2022

The enactment of the Children's Act in 2022 marks a significant step forward in Kenya's application of international standards for the protection of

⁶⁹Ibid, chapter IV.

⁷⁰ Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms. (2012) *Africa Human Rights Law Journal* 112-141.

⁷¹ The Constitution of Kenya, Article 21.

children's rights. The Act seeks to domesticate Kenya's duties under any human rights treaty, in this instance, the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The enactment of the Act gives a saddening lesson to learn from. In a country like Kenya, simply enacting a law like the Children's Act is insufficient. Full compliance with international children's rights standards necessitates an overarching audit of existing laws and policies. Rather, all laws must undergo regular reviews, while administrative and other practical measures must be enacted.⁷²

However, fulfilling this potential would need a high level of political commitment to assure budget allocation and the establishment of practical procedures for executing child rights-related legislation. Adopting the Free Primary Education program, for example, is a good step toward tackling the issues impoverished children face in Kenya. Kenya's present challenge is to replicate the Free Primary Education model in other crucial sectors, such as health and child assistance for low-income families. In the realm of juvenile justice, further legal requirements are also required. To integrate Kenyan legislation with the CRC and the African Children's Charter, removing regulations such as corporal punishment and closing loopholes in implementing current laws is essential.⁷³

The Children Act seeks to penalise people who interfere with a child's right to life, survival, wellbeing and development. The Act is very progressive and aims to tackle emerging issues. It also aligns itself with existing legislation touching on children.⁷⁴

⁷²Ibid

⁷³Ibid

⁷⁴ The Act the constitution, basic Education Act 2013, Legal Aid Act 2016, Victims Protection Act 2014, Counter Trafficking in Persons Act 2010, Sexual Offences Act 2006, Protection Against domestic violence Act 2015

The Act has a provision for needy children. Children whose parents cannot take care of them are entitled to social security in the form of alternative care services.⁷⁵ Apart from adoption, guardianship, kinship and foster care, which also existed in the repealed Children Act of 2001, the Act has added other benefits like kafalah, supported independent living, temporary shelter, supported child-headed households, and aftercare. These thoughtful services aim to provide a stable, loving and protective home for the child with the goal of permanency and protecting them from violence and abuse. The diversification of these care schemes to include informal settings such as supported independent living, child-headed households, and aftercare has eased the transition from alternative care to independent living and protected children while at it.

The Act has given life to Article 43(3) of the Constitution on social security. It also established the child Welfare Fund⁷⁶ under the Public Finance Act of 2012 to facilitate realising such social security rights.

Section 13 provides that every child has the right to free and basic education, access to which should be the primary responsibility of the parents. In addition to this, children are also entitled to leisure and play, which the government and the parent shall provide access to.

The Act has established the Office of the Secretary of Children Services⁷⁷ in the public sector, which shall perform supervisory, investigatory, and implementation functions and generally facilitate all children's matters. An interesting power of the Secretary is instituting proceedings concerning infringement of child maintenance, abuse, and neglect of the Child.

⁷⁵ Children's Act 2022, Section 12

⁷⁶Ibid

⁷⁷ Children's Act 2022, Section 37

The Act also recognises counties' role in providing socio-economic rights for children. For the first time, counties are introduced as important actors in administering services involving children. These services include the development of policies and the establishment of child care facilities. Counties have also been tasked with providing pre-primary education and children's recreational facilities.

2.3.3 Judicial decisions

The Court has many options under the Children's Act to ensure children enjoy their rights.⁷⁸ As illustrated in the following case law, the Court declared *in J. K. Versus J. T. K.*⁷⁹ that the guiding concept in children's issues is Article 53(2) of the Constitution, which states that a CBI is paramount in all matters involving the Child. The Court went on to say that this constitutional mandate is reinforced by Section 4(3) of the repealed Children Act, which requires all judicial and administrative institutions to treat the CBI as the first and most important consideration to the extent that this is consistent with taking action that:

- a) Protect and promote children's rights and wellbeing;
- b) Protect and encourage the Child's wellbeing;
- c) Ensure that the youngster receives the direction and correction required for the Child's wellbeing and the public good.

The Court said that in cases when a child has both parents, Article 53(1)(e) of the Constitution stipulates that parental duty is shared equally between the mother and the father. Section 90(a) of the Children Act emphasises this even further.

⁷⁸Ibid.

⁷⁹ High Court of Kenya at Nairobi Civil Appeal N0.16 of 2012

In *M. A. v. ROO*, the Court reaffirmed the notion of shared duty by both parents,⁸⁰ holding that Article 53(1)(e) of the Constitution says that a father and mother, whether married or not, have an equal obligation to care for and protect a child.

In the case of *B. M. P. v. A. A. M.*, the⁸¹Court cited Sections 24 (1) and (5) of the repealed Children's Act, which states that if a child's father and mother were married at the time of the Child's birth, they must take care of the Child. However, neither the father nor the mother of something like the being should have a dominant right or take care of the child alone. It then said that the accompanying assertions about a child's upkeep shall apply until the Court orders contrary and subject to almost any financial support required by anyone else.

- (a) When the parents of a child were married at the time of the Child's birth and are still alive, the obligation for the Child's upkeep is shared between them;
- (b) Where several or more caretakers of the child have been designated, the obligation to maintain the child should be the combined effort of all guardians, whether working in cooperation with the father of the baby or not;
- (c) When two or more variables in this study have been assigned to a child, it is the commitment of all guardians to keep the child safe;
- (d) When a residential order is placed in favour of more than just one person, it is the responsibility of those people to keep the child together;
- (e) When the mother and father of a child were also not married at the time of the Child's birth and haven't married since, but the Child's father has purchased parental responsibility, the mother but instead father of the child will be jointly responsible for the Child's upkeep.

⁸⁰ The High Court of Kenya at Busia H.C. Civil Appeal No.21 of 2009

⁸¹ The High Court of Kenya at Machakos Civil Appeal 185 of 2007

2.4 Conclusion

As many laws as above generally regulate child maintenance in Kenya. International laws have been incorporated under Article 2(5&6) of the Constitution of Kenya, 2010. Organs such as the Judiciary have a responsibility to assert and enforce children's rights. Furthermore, any adverse party, be it a parent, the State, or the Child, may seek to implement children's rights in Constitutional or Children's Court by applying for maintenance orders.

It should, however, be noted that despite the many laws, the lives of many children have remained undesirable, as many children have been victims of child neglect. These children have little to no rights in the society. Thorough education is thus a pre-requisite for the realisation of child rights, particularly child maintenance in any nation and, in this matter, Kenya. Non-Governmental Organisations dealing in child rights need to step up on education relating to child maintenance in Kenya to enlighten Kenyans, especially children, on their right to care.

