



## UNIVERSITY OF CAPE TOWN

### THE BALANCE BETWEEN CHILD AUTONOMY AND PARENTAL AUTONOMY IN MALAWI; AN ANALYSIS OF THE CHILD CARE, PROTECTION AND JUSTICE ACT

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MKNLEO001

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## DECLARATION

I Leona Temwa Mkandawire, hereby declare that the work on which this thesis is based, is my original (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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Leona Temwa Mkandawire

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## **DEDICATION**

With love to Ekarhi Catherine Makina.

## **ABSTRACT**

For a long time children have been considered to be vulnerable persons, incapable of making rational decisions. As a result, decisions have been made for children by other people such as their parents or guardians. In most African societies, including Malawi, children remain largely voiceless and dependent on their parents who view their role mainly as being to protect children from their own actions and actions of other people. However, international law considers children as autonomous persons capable of making their own decisions. Thus, it requires states to recognise the autonomy a child although it also recognises that parents are free to raise children the way they want.

Both the CRC and the African Children's Charter recognise children as bearers of rights and guarantee their right to take part in decisions that affect them. These treaties also recognise the principles of the best interests of the child, non-discrimination, and the child's right to life, survival and development.

This thesis finds that while the best interests' principle has been domesticated under the Constitution, the other principles are not explicitly entrenched in the Constitution or under the Child Care, Protection and Justice Act. At best, they can be implied in other provisions of the Act. Overall, the Child Care, Protection and Justice Act leans towards enhancing the parental autonomy in child rearing and institutional protection of children rather than towards the emancipation of children in accordance with their evolving capacities.

## ACRONYMS

UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
CCPJA	Malawi Child Care, Protection and Justice Act

## Table of Contents

UNIVERSITY OF CAPE TOWN.....	1
<b>DECLARATION</b> .....	i
ACKNOWLEDGEMENTS .....	ii
<b>DEDICATION</b> .....	iii
<b>ABSTRACT</b> .....	iv
<b>ACRONYMS</b> .....	v
Chapter One.....	1
<b>INTRODUCTION</b> .....	1
<b>I. INTRODUCTION</b> .....	1
<b>II. STATEMENT OF THE PROBLEM</b> .....	2
<b>III. SIGNIFICANCE OF THE RESEARCH</b> .....	2
<b>IV. RESEARCH METHODOLOGY</b> .....	3
<b>V. CHAPTER OUTLINE</b> .....	3
Chapter Two.....	5
<b>CHILD RIGHTS THEORIES</b> .....	5
<b>I INTRODUCTION</b> .....	5
<b>II. JOHN EEKELAAR AND THE INTEREST THEORY</b> .....	5
<b>III. FIDUCIARY THEORY</b> .....	8
<b>IV. THE THEORY OF PATERNALISM</b> .....	11
<b>V. CONCLUSION</b> .....	16
Chapter Three.....	19
<b>INTERNATIONAL AND REGIONAL FRAMEWORK ON CHILDREN’S RIGHTS</b> .....	19
<b>I. INTRODUCTION</b> .....	19
<b>II. HISTORICAL BACKGROUND OF THE CHILD RIGHTS</b> .....	20
<b>III. THE CONVENTION ON THE RIGHTS OF THE CHILD</b> .....	24
<b>IV. UNDERLYING PRINCIPLES UNDER THE CONVENTION</b> .....	25
<b>A. Non-discrimination</b> .....	25
<b>B. The child’s best interests</b> .....	26
<b>C. Life, survival and development</b> .....	27
<b>D. The Right of the Child to be heard</b> .....	29
<b>V. CATEGORY OF RIGHTS: THE FOUR P’S</b> .....	31
<b>VI. PARENTAL RESPONSIBILITIES UNDER INTERNATIONAL LAW</b> .....	33
<b>VII. THE CONCEPT OF THE EVOLVING CAPACITIES OF THE CHILD</b> .....	33
<b>VIII. AFRICAN CHARTER ON THE RIGHTS AND THE WELFARE OF THE CHILD</b> ...	36

IX. CONCLUSION.....	37
Chapter Four.....	39
<b>CHILDREN’S AUTONOMY AND PARENTAL AUTONOMY UNDER MALAWIAN LEGISLATION.....</b>	<b>39</b>
I. INTRODUCTION.....	39
II. RECOGNITION OF CHILDREN’S RIGHTS IN MALAWI.....	40
III. IMPLEMENTATION OF INTERNATIONAL CHILD RIGHTS LAW IN MALAWI ....	40
A. Best interests .....	40
B. Respect to Children’s Participation and Evolving Capacities .....	42
IV. LEGAL RECOGNITION OF CHILD AUTONOMY IN MALAWI .....	43
A. The Constitution of Malawi.....	44
B. The Children and Young Person’s Act .....	46
C. The Malawi Child Care, Protection and Justice Act.....	46
A. Guardianship.....	50
B. Fosterage .....	50
C. Judicial proceedings.....	51
D. The right to legal representation.....	52
V. CONCLUSION.....	53
Chapter 5.....	55
<b>CONCLUSIONS AND RECOMMENDATIONS.....</b>	<b>55</b>
I. INTRODUCTION.....	55
II. SUMMARY OF FINDINGS .....	55
III. RECOMMENDATIONS.....	57
<b>BIBLIOGRAPHY .....</b>	<b>59</b>

## Chapter One

### INTRODUCTION

#### I. INTRODUCTION

The Malawi Child Care, Justice and Protection Act No. 22 of 2010 (the Act) came into operation on 1<sup>st</sup> October 2011. The Act is a successor to the Children and Young Persons Act Chapter 26:03. The Constitution of Malawi and the Act are the key legislative documents that provide for and protect children's rights in Malawi. The Act has been described as a progressive Act, one that will revolutionize the child justice system in Malawi.<sup>1</sup>

However, where international human rights law is concerned particularly children's rights, it remains debatable whether the Act strikes an appropriate balance between parental autonomy and the child's self-determination.

The debate on parental autonomy and a child's self-determination also known as child autonomy, is a never-ending conflict. It involves the question whether children should be left in control of decisions or issues that directly affect them on one hand or whether their parents, guardians or the state should make those decisions for them before attaining the age of majority.

Some see this question as being fundamentally about whether rights are important to children. By recognising children to be autonomous, one is fundamentally accepting that children are free and have human rights which they can exercise on their own. In this connection, Freeman has discussed the two arguments commonly made by those who object to giving rights to children. These arguments include the claim that the importance of rights and rights-language are exaggerated and that other values such as love and altruism can better serve children than rights.<sup>2</sup> However, as Freeman

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<sup>1</sup> Justice E.B Twea and W Manjolo 'Malawi: The Status of Child Protection and Justice' 15th Annual Family Law Conference – Cape Town South Africa, 15 – 16<sup>th</sup> March 2012.

<sup>2</sup> M Freeman 'Taking children's rights more seriously in P Alston et al (eds) Children, rights and the law(Oxford: Clarendon Press,1992) 52-71.

notes, respecting that children must have autonomy, is to say that a child as a person and a rights holder.<sup>3</sup> Rights enable the child to enforce his or her interests when they are violated and enable the child not to be regarded as a mere recipient of charity, favour or love.

That said, those that advocate for recognising the autonomy of the child understand that the exercise of that autonomy can have a deleterious impact on that child's life.<sup>4</sup> Unlimited autonomy can lead to decisions that are not practical, irrational, and hinder their survival and development, preventing them from enjoying other rights. This is why in child rights discourse the need to strike the right balance between child autonomy and parental autonomy is emphasised.

## **II. STATEMENT OF THE PROBLEM**

As noted above, the Child Care, Protection and Justice Act was adopted recently to consolidate the laws concerning children in Malawi. It is therefore important to ask whether the Act has appropriately addressed the balance between parental autonomy and child autonomy. Does the Act lean towards parental autonomy or does it promote and respect child autonomy sufficiently? Relatedly, are the provisions in line with international child rights law?

## **III. SIGNIFICANCE OF THE RESEARCH**

This study will create awareness to the citizenry on the existence of the international principles and standards on child rights law, especially the concepts of parental autonomy and child autonomy and how either should be exercised. This study will also enable the citizenry to understand child rights law which will support the efforts of the promotion and protection of child rights at the same time improving the mind-set towards the abilities of children.

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<sup>3</sup> Supra note 1 p 184.

<sup>4</sup> Ibid

#### **IV. RESEARCH METHODOLOGY**

This research will undertake a qualitative research methodology which will be limited to a desk research. In order to criticize this Act, I am expected to understand the development of the concept of childhood and autonomy both in law and philosophy. Therefore, this research will start with an examination of child rights theories particularly theories on autonomy as well as understanding international child rights law.

International law of the child comprises of the United Nations system and regional systems of human rights. Malawi is party to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of Children. Thus, special reference will be made to these in examining the Act. At this point, the research will also refer to various sources of international law such as treaties, declarations, general comments, reports and other relevant documents. This paper will also look into the state reporting since Malawi's ratification of the Convention on the Rights of the Child.

Domestic law will also be a very important method of research specifically the Malawian Child Care, Protection and Justice Act alongside with the Constitution of Malawi which is the main focus of this research.

#### **V. CHAPTER OUTLINE**

Chapter one has identified the issue of how the Child Care, Protection and Justice Act of Malawi addresses the child's autonomy, especially in the context of the family. This is an important issue because it can help determine the extent to which the new law recognises children's rights and codifies international law.

Chapter two will discuss child rights theories and the concept of parental autonomy and child autonomy. The chapter will attempt a conceptual reconciliation of the two concepts as contemporary theorists see it so as to evaluate the Malawian law..

Chapter three will be an assessment of international and regional instruments and examine how the conflict in question has been addressed.

Chapter four will examine the Malawi Child Care, Protection and Justice Act. It will provide a brief overview of the repealed Children and Young Persons Act and also an overview of section 23 of the Constitution of Malawi which provides for children's rights.

Chapter five will conclude the thesis and make recommendations.

## Chapter Two

### CHILD RIGHTS THEORIES

#### I INTRODUCTION

It has been universally accepted that human rights are essential to every human being. However, the realisation of human rights around the world depends on various factors including culture and religion. In that regard, some cultural and religious practices perceive women and children as vulnerable. Taking into account of the biological factors such as lack of physical strength and underdeveloped mental capacities and social factors such as their financial dependence on adults, lack of experience and lack of a voice in social processes, children do need protection. However, the push for child protection can, and often does, interfere with the autonomy of children, making them live under the shadow of their parents or guardians. While the idea of protection is necessary, it should not be used to undermine children's rights and their self-determination. This chapter aims at analyzing the child rights theories such as the John Eekelaar's interest theory, the fiduciary theory, and the theory of paternalism. In a nutshell, these theories attempt to show different justifications of why children must be protected and the extent to which parental autonomy exercised over children.

#### II. JOHN EEKELAAR AND THE INTEREST THEORY

Eekelaar's interest theory is based on Joseph Raz's theory of rights. Raz argues that 'a law creates a right if it is based on and expresses the view that someone has an interest which is a sufficient ground for holding another to be subject to a duty'.<sup>5</sup> Eekelaar's theory asserts that 'the social conception that an individual or class of individuals has certain interests is a precondition to the conceptualization of rights'.<sup>6</sup> Further, he proposes that these interests must be capable of being separated from the

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<sup>5</sup> J Raz 'Legal Rights' (1984) | *Oxford Journal Legal Studies* 13-14 as cited by J Eekelaar 'The Emergence of children's rights'(1986) *Oxford Journal of Legal Studies* 166.

<sup>6</sup> J Eekelaar 'The Emergence of Children's Rights' (1986) *Oxford Journal of Legal Studies* p169.

interests of others.<sup>7</sup> With respect to children, he explains that parents may believe that they have their children's interests in mind when they make decisions on their behalf (for instance, on medical welfare or education), but the parent's interest or primary right to make that decision is not be identical to the child's interests.<sup>8</sup> Eekelaar also asserts that the child's interest is for the parent to make the best decision for the child. That being said, he suggests that we ought to be careful in understanding that, when we talk about rights as protecting interests, we conceive them as interest on those benefits that the subject might plausibly claim for him or herself. But how can children claim these interests and to what extent? Are they capable of determining what their rights are?

Eekelaar makes reference to the ideas of Goldstein, Freud and Solnit<sup>9</sup> who construct the concept of 'family integrity' which represents a combination of three liberty interests concerning children's rights: parental autonomy, the right to autonomous parents and privacy.<sup>10</sup> He however questions if children can claim these rights on their own. He is of the view that, if they do, it's probably because they are able to advance other desirable ends.<sup>11</sup> In that regard, this theory states that children will claim for such interests at some point for instance once they attain the age of majority and mature.

