

Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms

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Summary

The enactment in 2001 of the Children's Act was a significant development in the implementation of international children's rights norms in Kenya. The Act still stands as the first statute which substantially attempts to domesticate Kenya's obligations under any human rights treaty (in this case, the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child). Almost a decade since the Act entered into force, there is a poignant lesson to be learned. This is that in contexts such as Kenya's, where full compliance with international child rights norms requires a process of comprehensive audit of existing laws and policies, not even the enactment of a consolidated law such as the Children's Act suffices. Rather, the process requires a continuous review of all laws, on the one hand, and the putting in place of administrative and other practical measures, on the other. A significant development is the passage of a new Constitution, 2010. However, realising this potential under the new dispensation will require decisive political commitment to ensure the allocation of resources and the institution of practical measures for the implementation of child rights-related laws. The Free Primary Education programme still stands out as an example of a positive measure geared towards addressing the situation of some of Kenya's poor children. The challenge remains of replicating its example to other

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key areas, including health and child support to poor families. The need for further legal provisions, for example in the area of juvenile justice, the required repeal of laws such as in relation to corporal punishment and the gaps in enforcing existing laws mean that the process of harmonising Kenyan law with CRC and the African Children's Charter is far from complete.

1 Introduction

The status of the United Nations (UN) Convention on the Rights of the Child (CRC) as the most universally-ratified human rights treaty remains intact.¹ The year 2011 also saw a significant development in the adoption by the UN of an Optional Protocol to CRC which puts in place a complaints procedure at the international level regarding violations of children rights.² States continue to submit reports on the progress of implementation of CRC, albeit with noted delays.³

In Africa, the sister covenant to CRC, the African Charter on the Rights and Welfare of the Child (African Children's Charter) is ratified widely.⁴ The body in charge of monitoring states' compliance with the legal obligations under the African Children's Charter – the African Committee of Experts on the Rights and Welfare of the Child – issued its first adjudicative decision, finding a violation of children's rights to a nationality by the Kenyan government in relation to children of Nubian descent – a minority group in Kenya.⁵

1 Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989, has been ratified by 192 states – all UN member states apart from the United States, Somalia and South Sudan. More countries have ratified CRC than any other human rights treaty in history.

2 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure adopted and opened for signature and ratification by UN General Assembly Resolution 66/138 of 19 December 2011. As at 23 April 2012, no states had ratified the Protocol although it had been signed by 21. According to art 19 of the Protocol, it will enter into force three months after the deposit of the 10th instrument of ratification or accession.

3 The UN Committee on the Rights of the Child has consistently noted delays in the submission of state reports. However, in a recent examination of reports, the Committee has noted that it receives a large number of reports every year. It has, as an exceptional measure, recommended to some states, such as Kenya, to present consolidated periodic reports.

4 As of April 2012, 46 out of 54 member states of the African Union had ratified the African Children's Charter.

5 *Communication 002/009 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 (Nubian children's case).* The decision issued on 22 March 2011 and further discussed in sub-sec 4.2 below is available at <http://www.ihrda.org/wp-content/uploads/2011/09/002-09-Nubian-children-v-Kenya-Eng.pdf> (accessed 2 April 2012).

Rightly so, the current focus of governments, treaty-monitoring bodies, civil society activists and academics has shifted from the near-universal ratification of CRC and the wide acceptance of the African Children's Charter to the actual situation of children. Hence the questions: Against the backdrop of the African Committee of Experts' decision on Kenya, what is the present state of children's rights in Kenya? How is Kenya faring in the process of implementing children's rights, both in terms of legislation and in practice? Almost a decade since the enactment of the primary legislation – the Children's Act, 2001 – what are the successes, constraints and challenges? The article attempts to answer these issues in relation to Kenya.

2 Children's rights under the Children's Act

The Children's Act of 2001 remains the primary Kenyan law setting forth the legal obligations of all duty bearers – government, parents and civil society – to respect, protect and fulfil the rights of children. It is the first example of a comprehensive enactment in Kenya which gives effect to any international human rights treaty to which the country is a party.

The Act provides for a catalogue of rights for children. It also makes provision for new institutional arrangements and enacts the concept of 'parental responsibility' – elaborating on parental rights, powers, duties and authority.

Part II of the Act (sections 3-22), which deals with the 'rights and welfare of the child', is by far the most significant part of the Act. This part of the Act makes provision for the four rights which have been identified by the UN Committee on the Rights of the Child (CRC Committee) as reflecting the 'soul' of CRC.⁶ These core principles include, firstly, the best interests principle provided for in section 4(2) of the Act.⁷ Secondly, the Act guarantees the child's right to life, survival and development (section 4(1)). Thirdly, the Act provides for children's right to non-discrimination (section 5). Lastly, the Act provides for the rights of the child to participation and to be accorded the opportunity

6 UN Committee on the Rights of the Child, General Comment 5: 'General Measures of Implementation for the Convention on the Rights of the Child' CRC/GC/2003/5 27 November 2003. General Comments are authored by human rights treaty monitoring bodies (including the UN Committee on the Rights of the Child). By their nature (having been made by the treaty-monitoring body after years of experience of examining state party reports and state practice) these comments constitute authoritative elaborations on legal obligations entailed in the provisions of the various treaties.

7 The Act provides that '[t]he 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'.

to express his or her opinion, taking into account the child's age and degree of maturity (section 4(4)).

Section 6 of the Children's Act secures the right of the child to live and to be cared for by his or her parents. Section 7 guarantees the right of every child to 'free basic education which shall be compulsory in accordance with article 28 of the CRC' and be the responsibility of the state and parents. The child's right to religious education of choice is provided for in section 8. Sections 9 and 10 provide for children's rights to health and medical care and the rights to protection from armed conflict and economic exploitation and work.

The child's right to a name and nationality is provided for in section 11. However, as discussed in this article, certain categories of children, such as children of Nubian or Somali descent, still face formidable obstacles in accessing birth registration procedures.⁸

Section 12 of the Act provides for the right of children with disabilities to access education, special care and appropriate treatment. Section 13 provides for the child's right to protection from physical and psychological abuse, neglect and exploitation. Section 14 guarantees the right of the child to be protected from female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.⁹ In addition, sections 15, 16 and 17 provide for the right of the child to be protected from sexual exploitation, drugs, torture, deprivation of liberty, capital punishment and life imprisonment. The child's rights to leisure and privacy are the subject of section 18.

The Act's catalogue of 'duties and responsibilities of the child' in section 21 was a first amongst the new children's legislation that has been enacted in different African countries since 1990. The influence of the African Children's Charter on the provisions of the Kenyan Children's Act is evident in the inclusion of these 'duties and responsibilities'.¹⁰ By providing for the responsibilities of the child, the Act takes on board the opinion that children's rights cannot be viewed in isolation and that emphasis should not be placed solely on

⁸ See para 4.2 below.

⁹ This provision has since been bolstered in relation to female genital mutilation (FGM) by the provisions of the Prohibition of Female Genital Mutilation Act 32 of 2011, which provides for stiffer penalties in relation to FGM. Under sec 29 of this Act, persons convicted of FGM and related offences, such as aiding and abetting the commission of FGM, are liable to a punishment of a minimum of three years' imprisonment or a minimum fine of Kshs 200 000 (US \$2 500) or both imprisonment and fine. Under sec 20 of the Children's Act, the offence attracted a maximum imprisonment term of 12 months or a fine not exceeding Kshs 50 000 (US \$625) or both. The new law against FGM has been in legal effect since 4 October 2011.

¹⁰ The African Children's Charter makes provision for 'duties' of children in art 31.

children's rights to the exclusion of the rights of their parents and the community at large.¹¹

The Act sets out penalties for persons who infringe on the above highlighted rights of the child in section 20.¹² Section 22 confers jurisdiction on the High Court to enforce any of the rights of the child and confers legal standing (*locus standi*) on any member of the public to institute action or to approach the Court for such enforcement.¹³

3 The constitutionalisation of children's rights in Kenya

Kenya's new Constitution, in force since 27 August 2010, introduces a progressive Bill of Rights (chapter 4) which is by and large guided by international human rights standards. It guarantees economic, social and cultural rights – including the rights to food, housing, sanitation, water, health (including reproductive health care), education and social security as enforceable rights,¹⁴ alongside civil and political rights – including the rights to life, liberty and security of the person, privacy, freedom of conscience, religion, belief and opinion, freedom of expression and freedom of association. In addition, the Bill of Rights provides for other rights, including equality and freedom from discrimination. It includes specific provisions on the rights of minorities, persons with disabilities, older members of society, youth and children.