CHAPTER THREE: STATE RESPONSIBILITY FOR CHILD

MAINTENANCE IN KENYA - AN APPRAISAL

3.0 Introduction

This section investigates the State's responsibility to respect, protect, promote and fulfil the Child's rights concerning the best interests of the child principle. The following section analyses the scope of the legal regime for child maintenance in Kenya, considering the State's international obligations. This section will consider the scope of parental duties and the burden of child support.

3.1 The Rights of the Child to Maintenance

On July 31, 1990, Kenya ratified the United Nations Convention on the Rights of the Child. It also adopted two optional protocols, which deal with child exploitation, child prostitution and active participation of children in armed conflicts.⁸² Kenya also ratified the ILO Convention No. 132 on the Minimum Age and Number 182 on the Rights of the Child. If you want to use your rights as a child, you must do so "without discrimination in any way." This is what Article 2(1) says.⁸³

The Constitution and the laws are designed to protect children's rights in Kenya so they cannot be taken away.⁸⁴ The Children's Act is the primary law that deals with things that happen to children. Section 8 of the Act emphasises that the CBI are the first and most important thing to consider. Part III of the Act talks about parental responsibility. This section includes Section 31, which expresses the belief that the primary duty for children's upkeep is with the Child's parents or guardians. Following the Child's

⁸²World Organisation Against Torture, 'Rights of The Child In Kenya: An alternative report to the UN Committee on the Rights of theChild on the implementation of the Convention on the Rights of the Child in Kenya.' (January 2007) 44th Session: Geneva.

⁸³CRC, article 2(1).

⁸⁴*Cap 21* Laws of Kenya

increasing capabilities, Section 31 defines parental duty as all obligations, responsibilities, interests, and control a parent has over the child and the Child's property. These responsibilities include but are not limited to adequate housing, diet, shelter, and clothing, among other needs. Section 33 provides a parental responsibility agreement over a child by the concerned parents. Section 34 provides for the line of transmission of parental responsibility in the event of the death of the parent/parents as to who takes over responsibilities regarding the child in question. Section 35 extends parental responsibility beyond the eighteenth birthday to cater for college and university children.

The child's maintenance is guaranteed under Article 53 of Kenya's 2010 Constitution, which states that every child has the right to be safeguarded from neglect.⁸⁵ The Constitution also establishes a right to parental safety and treatment, which involves the mother and father sharing equal responsibility for the Child's upbringing, whether they are married or not. Article 21 of Kenya's 2010 Constitution states that the State is responsible for ensuring these rights. The text says, "it is the State's and every State organ's basic obligation to observe, respect, preserve, promote, and fulfil the privileges and democratic rights enshrined in the Bill of Rights."⁸⁶

3.1.1 Obligation of the State to Respect, Protect, Promote and Fulfil

According to the Committee on Economic, Social, and Cultural Rights, the State's commitment to observe, respect, defend, promote, and fulfil international law may be traced back to international law. Many academics think that governments are the primary actors in international law.⁸⁷ They take on the obligations of the Covenant

⁸⁵ Article 53(1)(d), *Constitution of Kenya 2010*

⁸⁶ Article 21, *Constitution of Kenya, 2010*

⁸⁷ Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86.

directly because they are legal people in the strict sense of the word. It's crucial for countries to have stability and wellbeing to have peaceful and stable relationships with each other. The United Nations wants to make this happen: Article 55 of the United Nations charter provides for: "...universal respect for, and commemoration of, human rights and the rule for all without distinction as to race, sex, language, or religion" ⁸⁸. Furthermore, under Article 56 of the Charter, Member States have a legal obligation to participate in international cooperation, i.e., to promote respect for and adherence to international human rights norms in collaboration with the UN and within the UN system. Human rights and fundamental freedoms are, in essence, all people's birthrights, and governments' primary job is to safeguard and promote them.⁸⁹

Each State's responsibility may be distinguished:

- (i) To respect the freedom and independence of the rights holder. The need to forbid the State from acting in any manner infringing on recognised rights and freedoms parallels what was formerly known as an obligation of non-interference. In other words, it may be met by an authority just abstaining from acting rather than requiring it to take constructive action. The general objective is not to worsen a person's condition by denying them the enjoyment of a legally recognised right. Respect would include not obstructing the exercise of a right. The State has the responsibility for 'respect.' The State must respect a right via its organs. This is the classic negative responsibility of non-interference, which means that an authority might satisfy it merely by abstaining from taking action rather than taking positive action. The general objective is not to worsen a

⁸⁸ Weissbrodt, D. (2010). United Nations Charter-based procedures for addressing human rights violations: Historical practice, reform, and future implications. In *The Delivery of Human Rights* (pp. 43-68). Routledge.

⁸⁹Vienna Declaration and Program of Action, I, A/CONF.157/23, 12 July 1993, p. 1.

person's condition by denying them the enjoyment of a legally recognised right.⁹⁰

- (ii) To protect, on the other hand, requires the State to take legal action against anybody that violates the law and appropriate corrective measures. The duty to protect extends further, requiring the State to take action – whether via law or otherwise – to prevent or prohibit third parties from infringing on recognised rights and freedoms. State authorities cannot sit on their hands: they must give appropriate remedies to individuals whose rights have been infringed, ensuring that they are compensated and, in certain situations, that the perpetrator is sanctioned via administrative or criminal penalties. Clearly, the duty to protect is not limitless.⁹¹ It must be seen as a duty put on the State to take all reasonable means to avoid the occurrence of the disaster. The mere fact that an event that should have been prevented occurred is not evidence that the State failed to protect; only if it can be shown that the State could have taken additional measures but did not, even though doing so would not have imposed an undue burden, will the State be considered in breach of its obligations.⁹²
- (iii) The responsibility to fulfil compels the State to implement necessary legal, administrative and other steps towards fully fulfilling human rights⁹³. Consequently, enforcing human rights must become the target of a policy to enhance them⁹⁴. Not only must policies in existence not violate the Constitution and consider it a transversal issue (a condition referred to as incorporating).

⁹⁰See *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, Petition No.65 of 2010.

⁹¹eKLR, Petition 164 of 2011. (2013)

⁹²eKLR, Petition No. 104 of 2009 (2013)

⁹³Whelan, D. J. (2010). Indivisible Human Rights. *Global Issues Series*, 69.

⁹⁴Christine, P. (2017). Meta-regulation: legal accountability for corporate social responsibility. In *Human rights and corporations* (pp. 335-365). Routledge.