As noted above, Eekelaar argues that children have three distinct interests which are separable from the interests of their parents: basic, development and autonomy interests. The basic interests seek to protect children from general, physical and emotional harm.<sup>12</sup> The goal is to ensure that the child has basic means of survival and development. These interests have to be fulfilled, primarily, by parents and, secondarily, by the state in the event of failure by parents to do so.<sup>13</sup> International child rights law addresses this through imposing and defining parental obligations of states, state's social welfare duties and child alternative care.

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> J Goldstein, A Freud and A.J Solnit *Before the Best Interests of the Child* (1979) p 9 as cited by J Eekelaar 'The Emergence of Children's Rights' page 169.

<sup>10</sup> Ibid.

<sup>11</sup> Eekelaar p 170.

<sup>12</sup> Ibid.

<sup>13</sup> Eekelaar p 171.

Development interests relate to economic, social and cultural right and are aimed at ensuring equal access to opportunities and resources for the psychological and social development of the child, as well as the acquisition of skills that the child's needs in society.<sup>14</sup> These interests may be asserted not only against parents but even against the wider community.<sup>15</sup> Development interests require allocation of resources so that children are not deprived of what is required for their development from childhood to adulthood. These resources include medical services and education.<sup>16</sup> The duty to allocate resources is placed on states. This duty is now enshrined in international child rights law which will be discussed in the next chapter. It can therefore be said that development interests also mirror the provisional rights recognized in international child rights law. The fulfilment of development interests is highly dependent on the family, which is in turn dependent on the wider social and economic mechanisms of the community.<sup>17</sup>

Autonomy interests relate to the freedom of the child to choose his or her own lifestyle and to enter social relations according to his or her own inclinations uncontrolled by the authority of the adult world, parents or institutions.<sup>18</sup> These autonomy interests enable children to make decisions for themselves and thereafter entitled to face the repercussions in the event of a mistake.<sup>19</sup> This type of interests are identified as participation rights in international child rights law.

Eekelaar asserts that the exercise of this autonomy by children conflicts with the child's basic and development interests. In order to recognize the exercise of child autonomy, it is necessary to apply the concept of the acquisition of full capacity<sup>20</sup>. This means a child must not only understand the nature of the action but must be able to evaluate the implications.<sup>21</sup> According to him, intellectual understanding must be supplemented by emotional maturity.<sup>22</sup> Thus, the provision of the simple test of age to provide an

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<sup>14</sup> Eekelaar p 172.

<sup>15</sup> Bainham and Cretney 'Children' *The Modern Law* 87 as cited by Sonia Human 'The Theory of Children's Rights' in Trynie Boezaart *Child Law in South Africa* (2009), 256.

<sup>16</sup> Eekelaar page 172

<sup>17</sup> Eekelaar p171.

<sup>18</sup> Ibid.

<sup>19</sup> Eekelaar p 177.

<sup>20</sup> Eekelaar p181.

<sup>21</sup> Supra note 20.

<sup>22</sup> Ibid.

upper limit to the scope of a supervisory, paternalistic power has advantages.<sup>23</sup> This notion embraces the evolving capacities of the child which are recognized in international child rights law which will be discussed in the following chapter.

### III. FIDUCIARY THEORY

This theory compares the relationship between children and their parents to that of a trusteeship.<sup>24</sup> Parents are considered to be the ‘trustees’ of their children and are supposed to develop their capacities for rationality, functioning in a democratic system, and bodily well-being.<sup>25</sup> This perspective implies that failure by a parent to meet the obligations of the trusteeship, dismisses the parent from the position of a trustee. This means that the parent does not have absolute authority over the child.

Locke’s view was influenced by his religious view that God owns children whom he entrusts to the care of parents. Accordingly, parents have obligations to children and are accountable to God.<sup>26</sup> He said:

From Adam and Eve the world is peopled with his descendants, who are all born infants, weak and helpless, without knowledge or understanding. But to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents, were by the law of nature under an obligation to preserve, nourish, and educate the children they had begotten, not as their own workmanship, but the workmanship of their own maker, the almighty, to whom they were to be accountable for them.<sup>27</sup>

In Locke’s words, he claims that the power parents have over their children arises from God and that that power is synonymous with their duty to take care of their children during the imperfect state of childhood. In light of Locke’s school of thought, what children need and what parents are obliged to provide, is to enrich their mental

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<sup>23</sup> Ibid,

<sup>24</sup> R Noggle ‘Special agents: Children’s autonomy and parental authority’ in Archard and Macleod

<sup>25</sup> J Soren *Libertarian Theory and Children’s Rights ‘The Fiduciary Model, Rationality Interests, and the Challenge of Abortion’* (2001) p 1.

<sup>26</sup> John Locke *Second Treatise of Government*.

<sup>27</sup> Ibid para 56.

capacity and parents to govern children's actions while they are still young and ignorant. As such, when children start to reason, parents are released from exercising control over them.<sup>28</sup> Ian Shapiro commends John Locke's approach although he sees it in a secular approach. He removes God from the equation as the settlor of the trust relationship, and places the state as a fellow trustee with the parents, not the settlor.<sup>29</sup>

This theory further proposes that the power parents have over their children comes from the duty to take care of their children during the imperfect state of childhood.<sup>30</sup> It claims that this duty exists until the child has reached a state of maturity in which he is capable of knowing the law to keep his actions within it. It is presumed that upon gaining maturity, the child might understand the meaning and be responsible enough to be mindful of acting within the law but until then, he is guarded by someone who understands the law and who is capable of guarding him to act within the law.

The fiduciary model is premised upon children being incapable of making decisions and in need of an adult to make important decisions on their behalf. It also claims that in the event that the father dies and has not completed his duty of guarding his child and has no substitutes to guard his child who lacks understanding, the state as by law shall step in to ensure that the minor is guarded.<sup>31</sup> This mirrors foster care or adoption as provided by law when a minor has no parental care.

According to Sorens, it is not plausible to say that parents owe children obligations to nourish or educate them. Children do not owe their obligation to refrain from self-destructive behaviour to their parents, for children's proper development and survival is not necessarily in the interests of the parents, and we would not want parents to be allowed to waive the right and obligation to prevent their children from engaging in self-destructive behaviour.<sup>32</sup> John Simmons' argument is that the 'natural account of children's rights to attempt is one that is 'forward-looking' that is, one that somehow

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<sup>28</sup> John Locke Second Treatises para 58.

<sup>29</sup> Supra note 25.

<sup>30</sup> Ibid note 28.

<sup>31</sup> Ibid note 29.

<sup>32</sup> Ibid.

anticipates the child 's future status as an autonomous, rational agent, capable of planning, self-control and moral action'.<sup>33</sup>

Sorens assumes that the correct fiduciary model of children rights is to consider children as rights-bearers or hypothetical adults that are subject to paternalistic oversight insofar as it advances their growth into adulthood.<sup>34</sup> He further adds that, children have rights and those rights are from adults in that they have welfare rights and are subject to paternalism. This school of thought is acceptable as it recognizes a child's potential to act for him or herself at some point which echoes the concept of child autonomy

One of the things that make this theory more acceptable to the child rights discourse, is that it recognizes the importance of parental guidance over the exercise of children's rights. It is undeniable that childhood is one of the stages that is delicate and once mishandled may lead to serious and irreversible repercussions. Traditionally, the denial of a child's self-determination or the need for parental care and protection has been justified on the grounds that children are immature to understand where their self-interests rest. Thus, it is the duty of the parents, society to protect them from themselves.<sup>35</sup> In that sense, this theory recognizes a child as human being who lacks capabilities to make decisions for him or herself. Thus, this theory makes room for child autonomy although at a much later stage when a child has obtained the understanding and responsibilities he or she beholds not just to act within the law but also to make wise decisions that affect him or herself. Parental autonomy in this theory is key only because the parents have been entrusted with the duty to care for the child until he or she is capable to be responsible.

Locke contends that children are not born in a state of absolute equality because they do not have the capacity to reason until the age and maturity which liberates them from parental autonomy. Sorens on the other hand thinks that children have rights as hypothetical adults and ought to be subjected to parental oversight as it advances their

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<sup>33</sup> Sorens p 2.

<sup>34</sup> Ibid.

<sup>35</sup> CM Rogers and LS. Wrightsman, 'Child Rights Attitudes toward Children's Rights: Nurture or Self-Determination? *Child Protection Centre* (2010).

growth into adulthood.<sup>36</sup> Thus, this theory recognizes that children have rights, in other words, the theory recognizes that a child is a right holder that lacks capacity to exercise autonomy over those rights thus needs parental autonomy to play a huge role to realize that capacity. However, this theory does not propose what these rights are, besides that, in contemporary child rights discourse, these would be protection and provision rights and the best interest principle recognised in international law.

This theory potentially balances the concept of autonomy; it grants autonomy to the child at the time when they have been guided and have gained capacity from the parental autonomy exercised by their parents. The end of childhood in this context is marked by the age set by the law in which the state can recognize the child to be able to make decisions. Although the maturity and competencies of the child should be taken into consideration in various facets as the standard age does not necessarily mean all children are mature and capable of making decisions.

While the theory recognizes the duty of parents over their children, it doesn't bequeath them with absolute autonomy. In the event that the parent fails to complete his or her obligations, these obligations are taken over by an alternative party capable to carry on these obligations such as the state.

#### **IV. THE THEORY OF PATERNALISM**

Paternalism has been defined as the interference with a person's liberty of action justified by reasons related to the welfare, good, happiness, needs, interests or values of the person whose liberty is being interfered with.<sup>37</sup> Generally, this theory implies that parents or guardians make decisions or exercise control over children on the basis that they lack capacity to make their own decisions. It also implies that those that are making decisions on behalf of children are making those decisions in the best interests of children. It is often assumed that this interference is done against children's will

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<sup>36</sup> Supra note 33.

<sup>37</sup> G Dworkin 'Paternalism' *Monist* 1972; 56: 64-84 as cited by G.B Weiss *Journal of Medical Ethics* (1985) 11 184-18.

despite the fact that those decisions being exercised is to protect the children from harm.

According to this theory, parents are entitled to make decisions which children would have made if they were capable of making decisions on their own.<sup>38</sup> Archard states that 'children are thought to merit paternalism both because they have not yet developed the cognitive capacity to make intelligent decisions in light of relevant information about themselves, and because they are prone to emotional inconstancy such that their decisions are likely to be wild and variable.'<sup>39</sup> This cognitive incapacity, as explained by Admark Moyo, means that the many decisions that children make on their own are likely to cause severe harm to them.<sup>40</sup> Adults are deemed competent to make decisions for children and ought to discharge this responsibility responsibly and rationally. The theory permits parents to make decisions for their children until the time they gain the capacity to decide on their own.

Paternalism is often thought to involve an attitude of superiority, which signals that the person who is being deprived of the right to exercise his or her autonomy doesn't know his or her own good well enough, or is unable to protect or promote his or her autonomy satisfactorily. An aspect of paternalism that is worth noting is that it is a combination of an action which interferes with some person and a reason for that action which concerns the same person's good, regardless of their attitudes.<sup>41</sup>

Mill suggests that every person knows best what is in his or her own interest and is most concerned to promote that interest. John Stuart Mill's position is that people should be free to do as they like so long as their behaviour doesn't harm others. He further claimed that although people have the liberty to do as they pleased, this liberty does not extend to children as it would expose them to a lot of danger not only to themselves but to others as well. In Mill's words;

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<sup>38</sup> A Moyo *Balancing Child Participation Rights, Parental Responsibility and State Intervention in Medical and Reproductive Decision Making under South African Law* PhD (Cape Town) (2014) 52

<sup>39</sup> D Archard *Children: Rights and childhood*, 2 ed (2004)

<sup>40</sup> Ibid note 38.

<sup>41</sup> JS Mill 'On Liberty' (1859).

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.<sup>42</sup>

Thus, Mill acknowledges that children are incapable of making decisions and argues that mature human beings are entitled to make decisions on behalf of the children under their care and that children can only be permitted to make decisions when they attain the age of majority as prescribed by the law.

