



International Environmental
Law Research Centre

Custody and the Rights of Children

published in:

Kivutha Kibwana & Lawrence Mute eds,
Law and the Quest for Gender Equality in Kenya
(Nairobi: Claripress, 2000), pp. 161-181

Dr Patricia Kameri-Mbote

This paper can be downloaded in PDF format from IELRC's website at
<http://www.ielrc.org/content/a0002.pdf>

Table of Content

Introduction	1
Who Is a Child?	1
The Rights of Children	2
Marriage	2
Labour	3
Criminal Law	3
Civil Law	4
Custody	4
Adoption	6
Fostering	7
Children Born out of Wedlock	8
Children and the Law of Succession Act	8
Child Abuse	9
Children in Adjectival Law	9
Juvenile Delinquency	10
Institutions of Juvenile Justice and Child Care	10
Citizenship Rights	10
Maintenance	11
Real Property	11
Conclusion	12
Endnotes	13

Introduction

Children have specific problems of general application to all societies, varying only in magnitude and character. This fact is lent credence by international legal instruments such as the Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990). These instruments have set the standards for national legislation in the area of children's rights. Realising the rights of adults depend to a large extent on realising the rights of children. Indeed a commentator has written that 'the way a society treats children reflects not only its qualities of compassion and protective caring but also its sense of justice, its urge to enhance the human condition for coming generations.'¹

In its 54 articles, the Convention on the Rights of the Child provides for matters of child survival, protection and development. In so far as child survival is concerned, it lays out in detail the fundamental rights and freedoms of the child such as the right to life, equality, name, nationality, conscience, expression, religion, non-discrimination and the principle of concern for the best interests of the child in public decision-making. Matters of child protection include special protections from dangers to which children are particularly susceptible such as physical and mental mistreatment or abuse, abduction or trafficking and economic and social exploitation. On child development, the Convention seeks to promote access to such basic necessities as education, information, leisure, play and cultural activities.

Kenya ratified the Convention on the Rights of the Child in 1990. Shortly afterwards, a task force was set up under the aegis of the Kenya Law Reform Commission. This initiative recognised the importance of the task of coming up with explicit legislation on children's rights. A cursory look at existing Kenyan legislation does not reveal children as a distinct social category requiring legal protection. Matters of custody, the rights of children and the rights of adults over children are found in a plethora of legislation whose concerns are other than children's rights. Their attention to children's rights is often incidental and peripheral.

In recommending reforms to the law, we will be recognising the fact that children need special care and that a clear articulation of their rights is imperative. It may be argued that this is not necessary, as plenty of legislation already exists dealing with children's issue. However, while there is no shortage of legislation touching on children, the fact that many problems still plague children clearly points to a need to improve on the existing legislation.

Who Is a Child?

The various Kenyan statutes use multiple terms to refer to a child – child, infant, juvenile, minor, young person. The statutes also ascribe different age categorisations to various terms. The Age of Majority Act (Cap. 33 of the Laws of Kenya, Section 2) defines a person below the age of 18 as a 'minor', whereas the Children and Young Persons Act (Cap. 141 Section 2) provides that a 'child' is a person under the age of 14, a 'juvenile' is a person aged between 14 and 16 years and a 'young person' is one aged between 16 and 18 years.

The Employment Act (Cap. 226) provides that a person under 16 years of age is a child for the purpose of being engaged in gainful employment in any industrial undertaking. The Marriage Act (Cap. 150) enables anyone

16 years of age and above to be married, but the consent of the parent or guardian is required for those below 21. The Hindu Marriage and Divorce Act (Cap. 157) prescribes 16 years as the minimum age of marriage for females and 18 years for males. Under the Traffic Act (Cap. 440, Section 33), a driving license may not be issued to any person below 16 years, or below 18 years where the license sought is for motorcycles. The Liquor Licensing Act (Cap. 121, Section 30) and the Traditional Liquor Act (Cap. 122, Section 27) prohibit the selling or delivering of liquor to persons under the age or apparent age of 18. The Adoption Act (Cap. 143) defines a child as a person under 18 years, but this does not include a person who is or has been married. The Guardianship of Infants Act (Cap. 144) has a similar definition. The Matrimonial Causes Act (Cap. 152, Section 2) gives different age categories for different races. It provides that an African child is a person who has not attained 16 years of age for males and 13 years for females. For other races, a child is an unmarried person who has yet to attain the age of majority.