Article 53 of the Constitution provides as follows:

- 1 Every child has the right –
 - (a) to a name and nationality from birth;
 - (b) to free and compulsory basic education;
 - (c) to basic nutrition, shelter and health care;

¹¹ See GO Odongo 'The domestication of international standards on the rights of the child: A critical and comparative evaluation of the Kenyan example' (2004) 12 *The International Journal of Children's Rights* 419 424, but cautioning, however, that the concept of children's duties is amenable to abuse.

¹² Sec 20 provides that 'In notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5-19, such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine'.

¹³ This too is a landmark legal development, since Kenyan courts have over the time restrictively interpreted *locus standi* in the sense that only those with a 'sufficient interest' in a matter may have the right to sue in court. This restricted interpretation has been a significant constraint to 'public interest litigation' even in constitutional and civil litigation cases which touch on the enforcement of fundamental rights and freedoms.

¹⁴ The Constitution envisages that the economic, social and cultural rights that it guarantees will come into effect immediately from the date when it (the Constitution) came into legal effect (27 August 2010).

- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
- (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
- (f) not to be detained, except as a measure of last resort, and when detained, to be held –
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child's sex and age.

2 A child's best interests are of paramount importance in every matter concerning the child.

The Constitution recognises the right of every one, including children, to pursue action in the courts in the event of a denial of any of any of the guaranteed rights – whether civil, political or economic, social and cultural. The inclusion of enforceable social and economic rights in the Bill of Rights will, for the first time in Kenya, ensure access to legal remedies and allow people to hold the government accountable for violations of these rights. The Constitution places an obligation on the state to 'observe, respect, promote and fulfil' the rights and freedoms in the Bill of Rights and to enact and implement legislation to fulfil its international obligations in respect of human rights and freedoms.¹⁵

The Constitution also provides for access to other institutions, such as the independent human rights institution.¹⁶

4 Implementation of the four key principles of CRC and the African Children's Charter¹⁷

4.1 The right of the child to have his or her best interests taken into account

The principle of the 'best interests of the child' has been part of Kenyan family law in relation to guardianship and custody issues. There are examples of significant court decisions in this regard as far

¹⁵ Art 21 Constitution of Kenya.

¹⁶ One of these institutions under art 59 is the Kenya National Human Rights Commission.

¹⁷ These four 'key principles' or rights have been identified as forming the core of implementation of CRC; see UN Committee on the Rights of the Child, General Comment 5 (n 6 above); The African Committee of Experts on the Rights and Welfare of the Child, which is responsible for monitoring states' implementation of the African Children's Charter, has also adopted these principles as the key principles for the realisation of children's rights. See Guidelines for Initial Reports of States Parties (Prepared by the African Committee of Experts on the Rights and Welfare of the Child Pursuant to the Provision of article 43 of the African Charter on the Rights and Welfare of the Child) Cmttee/ACRWC/2 II Rev2, 2003, http://www.africa-union.org/child/Guidelines%20for%20Initial%20reports%20_%20English.pdf (accessed 3 April 2012).

back as four decades ago. In an early 1970 case, *Wambwa v Okumu*,¹⁸ the High Court in a custody dispute invoked the principle of the best interests of the child¹⁹ in deciding against customary law in making the order that the best interests of a 14 year-old girl determined that the mother be granted custody rather than the father. This was in conflict with the relevant customary law that dictated that the father be granted custody.

Consequent to 2001, the Children's Act has revolutionised the importance of this principle by extending its application to the entire panoply of matters affecting children; whether private (involving parents and families) or public (by government, courts and other public authorities).²⁰ However, the need for further government action to give full effect to the best interests of the child principle has been expressed, for example by the UN Committee, who has called on the Kenyan government to²¹

ensure that the principle of the best interests of the child is systematically taken into account in all programmes, policies and decisions that concern children, and especially aiming at addressing vulnerable and disadvantaged children, *inter alia* by sensitising and training all involved officials and other professionals.

4.2 The right to non-discrimination

The overarching children's right to non-discrimination is a key provision under the Children's Act and the Constitution. In practice, however, concerns remain regarding unlawful discrimination against certain categories of children, including female children (in many respects including access to education), children of certain minorities, children with disabilities, refugee children and children of asylum seekers.

The recent decision by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in a case regarding the situation of children of Nubian descent in Kenya²² is significant in reiterating Kenya's and other states' legal obligations. The decision was made in the context of the reality that persons of Nubian descent in Kenya have historically suffered exclusion from obtaining citizenship. In practice, the majority of Nubian children are

¹⁸ [1970] EA 578 (Kenya) 41, discussed in Odongo (n 11 above) 422.

¹⁹ At the time included as part of the Guardianship of Infants Act, Cap 144 Laws of Kenya, since repealed by the Children's Act.

²⁰ Odongo (n 11 above) 422.

²¹ UN Committee on the Rights of the Child, Concluding Observations on Kenya's second periodic report, 19 June 2007, CRC/C/KEN/CO/2, para 27.

²² Nubian children's case (n 5 above).

not registered as Kenyans or any other citizens at birth.²³ This situation hinders the affected children's access to education, health care and other essential public services which comprise of their economic, social and cultural rights guaranteed under Kenya's domestic laws, the Constitution and the African Children's Charter to which Kenya is party. As a result, these children grow up facing obstacles to their and their families' ability to ensure their life, survival and development and with uncertainty as to whether they will ever become Kenyan citizens. The Children's Committee declared the case admissible before it after a review of the inordinate delay in the adjudication of the complainants' case before Kenyan courts.

On the merits, the Children's Committee affirmed that Kenyan Nubian children had the right to a nationality under article 6 of the African Children's Charter. According to the Committee, state parties have an obligation under the Charter to make sure that all children are registered immediately after birth. The obligation is not only limited to passing laws (and policies), but also extends to addressing all *de facto* limitations and obstacles to birth registration.²⁴ The Committee held that Kenya's citizenship confirmation procedures, which make it difficult for persons of Nubian descent to register the birth of their children and fail to take into account the historical official failure to provide valid identity documents to Kenyans of Nubian descent, unlawfully discriminate against the affected children in violation of article 3 of the African Children's Charter.²⁵ According to the Committee, 'being stateless as a child is generally antithesis to the best interests of the child'.²⁶ Among other recommendations, the Committee urged Kenya to take all necessary legislative, administrative and other measures in order to ensure that children of Nubian decent, that are otherwise stateless, can acquire a Kenyan nationality and proof of such a nationality at birth. It also recommended that the government of Kenya adopt a short, medium and long-term plan, including legislative, administrative and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, of affected children of Nubian descent, preferably in consultation with the affected beneficiary communities.

²³ In its decision, the Committee cites the report, Kenya National Commission on Human Rights (2007) *An identity crisis? A study on the issuance of national identity cards*, Nairobi, <http://www.knchr.org/dmdocuments/Final%20IDsReport.pdf> (accessed 23 August 2011). This report identified and recorded practices indicating discrimination against certain populations in Kenya, including persons of Nubian descent, in the grant of birth registrations and other official identity documents.

²⁴ Nubian children's case (n 5 above) para 40.

²⁵ Nubian children's case (n 5 above) para 57.

²⁶ Nubian children's case (n 5 above) para 46.

4.3 The right to life, survival and development

It is understood that this right goes beyond the protection of children's lives and also relates to life expectancy, child mortality, immunisation, malnutrition, preventable diseases and other related issues.²⁷ As the Africa Child Policy Forum explains:²⁸

The term 'survival' covers a child's right to life and the right to meet the needs that are the most basic in a child's existence. These needs include adequate standard of living, shelter, nutrition, and access to medical services. Amongst other things, states are urged to take all possible measures to improve neo-natal care for mothers and babies, reduce infant mortality, and improve conditions that promote the wellbeing of children. The survival and the development of a child therefore depend on the health conditions and the socio-economic and cultural environment in which the child grows. Harmful traditional practices such as infanticide greatly increase child mortality rates. Two other rights are inextricably tied with the implementation of the right to survival and development, namely, the right to health and the right to education.

Section 4(1) of the Children's Act explicitly provides for the child's right to life, survival and development. The inclusion of a children's rights clause, which explicitly provides for children's socio-economic rights (article 53) and a general clause providing for enforceable socio-economic rights (article 43) in the Constitution, also ensures that this right is now part of Kenya's Constitution. As discussed further in section 10 of this article, poverty remains a major cause and consequence of children's rights violations in Kenya.