Mill is mainly concerned with 'social as opposed to individual paternalism, though not only with the law but also with public opinion, which he argues can be as invasive as political oppression'.<sup>43</sup> He is of the view that society has absolute power over children. Society plays a significant role in a child's upbringing; it sets certain expectations that are to be met. A child is then raised knowing those expectations and living according to those expectations. In meeting these standards, a child will be taught and guided on how to overcome those expectations. Parents, on the other hand, ensure that the child is indeed striving to meet the expectations and failure to achieve those could have a negative reaction from society towards the parents. Hence parents are expected to be responsible for their children and exercise control or autonomy over them.<sup>44</sup>

John Feinberg is of the view that there are rights that only belong to adults (A- rights) and these are the legal rights to vote, to imbibe, to stay out all night, and also adds that autonomy rights that could hardly apply to children.<sup>45</sup> Then there are rights which he calls C-rights, these aren't in the strict sense peculiar to children, they are generally characteristic of them and are possessed by adults only in unusual circumstances.<sup>46</sup> C rights are two fold; the rights that derive from a child dependence upon others for the basic instrumental goods of life-food shelter, protection. The other class of C rights; rights in trust, they look like autonomy rights of class A except that the child cannot

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<sup>42</sup> Supra note 41.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> J Feinberg 'The right to an open future' The Philosophical debate' page 217 para 2

<sup>46</sup> Ibid.

ably exercise his free choice until later when he is more fully formed and capable.<sup>47</sup> He asserts that when autonomy rights are given to children who are not capable of exercising them, their names refer to rights that are to be saved for the child until he is an adult, but which can be violated 'in advance', so to speak, before the child is even in a position to exercise them.<sup>48</sup> The notion of paternalism according to Feinberg is to ensure that as a child, his future options are left open until he/she is a fully formed self-determining adult capable of deciding among them.<sup>49</sup>

Feinberg also states that children are not legally capable of defending their own future interests against present infringement by their parents, so that the task must be performed for them, usually by the State in its role of *parens patriae*<sup>50</sup>

Paternalism is justified on the grounds that children are not mentally mature enough to make their own decisions. It has been widely said that children are not morally responsible human beings because they are not rational.<sup>51</sup> Thus, it is justifiable for parents to command or instruct them to do what is rational.

On the contrary, Holt has a totally different proposal, he is of the view that rights, privileges, duties, responsibilities of adult citizens be made available to any young person, of whatever age, who wants to make use of them. These would include among other: the right to equal treatment, right to vote, right to be legally responsible for one's life and acts, right to work, privacy financial independence.<sup>52</sup> He adds that young people should be able to pick and choose.<sup>53</sup> For instance he uses the example of the reduction of the voting age and eliminating the barriers that deny young people the possibility of serious, independent, responsible participation in the world around them. His proposition advocates for child liberation which ideally is the promotion of a child to exercise autonomy over decisions that affect them directly (self-determination)

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<sup>47</sup> Supra note 45.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> A Palmeri 'Childhood's end: Towards children's liberation' in W.Aiken and H La Follette (ed) *Whose child?* (1980) p 11.

<sup>52</sup> J Holt 'The Problem of Childhood' in J Holt *Escape from Childhood* (1981) p15-19.

<sup>53</sup> Ibid p 16 para 2.

Whilst these theories have different approaches towards child rights and the description of what a parent-child relationship ought to be, they all seem to lean towards the understanding that children are vulnerable and lack capacity to make rational decisions. There is no particular age that these theories propose rather they all drive to children eventually being allowed to make decisions independently when they have gained the capacity, maturity to make independent and rational decisions. The fear of children harming themselves stems from the notion of giving them absolute autonomy even when they have the capacity to make rational decisions. The notion of absolute autonomy in children is in conflict with the theory of paternalism which as discussed implies parental control.

Child liberationists stand for children to have absolute autonomy, to enable children to make decisions for themselves without the interference of adults. Child liberationists confer rights that are enjoyed by adults to be enjoyed by children as well. They fight for children to be able to participate in decision making in all aspects. While it is important to have children participate in decision making in all aspects, it would be cause deleterious harm on them mostly if it is to be given across all children of all ages regardless of their capacities. Child rights are without a doubt to be respected by virtue of them being human and should be entitled to enjoy those rights as rights holders<sup>54</sup>. However, the conflict arises when the question of giving children autonomy. The results of giving children absolute autonomy can be deleterious to them and can interfere with their development and their future, this is also something that Eekelaar asserts in his interest theory that a child's autonomy interests can interfere with his basic and development interests.

Freeman asserts that in considering child rights it is important that we must recognize the integrity of the child and his or her decision making capacities but at the same time note the dangers of complete liberation.

As Feinberg puts it autonomy is respect for one's unfettered voluntary choice as the sole rightful determinant of his actions except where the interest of others needs

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<sup>54</sup> M Freeman 'Taking children's rights more seriously in P Alston et al (eds) *Children, rights and the law* (1992) 52-71.

protection from him'. Taking into account of this definition, if children have unrestricted freedom over their lives it is deemed that they are accountable for their own mistakes but only to the extent where the interests of others are at risk thus paternalism is justified.

Farson, a child liberationist, saw self-determination as a root of all other rights that children were entitled to claim. Farson and Holt in their writings for child liberation movement proposed self-determination rights, the liberationist school of thought has widely been criticized that granting children unlimited autonomy is a disadvantage on children in light of the circumstances that may follow as a result of incapacity.<sup>55</sup> However, it is worth noting that these authors wrote when child sex abuse had yet to be recognized, and when drugs were not perceived to be the social problem that they are today.<sup>56</sup> In addition, Freeman pointed out that the importance of the liberation school was in addressing discrimination and recognize both the importance of the child as a person and an individual and the importance of autonomy.<sup>57</sup> While Farson and Holt's theses remains as the contemporary thesis on child rights, the fact also remains that children need to be protected.

## V. CONCLUSION

This chapter has examined various schools of thought on the concept of child autonomy and parental autonomy. From John Eekelaar's interest theory, children's rights and interests are categorized into three, basic, development and autonomy interests. The autonomy interests if mishandled could have deleterious harm on the basic and development interests. As such, it is necessary to take into consideration the intellectual capacity of children. This school of thought to some extent could be agreed with in that it permits the exercise of parental autonomy and child autonomy in the right circumstances which is the balance that is being sought. The theory echoes

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<sup>55</sup> R Farson *Birthrights: A Bill of Rights for Children* (1974)

<sup>56</sup> Supra note 51.

<sup>57</sup> Ibid.

the concept of the evolving capacities addressed in the Convention on the Rights of the Child.

Secondly, the fiduciary describes the relationship between a parent and a child as a trusteeship, the parent exercises full control until the child is capable of making decisions for themselves. Ideally, even if a child is mature enough, the determinant of the maturity coincides an identified benchmark for instance age. This could actually delay exercise of child's autonomy in cases where a child's competencies are beyond the age of the child. The religious point of view of this theory is that God has entrusted parents with authority over children and the secular point of view is that the state has entrusted parents with duties and responsibilities until the child is able to claim those rights. I do not necessarily agree with this school of thought in that it does not recognize a child as bearer of rights with or without the parents, child autonomy is only when a child has attained some sort of recognition.

Lastly, the theory of paternalism has a lot of diverging views; it is fixated on the fact that children are incapable to make decisions for themselves and for that reason, parents or guardians are responsible for them. It bestows so much authority on parents over their children. Paternalism can also exist through institutions in the absence of parents or legal guardians. This theory ideally is the concept of parental autonomy. It absolutely makes no room for child autonomy until a child is an adult and able to make decisions for themselves.

In that regard the chapter essentially consolidated different views so as to appreciate the existing debates on the two concepts. However, in as much as there are contrary views on the subject matter, these theorists seem to acknowledge that children can exercise their autonomy but, only when they have the capacity to do so. In truth, children need protection, they can be autonomous but one should take caution when giving them the opportunity to exercise that autonomy as in some cases they would not understand the implications of what comes with the decisions that they make. Thus, it is important to have parents or legal guardians exercise autonomy for their own good. This theoretical background will contribute to the analysis of the Malawian legal framework as well as draw out the approach Malawi's school of thought on

whether it recognises child autonomy or not and whether it has addressed the balance between the two concepts.

## Chapter Three

# INTERNATIONAL AND REGIONAL FRAMEWORK ON CHILDREN'S RIGHTS

## I. INTRODUCTION

When the Malawi government ratified the United Nations Convention on the Rights of the Child (Convention),<sup>58</sup> it undertook to comply with the fundamental obligations the Convention possesses.<sup>59</sup> First, Article 4 of the Convention requires that governments must undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention.<sup>60</sup> The Convention demands a proactive commitment towards the implementation of all rights it guarantees. The second obligation is enshrined under article 42 of the Convention, which is to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.<sup>61</sup> This is also another proactive obligation which not only imposes an obligation on the state alone, but it requires all members of the public, together with the children themselves, to have a right to information about the commitments that have been made on behalf of children.<sup>62</sup> According to article 44, the Convention also creates another obligation for states to report two years after ratification and, subsequently, every five years to the UN Committee on the Rights of the Child on its progress towards implementation of the Convention.

The Convention is a legal document that sets binding standards for states that have ratified it. In addition, the Convention should be seen as a 'pinnacle of an international effort' to promote the basic needs of children as fundamental human rights.<sup>63</sup> Besides

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<sup>58</sup> United Nations Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990.

<sup>59</sup> Ratified on 19 March 1991.

<sup>60</sup> Article 4, Convention on the Rights of the Child.

<sup>61</sup> Article 42, Convention on the Rights of the Child.

<sup>62</sup> G Lansdown, 'Implementing the UN Convention on the Rights of the Child in the UK' (1995) 7(3) *Child and Family Law Quarterly* 1.

<sup>63</sup> DA Balton 'The Convention on the Rights of the Child: Prospects for International Enforcement' (1990) 12 *Human Rights Quarterly* 120-129.

the promotion and protection of children's rights, the Convention conceives of the child as 'an active agent entitled to be listened to, respected and capable of making his or her own decisions'. In other words, the Convention promotes the autonomy of the child. Although it grants children autonomy rights, it also introduces the concept of the evolving capacities of the child which recognizes that children's competencies improve with as they grow up and become more mature. The concept plays an important role mediating the conflict between parental autonomy and child autonomy.

The aim of this chapter is to provide a contextual framework for this study by reviewing how the Convention reconciles the idea that the child is an autonomous person with the idea that the child is a person in need of protection. This will inform the assessment of the Malawian child legislation in chapter four. This chapter first reviews the development of international instruments leading to the Convention. Secondly, it provides an overview of the Convention with a focus on the underlying principles it upholds. Thirdly, it reviews the category of rights contained in it. Thereafter, the chapter will discuss the concept of the evolving capacities of the child and conclude with the parental responsibilities and duties recognized under the Convention. Lastly, the chapter briefly reviews the African Charter on the Rights and Welfare of the Child (the Charter). This will not be an in-depth review since most of the provisions of the Charter replicate the provisions contained in the international child rights treaty.

## **II. HISTORICAL BACKGROUND OF THE CHILD RIGHTS**

The protection of child rights is not new to international law. It dates back to 1924 when the defunct League of Nations passed a resolution to endorse the Declaration of the Rights of the Child also known as the Geneva Declaration.<sup>64</sup> It codified resolutions which imposed duties and responsibilities on adults in order to ensure the fulfilment of its goals. The Declaration states that children are vulnerable and incapable of caring for themselves.<sup>65</sup> The Declaration was the first to elaborate provisions calling for the protection of the child. It also called for the provision of children's economic, social and

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<sup>64</sup> Geneva Declaration on the Rights of the Child of 1924, adopted 26 September 1924, League of Nations, O.J Supp, 21, at 43 (1924).

<sup>65</sup> Chapter 1 Declaration of the Rights of the Child 1924.

psychological needs.<sup>66</sup> The Geneva Declaration focused more on what society had to give to children by making emphasis on the welfare of the child.<sup>67</sup> Most importantly, the Declaration acknowledged that children had developmental needs and those needs were to be met by adults.

However, the 1924 Declaration did not make any reference to the obligations of states; it entirely imposed duties on men and women of all nations.<sup>68</sup> At the time, children were perceived to be recipients of treatment as opposed to holders of certain rights.<sup>69</sup> Children were presumed to be helpless and needed salvation from those that were able to help them. The approach undertaken by this Declaration was paternalistic as it bestowed upon parents or legal guardian to exercise complete autonomy over children.

The assumption that children should rely upon the protection of adults to ensure the fulfilment of their rights was also reflected in the 1959 Declaration of the Rights of the Child and other international law treaties adopted in the 1960s and 1970s.<sup>70</sup> The 1959 Declaration of the Rights of the Child consists of a preamble and 10 principles. It pronounces its principles as rights and freedoms demanding states to observe them by legislative and other measures progressively taken.<sup>71</sup> It reiterates the pledge that mankind owes to the child the best it has to give.<sup>72</sup> Furthermore, it places a specific duty upon voluntary organizations and local authorities to strive for the observance of these rights.<sup>73</sup> It is worth noting that the Declaration also affirms the Universal Declaration of Human Rights which states that, due to their physical and mental immaturity, children are in need of special care, including legal protection.<sup>74</sup>

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<sup>66</sup> G Van Bueren *International Documents on Children* 2ed xv.

<sup>67</sup> *Ibid.*

<sup>68</sup> G Van Bueren 'International law on the Rights of the Child' page 7 para 4.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> Declaration of the Rights of the Child (1959).

<sup>72</sup> See Preamble, Declaration of the Rights of the Child (1959).