Additionally, policies must be put in place intentionally to make that happen towards implementing them. Human rights demand, in that sense, effective policymaking; the requirement to fulfil may be differentiated into the responsibilities to facilitate and give⁹⁵. The responsibility to facilitate compels the State to take concrete actions to enable individuals and organisations to appreciate the right. The State is also required to satisfy the right when individual people or an organisation lack the means, for circumstances beyond their influence, to achieve that right individually using the methods at their disposal.⁹⁶

The commitment to promoting necessitates long-term positive actions such as advocacy, social justice education, strength and conditioning, and the distribution of information on social justice information to shift public perceptions of rights and the obligations they entail, both vertical and horizontal.⁹⁷ In essence, it is to help and support every participant in achieving their rights by allocating capital to the best of its ability and directly meet and greet an individual's personal basic needs throughout their entire lifespan.⁹⁸

The country's system must ensure the farthest measures on its part, as it must actively create an environment to achieve a specific result, such as a model that acknowledges personal freedoms⁹⁹. The responsibility to ensure and promote together includes, among other things, "computational" commitments within the process of market, personal, and Convention." In this context, the State is obligated under Kenyan

⁹⁵ Anderson, J. E., Moyer, J., & Chichirau, G. (2022). *Public policymaking*. Cengage Learning.

⁹⁶ eKLR, Petition 574 of 2012.

⁹⁷ eKLR, Petition 268 & 398 of 2012

⁹⁸ Economic, Social and Cultural Rights as Human Rights, in *Economic Social and Cultural Rights*. (1995)

⁹⁹ Armstrong, M. (2010). *Armstrong's handbook of reward management practice: Improving performance through reward*. Kogan Page Publishers.

constitutional interpretation to promote its citizens' economic, social, and cultural rights.¹⁰⁰

3.1.2 Minimum Core Obligation

"A minimal core commitment to guarantee the fulfilment of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party," according¹⁰¹ to the Committee on Economic, Social, and Cultural Rights. P. Alston elaborated on the notion of minimal core content, stating it as "an absolute minimum right, without which a state party is regarded to be in breach of its commitments." The International Covenant on Economic, Social, and Cultural Rights does include obligations that have "immediate effect," such as "taking steps" to gradually realise economic, social, and cultural rights "within a reasonably short time after the Covenant enters into force for the States concerned."¹⁰²

The idea of a minimum set of rights is that there are different levels of fulfilment for a right, and that a certain level of achievement takes priority through more realisation.¹⁰³

The nature of States Parties' duties is fully defined in General Comment 3 of the International Covenant¹⁰⁴ on Economic, Social, and Cultural Rights, ratified in 1990. It clarifies the meaning of Article 2.1 of the Covenant. According to Article 2.1 of the Covenant:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available

¹⁰⁰Ibid

¹⁰¹ General Comment no. 3 para. 10

¹⁰²Sital, K., Getgen, J. E., & Koh, S. A. (2017). Enhancing enforcement of economic, social, and cultural rights using indicators: A focus on the right to education in the ICESCR. In *Economic, Social and Cultural Rights* (pp. 211-268). Routledge.

¹⁰³Towards a reasonable approach to the minimum core: Laying the Foundation of future socio-economic rights jurisprudence (2003)

¹⁰⁴UN Doc. CCPR/C/21/Rev.1/Add.6 (1994)

resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The International Law Commission reads article 2.1 as placing 'obligations of outcome' rather than 'obligations of action' on the States Parties.¹⁰⁵ A 'duty of conduct' occurs when a State organ is required to follow a certain course of action, whether by deed or omission, that achieves a defined aim. A 'duty of outcome,' on the other hand, compels a state to accomplish a certain result via a course of behaviour - which may also be through Act or omission - the form of which is left to the discretion of the State.¹⁰⁶

In articulating the minimum core principle, the Human Rights Committee pointed out that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”¹⁰⁷ Therefore, the Member States' substantive duties were put forth in this Article, which had a wide substantive substance but also left room for discretion.

3.1.3 Best Interests of The Child

It is important to note that the State's margin of appreciation in enforcing socio-economic rights must be balanced against the premise of the CBI.¹⁰⁸ International human rights law has a growing and very significant inclination to recognise child rights and the protection of the CBI. In other words, international human rights legislation steadily improves the Child's comprehension and broadens the idea of childhood.¹⁰⁹

¹⁰⁵International Law Commission (ILC), Report of the International Law Commission (1977), 2 Yearbook of ILC, para. 8.

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Human Rights in Population Policies: A Study for SIDA. Swedish International Development Agency (1994)

¹⁰⁹ Ibid

This fundamental principle is enshrined in Section 8 of the Children's Act, which states that "the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies." The notion is repeated in Article 3 of the African Charter on the Rights and Welfare of the Child, and the Convention on the Rights of the child states that material assistance to children should be provided in the CBI.

The idea of the CBI is paramount. As a result, it should be the ultimate protection for anybody making decisions about a child. In the premise, the State's engagement in child support is guided by two principles: enhancing children's welfare and ensuring that parents bear financial care of the Child.

3.2 Burden of child Support

The primary goal of child support agreements is to improve the wellbeing of children. Child support is essentially the obligation of parents to agree on and pay. The Constitution's Article 53 emphasises that parental care and protection is a responsibility that falls equally on the mother and father of the child, whether they are married to each other or not. Similarly, section 110 of the Children's Act provides that an unmarried father who has acquired parental status shall be jointly responsible with the mother for maintaining the child. Furthermore, some countries, mainly EU member states, recognise this legal duty, requiring both parents to financially support their children until they reach the age of majority.¹¹⁰

¹¹⁰OECD, 'PF1.5: Child Support', OECD Family database, Social Policy Division -Directorate of Employment, Labour and Social Affairs, 7 October 2010.

Responsibility for the child is defined in the Children's Act as "all the obligations, responsibilities, functions, obligations, and jurisdiction which a parent of a child has by law in respect to the child and the child's property in a manner compatible with the child's maturing capabilities."¹¹¹ The fundamental obligations are outlined in Section 31(2), which include the responsibility to care for the child, including providing appropriate nutrition, housing, clothes, medical treatment, and education and direction. They are also responsible for safeguarding the child from abuse, neglect, and prejudice.