4.4 The right to participation, including respect for the views of the child

The Children's Act (section 4(4)) expressly provides for the right of children to have their views taken into account in matters affecting them. It is significant that the Act further specifies that this right is to be taken into account in light of the degree of the child's maturity. This consideration corresponds with the concept of children's evolving capacities under article 12 of CRC. Although not expressly provided for under the children's rights clause in the Constitution, this right is implied as part of the constitutionally-guaranteed rights of children. Such a reading is based on article 52(2) of the Constitution, which provides that the specific provisions which elaborate certain rights in relation to certain groups of persons (including the children's rights clause), 'shall not be construed as limiting or qualifying' any of the

27 The African Child Policy Forum *In the best interests of the child: Harmonising laws in Eastern and Southern Africa* (2007) 36.

28 See The African Child Policy Forum *In the best interests of the child: Harmonising laws on children in West and Central Africa* (2011) 36, http://www.africanchildinfo.net/site/index.php?option=com_sobi2&sobi2Task=sobi2Details&sobi2Id=1068&Itemid=59&lang=en (accessed 3 April 2012).

general rights that are part of the Bill of Rights. These rights include the right to freedom of expression under article 33 of the Constitution.

In practice, there are examples of official initiatives to encourage greater children's participation. For example, the government has on many occasions recognised civil society-led initiatives, such as the establishment of children's clubs and an informal children-led children's parliament which, from time to time, deliberates on issues and makes recommendations for required government interventions on issues affecting children.²⁹ Another example of a child participation initiative led by civil society was the participation of groups of children in giving opinions to influence the child law reform process that led to the enactment of the Children's Act of 2001 and children's participation in the collection and discussion of data, leading to the compilation of Kenya's first and second periodic state reports to the UN Committee on the Rights of the Child.³⁰ Beyond these examples, however, children's rights to participation require much more profound changes. Prevailing socio-cultural and traditional attitudes still inhibit the full consideration of children's views in the private or family and public settings. The UN Committee has called on the government to³¹

promote, facilitate and implement, within the family, schools, the community, in institutions as well as in judicial and administrative procedures, the principle of respect for the views of children and their participation in all matters affecting them ...

5 Significance of the inclusion of children's rights in the Constitution

5.1 Transformative potential of the provisions, particularly in relation to socio-economic rights

The inclusion of human rights norms in the Constitution, particularly article 43 which provides for a number of socio-economic rights, offers a blueprint for the betterment of the plight and welfare of Kenyan society. This includes children who are further entitled under articles 53(1)(a) and (c) to the right to basic and compulsory education, basic nutrition, shelter and health care. Article 21(3) provides for the obligation of 'all state organs and public officers' to address the needs of 'vulnerable groups within society ... including children'.

²⁹ Government of Kenya (2005) *Kenya second periodic state report to the UN Committee on the Rights of the Child*, CRC/C/KEN/2 paras 162-164.

³⁰ Save the Children (Sweden) 'Children's rights in Kenya – An analysis based on the CRC Reports' (2006) <http://ecaf.savethechildren.se/Documents/ECAF%20docs/Children's%20Rights%20in%20Kenya.pdf> (accessed 3 April 2012).

³¹ Concluding observations on Kenya (n 21 above) para 29.

The Constitution provides for a number of general principles in relation to the interpretation of rights, including children's rights. Article 24 provides for the limitations clause requiring any limitation to any right under the Bill of Rights to be 'reasonable and justifiable'. Article 20 provides that the interpretation of the meaning and scope of human rights shall be with respect to the promotion of values such as those that underpin an open and democratic society and based on human dignity, equality, equity and freedom. Article 21(2) provides that the state shall take legislative, policy and other measures to ensure the progressive realisation of socio-economic rights provided for under article 43 of the Constitution. Article 20(5) provides that the state bears the burden of proving that it lacks resources to implement socio-economic rights, but calls on the state to ensure that the process of allocation of resources is done in light of 'prevailing circumstances ... including the vulnerability of particular groups and individuals', which under article 21(3) explicitly includes children.

It is instructive to note that the qualifications regarding the progressive nature of state obligations and availability of resources in relation to socio-economic rights under article 43 of the Constitution are not made with regard to children's rights under article 53, including the right to free and compulsory basic education and children's rights to nutrition, shelter and health care. The implication is therefore that the legal obligations regarding children's socio-economic rights are of an immediate nature. Hence, in instances where the state is primarily obliged to provide for these rights, the state cannot claim that such an obligation is progressive/incremental over time and/or is subject to the availability of resources. Examples include children without parental care or other primary care and who may be placed in alternative care places or children without such care at all.

Writing with reference to the comparative South African example, one children's rights expert is of the opinion that³²

providing for justiciable socio-economic rights at a constitutional level ... and singling out children as beneficiaries can be highlighted for the potential it has to ensure that resource allocation for the fulfilment of

³² J Sloth-Nielsen 'Domestication of children's rights in national legal systems in the African context: Progress and prospects' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 57 61. Sloth-Nielsen further discusses the South African High Court's 2006 decision in the case *Centre for Child Law & Others v MEC for Education & Others Case 19559/06* (30 June 2006), which dealt with the nature of the state obligation towards children placed by a court in alternative care hostels. The hostels in which the children were hosted were, however, in a poor state, exposing children to inhabitable conditions and environmental and health hazards as a result of exposure to freezing conditions. The Court interpreted the lack of internal limitations in sec 28 of the South African Constitution 1996 to decide that, while children's socio-economic rights were subject to reasonable and proportional limitations to which all human rights under the Constitution were subject, these rights were 'unqualified and immediate'. Hence, the absence of internal limitations made children's socio-economic rights not subject to the

children's rights is prioritised, as well as for the fashioning of creative (legal) remedies ...

5.2 Entrenchment of the children's rights regime

The children's rights regime under the Children's Act, 2001, ran the risk of redundancy in the event of repeal or amendments to the Act. Hence, in the period before the 2010 Constitution, the children's rights guarantees under the Children's Act stood on tenuous legal ground. They could be de-legalised through a simple majority vote in parliament – the process of amending or repealing ordinary legislation under Kenyan law. However, the provisions of the Constitution now entrench the Bill of Rights providing for a two-thirds majority vote in both sets of parliament (upper and/or lower houses) in addition to a majority vote in a public referendum before any amendment(s).³³

Despite the global popularity of the concept of children's rights, genuine official commitment to the implementation of children's rights in practice cannot be taken as a given.³⁴ This is especially with regard to obligations related to government financial allocation for the realisation of children's rights or issues such as juvenile justice that may require governments to uphold children's rights in the context of socio-political climates where children's rights principles may easily be sacrificed in the face of perceived public pressure about other priorities or positions such as crime control.³⁵

Therefore, the specific inclusion of children's rights in the Kenyan Constitution offers a much-needed legal buffer against the potential danger of the repeal of or amendments to the Children's Act.

5.3 Addressing legal challenges to statutory provisions on child rights

The inclusion of children's rights norms in the Constitution ensures that guarantees of children's rights in ordinary legislation (including

availability of resources and legislative measures for their progressive realisation. The Court ordered the authorities to provide each of the children in this case with a sleeping bag, and to put in place proper access control and psychological support. This case is further discussed at <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/case-reviews/south-african-cases/high-court-cases/document.2009-05-29.2634707373/> (accessed 30 July 2011).

³³ Constitution of Kenya, 2010, ch 16, secs 255-257.

³⁴ See, generally, J Sloth-Nielsen 'The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' (1996) 4 *The International Journal of Children's Rights* 323 327-328.

³⁵ For a general discussion on possible tension between children's rights norms and public pressure relating to child/juvenile justice, see, generally, GO Odongo 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' unpublished LLD thesis, University of the Western Cape, 2006.

the Children's Act) are in line with the Constitution. This is important in the Kenyan context where the process of implementing the Children's Act in the last decade has consistently had to wrestle with the question whether the provisions of the Act can stand scrutiny in light of the absence of equivalent explicit provision for child rights norms under the old Constitution. A 2006 court decision of the Court of Appeal concerning the issue of pre- and on-trial detention of children and the High Court's judgment regarding parental responsibility reinforce this point. This is discussed in the section below.