The above disparities in the definition and description of a child have practical implications for the application and observance of children's rights and welfare. They complicate the administration and protection of these rights, as it is not clear who is a child. There is need to harmonise the descriptions and age categorisations for more efficacious administration and protection of children's rights. A common age of entry into adulthood is required. Eighteen years seems appropriate and reasonable. Everybody below 18 should be accorded the description of "child," and the other descriptions and age categorisations should only be retained and applied where it is reasonable and necessary. For instance, the provision in the Penal Code (Cap. 63) that a male child below 12 years of age is immune from criminal prosecution for a sexual offence should be retained, but those in the Matrimonial Causes Act ascribing different ages for different races (and in the case of Africans for different genders) should be removed.

The Rights of Children

A right can be defined generally as a claim, privilege, liberty, power or immunity accorded to someone and exercisable against another. The idea of rights has evolved over time, leading to an acceptance that all human beings are entitled to certain rights irrespective of sex, race, creed, age or whatever other local connection, due simply to being endowed with humanity. As human beings, children must therefore have these rights also. These fundamental rights are provided for in the Constitution of Kenya in Chapter V and include the rights to life, liberty, freedom of assembly and freedom of expression. However, children are a special class of human beings due to their limited capabilities. This fact makes them eligible for special protection, as they are vulnerable to abuses which they need protection from. Before they develop the capacity to look after themselves, they need the protection and support of adults. Therefore, a special system of rights is necessary to shield children from neglect, exploitation and abuse and to offer the child redress for violations of these rights.

The rights of children can be analysed under the following heads: marriage, labour, criminal law, civil law, custody, adoption, fostering, children born out of wedlock, children under the law of succession, child abuse, children in adjectival law, juvenile delinquency, institutions of juvenile justice, child care maintenance, real property and citizenship. I will discuss each of these in turn, highlighting the shortcomings of the existing laws and suggesting possible solutions.

Marriage

The various family systems existing in Kenya differ in their treatment of children's rights as far as marriage is concerned. As noted earlier, these systems use different age denominations to define who is a child. Under African customary law and Islamic law (Sunni), there is no fixed age of marriage. The age of puberty is generally regarded as an appropriate age for marriage. Under Islam, the age of legal responsibility is attached to the age of puberty of either sex. In practice, 15 -18 years for boys and 9-16 years for girls are often treated as the periods from which the concept of legal responsibility is derived. Marriage may then take place if it is auspi-

cious for the girl and is based on a good match as seen by her parents (Mohammedan Marriage and Divorce Act Cap. 156). The Hindu Marriage and Divorce Act (Cap. 157) provides that the minimum age of marriage for females is 16 years and for males is 18. The consent of the parents is required for a girl who has not yet attained 18 years of age. The Marriage Act (Cap. 150) gives 16 years as the minimum age for both males and females to enter marriage. However, before attaining the age of 21 years, those wishing to marry must obtain their parents' or guardians' consent.

It is important to harmonise the age at which a person can enter into marriage under these different systems of family law. Taking Into account the responsibilities pertaining to married life, 18 years seems .a reasonable minimum age for entering into a marriage relationship. It should also be required that those getting married between the ages of 18 and 21 have the consent of parents or guardians.

Labour

Children are vulnerable to exploitation as cheap (and docile) labour. In Kenya, poverty drives many family members to seek ways of augmenting meagre resources. Hiring out children to work is one way. The Employment Act (Cap. 226) sets the minimum age for entry into employment at 16 years. However, it excludes children under- going apprenticeship or indentured learning entered into by virtue of the Industrial Training Act (Cap. 237), as do the Employment (Children) Rules 1977 (Legal Notice 155 of 1977). Rule 3 provides that no person shall employ any child without the prior permission of an authorised officer. Permission cannot be granted if the child has to stay away from parents or guardians in order to work, unless the parents or guardians consent in writing. The authorised officer cannot grant permission if the child is to be employed in any bar, hotel, restaurant or club unless the Commissioner of Labour consents in writing. Every permit issued under this rule is renewable annually, and failure to comply is an offence. Rule 4 provides that every person authorised to employ more than 10 children on a permanent basis shall designate a person to be responsible for the welfare of the children. Such a person must be approved of in writing by the Commissioner of Labour.