Single parenting has a variety of repercussions, but in general, single-parent families have a more challenging socio-economic status than two-parent households.¹¹² During such a separation or divorce, one of the family's earners is taken away. This means that single-parent groups are more likely to earn less money than two-parent households. This is why single parents are more likely to be poor than families with two parents. It seems that the non-custodial responsible adult should pay back not only the money or rental costs to the adoptive parents, such as housing and food, but also the non-monetary costs, such as how much more work the correctional facility partner's job would be burdened by having to care for so many more children.¹¹³ As a result, the non-custodial parent's payment of child maintenance may help to alleviate child poverty by supplementing the custodial parent's income. As a result, it may be a "vital tool for increasing children's wellbeing after parental separation."¹¹⁴

Children maintenance throughout most countries stops when the child reaches the age of eighteen. On the other hand, child maintenance obligations may terminate when a

¹¹¹ Kinkelly, U. (2010). Protecting children's rights under the ECHR: the role of positive obligations. *N. Ir. Legal Q.*, 61, 245.

¹¹² House of Commons, 'Child Support Agency: Implementation of the Child Support Reforms', Committee of Public Accounts, Thirty seventh report of sessions, 27 June 2007.

¹¹³ *Ibid*

¹¹⁴ Child Maintenance and Child Poverty: A Comparative Analysis. (2011)

child is economically independent or has completed their college education in certain nations.¹¹⁵ The case of *Wambua v Wambua* exhibited an abuse of the child's right to education wherein the respondent's father was reluctant to sign the Staff Education Support Fund to enable the applicant to join the university to pursue a medical degree course. Such a refusal was a violation of the applicant's right to education. The Court directed the respondent to pay the requisite fee of 50 per cent provided for under the SESF programme of the university where the respondent was employed. Similarly, in *John Mbatia Kibebo & Another v Eliud Kibebo Mbatia*, the Court compelled the respondent father to pay for the second applicant up to 75 per cent of the fees at Kenya School of Law as post-graduate diploma at that institution formed part of Kenya's legal education.¹¹⁶

In Kenya, however, the application of the law is somewhat skewed in favour of the rich at the expense of the ordinary person. The case of *RPM v PKM* is a case in point. The respondent had disobeyed all the court orders to furnish maintenance, but even the sanction of civil jail is a doubtful deterrent against him. Therefore, the enforcement is majorly at the mother's instigation and with the help of law enforcement agencies such as the police, the children's officers, and the courts.

3.3 Scope of Family Duties

Before the promulgation of the new Constitution of Kenya 2010, the situation of children born out of wedlock was a clear violation of the right to maintenance by state actors. The case of *RM (Suing thro' Next friend) JK & another v Attorney General* must leave a bad taste in the mouth in the way the State treated children born out of wedlock and who should be seeking maintenance from their putative fathers. The Court was

¹¹⁵ Ibid, in Estonia, Greece, Ireland, Poland and Romania

¹¹⁶ HCCC No. 169 of 2008.

disinclined to find that the putative father was parentally responsible for the applicant child's maintenance under Section 24(3) of the repealed Children's Act, holding that the impugned section imposed the first responsibility on the mother. Accordingly, the said section could not be discriminatory since the principle of equality and non-discrimination does not mean that all distinctions between persons are illegal.¹¹⁷ This decision was just an example of policies and actions on the part of state agencies and departments towards children in general and the issue of maintenance in particular. This decision flew in the face of the principle of the best interest of the child in which a mother sought to enforce her Child's maintenance rights against the biological father.

The judges uncritically endorsed this unconstitutional Act, painting a bleak future for the thousands of women and children in similar predicaments, shielding thousands of men who have children out of wedlock from financially supporting their children. It seems that even in this age of universal progress towards achieving human rights for all worldwide, Kenyan men, backed up by law, policies and practices that have little regard for gender equality, are quite reluctant to be responsible.¹¹⁸

Impunity has also crept into maintenance matters. Several respondents' fathers have blatantly refused to pay on the belief that they cannot be committed to civil jail for inability to pay debt.¹¹⁹ A case in point is the Philip Moi case, the son of the deceased former President Daniel Moi. In *RPM v PKM*, the respondent had disobeyed several court orders, refused to pay for the maintenance of the children, and shown apparent contempt towards the Court. Justice GMB Kariuki ordered that he be committed to civil jail until he pays the sum of KES 250,000 for the maintenance of his wife and children.

¹¹⁷ NAI High Court Civil Case No. 1351 of 2002.

¹¹⁸ *Children and Women Lose out on Maintenance* (2007).

¹¹⁹ Bankruptcy Cause No. 19 of 2010 where the High Court held that no one can be committed to civil jail for inability to pay a debt.

The Court further directed the Officer-In-Charge of the nearest police station to his residence to arrest him and hand him over to the Prison authorities at Industrial Area Prison in Nairobi.¹²⁰

Payment of child maintenance raises various key issues, such as: how long is a parent expected to pay child support? Is it mandatory in all circumstances? The system struggles to keep up due to the complexity of the instances. Many customers are in challenging circumstances, with erratic income, frequent job changes, and tumultuous personal relationships. The respective parties' income and property, including matrimonial property; the dimensions of the marital relationship and the age range and general wellbeing of both party leaders; both parties' current and future earning capacities; the potential of something like the person who seeks preservation for becoming identity and, if useful, the average amount of time exercise would indeed be required; the party seeking maintenance's diminished or lost earning capacity as a consequence of having a child; the party seeking maintenance's ability to become self-supporting; and, if relevant, the amount of time training would take.

3.4 Limits of Parental Responsibility

Section 32 of the new children Act provides for equal parental responsibility¹²¹. This section sought to cure the injustices occasioned by Section 24(1) of the Children Act 2001, which placed the primary responsibility on the mother in instances where a child was born during the subsistence of the parents' marriage or born out of wedlock. This situation became evident in the case of *JGM v CNW*.¹²² Section 24(1) of the repealed Act released fathers from immediate parental responsibilities where the child is born

¹²⁰NAI High Court Divorce Cause No. 154 of 2008.

¹²¹Children's Act, No 29 of 2022.

¹²²NKRU High Court Civil Appeal Number 40 of 2004.

out of wedlock and placed the primary obligation on the Child's mother. In *SB v AAL*, the High Court in Mombasa found that neither the father nor the mother of the child has a superior right or claim against the other in the exercise of parental duty.

3.5 Legal Duty of the State to intervene

Parents are first and foremost responsible for child support. One of the most crucial parenting responsibilities is to take financial responsibility for one's children.¹²³ The welfare state either guarantees child maintenance payments as a matter of social policy, or this is a private duty in international practice.¹²⁴ The Child's well-being is at the centre of this strategy, with parents bearing the primary responsibility. If you don't take responsibility, the State will step in to guarantee compliance.