<sup>73</sup> *Ibid.*

<sup>74</sup> The UDHR makes specific reference to children in article 25 and 26. Art 25 UDHR provides that '(m)otherhood and childhood are entitled to special care and assistance 'and that '[a]ll children whether born in or out of wedlock shall enjoy the same social protection' Article 26 UDHR contains the right to education, including access to education and the aims of education. It also states that parents have the 'prior right to choose the kind of education that shall be given to their children'.

However, the Declaration has some striking shortcomings such as the fact that there is no mention of children's civil and political rights and the principle of non-discrimination in particular. In placing an emphasis on the need for children to be safeguarded and protected rather than empowering them,<sup>75</sup> it was paternalistic and certainly did not recognize children as full bearers of rights as autonomous persons; instead, it wholly perceived them as being vulnerable and in need of protection.

The International Bill of Rights<sup>76</sup> consists of the (UDHR), the International Covenant of Economic, Social and Cultural Rights<sup>77</sup> and the International Covenant on Civil and Political Rights<sup>78</sup> and its two additional Optional Protocols.<sup>79</sup>

The UDHR proclaims a cluster of human rights applicable to human beings including children. In addition to proclaiming the rights of everyone, it has two specific provisions on children: the right to special care and assistance to children<sup>80</sup> and the right to education.<sup>81</sup>

Like the UDHR, the ICESCR and the ICCPR apply to all women and men including children. The ICESCR recognizes that human beings can only enjoy freedom when they are able to enjoy both economic, social and cultural rights and civil and political

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<sup>75</sup> Phillip Alston and John Tobin *Laying the foundations for children's rights: An Independent Study OF Some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (United Nations Children's Fund, (2005) 5.

<sup>76</sup> The International Bill of Rights consist of the Universal Declaration of Human Rights G.A. Res/ 217A (III), U.N Doc a/8/10 T 71 (1948), International Covenant on Civil and Political Rights G.A Res 2200A (XXI), 21 U.N gar No. 16) at 52, U.N Doc A/6316) (1966), 999 U.N T.S 171, entered into force 23 March, 1976 and the International Covenant of Economic, Social and Cultural Rights. G.A Res. 2200A (XXI), 21 UN GAR Supp (No 16) at 49, U.N Doc A /6316(1966), 993, U.N.T.S. 3 entered into force 3 January, 1976.

<sup>77</sup> The International Covenant of Economic, Social and Cultural Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp.(No.16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>78</sup> The International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976

<sup>79</sup> Ibid.

<sup>80</sup> Article 25 (2) provides that; motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same social protection.

<sup>81</sup> Article 26(1) 'Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit(3) Parents have prior rights to choose the kind of education that shall be given to their children.

rights.<sup>82</sup> This recognition implies that human rights are interlinked, indivisible and interdependent.<sup>83</sup> Article 10 of the ICESCR provides that the widest protection should be accorded to the family which is the natural and fundamental group in society, and is responsible for the care and education of children.<sup>84</sup> The ICESCR imposes the duty on state parties to ensure the availability of resources for the progressive implementation of the rights it recognizes.<sup>85</sup> It is important to note that the ICESCR specifically provides that states should take special measures of assistance and for the protection for children.<sup>86</sup>

Akin to the ICESCR, the provisions of the ICCPR are applicable to all human beings including children. Under the ICCPR, children are entitled to enjoy all the rights enshrined in it including the additional provisions that directly concern children.<sup>87</sup> Article 24 of the ICCPR is very specific to children. It recognizes the right of children to be protected from any form of discrimination, and several identity rights i.e. the right to be registered after birth, to be given a name and to nationality.<sup>88</sup> By virtue of this article, a child as a minor is entitled to special measures of protection in addition to other general measures states are expected to take under article 2 of the Covenant.<sup>89</sup>

The two Covenants were the first binding instruments to recognize children as rights holders entitled to enjoy all rights set out in the Covenants. At the time these treaties were adopted, there was still reluctance to the recognition of children as rights holders under international law.

1979, proclaimed the International Year of the Child, served as a catalyst for the international community to begin to examine the international laws on children from a

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<sup>82</sup> See Preamble ICESCR.

<sup>83</sup> Supra note 68.

<sup>79</sup>Article 10 of the ICESCR.

<sup>85</sup> Supra note 68.

<sup>86</sup> Ibid.

<sup>87</sup> For example, article 10(3), article 14(1), article 6(5) article 10(2).

<sup>88</sup> Article 24 (1) Every child shall have without any discrimination as to race, colour, sex, language, religion or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. (2) Every child shall be registered immediately after birth and shall have a name. (3) Every child has the right to acquire a nationality.

<sup>89</sup> Supra note 68.

child rights perspective.<sup>90</sup> This intensified as the United Nations drew closer to the conclusion of the drafting of the Convention on the Rights of the Child in 1989.

### III. THE CONVENTION ON THE RIGHTS OF THE CHILD

The Convention was unanimously adopted by the United Nations' General Assembly in 1989 and entered into force in 1990. All states, except the United States of America, have ratified it.<sup>91</sup> The Convention is the first treaty to incorporate the complete range of international human rights; civil, political, economic, social, cultural rights together with other facets of international humanitarian law.<sup>92</sup> Having consolidated all rights from other international instruments, it articulates children rights and provides a set of principles to shape the way in which child rights are interpreted and implemented.<sup>93</sup>

The Convention contains 42 articles, covering civil and political rights and economic, social and cultural rights. Applicable to all children, these rights are indivisible and interdependent. The Convention also defines the obligations states have in relation to these rights.

The Convention is unique not only because it enjoys the widest ratification among all other international human rights treaties but also because of its impact on state behaviour towards children within their jurisdictions.<sup>94</sup>

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<sup>90</sup> Supra note 68.

<sup>91</sup> Somali ratified the CRC on 20<sup>th</sup> January, 2015. UN News Centre 'UN lauds Somalia as country ratifies landmark children's rights treaty available at <http://www.un.org/apps/news/story.asp?NewsID=49845#.WKG5FNJ97cs> accessed on 13<sup>th</sup> February, 2017.

<sup>92</sup> UNICEF 'Rights under the Convention on the Rights of the Child' 7 August, 2015 available at [https://www.unicef.org/crc/index\\_30177.html](https://www.unicef.org/crc/index_30177.html) accessed on 13<sup>th</sup> February 2017.

<sup>93</sup> UNICEF 'Understanding the CRC', 19 May 2014 available at [https://www.unicef.org/crc/index\\_understanding.html](https://www.unicef.org/crc/index_understanding.html) 19 May 2014 accessed on 10<sup>th</sup> February 2017.

<sup>94</sup> P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law' in T Boezaart (ed) *Child Law in South Africa* (2009) 309-330.

## IV. UNDERLYING PRINCIPLES UNDER THE CONVENTION

The Convention is built upon four underlying principles: non-discrimination,<sup>95</sup> the best interests of the child,<sup>96</sup> the child's right to survival and development,<sup>97</sup> and the right of the child to be heard<sup>98</sup>. These principles form the bedrock of all children's rights.

### A. Non-discrimination

The principle of non-discrimination calls upon states to ensure that the enforcement of these rights in their jurisdictions is done without discrimination of any kind.<sup>99</sup> It condemns discrimination on the basis of a child's race or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.<sup>100</sup> The Convention places an obligation on state parties to take appropriate measures to ensure that a child is protected against all forms of discrimination.

The Convention does not have any provision that defines discrimination, nor has the CRC Committee prepared a particular General Comment that covers the principle of non-discrimination. However, the Human Rights Committee has said in relation to the ICCPR that non-discrimination means 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.<sup>101</sup>

According to Hodgkin and Newell, Article 2 of the CRC requires state parties to prevent discrimination by taking a range of measures including the review of legislation, raising

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<sup>95</sup> Article 2 of the Convention.

<sup>96</sup> Article 3(1) of the Convention.

<sup>97</sup> Article 6 of the Convention.

<sup>98</sup> Article 12 of the Convention.

<sup>99</sup> Article 2 of the Convention.

<sup>100</sup> *Ibid.*

<sup>101</sup> R Hodgkin & P Newell *Implementation handbook for the Convention on the Rights of the Child* (2007) 17-32.

awareness-raising about children's rights, and measures to reduce disparities among children.<sup>102</sup>

Further the non-discrimination principle seeks to protect children from vulnerable groups in society that are mostly affected by discrimination. For example, children born out of wedlock, refugee children, children in conflict with the law or institutionalized and the girl child. The Convention has set out positive measures to ensure that children from these backgrounds do not face any form of discrimination and are protected by the law in the event any form of discrimination has been experienced. The principle of non-discrimination sets a goal to ensure that children that have faced any form of discrimination are protected and reintegrated back into society.

The CRC Committee has paid particular attention to the issue of discrimination against girls and frequently expresses concern about persisting discrimination in its concluding observations.<sup>103</sup> For example, in 1995, it recommended that states should adopt a forward-looking strategy to promote and protect the fundamental rights of girls and women and to decisively eradicate inequality and discrimination.<sup>104</sup>

## **B. The child's best interests**

The principle made its first appearance at international level under principle 2 and 7 of the Declaration of the Rights of the Child (1959).<sup>105</sup> Van Bueren has argued that although the CRC may not be responsible for inventing the principle, it has transformed it beyond its original scope.<sup>106</sup> This principle appears in various articles in the Convention and the Committee has interpreted it in its various General Comments.<sup>107</sup> The Committee has said that all legislative, judiciary and executive

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Committee on the Rights of the Child, Report on the 8<sup>th</sup> session, January 1995, CRC/C/38, p 5

<sup>105</sup> General Assembly, Declaration of the Rights of the Child, 14th Session, UN Doc A/RES 1386 (XIV) (20 November 1959) Principle 2 of the Declaration of 1959. Principle 2 of the Declaration of 1959 provides the stronger legal threshold, that is, 'the best interest of the child shall be the paramount consideration' in contrast to the primary consideration 'in the Convention.

<sup>106</sup> Supra note 68.

<sup>107</sup> Hodgkin and Newell Handbook p 35.

bodies are required to consider this principle systematically in their decisions and actions.<sup>108</sup>

It has been argued that the Convention should be considered as a whole in order to fully realise all the rights contained in the Convention and the underlying principles.<sup>109</sup> Thus, the principle of non-discrimination, the right to life, survival and development, and the right of the child to be heard are all relevant to determining the best interest of a child in a particular situation, as well as determining the best interests of children as a group.<sup>110</sup>

According to article 3 of the Convention, the best interests of the child shall be a primary consideration in all actions concerning the child.<sup>111</sup> In light of the wording of the provision, the Convention indicates that the child's best interests are not the only factor to be considered. There are other interests that need to be considered in matters concerning the child.<sup>112</sup> However, in certain specific issues, the best interests of the child play a predominant role. For example, article 21 of the Convention requires states that recognize or permit adoption to ensure that the best interests of the child are the paramount consideration.

### **C. Life, survival and development**

The Convention under article 6 provides for a child's inherent right to life. State parties are encouraged to ensure that the child enjoys this right to maximum extent possible for survival and development. The link between these three components cannot be ignored, while life is the primary one, one needs to survive to enjoy that life and the same goes with development needs. In that regard, there is need for appropriate measures in place in order to ensure the child's optimal development and survival.<sup>113</sup> The duty to have such appropriate measures for the right to life, survival and development to be realized is placed on the state.<sup>114</sup>

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<sup>108</sup> General Comment 5 at para 12 page 4.

<sup>109</sup> Hodgkin & Newell page p 37.

<sup>110</sup> Ibid.

<sup>111</sup> Article 3 of the CRC.

<sup>112</sup> Supra note 38.

<sup>113</sup> Supra note 48 p 320.

<sup>114</sup> Article 6 of the Convention.

The right to life is considered to be a universal human right and enshrined under article 3 of the UDHR and the ICCPR reinforces this under article 6. However, the right to life may be limited to the implementation of the death penalty in countries that have not abolished it. The right to life is supreme and arbitrary deprivation of this right is not permissible even in times of emergency.<sup>115</sup> In that regard, state parties are under the obligation to take all positive measures to ensure the reduction of infant mortality and the increase of life expectancy, especially in the adoption of measures to eliminate malnutrition and various epidemics.<sup>116</sup> However, children's right to life, survival and development may be threatened by armed conflicts, early marriages, harmful cultural practices, female genital mutilation, the death penalty and infanticides.<sup>117</sup>

The interconnectedness of rights is particularly apparent when considering the rights to life, survival and development under article 6. The implementation of other survival rights covers a child's survival rights to life and the needs that are most basic to the child's existence which include an adequate living standard, shelter, nutrition and access to medical services'.<sup>118</sup> The right to survival thus incorporates all measures taken to ensure the healthy development of children.<sup>119</sup> According to General Comment 5, the Committee articulates that development should be looked at in the broadest sense, embracing the child's physical, mental, spiritual, moral, psychological and social development.<sup>120</sup> Therefore, this entails that in whatever the case maybe, the measures put in place for the fulfilment of this right ought to be long term, continuously improved in order to give effect to the survival and developmental needs of all children.<sup>121</sup>

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<sup>115</sup> Human Rights Committee General Committee Number 6.