6 Interpreting the provisions of the Children's Act in relation to parental care

The provisions of the Children's Act in Part III – sections 23-28 – provide for the concept of 'parental responsibility' in a way that affirms the primary duty of parents and guardians to ensure children's rights – including the provision for the basic needs of children. The role of the state is important but secondary in supporting primary care givers. The state assumes a primary role for children only where parental or alternative care is lacking.³⁶

In article 54(1)(e), the new Constitution provides for the child's right to parental care and protection, 'which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not'. This provision affirms the primary role of parents and is in tandem with the Children's Act in this regard. It, however, goes further than the relevant provisions of the Children's Act. This is by virtue of the express statement that the child's right to parental care is an equal responsibility of both parents irrespective of marital status. In contrast, the Children's Act – in particular sections 24 and 25 – places a particular emphasis on the marital status of parents providing, for children born outside marriage, for the mother's parental responsibility in the 'first instance'³⁷ and for a process by which the father applies to a court to 'acquire' parental responsibility under section 25(1).³⁸

The author has previously agreed with the criticism by Kenyan children's rights advocates that the provisions of the Act are patently

³⁶ This interpretation is implicit in sec 23(2) of the Act which clarifies what constitutes 'parental duties'.

³⁷ Sec 24(3)(a).

³⁸ The Children's Act provides in sec 25(1): 'Where a child's father and mother were not married at the time of his birth, the court may, on application of the father, order that he shall have parental responsibility for the child; or the father and mother may by agreement ('a parental responsibility agreement') provide for the father to have parental responsibility for the child.'

and inherently discriminatory.³⁹ In the case of *Rose Moraa (Suing through Next Friend) Josephine Kavinda and Another v Attorney-General*,⁴⁰ the High Court, sitting as a constitutional court of three judges, considered the possible discriminatory nature of sections 23 and 25(1) of the Children's Act. In a ruling delivered in December 2006, the Court adopted a very restrictive interpretation of the place of international law on Kenyan law. It proceeded to hold that the relevant provisions of the Children's Act did not lead to unfair discrimination. In the Court's view, the purpose of the differential treatment was justified as it was meant to place parental responsibility for children born outside marriage, in the first instance, on the mother of the child.⁴¹ In this regard, the Court was guided by the provision that paternal responsibility could further be 'acquired' by virtue of section 25(1) of the Children's Act, holding that 'the principle of equality and of non-discrimination does not mean that all distinctions between persons are illegal'.⁴²

In a series of cases since 2003, the Kenyan High Court has affirmed the relevance of scientific proof of paternity through DNA testing.⁴³ However, the net effect of the provisions of the Children's Act in relation to children born outside marriage and mothers of this category of children is one of unjustifiable discrimination. The court decision in the *Rose Moraa* case has the effect that the fathers of children born out of wedlock cannot be legally presumed to have parental responsibility in the first instance, even where such a presumption may be necessary in light of the rights of affected children, including the children's best interests. Fathers of this category of children have the discretion to disown their children or to acquire paternal responsibility.⁴⁴ On the other hand, women alleging paternity must prove the paternity beyond reasonable doubt where such paternity is contested by the child's alleged father.⁴⁵ This will often necessitate DNA testing. As discussed by the women's rights organisation FIDA-Kenya, however,

³⁹ GO Odongo 'Domesticating international children's rights norms: The Kenya case study' in S Lagoutte & N Svaneberg (eds) *Women and children's rights: African views* (2011) 61 83.

⁴⁰ High Court Civil Case 1351 of 2002, reported in [2006] eKLR (*Rose Moraa* case).

⁴¹ FIDA-Kenya (undated) 'Research on the implementation of gender-related laws' 20, <http://fidakenya.org/wp-content/uploads/2011/02/Analysis-of-gender-discriminatory-laws-in-kenya.pdf> (accessed 6 August 2011).

⁴² As above.

⁴³ See EZ Ongoya 'The emerging jurisprudence on the provisions of Act No 8 of 2001, Laws of Kenya – The Children's Act' (2007) 1 *Kenya Law Review* 214 221-224, http://78.136.28.31/klr/fileadmin/pdfdownloads/Elisha_Paper.pdf (accessed 5 August 2011).

⁴⁴ This is the import of sec 25 of the Act as upheld by the court decision. See 'Judges shield love fathers from cost of care: Little girl loses case over right to upkeep' *Saturday Nation* 2 December 2006.

⁴⁵ FIDA-Kenya (n 41 above) 19.

the required DNA tests are likely to be 'expensive and out of the reach of many women'.⁴⁶

The explicit provision in the Constitution – article 54(1)(e) cited above – which provides for the child's right to parental care stated as the 'equal responsibility' of both parents, now provides a basis for looking into a possible legal review of sections 23 and 25 of the Children's Act. The author is of the view that the Court's ruling maintaining the legality of sections 23 to 25 in so far as the discrimination against children born outside marriage is concerned, cannot stand legal scrutiny in light of the provisions of the Constitution. The Constitution also provides for an expanded role of international treaties to which Kenya is party.⁴⁷ This would require a consideration of the discriminative nature of the provisions of the Children's Act in the context of children's rights under CRC, the African Children's Charter and women's rights under the UN Convention on the Elimination of Discrimination against Women. 'Discrimination' under these treaties is defined more broadly than was hitherto defined under section 82 of Kenya's applicable Constitution at the time (on the basis of which the High Court's decision was based).⁴⁸

In cases regarding children born within a marriage or cohabitation, where the father is presumed to have accepted *de facto* parental responsibility as envisaged by section 25(2) of the Children's Act,⁴⁹ courts have, in contrast, consistently upheld children's rights to parental care taking into account the child's best interests. A recent

46 As above.

47 Eg, art 2(5) of the Constitution provides that 'the general rules of international law shall form part of the laws of Kenya'.

48 In the *Rose Mora* case (n 40 above), the court adopted the long-held strict interpretation by courts of Kenya's dualist legal approach to treaties holding that the direct provisions of a treaty, including CRC and CEDAW (and the relevant treaty interpretation as regards the right to non-discrimination), requires a corresponding domesticating legislation/statutory provisions in order to apply as Kenyan law. Sec 82(4) of the old Constitution permitted discrimination against women in marriage, inheritance, adoption and other matters of personal law under customary law and was widely criticised for its legalisation of gender-based discrimination contrary to the right to equality. It inherently stood in conflict with a number of other laws, including the Children's Act 2001, which provides for, among others, the best interests of the child principle. Because of the doctrine of the supremacy of the Constitution (in art 3 of the previous Constitution, Constitution of Kenya 1969, as subsequently amended), the Court in the *Rose Mora* case opined that, in the event of a conflict, the provisions of the Constitution were superior to those of the Children's Act.

49 Sec 25(2) provides: 'Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.'

example is a December 2010 decision in the case *SB v AAL*.⁵⁰ This case involved issues of parental responsibility, custody, maintenance and child support in the context of family separation. In its decision, the High Court was unequivocal that the father had acquired parental responsibility due to his cohabitation with the children's mother and his provision of material and other support for the children's care.⁵¹ In such a context, the Court was of the view that 'neither the father nor the mother shall have a superior right or claim against the other in exercise of parental responsibility'.⁵²

7 Juvenile justice

The obligations of states under CRC (articles 37 and 40) and the African Children's Charter (article 17) read together with the overarching rights of the child, such as the best interests of the child, have the effect that states must ensure reform of the regular criminal justice system in dealing with children in conflict with the law. This necessitates a child-specific justice system. The underpinning principle for a child-specific justice system is based on the rationale that child offenders differ from adult offenders due to reasons of childhood, evolving capacities and vulnerability. In addition, they are more amenable to change than their adult counterparts. As a result, CRC introduces 'reintegration' as the aim of a juvenile justice system.

Part XIII of the Children's Act provides for the rights applicable to ensure due process for alleged child offenders and an array of alternative sentences which a court has at its disposal to deal with a child found by a court to have committed a crime.⁵³ It prohibits the use of the death penalty, imprisonment and corporal punishment of children⁵⁴ in line with the provisions of CRC and the African Children's Charter.⁵⁵ These provisions significantly advance Kenya's compliance

⁵⁰ Civil Appeal 178 of 2000 (In the High Court at Mombasa), reported in [2010] *eKLR*.

⁵¹ As above.

⁵² As above.

⁵³ Secs 186 & 191 respectively.

⁵⁴ The Act goes further than CRC (art 37) and the African Children's Charter (art 17), both of which outlaw the use of life imprisonment and not all forms of imprisonment as the Act does.