These regulations seek to protect children against exploitation. However, a balance has to be struck between protection of children's rights and the need for additional family income. This can be done by:

- maintaining the age of 16 years as the minimum age for entry into employment
- requiring that anyone under 18 be employed on service contracts spelling out substantive rights and duties and guaranteeing a minimum standard of rights for the child's protection, for example regarding hours of work, income and allowances
- making it an offence to employ children without these requirements
- strengthening the monitoring and policing machinery to protect employed children by enhancing the capacity to detect and deal with offenders.

Criminal Law

Criminal law exempts children from the full rigours of responsibility but does not give complete immunity. Section 14(1) of the Penal Code (Cap. 63) provides that a child under the age of eight bears *no* responsibility for any criminal act or omission. Such a child is dealt with under the Children and Young Persons Act (Cap. 141) as a child in need of care and protection and not as a criminal (Section 22). This provision is reasonable. Section 14(2) of the Penal Code provides that a child under the age of twelve but above eight is liable for any criminal act or omission if at the time of doing the act or making the omission the child had the capacity to know the act or omission was wrong. These cases should be dealt with exclusively in juvenile courts where children are likely to benefit from the practice of privacy and informal procedures. Such children would benefit from being treated in a rehabilitative and not a deterrent manner.

Section 14(3) of the Penal Code states that a male child under 12 years of age is presumed incapable of having "carnal knowledge." This seems a reasonable provision, but it may need to be revisited considering that children now mature earlier. Section 25(2) of the Penal Code decrees that a sentence of death shall not be

pronounced or recorded against any person convicted of an offence if it appears to the court that at the time the offence was committed the person was under the age of 18. Such a person IS to be detained at the President's pleasure in any place and under such conditions as the President may direct.

The Children and Young Persons Act (Section 15 of Cap. 141) seeks to remove children from the stigma of criminality by disallowing the use of the terms "conviction" or "sentence" in connection with young offenders. It is suggested that this be upheld and an amendment to the penal code made to remove any terminology appearing to stigmatise children as criminals. The power to detain children and the conditions of their detention should be determined by the Juvenile Court, which is appropriately armed to protect children. In *Mama vs. Republic* (1970) E.A. 370, it was held that a child should not go through the rigours of the criminal process. The provisions of Cap.141, in the judge's view, were intended for the protection of children and should be adhered to. However a more comprehensive guide on the manner of proof of the age of a person should be incorporated into the Penal Code. If doubt is raised as to ether one is a child or not, the case should be referred to the juvenile court.² The law on criminal procedure should also be tended to cater for the arrest of children. The provision should allow for as informal and non-confrontational a procedure as possible.

Civil Law

Contracts involving children are currently subject to the following principles:

- Contracts may be entered into with children except where statute law states otherwise, and the consequences of such contracts may be determined by statute law.
- Contracts by children are voidable at the instance of the child.
- Certain contracts by children are made void ab initio by the English Infant's Relief Act 1874.

The law renders void all contracts with children for the repayment of money lent or to be lent, as well as contracts for goods supplied or to be supplied (except for necessities) and states that any purported ratification by a child, upon attaining the age of majority, of earlier contracts shall not form a basis of action. These are all desirable safeguards. The law of tort imposes liability on a child for his or her own torts from the time the child is able to distinguish between right and wrong. The age at which a child is deemed to know right from wrong is at the discretion of the court. The contributory negligence of an adult does not preclude the right a child to recover damages (*Patel vs. Uganda Commercial Company* 1957 E.A.C.A. 27). It is recommended that these matters be handled exclusively by juvenile courts, where the best interests of e child should always guide the court's decision.

The Partnership Act (Cap.29) allows children to be partners in a firm. Under Section 12, a partner who is a minor, as a person, is not liable for partnership obligations, even though his or her shares held by the firm may be committed collectively with the shares of the her partners for: the abatement of liabilities (*Lakha vs. Standard Bank Ltd.* 1927-1928 II K.L.R.I). Where a child draws a benefit from partnership, he or she becomes liable for past obligations on attaining the age of majority, unless formal notice repudiating his or her position as partner is given (Section 3 of Cap. 29). The criterion of age of majority used in the Partnership Act is based on the law "to which the minor is subject". This criterion should be amended to make 18 the age of majority. The Trustee Act (Cap. 167) sufficiently protects trusts held in favour of children.