On the other hand, failure to provide financial responsibility may have far-reaching negative implications. It is not fair for the Child, the responsible parent, or society to suffer as a consequence of non-resident parents failing to fulfil their obligations¹²⁵. The provision of a framework for people to fulfil their duties is a well-accepted government responsibility. This gives the State a role in supporting and facilitating child support agreements and enforcing responsibilities when required¹²⁶.

3.5.1 Enforcing child Support Obligation

The effectiveness of the system currently in place depends on effective enforcement. Such enforcement should consider the various conceptual issues discussed above, i.e.

¹²³ Attitudes towards child support and knowledge of the Child Support Agency. Department for Work and Pensions Research Report 226 (2004).

¹²⁴ Ibid

¹²⁵ Finnström, J. (2023). Individual realities and legal responsibilities: a study of non-resident parents who dispute child maintenance obligations in Swedish administrative courts, 2014–2019. *International Journal of Law, Policy and The Family*, 37(1), ebad011.

¹²⁶ Emery, R. E., Otto, R. K., & O'donohue, W. T. (2019). A critical assessment of child custody evaluations: Limited science and a flawed system. In *Clinical Forensic Psychology and Law* (pp. 199–230). Routledge.

the minimum core approach content, the best interest of the child principle and the principle of subsidiary.

3.5.1.1 The National Council for Children’s Services: The Administrative Approach

The Children’s Act has created several offices and institutions whose core duties propound state responsibility for children’s maintenance¹²⁷. The National Council for Children's Services is established under Section 41(1). Section 42 sets the Council's mission and purpose, including but not limited to exerting general supervision and control over the planning, funding, and coordination of child rights and welfare initiatives, as well as advising the government on the subject. The Council is required to create and formulate policies on the planning, funding, and coordination of child welfare activities and is tasked with overseeing that the welfare of children is paramount. This is because one of the representatives is the Director of Children Programs, whose role is to protect people's health, notably through aiding in the development, implementation, administration, and oversight of services aimed at improving children's and families' well-being. Further, the Act also establishes a Sub-county Children Advisory Committee whose role is to advise and make recommendations of child welfare programmes as necessary to promote and protect children's rights in the respective sub-counties¹²⁸.

The institutional structures supporting this strategy must be perceived to function. New delivery issues arise as a result of the policy changes. As a result, this thesis suggests that the present child Support Agency be disbanded, with a residuary organisation

¹²⁷ Children’s Act, No 29 of 2022.

¹²⁸ Ngira, D. O. (2019). *Examining the Role of Informal Justice Systems in Child Rights Protection in Kenya: A Case Study of the Kipsigis* (Doctoral dissertation, Utrecht University).

tasked with collecting outstanding debt. To start from scratch and avoid being polluted by prior system problems, a new organisation focused on child welfare and enforcing obligations should be founded. The new arrangements will intensely focus on responsibility enforcement, and there is no reason why this cannot be done rapidly within the current Child Support Agency system. Under the new leadership of the current agency, a start has been made on this.

3.5.1.2 The Children's Court: The Judicial Approach

The Act also establishes the Children's Court in part VIII. The Court has jurisdiction over all civil and criminal proceedings relating to children. This Court is tasked with issuing maintenance orders for children pursuant to Section 111¹²⁹. Section 113 (a) provides for the power of the Court to make maintenance orders for periodical payments towards a child's maintenance. Accordingly, the Children's Court, as Goldstone J described in the *Minister for Welfare and Population Development v Fitzpatrick* case, is the institution charged with overseeing the wellbeing of children.¹³⁰ Section 30 of the Matrimonial Causes Act provides that the protection of children can be under the protection of the Court where causes appear to warrant such measure during the pendency of divorce proceedings between the parents of the child in question.

Similarly, section 112 of the Children's Act also provides for maintenance during matrimonial proceedings. In such instances, leave of Court must be obtained if maintenance proceedings have to be commenced under any other Act than the Children's Act. Putative respondents who fail to comply with the maintenance orders

¹²⁹ Children's Act, No 29 of 2022

¹³⁰ *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC), para 31.

may be arrested on a warrant issued by the Court or summoned to Court under Section 121.

The case of *Z W v M G W* illustrated the importance of the principle of the CBI, the overriding factor where children are in issue.¹³¹ The Court duly considered this principle and ordered the putative respondent father to undergo a DNA test for a determination of the maintenance proceedings in the Children's Court. In *AOG v SA J*, the Court of Appeal affirmed the centrality of the principle of the CBI by considering that the Child's mother had already enrolled the child in a kindergarten school in Kenya. The case of *D N W v P M W* has extensively dealt with the issue of parental responsibility over a child who has attained 18 years and above. The Court agreed with the respondent that Section 28 extended a parent's responsibility to higher education, bolstered by Article 28 of the UN Convention on the Rights of the Child. This Article calls on state parties to make higher education accessible to all based on capacity by every appropriate means. As a result, leave to apply for an order of maintenance against the respondent was allowed so the daughter applicant could join a medical school.¹³²

3.5.1.3 State Reports to the Economic and Social Council

Kenya has to report to the Economic and Social Council every few months under the terms of the 1966 International Covenant on Economic, Social, and Cultural Rights¹³³. Each State's report may show what factors and challenges affect how well the Covenant's promises are kept. If the Economic and Social Council wants to give the General Assembly general advice and a summary of information from States Parties

¹³¹*Z W v M G W* NAI High Court Misc. Case No. 108 of 2003, para 12.

¹³²*D N W v P M W* NAI High Court Civil case No. 30 of 2003

¹³³ Ssenyonjo, M. (2017). The influence of the international covenant on economic, social and cultural rights in Africa. *Netherlands International Law Review*, 64, 259-289.

and other special groups, it can do that. On the other hand, these studies and suggestions are only suggestions and are not legally required.

On January 3, 1976, the Covenant came into effect. After that, ECOSOC passed Resolution 1988 (LX), which called for the formation of a Working Group to help it review reports.¹³⁴ Following that, in 1978, ECOSOC passed Resolution 1978/10 about how the Sessional Working Group should be set up and run. The Committee on Economic, Social, and Cultural Rights was set up by ECOSOC Resolution 1985/17. (CESCR)¹³⁵. It is not like the treaty bodies of other UN human rights covenants and conventions. Instead, it is backed by a UN resolution, not the original treaty.

It says in Articles 16 through 21 that people who sign the Covenant have to report on what they have done and how far they have come along in ensuring that people have the rights as stated in the Covenant. Suppose a report is made to the United Nations Secretary-General. In that case, they will send a copy to the Economic and Social Council, other agencies, and the Commission on Human Rights, all of which can suggest how the United Nations can better implement human rights¹³⁶.