⁵⁵ There are a number of examples between 2002 and 2007 where courts have proceeded to impose (contrary to the explicit prohibition) the death penalty and prison sentences on child offenders for capital and other offences. Two examples illustrate this point. In the case *Peter N Lugulai v Republic*, Nakuru HC Criminal Appeal 363 of 2002 (unreported), discussed in Ongoya (n 43 above) 225, a magistrate's court sentenced a 16 year-old offender to death upon a finding of guilt in relation to the capital offence of robbery with violence. On appeal, the High Court overturned the conviction of the child on the basis of a lack of incriminating evidence. In relation to the death penalty, the Court stated that the Children's

with its obligations under CRC and the African Children's Charter as regards juvenile justice.

However, there are concerns that the Act fails to fully comply with Kenya's legal obligations in relation to juvenile justice. On two successive occasions – ten and four years ago – the UN Committee on the Rights of the Child recommended that Kenya should raise its minimum age of criminal responsibility – the age below which children are legally presumed not to be capable of committing crimes.⁵⁶ In 2007 the Committee urged Kenya to raise the age from the current age of eight years to 12 years and consider increasing it.⁵⁷ However, to date, the age of criminal responsibility remains eight – a clear violation of CRC and the African Children's Charter.⁵⁸

A significant limitation in the Children's Act, 2001 remains unaddressed to date. As already pointed out, a trial court has an array of alternative sentences/disposition measures to resort to upon finding a child guilty. However, the Act does not explicitly recognise the possibility of a formal referral of children away from criminal justice (diversion) processes before trial. The limited scope for diversion under the Act does not comply with the general spirit of CRC.⁵⁹

In a number of court cases since 2003, the Kenyan High Court has upheld the provisions of the Act and the Child Offender Rules – made under schedule 5 of the Children's Act. These provisions relate to the process of expediting cases involving child offenders, including by setting time limits for these trials and the pre-trial detention of

Act (sec 190(2)) was explicit in its inapplicability to children even in the event of a finding of guilty. The other example is the case *CKL v Republic*, Kericho High Court Criminal Appeal 104 of 2004 (unreported), discussed in Ongoya (n 43 above) 225. In this case, a child offender who was 17 years old at the time of committing two offences of arson and assault had been sentenced by a lower court to serve concurrent prison sentences of 18 months and three years, respectively, for the offences. On appeal, the High Court declared that the custodial sentences were illegal as sec 191 of the Children's Act prohibited the imposition of the sentence of imprisonment on child offenders.

56 Concluding observations on Kenya (n 21 above) para 68; UN Committee on the Rights of the Child 'Concluding Observations on Kenya's initial report', CRC/C/15/Add 160, 7 November 2001, para 22.

57 Concluding observations on Kenya (n 21 above) para 68(a).

58 Although CRC and the African Children's Charter do not specify such an age explicitly, the UN Committee on the Rights of the Child has recommended the age of 12 as the minimum age states should set in this regard. See UN Committee on the Rights of the Child, General Comment 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007 paras 32-33.

59 Art 40(3) and the UN Beijing Rules on the Administration of Juvenile Justice (Rule 11) which encourage diversion at all stages of the criminal justice procedure.

children.⁶⁰ In a second set of decisions, the High Court has ruled that the Act and Rules made under it do not have the effect of imposing time limits within which to 'complete trials' *per se*, but provide a basis for ensuring an expeditious handling of criminal cases involving alleged child offenders.⁶¹ Still, the common effect of both sets of decisions has been to implement the principle of detention as a last resort and for the shortest period of time for children.⁶²

A 2006 court decision put a halt to this progressive trend of court decisions. The case is discussed in the next sub-section below.

7.1 The case of *Kazungu Mkunzo and Another v Republic*⁶³

Rule 12 of the Child Offender Rules, which are part of subsidiary legislation under schedule 5 of the Children's Act, provides for time limits within which a case involving a child must be completed. The rule also makes provision for the dismissal of any cases (involving children) that are not completed within three months after the child's taking of plea (except for capital or serious offences which are to be

60 Eg, in *R v SAO (a minor)* [2004] eKLR, in which the High Court enforced the provisions on time limits by ordering the release on bail, pending trial, of a 13 year-old girl charged with murder. The Court cited the inordinate delay at the start of the trial in applying the provisions of the Child Offender Rules. In *Victor Lumbasi v Republic*, Bungoma High Court Criminal Case 57 of 2006 (unreported), the High Court held that, irrespective of the nature or seriousness of the criminal charge, including the capital offence of murder, unless there are militating circumstances, bail should ordinarily be granted to an alleged child offender. The Court also held that where a child is not released on bail, the Court may make an order for his or her detention in a children's remand home until the case is heard and determined which in any event must be within 12 months from the date of plea. In *Republic v Wambua Musyoka Machakos* High Court Criminal Case 24 of 200 (unreported), the High Court ordered the immediate release on bail of a suspected offender after an eight-month duration of the trial on the basis that the Child Offender Rules under the Act set a 12-month time limit within which to complete criminal trials involving alleged child offenders.

61 Eg, in *Republic v Matano Katana Mombasa* High Court Criminal Case 33 of 2004 (unreported) and *Republic v ST (a child)*, Nakuru High Court Criminal Case 144 of 2003 (unreported). In both cases, the High Court decisions interpreted the purpose of the explicit wording of the Child Offender Rules (Rule 12) which set a time limit of three months for the trial of children for non-capital offences and one year for capital offences to be a safeguard to prevent delays in the completion of criminal cases involving alleged child offenders. According to the Court's decisions, the Rules provided trial courts jurisdiction to grant bail pending the hearing and disposal of cases against children, especially where there was a delay. The Court was of the view that, despite the prescriptive nature of the Rules, which set a time frame within which to complete the trial process, the Rules did not have the effect that cases regarding children accused of committing offences would have to be halted based on these time limits.

62 As provided for under CRC (art 40) and the African Children's Charter (art 17) and in the subsidiary legislation – the Child Offender Rules promulgated by the Minister in charge under the Kenyan Children's Act.

63 Court of Appeal, Criminal Appeal 239 of 2004, [2006] eKLR http://www.kenyalaw.org/family/all_cases.php?pageNum_Recordset1=1&totalRows_Recordset1=111 (accessed 23 April 2012).

dismissed after 12 months from the date of plea).⁶⁴ This particular rule was designed to further children's rights, particularly article 37(b) of CRC which requires that detention of children should be used as a last resort and *for the shortest period of time*.

In this decision dated July 2006, Kenya's then highest court, the Court of Appeal, held that Rule 12 was unconstitutional and violated the Children's Act itself. The Court reasoned that the rule purported to set time limits within which to complete the criminal trial of alleged child offenders in a context when Kenya's Constitution, applicable at the time, and the Children's Act did not make corresponding express provisions setting time limits on the completion of trials – involving children or adults. According to the Court, the setting of such time limits did not comply with section 186 of the Children's Act which provides that such trials must be determined 'without delay', and section 77 of the then applicable Kenyan Constitution which provided for the right to a fair trial for all persons, including the right to be tried 'within a reasonable time'. The Court reiterated that section 77 of the previous Constitution did not expressly specify time limits for completing criminal trials.

The import of the Kenyan Court of Appeal's judgment is that for this rule to have stood legal scrutiny, it should have been passed into law as part of the Act and not subsidiary legislation to the Act. Also, the legality of such a rule would have had to involve a constitutional amendment to the general right to a fair trial as was provided in section 77 of the applicable Constitution.

As with the High Court's decision regarding section 25 of the Children's Act on parental responsibility,⁶⁵ the Court adopted a view by which the interpretation of the provisions of an international treaty has no relevance at all to the subject issue that was in this case drawn from the provisions of a treaty to which Kenya was a party. The provisions of the new Constitution, which explicitly include the principle of detention as a last resort and for the shortest period of time⁶⁶ and an expanded role of international treaties to which Kenya is party, would necessitate a different court interpretation in favour of the rules prescribing time limits for the trial of children and restrictions to the detention of child offenders. Still, in relation to the Children's Act, the government needs to ensure the inclusion, in the substantive provisions of the Act, the Child Offender Rules, including provisions regarding time limits within which criminal cases involving children must be completed. This would ensure legal consistency between

⁶⁴ Children's Act, Child Offender Rules, Rules 12(2) & (4).

⁶⁵ Discussed in sec 6 above.