Custody

The Guardianship of Infants Act (Cap. 144) is the principal legislation in this area. "Child" under this act is an unmarried person be- low 18 years of age. "Parent" includes the father, mother or any other person appointed by the court to maintain the child, or to be responsible for custody, but "father" does not include the natural father of a child born out of wedlock (and an unmarried father is not liable to maintain the child). If one parent dies, the surviving one becomes guardian, but if the deceased parent had appointed a guardian, then the appointee and the surviving parent become joint guardians.

If the appointee is dead or refuses to comply with the terms of appointment, the court may appoint a new guardian. Such an appointment is made only if it is in the best interests of the child. In *Philimon Jumba Manase vs. Public Trustee* (Civil Appeal No. 30 of 1983), the brother of a deceased man applied under Cap. 144 for custody, care and control of the deceased's infant child, stating that he was "able to maintain and take care of the said infant." Having secured custody, he then applied to be made the trustee of the estate of his deceased brother and of the infant in place of the Public Trustee, arguing that the KSh 16,000 given to him by the Public Trustee was not enough to maintain the child. He summarised his application as follows: "I can invest and gain a lot of income from the estate of my late brother." It was held that this application lacked in bona fides, and it was therefore dismissed.

The court may also appoint a guardian where the child is an orphan or has been abandoned. In such cases, any interested person may apply to the court for a guardianship order. If the guardian appointed in a will considers that the surviving parent is unfit to have custody, the guardian may apply to the court to be made the sole guardian of the child. If such an application is granted, the surviving parent may be granted access to the child(ren) and may also be required to make payments to the guardian towards maintenance. Where both parents have appointed guardians, the guardians are expected to work jointly in the event of the death of the parents.

Both parents have equal rights to apply to the court for custody or divorce. In such cases, the court will consider the following:

- the welfare of the child
- the conduct of the parents
- the wishes (if any) of both parents.

The welfare of the child is the paramount consideration.³ The court considers which parent will be able to provide the best shelter, health, education and upbringing. In the case of a child of tender years, the court normally awards custody to the mother, for she is considered best able to take care of very young children (*Karanu vs. Karanu*, (1975) EA 18). Abandoning a child or allowing the child to be cared for by someone else for considerable lengths of time is treated as a failure in the discharge of parental duties. Parents are expected to agree between themselves on who should have custody,⁴ but the court is not enjoined to honour such an agreement if it deems it not to be in the best interests of the child. Parents of equal suitability as guardians may occasion a split order where one parent has physical possession and the other has legal custody (the making of decisions affecting the child).⁵ The parent with legal custody may be permitted to visit the child. Where physical custody is granted to the mother, she is entitled to maintenance from the father until the child attains of majority (*Wanjiku vs. Hinga*, Cause No 2 of 1976).

The provisions of the Guardianship of Infants Act provide a reasonable basis for the protection of the child in matters of custody. However, the definition of "father" should be extended to include the natural father of a child born out of wedlock, as natural fathers may be better placed to look after them, while shutting them out is unfair.⁶ "Child" should be defined to mean all persons under 18.

The Matrimonial Causes Act (Cap. 152) empowers the court in divorce, separation or nullity proceedings to make appropriate decisions regarding the custody, maintenance and education of children. However, it deals primarily with maintenance, leaving custody questions to the Guardianship of Infants Act. Under the Subordinate Courts (Separation and Maintenance) Act (Cap. 153), a married woman may apply for separation and maintenance on grounds that her husband has been guilty of persistent cruelty to her or her children, or has neglected to provide reasonable maintenance. The applicant may be awarded the custody of the children aged under 16. These children are entitled to maintenance by the father until they reach the age of 16 or the mother dies, whichever occurs first. It is recommended that 18 years be recognised as the age of majority; he act should also be amended to make provisions for the maintenance of all children of the family if the mother applies for separation and maintenance on other grounds. An amendment should also be made specifying how all children placed in the custody of the mother following an application for separation and maintenance are to be maintained in the event of her death before they attain the age of majority.

Section 142 of the Penal Code penalises anyone who unlawfully takes away an unmarried girl below 16 years of age from the custody of her parents or lawful guardians. It is recommended that this law be amended to protect all unmarried girls below the age of 18 years.