This process may lead to new legislation being passed, existing legislation being changed, or new legislation being implemented. It may also lead to Non-governmental organisations (NGOs) created plans being put into place, or it may lead to NGO-created plans not being put into place; advocating for the substantive provision of rights and

¹³⁴Alston, P. (2020). The committee on economic, social and cultural rights. *NYU Law and Economics Research Paper*, (20-24).

¹³⁵Alston, P. (2020). The committee on economic, social and cultural rights. *NYU Law and Economics Research Paper*, (20-24).

¹³⁶ Ibid

advocating for specific policy measures. These observations are the primary means the Committee monitors Member States' adherence to the Covenant's provisions.

The reporting mechanism encourages state observance and accordance with fundamental rights. However, there are a few flaws. First, since the procedure is not legally obligatory, it cannot guarantee that Member States will act in line with the supervisory bodies' conclusive observation reports or other findings. Furthermore, since the reports often deal with broad issues rather than particular situations, there are no procedures for dealing with individual incidents of human rights breaches.¹³⁷

3.6 Conclusion

As the High Court case correctly pointed out in *RM v. The Attorney General* in 2006¹³⁸, the Children's Act 2001 contained various discrepancies resolved in the Children's Act 2022 to ensure proper enforcement of child maintenance rights. The 2022 Act reflects a hybrid system for child support that enables both the State and parents to contribute to child maintenance. It permits successful private arrangements between parents and substantial state intervention.¹³⁹ Failure to establish such arrangements may have severe ramifications for children's well-being and society as a whole. As a result, the government should assist parents in carrying out their obligations.

Many variables influence child well-being, but family formation and poverty are two of the most important. Children who have experienced parental separation or who have grown up in a single-parent home are more likely to have unfavourable consequences. This may happen in various areas, such as health, education, and jobs. Such effects are

¹³⁷Report of the fifth session of the Committee on Economic, Social and Cultural Rights, UN. Doc. E/C.12/1990/8, para. 44.

¹³⁸Nairobi HCCC No. 1351 of 2002 (OS), Judgment dated 1st December 2006.

¹³⁹ Child Support Reform: The views and experiences of CSA staff and new clients, Department for Work and Pensions Research Report No 232 (2005).

partially the result of growing up without a parent and the emotional, social, and economic functions that they play. Seeing their parents divorce and witnessing family strife may have long-term consequences for a child's well-being. Furthermore, the Child's welfare may be affected due to disagreements between parents due to third-party engagement in child support.

CHAPTER FOUR: LEGAL FRAMEWORK AND POLICIES ON CHILD MAINTENANCE IN SOUTH AFRICA COMPARED TO KENYA'S

4.0 Introduction

This section will interrogate the legal framework, policies and principles on child maintenance in South Africa, comparing and contrasting them to Kenya. South Africa was chosen because, like Kenya, it has accepted the United Nations Convention on the Rights of the Child, providing a common foundation for child maintenance reform projects. It will shed light on the crucial role that the State plays in child maintenance in the said jurisdictions.

According to Section 28 of the South African Constitution, every child is entitled to family or parental care or to suitable substitute care when separated from the family context. Furthermore, every child has the right to adequate nourishment, housing, health care, and social services.¹⁴⁰ From the words “appropriate alternative care when removed from the family environment”, it is clear that the Constitution of the Republic of South Africa contemplates a situation where the duties of care and protection of the child are owed directly by third parties other than the Child's parents. In many instances, the third party owing such rights is the State.

Kenya subscribes fully to the CRC, whose Article 20 deals with family and alternative care: According to the CRC (Article 20 - the protection of a child without a family), the state or government has a responsibility to offer particular protection for a child who lacks a family environment and to guarantee the availability of suitable alternative family care or institutional arrangements in such circumstances. Fulfilling this responsibility should consider the child's cultural heritage. This means that Kenya like

¹⁴⁰ Section 28(1) (c), *Constitution of South Africa*.

South Africa, anticipates a situation where the child is out of a family setting and therefore, the state steps in as the third party.

4.1 The Concept of Social Protection in South Africa versus Kenya

Social protection entails the provision of goods and services across many ministries, including social assistance (social grants), education, health interventions, the extended public works program, and water and sanitation services. The Constitution of the Republic of South Africa defines social benefits as an overarching concept that incorporates, among other things, public assistance and interpersonal welfare programs, access to essential services at the national and local levels, free primary education inside the poorest and most disadvantaged schools, universal healthcare for people under the age of six, school dietary habits, and school transportation.¹⁴¹ Similarly, in Kenya, Social Protection (SP) is a constitutional right described as a set of policies and measures, which encompass legal actions, aiming to:

1. Increase the ability and chances for the impoverished and at-risk individuals to enhance and maintain their means of living and well-being
2. Empower income earners and their dependents to sustain a satisfactory income level through suitable employment
3. Guarantee access to economical healthcare, social security, and support systems.

4.2 The South African Maintenance System versus Kenya's

It is made up of two parts: a public grant system and a private court system. Based on the law, people are legally required to support their families, and a judge makes the

¹⁴¹ Medium Term Strategic Framework (mtSF) document.

final call in case of disagreement.¹⁴²This system talks about the help that parents are legally required to give their children when it comes to things like housing, food, clothes, medical bills, and other things that are important in life, among other things. To properly use one's right to maintenance, there must be laws and processes to ensure that custodial parents get the help they need to raise their children.¹⁴³ The state maintenance system, also known as the public grant system, is intended to serve as a safety net by assisting when the judicial maintenance system's processes fail.¹⁴⁴Child Support Grants, Foster Care Grants, and Care-Dependency Grants are the three primary forms of child grants available via the state maintenance system.¹⁴⁵

Kenya has a similar system entrenched in the constitution. Article 53(1) (e) of the Constitution is clear on parental responsibility. It specifies that “Every child has the right to parental care and protection including parental responsibility of the mother and father to provide for the child whether they are married or not”

4.3 South Africa’s Legal Framework on Child Maintenance versus Kenya’s

4.3.1 International Instruments

South Africa ratified the CRC in 1995 and the ACRWC in 2000. This was done to help African children, who are more at risk than other children. These tools work together to ensure children have political, civil, cultural, and socio-economic rights. Children have more socio-economic rights, like the right to be cared for by their parents or caregivers and the right to good nutrition, shelter, health care, and social services. They

¹⁴² SA Law Commission Issue Paper 5 Review of the maintenance system (1997) 13, 14, 39

¹⁴³ Coming to court for child support – the policy, the practice and reality. A case study of black women in the maintenance system at the Johannesburg Family Court (2002 – 2004) (2004) 17 *ActaCriminologica* 143

¹⁴⁴ The South African Child’s Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right? 2005

¹⁴⁵ Money and gender relations in the South African maintenance system. *South Afr Rev Sociol* 2012

also have the right to be protected from maltreatment, neglect, abuse, and degradation, the general human rights to equality, a basic education, and the right to dignity.