⁶⁶ Art 53(1)(f) provides for a child the right 'not to be detained, except as a measure of last resort, and when detained, to be held (i) for the shortest appropriate period of time'.

the provisions of the Constitution, the Act and the Rules promulgated under it.

Further, the discrete aspects of child justice require considerable detail necessitating separate legislation. The 2010 proposal for a draft Child Justice Bill is therefore a step in the right direction. It is instructive that the Bill seeks to make statutory provision for time limits in relation to trials involving child offenders by incorporating the time limits in the Child Offender Rules under the Children's Act into the main body of the draft Child Justice Bill.⁶⁷

8 Advancing the protection of children from corporal punishment⁶⁸

The high prevalence of corporal punishment in Kenyan homes and schools, with the attendant physical, psychological and other forms of harm to children, has been documented previously.⁶⁹ In July 2007, the UN Committee on the Rights of the Child noted, in relation to Kenya, that⁷⁰

[it] continues to be concerned at corporal punishment in the home, in the penal system, in alternative care settings, as well as in employment settings. The Committee is also concerned at the continued use of corporal punishment in practice by certain schools and the lack of measures to enforce the prohibition of this practice ...

The Committee recommended that Kenya introduces legislation which explicitly abolishes corporal punishment in all settings – 'in the home and in all public and private alternative care and employment settings'.⁷¹

⁶⁷ Draft Child Justice Bill 2010, art 59.

⁶⁸ In General Comment 8: The right of the child to protection from corporal punishment and other cruel and degrading forms of punishment, CRC/C/GC/8, 2 March 2007, para 11, the UN Committee on the Rights of the Child defined 'corporal' or 'physical' punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, eg, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, caning, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion.

⁶⁹ See J Stavropoulos *Violence against girls in Africa: A retrospective survey in Ethiopia, Kenya and Uganda* (2006); The African Child Policy Forum; ANNPCAN Kenya *From physical punishment to positive discipline: Alternatives to physical/corporal punishment in Kenya* (2005). An earlier study is the 1999 study by Human Rights Watch 'Spare the child: Corporal punishment in Kenyan schools' 1 September 1999, <http://www.unhcr.org/refworld/docid/45d1adbc2.html> (accessed 30 April 2012).

⁷⁰ Concluding Observations on Kenya (n 21 above) para 34.

⁷¹ Concluding Observations on Kenya (n 21 above) para 35.

Under CRC, 'children's physical integrity is absolute: Any corporal punishment as a means of discipline, whether used in schools or the homes and whether considered mild, moderate or severe, is prohibited'.⁷² This absolute prohibition extends to the use of corporal punishment in the justice system. While there is wide global acceptance of the prohibition of corporal punishment in the criminal justice system, the legal sanctioning of the use of corporal punishment – smacking, caning, whipping and other forms – in schools and homes, remains prevalent in many African countries.

In Kenya, the Children's Act, 2001 explicitly prohibits the imposition of corporal punishment on child offenders.⁷³ A subsequent 2003 amendment to Kenya's Penal Code abolished the use of corporal punishment in the criminal justice system, whether for children or adults.⁷⁴ This law did not outlaw the use of corporal punishment in the context of prisons under which the Prisons Act still permits the use of corporal punishment, and children held under institutional care in respect of which the Borstal Institutions Act retains the applicability of the penalty as a form of discipline.⁷⁵

Subsidiary legislation promulgated by the Education Minister in 2001 specifically provides that corporal punishment should not be used as a form of school discipline.⁷⁶ It appears, though, that the Children's Act leaves a window for the use of corporal punishment by parents and others (including school authorities). Section 127 of the Act retains the right of parents and others to 'administer reasonable punishment'.

Kenya's new Constitution now provides for the absolute legal protection of children from all forms of corporal punishment in all settings – including in homes and schools. Article 29 of the Constitution provides:

⁷² L Kurki 'International standards for sentencing and punishment' in M Tonry & S Frase (eds) *Sentencing and sanctions in Western countries* (2001) 339-340, interpreting the views of the UN Committee on the Rights of the Child in relation to arts 19, 28(2) & 37 of CRC (prohibiting all forms of abuse of children by parents, any form of cruel, inhuman and degrading treatment and punishment and obliging states to ensure all forms of school discipline conforms to human dignity). This interpretation has recently been reiterated by the Committee; see UN Committee on the Rights of the Child, General Comment 13: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011 para 17.

⁷³ Sec 191(2). Sec 18(1) on the prohibition of torture, cruel and inhuman treatment is also relevant for the prohibition of corporal punishment.

⁷⁴ Criminal Law (Amendment) Act 5 of 2003.

⁷⁵ Sec 55 of the Prisons Act, ch 90 Laws of Kenya allows for the imposition of corporal punishment on any male inmates (except inmates held under sentence of death or pursuant to a civil penalty). Sec 36 of the Borstal Institutions Act, ch 92 Laws of Kenya allows for the imposition of corporal punishment on male inmates, including boys held within Borstal institutions.

⁷⁶ Legal Notice 56 of 2001 – The Education (School Discipline) Regulations 2001.

Every person has the right to freedom and security of the person, which includes the right not to be –

....

- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

Article 53(1)(d) further makes provision for every child's right 'to be protected from all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour'. It is instructive that the Bill of Rights, under which this provision falls, is stated to apply to all and binds all state organs.⁷⁷ By virtue of the supremacy of the Constitution,⁷⁸ it is submitted that the provisions of the Constitution supersede the statutory and other provisions – including section 127 of the Children's Act – which retain the applicability of forms of corporal punishment. The relevant provisions of the Children's Act and other laws, such as the Prisons Act and the Borstal Institutions Act and the relevant rules made under these laws, should be repealed to ensure compliance with the Constitution.

The constitutional prohibition of all forms of corporal punishment is progressive. However, achieving substantial and total compliance in the use of alternative forms of discipline for children requires the enforcement of the requisite criminal law⁷⁹ in addition to extra-legal measures. To this end, the recommendation made by the UN Committee on the Rights of the Child to Kenya in 2007 remains relevant. The Committee urged Kenya to ensure, *inter alia*, 'public education and awareness-raising campaigns on children's rights to protection from all forms of violence and promotion of alternative, participatory, non-violent forms of discipline'.⁸⁰ To date, this process is yet to be taken up as a key aspect of child protection by the relevant government agencies.

⁷⁷ Constitution of Kenya, 2010, art 20(1).

⁷⁸ Art 2(4) of the Constitution provides that '[a]ny law, including customary law, that is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'.

⁷⁹ In the absence of corresponding provisions in Kenya's criminal law, the prohibition of all forms of corporal punishment in all settings requires the legal enactment of the necessary penal proscription in order for there to be a legal basis for criminal prosecution of individuals and other actors who may violate this prohibition.

⁸⁰ Concluding Observations on Kenya (n 21 above) para 35.

9 Official commitment to the realisation of children's socio-economic rights: The contrasting examples of education and health

9.1 Children's rights to free and compulsory education

Under article 53 of the Constitution and section 7 of the Children's Act, children's rights to primary/basic education is stated to be 'free and compulsory'. Section 7 of the Children's Act specifically provides that basic education shall be compulsory 'in accordance with article 28 of the CRC'. In practice, the compulsory nature of basic education, as envisaged under Kenyan law, depends not only on the duty of parents and children, on the one hand, to ensure school attendance, but also the duty of government to ensure that such education is indeed available and 'free', on the other. The realisation of this right is currently being done under the auspices of the government's free primary education programme discussed in this section.

9.2 Free primary education programme

In 2003 the Kenyan government made free primary education (FPE) one of its key official programmes. The programme initially involved the scrapping of school tuition fees in all 18 000 public primary schools in 2003. This policy has been retained in the 20 000 or so public schools.⁸¹ In addition, the programme introduced financial disbursements, based on student population, to cover the purchase of school text books. The policy of government allocation of tuition fees and the provision of text books remains. However, in practice the majority of public schools impose some forms of non-tuition and other levies on parents.

Writing in 2006, I agreed with the widely-held view at the time that the FPE programme was the most recognisable achievement of the government.⁸² Over eight years since the initiation of the programme there are examples of considerable progress through the programme. The major success of the FPE programme remains the increased access to primary schooling, especially to children who would previously not have been able to access such schooling at all. There were a total of 5,9 million children in primary schools at the end of 2002 – before the programme's inception in early 2003 – with the number rising

⁸¹ Recent government documents such as the government of Kenya *Kenya economic survey 2011 – Highlights* (2011) 38 (on file with author) indicate the total number of primary schools in the country as of 2010 to be 27 489. Of these, there were about 20 000 public (state) primary schools in the country as of July 2011 – an increase of about 11% since 2003. See T Muindi 'Teacher truancy short-changes pupils' *The Daily Nation* 20 July 2011 68.