It is likely that only a tiny minority of justiciable disputes in Kenya are actually litigated and that African customary law, which often differs from the provisions of the Guardianship of Infants Act, prevails in most cases. Accordingly, it is recommended that the basic principles of the act be made part of the law governing grassroots administration of custody matters. The current sorry state of the law urgently requires a new law to cater for the custody of children born out of wedlock. This law should be aimed at catering for their best interests.⁷

Adoption

Adoption legally terminates the natural bond between a child and its natural parents and substitutes these parents with adoptive parents, creating a permanent relationship. This is done through the Adoption Act (Cap. 143) which provides for the making and registration of adoption arrangements made by adoption societies and other persons concerned with the adoption of children and the restriction of pecuniary transactions in relation to adoption matters.

An adoption order may be made only in respect of a person who is aged 18 or below, is not married and has not at any time been married. Section 4 of the act lists three categories of persons who obtain an adoption order:

- persons who have attained 25 years of age and are at least 21 years older than the child to be adopted
- a relative of the child who is at least 21 years of age
- the mother or father of a child who has been born out of wedlock and whose parents are not married to each other.

The following restrictions also apply:

- A sole male applicant may obtain an adoption order only in special and exceptional circumstances.
- A spouse in a polygamous marriage may obtain an adoption order only in special and exceptional circumstances.
- An applicant who is of a different race to the child may obtain an adoption order only in special and exceptional circumstances.
- An applicant who does not intend to reside with the child in Kenya may be granted an adoption order only in special and exceptional circumstances.

The Adoption Act should be amended as follows:

- Adoptions at early ages, for example between one and five years, should be preferred. Older children should only be adopted in exceptional circumstances at the court's discretion. The process of adjusting to different home conditions is more exacting on older children.
- The age of adopting parents should be changed to between 28 and 50 years for women and 28 and 60 years for men, considering the nurturing required of such parents. Health conditions should also guide the court alongside these age requirements.
- Race as a factor in granting or refusing an adoption order should be repealed. Caution should, however, be exercised in granting adoption orders where the adopting parent and the child belong to different races.
- Intending adopters should be required by law to produce evidence of economic standing.
- The personal character of a prospective adopter should be a relevant factor in making an adoption order.
- The age and sex of the child should be important factors for consideration where a single man or a woman apply for an adoption order.

- International adoptions involving Kenyan children should be subject to the restrictions in Section 4 of the act along with all the above conditions.

In addition, in international adoptions:

A single man should not be granted an adoption order.

If the applicant is married, the marriage must be a heterogeneous union.

The applicant(s) must obtain authority from a recognised juvenile court in their home country

The applicant(s) must obtain immigration authority from their home country respecting the adopted child.

The applicant(s) must produce a security bond from their home country for the safety of an adopted child.

The applicant(s) must produce a certificate of moral fitness. The applicant(s) must produce a certificate of financial fitness.

The applicant(s) must appear before a High Court judge for a preliminary hearing before proceeding to an adoption society.

The applicant(s), if successful at the preliminary hearing, should be required to remain in Kenya for at least three months, during which an interim order is in force and a Kenyan agency is to be appointed guardian ad litem.

The guardian ad litem must be able to visit the child freely and make frank reports in court.

The court should have the power to reject any preliminary application summarily; the power to act on its own motion between the preliminary hearing and the final order, the power to rescind any order made in the meantime and the power to impose penalties in accordance with the law (which should provide the same).

- Any appeals in such cases should be heard under a certificate of urgency.
- A register of international adoption should be kept by the public office in charge of adoptions.
- Kenyans adopting abroad and complying with the laws of the country in question should have such adoptions automatically registered in Kenya and governed by Kenyan law.

These suggestions are based on the fact that while international adoptions are not undesirable, it is advisable to keep a tight rein on them given the fact that the children adopted will be out of our courts' jurisdiction. For adoption of children born out of wedlock where the father has not acknowledged paternity, the law should require that the consent of the unwed mother (and that of her parents if she is under 18) is sufficient consent. However, the court should have discretion to require the consent of the extended family.