The South African government said that it would put in place ways to make these rights come true by ratifying international agreements on children's rights and making provisions in its own Constitution for children's rights.

The CRC, sometimes known as the "Magana Carta of Children's Rights,"¹⁴⁶ reaffirms the government's responsibility to assist parents in their child-rearing responsibilities. States must 'provide sufficient support to parents and legal guardians in the execution of their child-rearing obligations, and guarantee the establishment of institutions, facilities, and services for the care of children.'¹⁴⁷ It also supports a child's right to alternative care, protection, and help if separated from their family. The Convention states that a child separated from their family for a while or permanently is entitled to particular protection and help from the State.¹⁴⁸ States must also recognise that "every child has the right to a standard of life appropriate for his or her physical, mental, moral, and social development."¹⁴⁹

States are expected to aid caretakers in implementing children's rights by providing support assistance and welfare programs in nourishment, clothing, and shelter.¹⁵⁰ States must also "take all reasonable means to recover appropriate sustenance for the child first from parents or other people responsible for the child's physical wellbeing."¹⁵¹

¹⁴⁶Ibid

¹⁴⁷Article 18 (2), The United Nations Convention on the Rights of the Child (CRC).

¹⁴⁸Article 20, *Ibid*.

¹⁴⁹Article 27(1), *Ibid*.

¹⁵⁰ *Abid*

¹⁵¹Article 27(4), *Ibid*.

Because the CRC has been made part of the South African Constitution, it has a higher status there. Articles 26 and 27 of the CRC, which outline children's rights, now have direct legal meaning. Such rights have been given more importance than the other rights in the Constitution. The CRC has more power because South African courts must examine international law as parts of the consideration before rendering judgements.¹⁵²

Kenya also ratified regional and international legal instruments on the child care and maintenance. By ratifying both the CRC and ACRWC.

4.3.2 The Constitution of South Africa

The South African Constitution says everyone has the right to social security, and if they can't support themselves and their families, they should get the right help.¹⁵³ The Constitution directly refers to a child's right to essential social services.¹⁵⁴ There is a strong connection between rights to social security and rights to social services. Childs have rights when parents aren't able to do what they should.¹⁵⁵ When that happens, they focus on the State, which has international and constitutional obligations to its children. The Constitution says that the State must ensure children have places to live, basic food, primary health care, and social services.¹⁵⁶ This is similar to Article 53(1) (e) of Kenya's Constitution, which observed children's rights.

4.3.3 The Maintenance Act 99 of 1998

It is a very detailed piece of legislation. It was made to ensure parents who pay child support can get their childs back quickly and cheaply. It also ensures that children's rights are protected by section 28 of the South African Constitution. The Act aspires to

¹⁵² S 39, The South African Constitution.

¹⁵³ S 27(1) (c), Ibid.

¹⁵⁴ S. 28(1)(c), Ibid.

¹⁵⁵The protection of economic and social rights in domestic legal systems (2001).

¹⁵⁶Supra n 8.

create a fair, egalitarian, and compassionate maintenance system that prioritises children's rights to maintenance.¹⁵⁷

It states that if a complaint is made that a person obligated to maintain another has failed to do so, the Maintenance Officer is required to investigate the complaint under the Act. After investigating the complaint, the Officer may file a complaint with the Maintenance Court in the region of the jurisdiction where the person to be maintained lives to determine whether or not that person is entitled to maintenance.

The Act introduced several new or revised concepts, including the advisement of repair work investigators (tracers), changes to the types of orders that can be made (including that of the granting of default orders), a shift in the onus of proof from the accused to the prosecutor in a criminal case, and the extension of the Act's application to a contractual duty that is not related to blood or marriage.¹⁵⁸ The maintenance investigators have been called the Act's "teeth," and their inability to be appointed makes it mostly ineffectual.¹⁵⁹

4.3.4 The Children's Act 38 of 2005 versus Kenya's 2022 Children's Act

In the Children's Act, the idea of parental rights and obligations involves a contribution to a child's upkeep, as outlined below: -

“... a parent's maintenance duty towards the child is part of parental responsibilities and rights but is not limited to it. The maintenance duty exists even if the parent has no parental responsibilities and rights over the Child.”¹⁶⁰

¹⁵⁷ Ten-year anniversary of the Maintenance Act 99 of 1998 - a time to reflect on improvements, shortcomings and the way forward' (2009) SALJ 590-591

¹⁵⁸ Bannatyne v Bannatyne and Another (CCT18/02) [2002] ZACC 31

¹⁵⁹ What about the children?: The Silent Voices in Maintenance' (2004) 36.

¹⁶⁰ S. 6, the Childrens' Act 2005.

Treatment for a child includes, among other things, the supply of basic requirements such as housing, food, clothes, medical care, the Child's education, including religious and cultural education and upbringing, and other rights and responsibilities.

It creates a child-centred approach in all child-related laws, processes, and governmental actions.¹⁶¹ The CBI principle is also enshrined in the Act's provisions, which include considerations to consider while assessing the same.¹⁶² The Act stipulates that the criterion of the CBI must take precedence in all areas relating to a child's care, protection, and well-being.¹⁶³ These legal and constitutional aspects of children's rights match those of Kenya.

4.3.5 Judicial decisions

Although several articles of the Constitution have established the law in this area, the South African Constitutional Court has not gone to the CRC in any detail in its interpretation of children's socio-economic rights.

The Constitutional Court of South Africa recognised the South African government's need to create a strategy to guarantee compliance with its constitutionally enshrined socio-economic rights in the landmark judgment of *The Government of the Republic of South Africa v Grootboom and Others*.¹⁶⁴ However, the Constitutional Court said that the gradual realisation of socio-economic rights would be rendered meaningless if the right of a child to receive state-provided shelter on demand could be trumped in every situation.¹⁶⁵ The Constitutional Court emphasised that the children's rights clause was not intended to create independent rights but rather to ensure that children were

¹⁶¹ S. 6, *Ibid.*

¹⁶² S. 7, *Ibid.*

¹⁶³ An individualised, contextualized and child-centered determination of child's best interests, and the implications of such on an approach in the South African context' (2009) JJS 2, 3.

¹⁶⁴ 2001 1 SA 46 (CC)

¹⁶⁵ *Ibid.*

adequately cared for by their families and that they received appropriate alternative care if they were not cared for by their families or parents. As a result, if children were being cared for by their families, the State had no primary responsibility to provide shelter for them.