⁸² See Odongo (n 39 above) 72.

to 6,8 million at the end of 2003 and 7,6 million in March 2006.⁸³ The government's Economic Survey of 2011 reports that as of the year 2009, there were 8,83 million children enrolled in primary schools and 9,38 million by the end of 2010.⁸⁴

The huge increase in the number of children enrolled in schools has been mainly attributed to the introduction of the FPE programme. Most of the beneficiary children are Kenya's vulnerable and poorest. A 2009 study attributes the increase in numbers to the halving of household educational expenditure when sending children to state schools following the introduction of the programme.⁸⁵

However, a few lingering concerns remain. The impressive increase in enrolment rates has not been matched by a concomitant increase in the quality of education in Kenya's public primary schools where the FPE policy is being implemented. In the period since the introduction of the FPE programme, the number of children in private schools has nearly tripled. During this period, school results and overall enrolment rates in many of Kenya's state (public) primary schools have fallen compared to earlier years.⁸⁶ In the rural areas, practices such as early marriages and widespread child labour remain formidable obstacles to schooling.⁸⁷ The factors leading to school drop-outs, particularly in relation to harmful cultural practices, affect girls disproportionately more than boys.

9.3 Constraints to the realisation of children's rights to health

According to the United Nations Population Fund (UNFPA), as of June 2011 up to 86 out of 1 000 new-born children in Kenya are likely to die before reaching the age of five.⁸⁸ The factors affecting households' health status in Kenya include low income *per capita*, low literacy levels, poor government spending in the health sector resulting in restricted immunisation coverage and inadequate household access to doctors by households and the high HIV/AIDS prevalence rates. These and other poor indicators, in effect, infer that the right to 'the highest

83 *Kenya second periodic state report* (n 29 above) para 401.

84 Government of Kenya (n 81 above) 38.

85 T Bold *et al* 'Free primary education in Kenya: Enrolment, achievement and local accountability' (2009) 10, <http://www.economics.ox.ac.uk/Members/tessa.bold/work/Kenya%20CSAE%20Conf%20Mar09.pdf> (accessed 10 August 2011).

86 See, generally, 'Improving institutions for pro-poor growth' University of Oxford 'Lessons from Kenya's introduction of free primary education' (2009) <http://www.iig.ox.ac.uk/output/briefingpapers/pdfs/iiG-briefingpaper-03-kenya-primary-education.pdf> (accessed 1 August 2011).

87 A July 2011 study by a Kenyan NGO cited by Muindi (n 81 above) found that student performance in public schools was poorest in arid and semi-arid rural Kenya and rural parts of Western Kenya.

88 See UNFPA 'State of the world's midwifery, 2011 – Kenya country situation' (2011), http://www.unfpa.org/sowmy/resources/docs/country_info/profile/en_Kenya_SoWMy_Profile.pdf (accessed 23 August 2011).

attainable standard of health which includes the right to health care services' under section 43 of the new Constitution and the right to health under section 9 of the Children's Act remain a pipe dream for many Kenyans and Kenyan children.

Government spending and complementary private sector support to the health sector are crucial for improved access to health care services by majority poor households. This would entail improved official budgetary allocation to public health. The government also needs to expand the household/child support programme discussed in the next section of the article in addition to examining how the user fees in the public health sector inhibit access to health care, especially by the majority poor family households.⁸⁹

10 Poverty, the lack of a social security system and orphan and vulnerable children

The majority of Kenyan children bear the brunt of living in conditions of poverty. Poverty is both a major cause and consequence of children's rights violations. Published in 2009, a joint government-UNICEF study summarises the Kenyan situation as follows:⁹⁰

Forty-six years after independence, Kenya still faces the challenges of inequality and disparity. The poverty gap and socio-economic disparities continue to manifest in the lives of children, who in large numbers, are engaged in hazardous and exploitative forms of child labour to cope with the grinding economic and social hardships, mainly in the informal sector due to the socio-economic circumstances of their families and guardians. As is the case in many developing countries, these children, mainly from the socially-deprived segments of the country, are readily recruited by traffickers into the modern slavery of the sex trade, domestic labour and are often victims of the worst forms of abuse, denied their rights to care, education, and health ...

In an article regarding the South African Children's Act, Sloth-Nielsen correctly argues in relation to a much-needed transformative role of the law in this regard:⁹¹

89 Kenya is yet to abolish the imposition of user fees in public health institutions. The applicable government policy still requires the standard payment of Ksh 10 (US \$0,08) to access the lowest health unit (dispensary) and Ksh 20 (US \$0,16) for access to health centres. For many low-income families, these standard payments are beyond their reach and often entail a balancing of expenditure between health care and other basic needs such as food.

90 Government of Kenya and UNICEF 2009 *Situational analysis of children, young people and women in Kenya: Securing Kenya's future in the hands of children and young people*, Nairobi: GoK/UNICEF (2009) 128.

91 J Sloth-Nielsen 'A developing dialogue – Children's rights, children's law and economics: Surveying experiences from Southern and Eastern African law reform processes' (2008) 12 *Electronic Journal of Comparative Law* 4.

The drafters of [the South African Act] intended that the statute would be of far greater reach than merely a regulatory framework elucidating rights, responsibilities and respective roles of parents, family members, communities and the state: In conception this new law was intended to be transformative of both social and economic relationships ...

At the end of the year 2004, the Kenyan government, with the assistance of donor and international agencies,⁹² introduced an experimental social security programme aimed partly at addressing the vulnerability of families and children to poverty. The programme involves the granting of limited forms of social cash transfers to targeted households. To qualify for the programme, the household has to be poor, has to contain orphans or vulnerable children – explicitly defined as persons under the age of 18 – and must not be receiving benefits in another programme, either in cash or kind.⁹³ With this focus, the programme has benefitted mainly caregivers with a primary responsibility for children orphaned and affected by the HIV/AIDS pandemic and living in poverty.

Between 2006 and 2010, each beneficiary household within selected districts across the country received a flat rate amount of Kshs 1 500 (US \$18) per month. From a small beneficiary base of 22 500 households in the 2007/2008 financial year, the programme is reported to have benefited 60 000 households in 2008/2009; 80 000 in 2009/2010 and a projected 100 000 households in 2010/2011. Overall, the programme is intended to reach up to 300 000 households caring for orphaned and vulnerable children by 2015.⁹⁴ Although noble, this initiative remains geographically and numerically limited in scope – still covering only a small portion of households caring for orphaned and vulnerable children. With a specific substantive focus, it does not address the need for child support for other categories of children such as those without access to adequate shelter, food and health care. Further, the scheme is not backed by explicit legal provisions and its implementation exclusively relies on political and donor goodwill.

The absence of a comprehensive state-funded child support programme in Kenya ensures that the children's rights guaranteed under the Children's Act and the new Constitution⁹⁵

⁹² These are mainly the World Bank, UNICEF, the Swedish International Development Co-operation Agency (SIDA) and the UK Department for International Development (DFID).

⁹³ JH Bryant 'Kenya's cash transfer programme: Protecting the health and human rights of orphans and vulnerable children' (2009) 11 *Health and Human Rights* <http://www.hhrjournal.org/index.php/hhr/article/viewArticle/174/259> (accessed 15 August 2011).

⁹⁴ As above.

⁹⁵ MN Wabwile 'Rights brought home? Human rights in Kenya's Children Act 2001' in A Bainhaim & B Rwezaura (eds) *The international survey of family law* (2005) 393 413.

remain paper rights and pipe dreams for the hundreds of thousands of doomed poor children in Kenya who are decimated daily by hunger, malnutrition, curable diseases, and material deprivation due to the grinding poverty situation in the country.