<sup>116</sup> Human Rights Committee, General Comment no 6.1982,HRI/GEN/1/Rev8 para 5, p167.

<sup>117</sup> General Comments, Hodgkin and Newell.

<sup>118</sup> Sloth-Nelson & Mezmur'2+2=5? Exploring the domestication of the CRC in South African Jurisprudence (2002-2006)'2008 International Journal of Children's Rights at 10 as cited by P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law' in Trynie Boezaart 'Child Law in South Africa' Chapter 321 page 320.

<sup>119</sup> P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law' in Trynie Boezaart p 320.

<sup>120</sup> General Comment 5 para 12.

<sup>121</sup> Supra note 110.

The concept of development is not just about the preparation of the child for adulthood, it entails the provision of optimal conditions for childhood, for the child's life presently.<sup>122</sup>The Committee deems the development as a holistic one which embraces the whole Convention.<sup>123</sup>The obligations covered in the Convention that are essential to the development of a child for instance right to health, adequate standard of living , education, leisure and play are essential to the development of the child.

## **D. The Right of the Child to be heard**

As this principle is the backbone to this research, it is necessary to quote the provision of article 12 for ease of reference:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Child participation has been one of the most debated and examined aspects of the Convention since its adoption.<sup>124</sup> It has, however, had an impact in society in that, platforms for child participation have been formulated, from the school, local and global community. The concept itself involves a combination of rights. For instance, besides the right to be heard, rights to freedom of expression, religion, conscience, association, information and privacy all form part of participation rights.

States are under strict obligation to undertake appropriate measures to fully implement this right for all children.<sup>125</sup> This obligation is two-fold. First, the state is ensure that there are mechanisms in place to solicit the views of the child in all matters affecting

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<sup>122</sup> Hodgkin &Newell Handbook p 93.

<sup>123</sup> Ibid

<sup>124</sup> G Lansdowne 'The realisation of children's participation rights: Critical reflections'.

<sup>125</sup> Article 12(1) of the Convention.

him or her. The second obligation is to ensure that those views are heard.<sup>126</sup> States are also under the duty to assure the right to be heard to every child that is 'capable of forming his or her own views'.<sup>127</sup> The Committee has explained that this obligation should not be perceived as a limitation, but, somewhat looked at as an obligation for states parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible.<sup>128</sup> It has further explained that state parties cannot begin with the assumption that a child's incapable of expressing his or her own views.<sup>129</sup> In contrast, state parties should presume that a child has the capacity to formulate his or her own views and recognize that she or he has the right to express those views: it's not the duty of the child to prove that his or her own capacity.<sup>130</sup>

In as much as age and maturity is taken into consideration while hearing the views of the child, it should not undermine other forms of communication.<sup>131</sup> Research has indicated that babies are able to speak a complex language and that adults who can read it can provide more sensitive and appropriate care.<sup>132</sup> It is therefore permissible for the implementation of article 12, there must be recognition of and respect for non-verbal forms of communication such as play, body language, facial expression, or drawing and painting, through which very young children make choices, express preferences and demonstrate understanding of their environment.<sup>133</sup> This also assists in accommodating the views of disabled children that may be of age and are mature but cannot communicate verbally.

Additionally, article 12 encompasses the right to be heard in judicial and administrative proceedings affecting them. Judicial proceedings include, though without limitation; separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied, children, asylum seeking and refugee

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<sup>126</sup> Article 12 of the Convention, General Comment No. 12 'The right of the child to be heard' CRC/C/GC/12 (2009).

<sup>127</sup> Article 12 of the Convention.

<sup>128</sup> General Comment No. 12 'The right of the child to be heard' CRC/C/GC/12 (2009), para 20.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Lansdown 12, Mahery 322.

<sup>132</sup> General Comment No.7, Implementing Child Rights in Early Childhood CRC/C/GC/7 (2005).

<sup>133</sup> Lansdown 12.

children, and victims of armed conflict and other emergencies.<sup>134</sup> Administrative proceedings include; decisions about children's education, health, environment, living conditions, or protection.<sup>135</sup> In that regard, children may express their views directly or through a legal representative or an appropriate body.<sup>136</sup>

Generally, article 12 expounds on the child's right to be involved and taken seriously in decision making and all matters that affect them. State parties are under the obligation to assure that children's views are heard and those views are expressed freely. The provision implies that all children that are capable to express their views are heard and this is not limited to the age or maturity of the child. It is not the child's duty to prove his or her capability but the government.

## V. CATEGORY OF RIGHTS: THE FOUR P'S

The Convention comprises of all the basic human rights akin to those enshrined in the general human rights mechanism.<sup>137</sup> These rights as the name of the Convention suggests, are applicable to all children. These rights have been classified into four. The overall classification of these rights is known as the four Ps.<sup>138</sup> The four Ps refer to the provision, protection, participation and prevention rights.

Provision rights refer to rights that children have to be provided with services to realize their basic needs. For instance, the right to highest attainable standard of health, the right to social insurance and the right to education.<sup>139</sup> These also include the right to food, clothing. The duty to ensure that a child's basic needs are provided for is imposed on the parents, although states are obligated to ensure that there are services available to enable parents to provide for their children. In the event that parents fail to provide basic needs, there is room for state intervention so as children enjoy the

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<sup>134</sup> General Comment No 12 'The right to be Heard' ,CRC/C/GC/12 (2009) para 32,

<sup>135</sup> Ibid.

<sup>136</sup> General Comment No. 7 'Implementing child rights in early childhood' CRC/C/GC/7 (2005) para 35.

<sup>137</sup> Rights enshrined in the core international human rights treaties.

<sup>138</sup> UNICEF 'Rights under the Convention on the Rights of the Child' 7 August, 2015 available at [https://www.unicef.org/crc/index\\_30177.html](https://www.unicef.org/crc/index_30177.html) accessed on 13<sup>th</sup> February 2017.

<sup>139</sup>See Article 24, Article 26, and Article 28 of the Convention

rights entitled to them. However, a family is considered private thus state intervention in some instances may be resisted.

Protection and prevention rights refer to those rights that aim to protect the child from harmful and violent acts or practices and preventing a child from being a victim of any form of harm.<sup>140</sup> For instance, the Convention provides children with the right to privacy in which they are protected from arbitrary or unlawful interference with their privacy. The child is entirely granted protection of the law against such interference or attacks.<sup>141</sup> The Convention also places a duty on the state to ensure all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse and all forms of abusive, harmful and degrading treatment. This protection extends to sexual abuse while in the care of an adult (parent or legal guardian).<sup>142</sup> The Convention also emphasizes the protection of children from economic exploitation, sexual exploitation and any other form of exploitation. In addition, under articles 11 and 35 the Convention imposes a duty on state parties to take measures to combat inter-country abductions and child trafficking. The inclusion of these rights in the Convention strengthens and justifies the need for protection of the child although they remain to be at risk of being victims of abuse and harm.

The last category is the participation rights which essentially allow a child to participate in decisions that directly affect him or her and enable the child to express his or her views in all matters affecting him or her.<sup>143</sup> There are many decisions that a child may be expected to participate in to express their views be it in the home, school, court proceedings etc. Thus, participation takes into consideration of the evolving capacities of the child which will be discussed much later in the chapter. This category of rights is very central to the autonomy of the child as it is the only avenue a child may use to exercise his or her autonomy. These rights most times conflict with the parents interests over the child.

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<sup>140</sup> A Skelton 'Constitutional Protection of Children's Rights' in Trynie Boezaart '*Child Law in South Africa* p 314.

<sup>141</sup> Article 16 of the Convention.

<sup>142</sup> Article 19 of the Convention.

<sup>143</sup> Article 12 and Article 13 of the Convention.

## VI. PARENTAL RESPONSIBILITIES UNDER INTERNATIONAL LAW

The primary responsibility to raise children rests with their parents. This responsibility is recognized legally at international level and at domestic level. The concept of parental responsibility performs two distinct but inter-related functions.<sup>144</sup> It first entails that the parent has power in terms of responsibility and not rights, secondly, it locates the obligation to care for children with the parents, not with the state.<sup>145</sup> This responsibility is predominantly in a family set up. The family plays a crucial role towards the child's enjoyment of rights.<sup>146</sup> The role of the family particularly the parents' in a child's enjoyment of rights is not taken lightly, the Convention in its Preamble indicates that for these roles under the provisional, protection and prevention rights to take effect, the presence of parents and the family as a whole is necessary the same goes with the duties of the parents.<sup>147</sup>

## VII. THE CONCEPT OF THE EVOLVING CAPACITIES OF THE CHILD

The Convention introduces the concept of the evolving capacities of the child which is central to the discourse on child rights as well as to the recognition of children as active agents.<sup>148</sup> This concept holds that children's views must be respected in accordance with their relative immaturity and youth.<sup>149</sup> This concept balances child autonomy and parental autonomy in that it helps with determining the extent to which a parent or legal guardian can decide on behalf of his or her children. As children grow, their capacities evolve, which means that children should receive less direction and protection from

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<sup>144</sup> J Eekelaar 'Parental responsibility: state of nature or nature of the state' (1991) *JSWF.L* 37. as cited by J Masson, R Bailey-Harris & R Probert *Principles of Family Law* 8ed (2008).

<sup>145</sup> Ibid.

<sup>146</sup> See Day of General Discussion on 'The role of the family in the promotion of the rights of the child' in Committee on the Rights of the Child, *Report on the fifth session CRC/C/24, Annex V*, (1994) 63; It was stated that the family is an essential agent for creating awareness and preservation of human rights'.

<sup>147</sup> Committee on the Rights of the Child, 'General Discussion on the role of the family in the promotion of the child' para 198 read with 193-195.

<sup>148</sup> G Lansdown 'The Evolving Capacities of the Child' UNICEF Innocenti Research Centre, (2005), available at <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> accessed on 17 January 2017.

<sup>149</sup> Ibid.

their parents.<sup>150</sup> Apart from recognising that children have agency, the concept protects children from premature exposure to vast responsibilities that are associated with adulthood.<sup>151</sup>

In view of the above, the concept of the evolving capacities is very central to child rights in general. Under article 5 of the Convention, state parties have the duty to respect the responsibilities, rights and duties of parents towards children in a manner consistent with the evolving capacities of the child. This provision codifies the principle of the evolving capacities of the child. Although recognised in relation to the state's duty to respect the parent's responsibilities, the principle of the evolving capacities of the child is now widely recognized as a major principle of interpreting international child rights law.<sup>152</sup>

The Convention recognizes that children grow in diverse culture and physical environments. These backgrounds and experiences have an impact on a child's acquisition of competencies. The degree of autonomy or protection they need will therefore also vary.<sup>153</sup>

From the foregoing, the concept of the evolving capacities corresponds with the underlying principle of participation and also has the relationship with the principle of autonomy. The concept serves as an emancipating step that allows the child to be an autonomous being and capable of being responsible not only for their lives but in society as well. It accommodates a child to be part of the adulthood and access to participation in decision making and voicing out their opinions without having parents decide for them.

The concept of the evolving capacities to a great extent mirrors adolescent stage as this is the time when most children are exploring their maturity and abilities. Adolescence is the stage where children require the most protection as their desires to exercise their rights is heightened as such there is usually a call for protection from

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Supra note 149.

<sup>153</sup> Ibid.

parents over their children as well as the state to undertake or put certain measures in place which can limit adolescents from going beyond their exercise. The Committee on the Rights of the Child under General Comment No.20 emphasized that the right to exercise increasing levels of responsibility does not obviate states' obligations to guarantee protection.<sup>154</sup> According to the Committee, this gradual emergence from the protection of the family or another care environment, together with relative inexperience and lack of power, can render adolescents vulnerable to violations of their rights.<sup>155</sup> This paper agrees with the Committee, even though respect for the evolving capacities is needed, there are certain elements that must be taken into consideration before parents can recognize the independence of children in order for them to be active agents of their own rights.

Thus, the Committee points out that the importance in seeking an appropriate balance between respecting the evolving capacities and adolescence, is that there is need for appropriate levels of protection, consideration should be given to a range of factors affecting decision-making including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.<sup>156</sup>

The concept of the evolving capacities in effect, fills the gaps in the theories discussed in chapter 2. For instance, John Eekelaar's interest theory recognizes child autonomy, but he is of the view that if obtained earlier, it may conflict with other interests such as basic and development interests. As for the fiduciary theory it does not necessarily advocate for autonomy of the child, what it does recognize is that, a child has the rights but the parents retain them until the child is ready to attain them. Ideally, there is no room for the evolving capacities in the fiduciary theory it presupposes that all children are capable of exercising their rights at the same time.