The Grootboom case highlights the link between section 26 of the South African Constitution, which guarantees everyone the right to housing, and section 28(1) of the Constitution, which guarantees children the right to shelter (c). The Court determined that the rights clearly overlapped and that Sections 28(1) (c) and 26 could not be construed as creating separate and different claims. The Court determined that section 28 (1) (c) did not typically provide minors the right to make a "direct and enforceable" claim against the State. However, every child has the right to "family care or parental care or adequate substitute care when away from the family setting" under section 28(1) (b) of the Constitution.

The Court emphasised that parents and families have the main responsibility for children's wellbeing. It further emphasised that the State has the primary duty to care for children who have been abandoned or who do not have a family context.

In Bannatyne's case, the Constitutional Court ruled that the State is responsible for providing the legal and administrative framework required to realise children's constitutional rights. The State's role in this area is to provide a procedural framework for protecting children's rights and a mechanism to verify that this framework is practical.¹⁶⁶

¹⁶⁶ Bannatyne v Bannatyne and Another (CCT18/02) [2002] ZACC 31

4.4 Conclusion

The minimum core of the State's obligation regarding child maintenance in South Africa has long been identified. Establishing clearly defined criteria for providing socio-economic rights to children and their caregivers helps society and, more significantly, children. The South African government has done an excellent job of maintaining the true worth of child-specific subsidies such as child support, foster care, and care dependence grants. Social grants that directly benefit children account for around 42% of total grant spending.

According to research, handouts directly help disadvantaged and/or orphaned children in female-headed homes.¹⁶⁷ Social assistance for children in South Africa has continued to reduce tremendously over the last year, which can be linked to the sharp economic decline resulting from the COVID-19 pandemic.¹⁶⁸

As an economically developed and politically stable country, Kenya may learn a lot from South Africa and participate in a discussion about the State's role in child maintenance. Even though the Kenyan Children Act is a complete piece of law that adheres to the Committee on the Rights of the Child's guideline for the United Nations Declaration on the Rights of the Child, there is still work to be done.

Many things about the Kenyan Children's Act and the South African Children's Act are the same. Parents are responsible for their children's well-being, and both of the Children's Acts try to make that happen — both place primary responsibility for child upkeep on

¹⁶⁷ UNICEF, Social Development Budget 2017/2018, available at <https://www.unicef.org/esa/sites/unicef.org/esa/files/2018-09/UNICEF-South-Africa-2017-Social-Development-Budget-Brief.pdf> last accessed 27 July 2021.

¹⁶⁸ See University of Cape Town, Children's Institute urges Parliament to increase Child Support Grant by R10 available at <https://www.news24.com/news24/southafrica/news/childrens-institute-urge-parliament-to-increase-child-support-grant-by-r10-20210628> last accessed 28 July 2021.

the parents, with the State only acting when required. For example, if children are being cared for by their relatives, the State does not have a primary responsibility to provide shelter. A child is entitled to appropriate maintenance in both jurisdictions, which includes clothes, housing, dental and medical care, education and training, and leisure (where applicable). Both parents are responsible for providing for their children within their financial limits. The responsibility persists whether the child's parents are married, the child is adopted, or the child is from a first or second marriage.

However, South Africa's social protection and maintenance system concept is lacking in Kenya. Inculcating the much-needed social grants to parents and foster parents with children as the targeted beneficiaries would be a step in the right direction. There is far more to gain than lose for Kenyan children.

CHAPTER 5: GENERAL CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

The constitutionalisation of children's rights following the promulgation of the 2010 Constitution heralds a new era of protection of children's rights in Kenya. Parents' primary obligations are to provide children with the appropriate maintenance necessary for their survival and well-being. However, the State should intervene when parents fail or cannot provide such maintenance.¹⁶⁹

5.1 Conclusions

In the preceding chapters, I have set out to illustrate the obligations of the State in the care and maintenance of children whose parents are unable or unwilling to do so. The constitutionalisation of children's rights is in line with the transformative agenda of the 2010 constitution.

To bring it in line with constitutional principles, a comprehensive review of the Children's Act of 2001 has been achieved by implementing the new Children Act 2022. The new Children's Act 2022 is an improvement from the old Act of 2001. Currently, the Act enhances sufficient allocation of resources to children's welfare, easy access to services, protection of children's rights, and stipulation of county government roles in the administration of children's welfare. The Act also provides parental responsibility, children guardianship, foster care and adoption for the care and protection of children.

The rights of children are stipulated in the constitution of Kenya 2010. The rights are further protected by the Children Act of 2022. Despite the provisions stated in the Act, the increasing population, increased number of orphans, and change in family structure,

¹⁶⁹ Council of Europe: Recommendation of Payment by the State on Advances of Child maintenance Recommendation no. R(82)2 of the Committee of Ministers to MAembers States on payment by the State of Advances on Child maintenance (2012)

among others, make realising the rights a challenge. The study, therefore, explored the responsibility of the state and legal frameworks governing child maintenance in Kenya. The study further compared the implementation of children's rights in South Africa.

South Africa's government has done a commendable job by providing child support, foster care and dependable grants. Kenya, through the new Children's Act 2022, is commendable in the protection of the rights of children. However, there are some suggestions, such as providing housing, education, healthcare subsidies and childcare support to vulnerable parents.

5.2 Recommendations

Despite the commendable changes introduced by the new Act, the following are some of the recommendations;

1. The Act should incorporate a social welfare system whereby vulnerable families are given child support in accordance with Article 53 of the constitution of Kenya. This can be achieved through tax funding and implemented by the public and private sectors. Also, the Act can include tax-free monthly payments to vulnerable families for each child, and single parents get an additional payment for each child to cater for their welfare up to the age of 18.
2. The Act should include the provision of childcare subsidies. This includes medical health coverage, whereby children from vulnerable families should have access to free medical assistance. This could be achieved through the state working with the Ministry of Health and Social Affairs. This should apply to situations where the parents or the primary caregivers are unwilling or unable to do so.

3. The Act should include the provision of housing subsidies for vulnerable families. Every child has a right to shelter, among the primary basic needs. The state with the Ministry of Housing should ensure that vulnerable families and primary guardians with low income receive housing subsidies.

4. The Act could include education subsidies. Every child has a right to education as per article 43(1) (f) of the constitution of Kenya. This guarantees every child the right to access education from pre-primary to tertiary. The Ministry of Education should work to ensure that children from vulnerable families get education from pre-primary to tertiary through education subsidies.

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