The adoption process should be streamlined by establishing a Council of Adoption to:

- formulate policy in matters of adoption
- liaise between adoption societies, government and non-governmental organisations
- propose names of officers who may serve as guardians ad litem
- monitor adoption activities in the country
- expedite all documentation required for the adoption process

Fostering

Fostering means the temporary care of a child without any change in the status of the child or any permanent separation from his or her natural relatives, and without any right of inheritance by the foster parents. There is need for the law to incorporate arrangements for fostering through registration and court orders. All fostering should be subject to time limits and periodic judicial review. The law should provide for specific rights in respect of custody, maintenance and inheritance for fostered children who do not succeed in being adopted. A

monitoring arrangement should also be provided to prevent the current practice of using lax fostering procedures to defeat the safety measures of the adoption process.

Children Born out of Wedlock

This class of children is stigmatised as “illegitimate”. Therefore, the term “illegitimacy” or any associated term should be removed from the laws dealing with such children. The Legitimacy Act (Cap.145) is not really aimed at resolving problems affecting the normal child born out of wedlock. It is concerned with children who, though born out of wedlock, acquire the status of children born in wedlock by virtue of marital actions taken by their parents. The now-repealed Affiliation Act (then Cap. 142) enabled the mother of a child born out of wedlock to seek a court order against the putative father for the maintenance of the child where a marriage between the father and the mother had not subsequently taken place. It protected the rights and welfare of children born out of wedlock. With its repeal, none of the parents is now, strictly speaking, legally bound to provide for them.

A new act is needed to provide for the adequate protection of all children born out of wedlock. This should incorporate the substance of the repealed Affiliation Act, but with the following modifications:

- The courts with jurisdiction should be either the resident magistrates courts, the High Court or a special set of family courts established by law.
- The new law should limit to two the number of times one woman can apply for affiliation orders.
- The new law should provide machinery to ensure that money paid under affiliation orders is actually used for the maintenance of the child.
- There should be detailed provisions in the law regarding *proof* of paternity.
- The new law should specify the mode of payment of maintenance dues where the father is below 18.
- The new law should apportion the responsibility for maintenance, whether in cash or in kind, between the mother and the father.
- The new law should regard the age of majority as 18, and payments for maintenance should end at that age.
- The new law should allow either the mother or the father at any stage before the child attains the age of majority, to apply for custody, and the court in determining such an application should have the power to vary the allocation of maintenance costs.
- The new law should provide for a flexible procedure, including provisions for inflation, for determining the cost of maintenance of a child born out of wedlock.
- The new law should avoid the use of such terminology as "bastard," "legitimate child" or "illegitimate child".
- The new law should also provide that the court will honour any written contract made in good faith between the mother and father of a child born out of wedlock, and make suitable arrangements for the custody and maintenance of the child.

Finally, Section 2 of the Magistrates' Courts Act (Cap. 10) should be amended to provide for maintenance of children born outside wedlock in place of providing, as it does currently, for seduction and pregnancy compensation. This will reflect the paramountcy of child care and welfare issues, especially bearing in mind that costs payable under Cap. 10 as it currently stands are to the father of the girl who bears a child outside wedlock.

Children and the Law of Succession Act

The Law of Succession Act (Cap. 160) defines “dependant” (that is, the category of persons who may challenge a will on grounds of inadequate provision and who are entitled to inherit from an intestate estate) as “the children of the deceased whether or not maintained by the deceased immediately prior to his death.” When read alongside other provisions of the act, there appears to be no recognition of children born out of wedlock where

the testator or intestate is a man, if he does not express such recognition expressly or impliedly. Accordingly, the act should be adjusted to lessen the current inequity whereby a child born in wedlock can inherit from both parents while one born out of wedlock can only inherit from one parent.

Child Abuse

There is no Kenyan law that expressly defines “child abuse.” Therefore, there is need for a new law which defines the term. Child abuse offends Section 23 of the Children and Young Persons Act, but this legislation does not give sufficient grounds to outlaw cultural practices which endanger the survival, safety or development of the child such as female genital mutilation. A comprehensive law needs to be enacted in that regard. In addition, the provisions in the Penal Code on defilement should be amended as follows:

- Defilement of children under 11 should be treated as aggravated defilement and carry a tougher sentence than that for simple defilement.
- The defilement age should be raised to 18, with the exception of girls who are or have been married.
- The sentence on defilement should be enhanced to make it more of a deterrent.

The penalties for unnatural offences against children and for wilfully committing violence against children should also be enhanced, again to make them more of a deterrent. Finally, there is need for tougher penal sanctions against persons involved in illegal child labour and in child prostitution and related practices.