On the contrary, according to the paternalistic theory, there is little to no regard to taking heed of the age and maturity of the child. In some cases it goes beyond a child who has already attained the age of majority. Such paternalistic behaviour is

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<sup>154</sup> Article 32-39 of the Convention, General Comment No.20 on the Convention of the Rights of the Child

<sup>155</sup> Ibid, para 19.

<sup>156</sup> Para 20.

dependent on the cultural background of the child. The girl child in most scenarios is the victim regardless of the age, which potentially serves as a factor towards the prevalence of child marriages in most countries Africa, Malawi in particular.

At this juncture, it is important to bear in mind that the recognition of autonomy comes with the desire, opportunity and the capacity to exercise it.<sup>157</sup> A child is not mandated to exercise his or her autonomy if they lack the will to do so. The fact that the Convention embodies it does not necessarily imply that parents, guardians or the state must impose responsibilities on a child to make decisions that they are not willing to make. Lansdowne asserts that children across the globe seem to be willing to exercise their autonomy and the presumption that they lack competence serves to deny them the opportunities to acquire it. This thesis concurs with Lansdowne, indeed most children have the desire to be autonomous but the confidence to exercise it is lacking primarily because they are already deemed to be incapable of making sound decisions. The approach to be undertaken is acceptance of these evolving capacities which paves way for the exercise of the autonomy, as opposed to not providing a platform at all.

## **VIII. AFRICAN CHARTER ON THE RIGHTS AND THE WELFARE OF THE CHILD**

The Organisation of African Unity (OAU) Assembly adopted the Charter on 11 July 1990, which came into force on 29 November 1999. This document is the second international binding instrument and the first regional binding instrument that recognizes children as bearers of rights. In that regard, it asserts that a child is entitled to claim those rights at domestic level through judicial or administrative proceedings. As a regional instrument, the Charter is only applicable to African countries that are party to it.

Similar to the Convention, the Charter imposes obligations on state parties to recognize the rights, freedoms and duties contained in the Charter and to take necessary steps, in accordance with the constitutional provisions and the Charter

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<sup>157</sup> Supra note 149.

provisions, to adopt appropriate measures in order to give effect to the provisions of the Charter.<sup>158</sup> The Charter recognises civil, political, social, economic and cultural rights, and thus reaffirms that all rights are interrelated, indivisible and interdependent.

The Charter follows the Convention in codifying the underlying principles of children's rights. Firstly, the Charter recognises non-discrimination principle<sup>159</sup> a more extensive list of the grounds on which discrimination is prohibited than those listed in the Convention. Secondly, under article 4, the Charter provides that in all decisions affecting the child, the best interest principle shall be the primary consideration. The language used in the Charter implies that the principle is the overriding consideration in all matters affecting the child.<sup>160</sup> Thirdly, the Charter recognizes the participation principle, which means it regards the child as an autonomous person whose view must be taken seriously.<sup>161</sup> The Charter's conceptualization of the child as an autonomous being is significant considering that in many African countries, 'children are considered incapable of making decisions' and that their decisions are made by their parents or male elders.<sup>162</sup> Lastly, the Charter also recognises the principle of life survival and development it contains survival rights akin to those enshrined in the Convention.

## IX. CONCLUSION

In conclusion, both the Convention and the Charter have made a significant contribution towards the realization of children's rights. The international and regional instruments recognise a child as an active agent capable of exercise autonomy over decisions affecting his or her life. This allows children to claim their rights against parents and the state. The underlying principles and the evolving capacities play an important in striking the balance between the exercise of this autonomy and that of the

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<sup>158</sup> Art 1 of the Charter.

<sup>159</sup> Article 3, the Charter.

<sup>160</sup> Some scholars argue that the use of the word 'the' and 'a' used before 'primary consideration' have different meanings. For example G Van Bueren(1995),A.G Mower(1997) G.S Kamchedzera (1999) 520-521 as cited by DM Chirwa 'The merits and demerits of the African Charter' (2002) 10 (2) International Journal of Children's Rights 157-177.

<sup>161</sup> It does so by providing a cluster of participation rights. See Article 4(2), Article 12, Article 13, Article 17, Article 7. Article 8, Article 9, Article 10 of the ACRWC.

<sup>162</sup> A Moyo *Balancing Child Participation Rights, Parental Responsibility and State Intervention in Medical and Reproductive Decision Making under South African Law* PhD (Cape Town) (2014)

parents. Having reviewed the international standards for the realization of child rights, in the following chapter, the thesis addresses the extent to which the Malawian legislation balances the concept of child autonomy and parental autonomy.

## Chapter Four

# CHILDREN'S AUTONOMY AND PARENTAL AUTONOMY UNDER MALAWIAN LEGISLATION

### I. INTRODUCTION

The previous chapters demonstrated the theoretical underpinnings of children's rights and tracked the evolution of children's rights under international law. Chapter three, in particular, illustrated the significance of children's rights and established that a child possesses rights separate from those of their parents or legal guardians. It also discussed the underlying principles of rights recognized under international child rights law, and demonstrated that children's rights are indivisible, interrelated, and interdependent. The chapter also highlighted that some of the key factors to be considered when balancing child autonomy and parental autonomy.

This chapter seeks to determine whether Malawian laws strike the right balance between child autonomy and parental autonomy. This will be done against the standards set by international law under the Convention and the ACRWC. The domestic laws that will be considered in the analysis are section 23 of the Constitution of Malawi (the Constitution), the repealed Children and Young Persons Act<sup>163</sup> and the Child Care, Protection and Justice Act<sup>164</sup> (the Act). As indicated in the previous chapter, Malawi acceded to the Convention and the ACWRC on 2<sup>nd</sup> January, 1991 and 16<sup>th</sup> September, 1999 respectively.

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<sup>163</sup> Cap 26:03 of the Laws of Malawi.

<sup>164</sup> Act No. 22 of 2010.of the Laws of Malawi.

## **II. RECOGNITION OF CHILDREN'S RIGHTS IN MALAWI**

The recognition of children as rights bearers in Malawi is fairly new. This is so because, traditionally children are deemed to be vulnerable and dependent on their elders. The Committee on the Convention of the Rights of the Child once observed that customary law and social traditions were an impediment to the implementation of the Convention particularly its general principles<sup>165</sup> Indeed in Malawi most social traditions place children as those in need of protection and must depend on adults particularly their parents until they have matured and proven to be independent. In fact, it is a shared experience that a child must respect his or her parents, obey instructions and regarded as vulnerable. As such, one would identify Malawi to be paternalistic as far as child rights is concerned. But without having to quickly consider it as paternalistic, it is necessary to look at the relevant laws to have a well-founded conclusion of what theoretical approach Malawi undertakes.

## **III. IMPLEMENTATION OF INTERNATIONAL CHILD RIGHTS LAW IN MALAWI**

### **A. Best interests**

The recognition of the concept of the best interest's principle at domestic level as a primary consideration in all matters affecting the child is a recent inclusion in the Constitution of Malawi.<sup>166</sup> Section 23(1) of the Constitution provides that 'all children regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in decisions affecting them'. The inclusion of the principle in 2010 was a progressive one and an indication towards the adoption of international law standards. Initially, the Constitution did not consider this principle despite it being a principle clearly spelt out in the Convention and emphasized by the Committee. It is therefore laudable for Malawi to have considered this principle and included it in the Constitution after the

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<sup>165</sup> Concluding Observations...

<sup>166</sup> Section 23(1) of the Constitution of Malawi.

Committee had recommended that Malawi must take all appropriate measures to ensure that the principle is appropriately integrated in all legislation<sup>167</sup> Furthermore, in 2010 was a significant year as far as reforms are concerned in that not only was the section 23 amended but also the enactment of the Child Care, Protection and Justice Act.

According to the Child Care Protection and Justice Act (the Act), the best interest principle emerges under custody or access orders. It also emerges under the appointment of a guardian,<sup>168</sup> to mention a few provisions. The best interest principle is a very fundamental principle for interpreting and implementing child rights and must be applied as a dynamic concept requiring an assessment appropriate to the specific context.<sup>169</sup> The best interest principle is not mentioned in all the provisions, but it undertakes to be considered when child rights are being implement domestically.

It should also be noted that the principle found its place in the Malawian jurisprudence prior to 2010 when case of the adoption of Chifundo James went as far as the Supreme Court of Appeal. In April 2009, the High Court rejected th adoption of the infant CJ. In declining the application, the court had recourse to Article 3(1) of the Convention and qualified the principle on the understanding that inter-country adoption is a remedy of last resort.<sup>170</sup> When the matter went to the appellate court the Supreme Court read the principle differently. In their judgement they head that the Petitioners appeal be allowed and granted the adoption order. The issue in the matter was whether the principle was applicable in Malawi since it did not have constitutional or legislative effect at the time. The Supreme Court found that as a signatory to the Convention, the application had local application and stated as follows:

‘In our judgment, think that whether you talk about the best interest of the child as is the case in the above cited Conventions or you talk about the welfare of the child as is contained in the Act, this really is a question of semantics or nomenclature. They mean the same thing, and it is this: a court of law dealing

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<sup>167</sup> Committee on the Rights of the Child, 29<sup>th</sup> Session, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observation of the Committee on the Rights of the Child; Malawi, para 26. CRC/C/15/Add.174, 2<sup>nd</sup> April 2002.

<sup>168</sup> Section 41 (1) of the Constitution of Malawi.

<sup>169</sup> General Comment 14 (2013) on the right of the Child to have his or her best interests taken as a primary consideration para 1, CRC/C/GC/14 29<sup>th</sup> May, 2013.

<sup>170</sup> Committee on the Rights of the Child, 3<sup>rd</sup> to 5<sup>th</sup> Reports of States parties due in 2013- Malawi, Consideration of reports submitted by states parties under article 44 of the Convention received on 7<sup>th</sup> January, 2015.

with the adoption of an infant must pay attention at all times that the welfare of the child is not compromised by secondary issues. We therefore find that there is absolutely no conflict between what the Act provides and what Articles, 3, 20 and 21 of the Convention provide. The provisions deal at some length with matters that can only be said to be for the welfare of the child which our courts are mandated to protect under the Act.<sup>171</sup>

However, the Committee once observed in 2002 that customary laws and social traditions were factors impeding the implementation of this principle.<sup>172</sup> For instance, cases of child marriages are prevalent in Malawian traditions and cultures which encourage early sexual initiations, the status of being married, women's subordinations in society and stigmatisation of teen pregnancies.<sup>173</sup> Such traditions and cultures by far are not in the best interests of the child particularly the girl child. It refrains them from enjoying their childhood as they are transformed to being an adult at premature stages and nonetheless it is adulthood imposed on them. Similarly, the Committee stated that during adolescence, gender inequalities become more significant and that manifestations of discrimination, inequality and stereotyping against girls are often intensified which lead to more serious violations of their rights, including child and forced marriages, early pregnancy, exploitation and trafficking.<sup>174</sup>

## **B. Respect to Children's Participation and Evolving Capacities**

Child participation is also closely linked to the concept of the child capacities. These two play a huge role in respecting child autonomy. For a child to exercise autonomy, aspect of child participation come into play immediately at the same time the evolving capacities will need to be considered. Child autonomy requires the child to participate in decisions and actions affecting him or her and the ability to express their views. Article 13 of the Convention provides for children's freedom of expressions and that

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<sup>171</sup> Ibid 170.

<sup>172</sup> Ibid 167, para 25.

<sup>173</sup> Malawi Human Rights Commission, 'Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi (2005) p.7.

<sup>174</sup> General Comment 20 para 27 and A/HRC/26/22. Para 21.

the exercise of that freedom may be subject only to the restrictions set out under article 13(2). The Committee in General Comment 20 stresses that the obligation of parents and caregivers to provide appropriate guidance in accordance with the evolving capacities of adolescents should not interfere with the adolescents' right to freedom of expression.<sup>175</sup> The same goes with freedom of religion, association and privacy which must be given to an adolescent as it is the stage where child autonomy is sought. This thesis maintains that these participatory rights and freedoms must be given but some sort of parental direction is needed not to overpower the child but laying out options and repercussions therein while at the same time ensuring the child plays an active role in exercising their choices.

At domestic level, child participation is protected the same way under the Convention. The Constitution of Malawi does not provide for a separate set of rights specific for children. As such, it is deemed that all rights inclusive of participatory rights under the Constitution are applicable to all persons which presupposes autonomy of the child although the age and maturity would have to be taken into consideration. The Act on the other hand to a certain degree codifies the duties and responsibilities of a child, thus recognizing a child as autonomous although subject to the evolving capacities of the child.<sup>176</sup>

Looking at the general principle of child participation together with the evolving capacities, the two are important benchmarks towards determining when a child should exercise their autonomy. States are under the duty to ensure children are controlled in accordance with their age, maturity and competencies.<sup>177</sup>

#### **IV. LEGAL RECOGNITION OF CHILD AUTONOMY IN MALAWI**

The Malawian legal framework presents an appropriate platform within which to examine the appropriate balance addressed between child autonomy and parental autonomy. This section focuses on the Constitution, the repealed Children and Young

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<sup>175</sup> General Comment 20 par 42.