Over half of Kenya's near 40 million people are children. More than half of Kenyans live below the poverty line.⁹⁶ This implies that a significant population of Kenya's children – upwards of ten million – are in urgent need of child support.⁹⁷ As of 2009, up to 12 per cent of Kenya's children – some 1.8 million – were orphans.⁹⁸ The UNAIDS global statistics of 2010 indicate that as of 2009, an estimated 1,2 million Kenyan children had been orphaned by AIDS alone.⁹⁹

11 Enduring examples of child abuse

Despite the passing of new laws, including the Sexual Offences Act, 2006,¹⁰⁰ the Counter Trafficking in Persons Act, 2010¹⁰¹ and the Prohibition of Female Genital Mutilation Act, 2011,¹⁰² the various forms of child abuse sought to be criminalised with stiffer penalties still remain. Poor enforcement of existing laws and the entrenched nature of gender-based discrimination continue to ensure impunity for child sexual abuse. This is despite the marginal improvement in relation to accountability for sexual offences compared to the period before the enactment of the law on sexual offences.¹⁰³ Previous studies on trafficking in Kenya have noted the existence of cross-border and internal trafficking of children.¹⁰⁴ In 2006, up to 175 000 Kenyan children were reported to be victims of domestic, regional and international child trafficking for various forms of exploitation, including sexual exploitation, labour, domestic servitude, illegal

96 Kenya's Second Periodic Report (n 29 above) para 328 stated that at least 56% of Kenyans lived below the poverty line.

97 Bryant (n 93 above).

98 As above.

99 See UNAIDS *UNAIDS Report on the Global AIDS Pandemic*, <http://www.unaids.org/globalreport/> (accessed 10 August 2011). The report defines 'orphans' as children aged under 18 who have lost one or both parents to AIDS.

100 Act 3 of 2006, providing stiffer penalties for sexual offences and criminalising various forms of sexual offences against children and adults. The Act has been in legal effect since 21 July 2006.

101 Act 8 of 2010 providing for harsher penalties in relation to the trafficking in persons. The law has been in legal effect since 13 December 2010.

102 Act 32 of 2011 (n 9 above) which provides for harsher penalties for the offence of female genital mutilation/cutting.

103 See, generally, Federation of Women Lawyers in Kenya (FIDA-K) (2009) *Implementation of the Sexual Offences Act – A Research Report*.

104 See, generally, African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) *Report of the Conference on Child Trafficking, Nairobi*, 17 August 2006.

adoption, organ removal, street vending and agricultural labour.¹⁰⁵ While the prevalence rates of female genital mutilation have dropped among certain ethnic communities, in others they have virtually stagnated or even risen.¹⁰⁶ Amongst some ethnic groups, including the Borana, Kisii, Maasai, Kuria and Somali communities, the prevalence rate of genital cutting among girls remains over 90 per cent in some areas.¹⁰⁷ In addition, the ever-burgeoning numbers of children who live or fend for a living in the streets point to the failure of children's rights duty bearers, including families and the government, to ensure children's parental or alternative care.¹⁰⁸

Specific categories of children, such as children with disabilities, refugees and internally-displaced children and children from minority groups,¹⁰⁹ continue to suffer discrimination over and above the children's rights violations that they face. There also remain considerable gaps in enforcing the existing domestic legal provisions under the Children's Act and the Employment Act, 2007 regarding the protection of children from child labour. A nation-wide study on the issue found that about 600 000 children work and attend school and 1,3 million are out of school altogether, with 34 per cent of the children working in commercial agriculture and fisheries, 24 per cent in subsistence agriculture and fisheries, 18 per cent in domestic and related services, and 24 per cent in other sectors.¹¹⁰ Overall, the problem of child labour is a manifestation of the high incidence of poverty at household levels.¹¹¹ Ultimately, dealing with the problem will require measures to address the impact of poverty on the realisation of children's rights.

105 Government of Kenya and UNICEF (n 90 above) 137.

106 As above.

107 As above, citing Government of Kenya *Kenya Demographic and Health Survey 2008/9* (2009).

108 A joint 2009 government-UNICEF study estimated that there were 700 000 street children in Kenya. This study uses an expansive definition of street children to include children working in the streets; see Government of Kenya and UNICEF (n 90 above) 130.

109 In respect of discrimination faced by children from minority groups in relation to birth registration and the right to a nationality, see generally KNCHR (n 23 above).

110 PO Alila & JM Njoka 'Child labour, new and enduring forms from an African development policy perspective', cited in Government of Kenya and UNICEF (n 90 above) 140-141.

111 As above.

12 Concept of childhood under Kenyan law and practice

It is clear from the children's rights clause in the Constitution and the provisions of the Children's Act that the concept of children as bearers of rights is now firmly anchored in Kenyan law. Article 260 of the Constitution and section 2 of the Children's Act state that a 'child' is any person under the age of 18 years. This definition is a considerable advance in Kenyan law due to the fact that prior to the enactment of the Act, different definitions of a 'child' abound in law.¹¹² However, even with this legal definition there remain issues at a practical and legal level.

In practice it is clear that widespread cultural definitions of a child are prevalent, much to the detriment of children's rights. The widespread socio-cultural concept of childhood conflicts with the legal view of children as bearers of certain legal entitlements ('rights'). Hence, as discussed in relation to the right to free and compulsory education in an earlier section of this article, many children's access to education is still limited by virtue of negative cultural practices under which, among others, children are viewed as a vital source of labour.

In addition, inconsistencies remain between the legal reference of 18 as the age below which persons are considered children and the applicable and often discriminatory low legal minimum age limits. One key area relates to the age of marriage. In 2007, the UN Committee of the Rights of the Child noted the concern that different laws set the minimum age of marriage differently, in conflict and differently for boys and girls.¹¹³ There are current legislative proposals for the harmonisation of the different marriage law regimes (African, Christian, Muslim and Hindu marriage regimes) with reference to one co-ordinated marriage law – the Marriage Bill, 2007. Part of the proposed changes includes the legal provision for the age of 18 as the minimum age for marriage. However, the proposed law is yet to be considered by parliament. This leaves a window of opportunity for early marriage, especially by young girls.

Addressing the various inconsistent and discriminatory sets of legal minimum ages is vital to harmonising Kenyan law with existing treaty

¹¹² See P Kameri-Mbote 'Custody and the rights of children' in K Kibwana & L Mute (eds) *Law and the quest for gender equality in Kenya* (2000) 161-181. Different terms were used to refer to children within the legal system, including terms such as 'infant', 'young person', 'juvenile', 'minor', etc.

¹¹³ Concluding Observations on Kenya's Second Periodic Report (n 21 above) para 22. The Hindu Marriage and Divorce Act, ch 157 Laws of Kenya and the Marriage Act, ch 150 Laws of Kenya provide that the minimum age for marriage for a girl is 16 and the minimum age of marriage for a boy 18 (in relation to Hindu and Christian marriages). Customary law and Islamic law (applicable for personal matters under Kenyan law) allow for persons under the age of 18 (without necessarily setting minimum ages) to be married.

obligations. Further, the government must invest in a public education and sensitisation process aimed at reconciling the different prevailing cultural conceptions of children with the legal recognition of children as bearers of human rights if the concept of children's rights is to be part of practice within the family, societal and official settings.

13 Conclusion

The constitutionalisation of children's rights norms following the passing of a new Constitution serves to highlight the hitherto tenuous nature of legislating children's rights norms in an ordinary piece of legislation that is subject to political vagaries and whims. By entrenching children's rights, the new Constitution decisively deals with the previous incongruence between the Children's Act and Kenya's Constitution – a point emphasised by court decisions which have served to stymie the cause of children's rights. In some instances, such as the absolute protection of children from corporal punishment, the new Constitution further advances Kenya's compliance with international legal obligations.

The new Constitution provides for a transformative legal framework within which to realise children's rights, particularly with reference to the child's right to life, survival and development. Poverty stands out as a major cause and consequence of children's rights violations in Kenya. The guarantee of children's and families' socio-economic rights provides a key reference point within which to address the welfare of Kenyan children, specifically those living in poverty. However, it goes without saying that addressing the problem of poverty will invariably involve the formulation and implementation of requisite policies to provide flesh to the bare bones of the provisions of the Constitution. The pilot limited cash transfer grant programme, highlighted in this article, is a positive example in alleviating the plight of a select target group of children living within poor households. More generally, the FPE programme, although itself long overdue for reform, offers a powerful example for addressing the need for children's improved access to other essential services such as health.

The enactment in 2001 of the Children's Act was a significant development in the implementation of international child rights norms in Kenya. Indeed, the Act stands out as the first to domesticate Kenya's legal obligations under any human rights treaty. Almost a decade since the Act entered into legal force, the major lesson is that full compliance with international children's rights norms requires a continuous review of all laws, on the one hand, and administrative and other practical measures to ensure the realisation of children's rights, on the other.