Children in Adjectival Law

A justice system is incomplete without adjectival law. As such, the administration and enhancement of children’s rights must be reflected in our procedures. Section 19 of the Oaths and Statutory Declarations Act (Cap. 15) provides, inter alia, that if a ‘child wilfully gives false evidence, whether under oath or not, in circumstances that would constitute perjury if the evidence were given on oath, then the child has committed perjury and is liable to be dealt with as if he or she had committed an offence punishable with imprisonment. Perjury carries a sentence of seven years imprisonment. This section is not in line with the provision of the Children and Young Persons Act which does not allow the use of the word “guilty” in relation to children. Hence, the Oaths and Statutory Declarations Act should be amended to relieve children of the rigors of criminal sanctions applicable to adults who have committed perjury.

Section 124 of the Evidence Act requires corroboration of evidence given by children of tender years. However, there is no evidence that this class of children is unreliable. This provision is based merely on speculation. Thus, the law should be amended to allow courts to exercise full discretion to receive evidence from a child of tender years, especially in sexual offences, and to rely on it with or without corroboration as a basis for assessing guilt or liability.

Juvenile Delinquency

This is a general term that denotes anti-social conduct by children. Under the law, children deemed delinquent are to receive rehabilitation designed to develop more sociable and responsible behaviour. For this purpose, the Children and Young Persons Act establishes juvenile courts. Children are brought to these courts if it is established that they are neglected, not under the proper control of their parents or guardians or living in an environment detrimental to their physical or mental health. Parents who neglect their children may be summoned to appear before a juvenile court, which may then order the child to be:

- handed back to his or her parents or guardian
- committed to the care of a fit person
- committed to an approved school (if over 10 years of age)
- committed to a borstal institution or other youth corrective centre.

The juvenile court may also send the child to jail, but in such cases the sentence first has to be confirmed by the High Court. Any child sent to jail is meant to be kept away from adult prisoners whenever practicable. However, in our view the judicial discretion to commit a child to prison should only be exercised after the court is assured that there is an existing facility for separate custody for the child in some particular prison. A new law should also be passed to emphasise the parental duty of custody and maintenance as the best way of dealing with juvenile delinquency

Institutions of Juvenile Justice and Child Care

The Children's Department in the Ministry of Home Affairs, National Heritage and Sport is responsible for the day-to-day administration of the Children and Young Persons Act. It processes appointments in connection with the management of children's affairs. It supervises the care, protection, control, discipline, education and training of children who are in need. Officers and social workers in the department are primarily responsible for bringing cases of child delinquency before the juvenile courts, for supplying the courts with relevant information on the children and for conducting any follow-up investigations. There are several public and private children's institutions. The public institutions include the statutory institutions: juvenile remand homes (which host children pending the judicial disposition of their cases), approved schools (which provide corrective care, education and vocational training) and borstals set up under the Borstal Institutions Act (Cap. 92), which fall under the Prisons Department and are reserved for boys between 16 and 18 years of age. Particular institutions promoting the welfare of needy children can also be set up by local authorities with the authority of the minister. This involves registration and gazettelement under the Children and Young Persons Act.

It is recommended that the judicial capacity to handle children's cases be enhanced through establishment of family courts, at least one in each province. These courts should have similar jurisdiction to that of resident magistrates courts and should handle all family cases which originate below the High Court. They should deal with matrimonial cases, children's cases of all kinds and any civil and criminal cases which are likely to affect family privacy or family interests in a profound manner. There should be a special division in the High Court to handle appeals from such cases. This system will ensure the privacy and urgency of family cases. It is also recommended that the number of approved schools and borstals be increased to at least one of each in each province. Finally, the Children's Department should be expanded and qualified personnel hired to run its affairs.

Citizenship Rights

A child born outside Kenya to a Kenyan father becomes a Kenyan citizen. But a child born to a Kenyan woman married to a non-Kenyan father is not considered a Kenyan citizen. This situation is inequitable. By discriminating against female citizens, we are discriminating against our children. The law should be amended to allow the child of a Kenyan woman and a non-Kenyan father to have Kenyan citizenship. This will enable the child to enjoy rights provided for Kenyan children in the event of the marriage breaking up.