<sup>176</sup> Section 4 of the Child Care, Protection and Justice Act.

<sup>177</sup> Article 5 of the Convention.

Persons Act and the Child Care, Protection and Justice Act (the Act). This section shall demonstrate that certain provisions promote child autonomy and others are protective thus enhancing parental autonomy and institutional autonomy. In effect indicating the paternalistic nature of the laws and elements of the fiduciary theory.

## A. The Constitution of Malawi

Chapter four of the Constitution provides for human rights to be enjoyed by all people in Malawi. The Chapter dedicates a section for children's rights under section 23. According to section 23(1) of the Constitution, '[all] children regardless of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them'.<sup>178</sup> This provision mirrors the best interest principle entrenched under the Convention.<sup>179</sup> As indicated in the previous chapter the best interests' principle paves way for their interests and not those of their parents to shape any decision that affects them. This principle is to be implemented in all decisions and actions affecting the child.

The Constitution has a few sections that strictly provide for the rights and individuality of the child towards their autonomy. For instance, it provides that children have the right to a name<sup>180</sup> and that they have the right to know and be raised by their parents.<sup>181</sup> Section 23(4) of the Constitution provides that children are entitled to reasonable maintenance from their parents or guardians.<sup>182</sup> The content of this provision entrenches the provisional rights as stipulated under the Convention. It does not state the evolving capacities a child might have such as obtaining independence earlier and being able to provide for themselves. This to some extent weakens the child's

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<sup>178</sup> Section 23(1) of the Constitution of Malawi.

<sup>179</sup> Article 3(1) of the Convention.

<sup>180</sup> Section 23(2) of the Constitution provides that 'All children have the right to a given name and a family name and the right to a nationality'.

<sup>181</sup> Section 23(3) of the Constitution provides that All children shall know, and to be raised by, their parents.

<sup>182</sup> Section 23(4) provides that 'All Children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, from their guardians, and in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance'.

autonomy. This provision places parents in a unique position of the duty to provide for their children by clearly defining their role. .

Section 23(5) of the Constitution is protective of children.<sup>183</sup> It unequivocally prohibits the employment of children that is harmful to their health or to their physical, mental, spiritual or social development.

The Constitution recognizes the need for the protection of children, but, it does not pave way for self-determination of the child.

As regards to child participation, children in most cases fail to participate in decisions that affect them to the desired degree. This is usually influenced by traditional perceptions such as elders speaking on behalf of children.

As the Constitution recognises the principle of non-discrimination and the right to equality before the law, it does not expressly recognise the right of the child to participate. It however, recognises the rights of everyone to privacy,<sup>184</sup> freedom of expression,<sup>185</sup> to have access to information.<sup>186</sup>

It is worth noting that the Constitution states that for purposes of certain specific rights, a child is a person under the age of sixteen.<sup>187</sup> However, other laws stipulate that a child is any person under the age of 18.<sup>188</sup> The laws of Malawi have been criticized by Civil Society Organizations, both local and international, for failing to harmonize the age of the child in order to strengthen the protection of children.<sup>189</sup> For example, the Constitution permits marriage with a child aged between 15 and 18 years as long as the child and parent give consent.<sup>190</sup>

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<sup>183</sup> Section 23(5) provides that Children are entitled to be protected from economic, exploitation or any treatment, work or punishment that is , or is likely to- a) be hazardous; b) interfere with their education; or c) be harmful to their health or to their physical, mental or spiritual or social development.

<sup>184</sup> Section 21 of the Constitution.

<sup>185</sup> Section 35 of the Constitution.

<sup>186</sup> Section 37 of the Constitution.

<sup>187</sup> Section 23 of the Constitution.

<sup>188</sup> Domestic Violence Act, National Registration Act,

<sup>189</sup> UNICEF, Human Rights Watch, ...

<sup>190</sup> Section 22(7) of the Constitution.

## **B. The Children and Young Person's Act**

Prior to the enactment of the Child Care, Protection and Justice Act, issues concerning children in Malawi were regulated by various Acts of Parliament. Among them was the Children and Young Persons Act.<sup>191</sup> While this Act was enacted to consolidate the law relating to children and young persons, its provisions only covered juvenile justice and children in need of care and protection.<sup>192</sup> Accordingly, the Act did not make provision for the autonomy of the child. At the time this Act was in force, children already had no room to exercise autonomy and this was also prior to the adoption of the Convention.

## **C. The Malawi Child Care, Protection and Justice Act**

The Child Care, Protection and Justice Act (the Act),<sup>193</sup> repealed the Children and Young Persons Act and was enacted to consolidate the law relating to children by making provision for child care, child protection, child justice, or child social development and related matters. The Act aims at the protection and upholding the best interests of the child by introducing new provisions which were not included under the repealed Act. For instance, it introduces many provisions in the field of juvenile justice such as those on preliminary inquiries,<sup>194</sup> diversion,<sup>195</sup> legal representation,<sup>196</sup> and a separate court system for children,<sup>197</sup> detention places for children pending trial and guidelines for arresting children.<sup>198</sup> This legislation lays emphasis on the rehabilitation of young offenders and on reintegrating them back into society which is reflected under international child rights law.

Besides improving the juvenile justice system, the Act makes provision for child care and protection system. It introduces duties and responsibilities of parents towards

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<sup>191</sup> Cap 26:03, Laws of Malawi, now repealed.

<sup>192</sup> DM Chirwa 'Children's rights. Domestic alternative care frameworks and judicial response to restrictions on inter-country adoption: A case study of Malawi of study of Malawi and Uganda (2016) 16 *African Law Journal* p 123.

<sup>193</sup> Act No. 22 of 2010, entered into force on 11 October 2010.

<sup>194</sup> Section 99-121 of the CCJP Act

<sup>195</sup> Section 112-121 CCPJ Act.

<sup>196</sup> Section 126-131 CCPJ Act.

<sup>197</sup> Section 132-149 CCPJ Act

<sup>198</sup> Section 157-176 CCPJ Act

children;<sup>199</sup> new rules for determining whether a child is in need of care and protection<sup>200</sup> and on guardianship,<sup>201</sup> fosterage<sup>202</sup> and residential placements; and defines the duties and functions of local authorities relating to child care and protection of children from undesirable practices.<sup>203</sup>

From the above, it is this paper's considered view that the overall goal of the Act is to strengthen the protection of children than to protect child autonomy.

However, the Act includes some provisions that promote autonomy to a certain degree. Some provisions to be discussed below also indicate how they do not have a significant bearing if that autonomy is to be exercised, in other words, they do not play an important role in a child's enjoyment of exercising autonomy over decisions and action that affect their daily lives. For instance, section 4 of the Act provides as follows:

In the application of the provisions of this Act, and in any matter concerning a child, due regard shall be made to the duties and responsibilities of the child to-

- a) respect the parents, guardians, superiors and elders at all times and depending on the age of the child assist them in cases of need;
- b) serve the community by placing his or her physical and intellectual abilities at its service;
- c) preserve and strengthen social and national unity and character of Malawi;
- d) uphold the positive values of the community; and
- e) contribute towards the child's own development into being a useful member of the society.

But due regard shall be paid to the age and ability of the child and to such limitations as are contained in this Act.

First, this provision codifies the concept of the evolving capacities of the child as stipulated under the Convention,<sup>204</sup> by acknowledging that the duties and responsibilities of the child shall consider the age and abilities of the child. To a limited extent section 4 empowers children and recognizes them as persons that are capable of serving a purpose in society rather than just persons that need protection. Although

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<sup>199</sup> Section 3 of the CCPJ Act.

<sup>200</sup> Section 23, CCPJ Act.

<sup>201</sup> Section 38 – 45, Division 3 of the CCPJ Act.

<sup>202</sup> Section 49 -69, Division 4 of the CCPJ Act.

<sup>204</sup> See article 5 of the Convention on the Rights of the Child.

it does not provide for the age, these duties and responsibilities are still applicable to children. It is important to note that the evolving capacities have been acknowledged. In this way, the section seems to accept that a child may be mature enough to execute certain duties and responsibilities.

The content of this provision resonates with Eekelaar's interest theory, which indicates that children have basic interests and developmental interests. Children's duties and responsibilities might serve a useful developmental role for children, but their fulfilment must not be at the expense of the child's basic and developmental interests.<sup>205</sup>

Section 3 of the Act demonstrates that children need protection and that parents are under the duty and responsibility to ensure children are provided and protected.<sup>206</sup> In as much children need protection at whatever stage of their childhood and need to be provided for, there is need for a line to be drawn as to when it is reasonable for their parents and guardians to reduce their control over their children. Respecting a child's age and maturity may be important but careful consideration must be taken in different stages of childhood particularly adolescence which is the stage that requires an appropriate balance between what they want and what they need.

Section 5(1) of the Act provides that children must be heard in matters affecting them.<sup>207</sup> This is welcoming as it plays a huge role in their daily lives. This provision implies complete autonomy of the child in decisions and actions affecting him or her as required under international law. Similarly, section 8(4) (a) provides for the views of the child to be taken into account in custody and access to children proceedings before child justice courts. To this extent, the Act respects and recognizes children's participation rights, which is one of the four underlying principles of the Convention and the ACWRC. This is a reflection of Eekelaar's interest theory in which the Act it is giving the child's autonomy interests priority. Although these provisions do not seem to have any impact on the child basic and developmental interests.

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<sup>205</sup> See chapter 2 on the discussion on John Eekelaar's interest theory.

<sup>206</sup> Section 3 of the CCPJ Act comprehensively provides for the duties and responsibilities of parents or guardians.

<sup>207</sup> See Article 12 of the Convention.

Section 9(1) (a) of the Act expands the protection of the child's autonomy by stipulating that where a parent or legal guardian legally liable to maintain a child fails to maintain the child, the child or other persons acting on the child's behalf may make an application against the parent or guardian to a child justice court for a maintenance order for the child.<sup>208</sup> In practice, this provision may be difficult to implement, in Malawi there are many parents who fail to look after their children due to poverty and children are generally taught to respect his or her elders at all times even when they are in the wrong. Section 9 has a chance of being implemented where the child's parents are separated and maintenance is either joint or one of the parents is liable for that maintenance. In this instance, one of the parents may have the motivation to enforce the maintenance order.

Section 14(1) of the Act makes provision for persons entitled to receive maintenance funds. These funds are received and administered by the person who has custody of the child. If it is read together with section 4 of the Act, one could interpret it as implying that a child who has attained the age of majority has displayed some maturity could receive and administer maintenance funds. This is an apparent recognition of a child as a bearer of rights if the provision is to be read together with section 4.

From the above provisions, it must be noted that child autonomy must not be limited to certain situations. The view that this thesis undertakes is child autonomy to be available at all times. Child autonomy must not be questionable only in situations where there is potential harm to the child, it must exist even when there is no harm. This is where Eekelaar's theory could be faulted as it only indicates that due care must be given where autonomy interests have an impact on basic and developmental interests. This in effect implies that autonomy is tested in particular unique instances. Child autonomy must also be recognised even if there is no harm to any basic and developmental interests. Both the fiduciary theory and paternalism theory are just as concerned with the vulnerability of the child in general and not focus on the possibility of instances where there is no harm at all. As such, international law fixes this as it does not necessarily anticipate harm it just sets out the age and consideration of the

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<sup>208</sup> See article 9(1) a child, parent of the child, guardian of the child, relatives of the child, social welfare officer, police officer, teacher, health officer and any other appropriate person.

evolving capacities all these factors that delay a child's autonomy are either cultural or a social tradition.

## **1. PROVISIONS PROMOTING CHILD AUTONOMY AND PARENTAL AUTONOMY**

This section provides for particular provisions that either promote child autonomy or parental and institutional autonomy.

### **A. Guardianship**

Another area of the Act that promotes child autonomy is guardianship. Section 40(1) of the Act promotes autonomy of the child by permitting him or her to apply for appointment of a guardian if a surviving parent is unfit to have legal custody over the child.<sup>209</sup> Further, during guardianship proceedings, the child justice court may consider the best interests of the child in appointing a guardian for the child.<sup>210</sup> Although section 41(1) promotes child autonomy, there is still some institutional autonomy in that the court 'may' consider in the best interest of a child. The use of the word 'may' implies that the court has discretion to consider the best interests whereas Convention and the ACRWC emphasise on the consideration of the best interests of the child in all actions that directly affect them.<sup>211</sup>

### **B. Fosterage**

The Act promotes child autonomy by taking into account the wishes of the child concerning the determination of a foster parent(s).<sup>212</sup> The inclusion of the views of the child during fosterage is a clear recognition of a child as an autonomous being, even though the content of the entire provision rests on institutional autonomy which in this case works to the advantage of the child.