Maintenance

Maintenance entails the duty to support, assist and sustain in respect of basic needs as well as other normal wants. It therefore covers issues such as food, shelter, apparel, education, hearth, recreation, comfort and so on. In Kenya, there is currently no statute which sets out in any detail the duties of parents towards their children. There are, however, a number of statutes which provide in certain respects for the parental duty to maintain children. Under Section 239 of the Penal Code, a person having charge over another (adult or child) is under a duty to provide that other with the necessaries of life. Section 23 of the Children and Young Persons Act makes it an offence for anyone having custody of a child to wilfully assault, ill treat, neglect, abandon or expose the child to be assaulted, neglected, abandoned or exposed to danger. Section 22 requires children's officers to apprehend and bring to court any children who:

- have no parent or guardian
- are destitute or vagrant
- cannot be controlled by their parents or guardians
- are not receiving proper care from their parents or guardians
- are falling into bad associations or are exposed to moral or physical danger
- are kept in premises considered by a medical officer to be overcrowded, unsanitary or dangerous
- are prevented from receiving compulsory education or are habitual truants
- frequent public bars or gambling houses
- are found buying or receiving any drug which is deemed to be dangerous to children
- are found begging.

The court may then make a ruling. It may order the child to be returned to the parent or guardian and require the parent or guardian to take out a bond as security for ensuring the proper upbringing of the child. Where the parent is found unable to give proper maintenance, the court may place the child in the custody of a fit and proper person, or it may order the child to be committed to an approved school, especially if the child is delinquent and uncontrollable.

The Public Health Act (Cap. 242) directs parents to secure immunisation of children against diseases such as whooping cough, polio, measles, tetanus and diphtheria. The Education Act (Cap. 211) makes institutional arrangements for school education without imposing duties of child maintenance. However, new legislation obligating parents or guardians to maintain their children is needed. Parents or guardians should be strictly responsible for the provision of food, shelter, clothing, education, health and for ensuring the discipline of their children. In the case of *Tahir Sheikh Said vs. Umi Rashid Omer*,⁸ it was held that transport to school may be regarded as maintenance, as also employment of a house servant. This ruling takes into account the standard of life of a child in the event of the breakup of a marriage and is desirable in our view. A provision should be incorporated to ensure that the standard of life of a child is not affected by the breakup of the parents' marriage.

Real Property

Section 113 of the Registered Land Act (Cap. 300) enables a child to be registered as a proprietor of land on first registration, as a transferee or on transmission. However, the child cannot deal with the land or any interest thereon by virtue of the registration, and the Registrar of Lands is enjoined to enter a restriction with respect to such land. But the act then states that where a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, it may not be set aside only on grounds of minority. The issue is whether or not children should be registered as proprietors at all, especially given that they can be easily manipulated by those looking after them. It is important to include in the law a provision to certify the bona fides of a person to whom a minor disposes of his or her interests in land.

Conclusion

The basic aim of the law in regard to children should be to identify, protect and enhance their rights and make the enjoyment of these rights realisable and easier. To this end, it would be desirable to consolidate all the valid existing legislation on children's rights, together with the recommendations put forward in this chapter and any other useful and relevant changes, into one amalgamated statute to cater for the rights of children. Where it is not possible to extricate particular provisions from a statute for inclusion into a law on children, an amendment should be effected in the relevant statute to ensure holistic protection of the rights of children alongside those of adult citizens. Long-term policy arrangements should also be made to ensure that all children born in this country receive adequate care through provision of education, nutrition, health and other basic needs.

Endnotes

- ¹ Martemson, in Preface to Derrick Sharon *The UN Convention on the Rights of the child* (1992), P. X.
- ² See Maina vs. Republic and also Thomas Oginga Mucanya vs. Republic, Criminal Appeals No. 34 of 1986.
- ³ See Section 17 of Cap.144; Wambua vs. Okumu 1970 E.A. 578; Nzioka vs. Mwikali W/O Mule 1971 K.H.C.D. 79.
- ⁴ See Section 17 and 14 of Cap. 144.
- ⁵ See Timina Okeja vs. Elam, Court of Review L.R. Vol. X (where the legal custody of a child was given to one person and the physical custody to another).
- ⁶ See Mary Khabele vs. Peter Walusimbi, CC No. 734 of 1981.
- ⁷ See Wambura vs. Okumu 1970 E.A. 587 and Mary Khabele vs. Peter Walusimbi CC No. 734 of 1981.
- ⁸ Civil Appeal No. 27 of 1987.