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<sup>209</sup> Section 40(1) of the CCPJ Act,

<sup>210</sup> Section 41(1) of the CCPJ Act.

<sup>211</sup> Article 3 of the Convention, Article 4 of the ACRWC.

<sup>212</sup> Section 55(f) of the CCPJ.

The Act respects a child's religion when put into foster care.<sup>213</sup> This is not only respecting the child's freedom of religion as provided under the Constitution<sup>214</sup> Convention and the ACRWC,<sup>215</sup> but also a recognition of the child as an autonomous person. However, in some instances it is possible to find that a child is not aware of exercising his or her choice of freedom. As such, the child adopts the foster parents' religion without the child knowing that he or she is free to choose the religion he or she wishes to associate with. The issue that needs to be addressed is for the child to be aware of this and this is the state's duty to ensure that the professionals and institutions exercise due diligence and expertise as emphasized under General Comment 20 and the Convention on the freedom of religion.

According to the Convention, 'states shall respect the rights and duties of the parents or legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities'.<sup>216</sup> Section 56 of the Act does not explicitly mention the evolving capacities of the child regarding the child's freedom of religion while in foster care.

### **C. Judicial proceedings**

The Act recognises the autonomy of the child during preliminary inquiries. It provides that preliminary inquiries 'shall be held in respect of a child suspected to be responsible for an offence prior to plea unless the child has been released on caution or the charge has been withdrawn'.<sup>217</sup> Among the objectives of the preliminary inquiries is to encourage the participation of the child.<sup>218</sup> This provision values the principle of participation of the child in all decisions that concern him or her which reflects the principles underpinning the Convention towards the promotion and protection of children's rights globally. Article 12 of the Convention emphasizes that opportunities

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<sup>213</sup> Section 56(2) of the CCPJ.

<sup>214</sup> Section 33 of the Constitution provides that every person shall have the right to freedom of conscience, religion, belief and thought, and to academic freedom.

<sup>215</sup> See article 30 of the Convention.

<sup>216</sup> See article 14 of the Convention.

<sup>217</sup> Section 99(1) of the CCPJ Act.

<sup>218</sup> Section 99(4) (g), it also encourages the participation of the child's parent(s), guardian or appropriate adult in decisions concerning the child.

to be provided in particular 'in any judicial and administrative proceedings affecting the child'. The Committee has emphasized the relevance of this principle to judicial proceedings affecting the child including those concerning children in conflict of the law.<sup>219</sup>

In addition, the section 100(1) (c) and (d) makes provision for parents to attend preliminary inquiries.<sup>220</sup> In cases where a child is competent to express his or views and make decisions and depending on the matter, the child may not need the parent to be present. But in instances where the child is unable to decide, the parent(s) or guardian will have to be present and make decisions on behalf of the child. Thus, the display of the fiduciary model which describes the relationship between the parent and the child, in that parents are deemed as trustees over the interests of the child until they are able to claim those interests for themselves. However, the fiduciary does not necessarily strike the balance between parental autonomy and child autonomy the way international law has done by including the evolving capacities of the child together with the principles underpinning the Convention. Thus, where a child is accompanied by his or her parent or any appropriate adult at the preliminary, inquiry due regard must be made to the evolving capacities of the child.

Furthermore, under the preliminary inquiries, the Act promotes child autonomy by making provisions for the child to be informed of the nature of the allegations, of his or her rights and of the procedures to be followed in accordance of the Act.<sup>221</sup> The provision recognizes the evolving capacities of the child and it also equips the child with knowledge to enable him or her to make a formed decision when exercising his or her autonomy related rights.

#### **D. The right to legal representation**

The Act also recognises the autonomy of the child under the provisions pertaining to legal representation. First, under section 126(1) of the Act, it guarantees a child the

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<sup>219</sup> Article 12 (2) of the Convention, General Comment No. 12, Committee on the Rights of the Child, 'The right of the child to be heard' CRC/C/G/12. p.32 page 11.

<sup>220</sup> Section 100(1) of the CCPJ enlists the persons that shall attend a preliminary inquiry.

<sup>221</sup> Section 102 (1) (b), (c) and (d) of the CCPJ Act.

right to legal representation. This provision in itself recognises the child's separate personhood. Secondly, a child is entitled to give the legal representative instructions in a language of his or her choice.<sup>222</sup> In cases where a child or his or her parents cannot afford a legal representative for the child, the state may appoint a legal representative for the child at the expense of the state.<sup>223</sup> The Act emphasizes the best interests of the child to be considered when appointing a legal representative. As aforementioned, the state is under obligation in international law to undertake all appropriate measures in ensuring the views of the child are heard.<sup>224</sup>

The legal representative is responsible to explain the rights and responsibilities of the child in relation to the proceedings provided for under the Act in a manner consistent with the age and intellectual development of the child.<sup>225</sup> The provision articulates the evolving capacities to a certain degree in using the terminology of 'intellectual development' instead of 'maturity' which is used in most provisions in the Act. The provision elevates child autonomy in that a legal representative must allow the child, if capable of doing so, to give independent instructions concerning the case.<sup>226</sup>

## V. CONCLUSION

As shown above, the Constitution does not explicitly recognize a child as an autonomous person as the rights provided are to be enjoyed by all individuals in Malawi. Section 23 of the Constitution particularly provides for children rights and domesticates the best interests' principles to be taken into consideration in matters concerning children. The current Malawian legal framework recognizes the need for the protection of children as opposed to the repealed Children and Young Persons Act which largely focused on juvenile protection. The Child Care Protection and Justice Act offers a comprehensive legal protection mechanism for children including those in need of care and protection and for juvenile justice. However, the content of the Act presupposes the autonomy of the child, especially in specific areas such as legal

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<sup>222</sup> Section 126(5) of the CCPJ Act.

<sup>223</sup> Section 127(2) of the CCPJ Act.

<sup>224</sup> Article 12 of the Convention,

<sup>225</sup> Section 128(1) (a) of the CCPJ Act.

<sup>226</sup> Section 128(1) (b) of the CCPJ Act.

proceedings. The Act allows the participation of a child which is a key aspect of a child exercising his or her autonomy.

As regards to parental autonomy, the Act bestows more duties and responsibilities on parents that enhances parental authority over children. The Act undertakes an approach that is protective in order to safeguard the welfare of the child. The concept of the evolving capacities emerges as the key device for establishing the right balance of the two concepts. However, the Act does not extensively address the concept as it has been done under international law. International child rights law ensures that the more developed interpretive approaches accepted by institutions such as the Committee on the Rights of the Child, the more it will be effectively domesticated.<sup>227</sup> The Act considerably leans towards the protection of the child and the promotion of autonomy of children under the Act is only present in a few provisions.

The Act falls short in the promotion of child autonomy in a child's everyday lives, it is focused on autonomy of the child in only special instances where a child needs protection and justice. It does not establish children as an active agent over their lives, it clearly shows that a child is vulnerable as such exercise of child autonomy in Malawi remains to be an ambition that is farfetched. Regrettably, child rights in Malawi fall short from recognizing international standards because of customary laws and social traditions. With the Committee recommending for a separate bill of children rights in 2002 one would expect the Act which became operational in 2010 to contain children's rights and not provisions on protection and juvenile justice. Further, Malawi's report on child rights particularly on child autonomy does not come out strongly in that reports are based on the Act which does not necessarily promote as such there is a visible gap between the concept of child autonomy and the protection of child rights in general.

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<sup>227</sup> G Van Bueren, 'The Committee on the Rights of the Child: Overcoming Inertia in this Age of No Alternatives' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 569.

## Chapter 5

# CONCLUSIONS AND RECOMMENDATIONS

### I. INTRODUCTION

In human rights discourse, particularly child rights, the debate between parental and child autonomy is never ending. Children for the most part are considered to be individuals in need of protection and provision because of their vulnerability and inability to make decisions over matters that concern them. International child rights law has set benchmarks in order to determine when parental autonomy should be exercised and when child autonomy must be exercised.

### II. SUMMARY OF FINDINGS

The objective of this study was to analyse the Malawi Child Care, Protection and Justice Act on how it addresses the balance between parental autonomy and child autonomy. In order to find out whether it does so or not, several theories were examined. Some theorists like John Eekelaar assert that giving children full exercise of their autonomy interests has a potential to hinder their basic and development interests. However, he also asserts that the intellectual understanding must be supplemented by emotional maturity. This assertion resonates with the concept of the evolving capacities under the Convention on the Rights of the Child.

The fiduciary theory, on the other hand, describes the relationship between a parent and a child as being akin to a 'trusteeship'. Under this theory, parents only exercise autonomy for a certain period of time until their children are of age and capable of making decisions on their own. The paternalism theory as the name suggests entails parental control over the child to advance the interests of the child. This theory mirrors the protective and provisional right recognised by the Convention on the Rights of the Child. .

This study also explored both international and regional mechanisms that protect and promote child rights. It has shown that the best interests of the child and child participation principle play an important role in the child's exercise of autonomy. At the same time, the concept of evolving capacities of the child is fundamental to striking a balance between parental autonomy and the child's autonomy. Under the Malawian legal framework, the best interest principle is a guiding principle in all matters affecting the child. It emerges as a benchmark for measuring the conduct of children and parents. The best interest principle is very important in that it assists authorities when making decisions affecting the welfare of the child. The outstanding feature for this principle is that the interests of decision makers and parents' interests are set aside and only the child's interests carry weight. In order for this principle to be implemented, it is necessary that a child who is capable of participating is permitted to participate in decision making through being given an opportunity to express his or her views. This underlines the importance of recognising the evolving capacities of the child. The introduction of this concept solves the conflict between parental autonomy and child autonomy.

We cannot deny the fact that children need protection before parents or adults relieve themselves from the duty to protect children and allow children to exercise complete autonomy over decisions that affect them, we will find ourselves in situations where other interests' children have, such as basic and development interests, are in danger as Eekelaar proposes.

Under the legal framework in Malawi, the study has found that the Malawi Child Care, Protection and Justice Act leans towards enhancing the protection of children as opposed to promoting their autonomy. The Act promotes autonomy of the child in certain instances such as judicial proceedings, fosterage, guardianship and legal representation. With regard to legal representation, for example, the Act does not specify the matters in respect of which a child must be legally represented besides the obvious cases such as in criminal, adoption and custody proceedings. Furthermore, the Act does not address the issue of children's capacity to contract at their own volition, and to have a say on marriage, labour and medical decisions involving them.

The Constitution protects children from exploitation in such instances but it does not explicitly state whether children can enter into contracts or make medical decisions.

As regards to parental autonomy, the Act makes it clear that parents have a number of duties and responsibilities. In a way, this enhances parental authority over children. That said, the approach taken by the Act is protective, to safeguard the welfare and the rights of children in Malawi. The Act is laudable in that, as opposed to the repealed Children and Young Persons Act, it is a comprehensive piece of legislation protecting children including those in need of care, protection and justice.

As to the overall question whether the Malawian legal framework establishes the right balance between parental autonomy and child autonomy, the response is negative: the Act's overarching goal seems to be to protect children. Although the concept of the evolving capacities is present in the Act, it is not prominent enough to make it recognizable. As a result, the approach taken by the Act undermines the child's autonomy which arguably has an adverse effect on the child's development and continuation to society in general.

### **III. RECOMMENDATIONS**

Having accepted the protective nature of the Act, it would be necessary to incorporate more specific rights of children in the Act. Section 23 under the Constitution is the only one that specifically covers child rights. The Child Care, Protection and Justice Act, as a key legislation that aims to protect the rights and welfare of children, is the right place to spell out in greater detail the specific rights of children, including those that protect the autonomy of the child. The rights and freedoms contained in the Constitution apply to all persons in Malawi without limitations, but in practice, it is not easy for a child to claim and exercise the general rights recognised by the Constitution. Thus, a separate bill of rights for children would enhance the protection and promotion of children's rights particularly towards self-determination of the child.

Such a bill has a better chance of being enacted in the form of an amendment to the Act than to the Constitution due to the fact that it is more difficult to effectuate the latter.

Including specific rights for children in the Act would enhance the protection and promotion of child rights in Malawi. In addition, in light of the finding of this study, the Act should also clearly spell out the balance of the two concepts. This study has established the principle of evolving capacities of the child is not fully codified in the Act. It is an important principle to navigate the conflict between parental autonomy and child autonomy this concept must be pronounced clearly throughout the Act.

Towards the recognition of child autonomy, complaint handling institutions such as the Office of the Ombudsman must set up child rights units and ensure comprehensive public awareness must be done in order to have children lodge complaints on injustices.

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