

CHILDREN'S RIGHT TO PARTICIPATION IN KENYA



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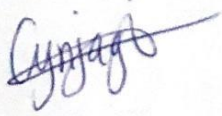
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degree of Master of Laws (LL.M) at the University of Nairobi*

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DECLARATION

I **NJAGI CYNTHIA WAWIRA**, declare that this is my original work and that it has not been submitted to any university or institution of higher learning for the award of a Diploma, Degree or Post-Graduate qualification.

Signed



Date **24th November 2021**

.....

NJAGI CYNTHIA WAWIRA

24.11.2021

Signed



Date.....

DR. AGNES MEROKA

DEDICATION

This research paper is dedicated to all Individuals, Civil Society Organizations, Activists whose desire is to fight for children's rights to become children's reality.

ACKNOWLEDGMENT

With utmost humility I acknowledge the Almighty God for it is through Him that I managed to complete this paper work successfully. I would like to thank my supervisor, Dr. Agnes Meroka, for her patience support and careful guidance during this research project. Her wisdom, insights and intellect significantly improved my work. My sincere gratitude goes to my beloved parents, David Njagi and Anne W. Njagi who have kept the faith in me all the way and stood by me throughout my academic life; my brothers Eddie Njagi and Ronald Njagi for the moral support they accorded me. You, my family are appreciated. I acknowledge my Senior, the late Faruq Kyalo (Advocate) for his inspiration, mentorship, persistent encouragement and motivation to go an extra mile in the course of this paper work. Ultimately, I would like to take this opportunity to say thank you to all my beloved friends, who have been so supportive along the way of doing my thesis.

TABLE OF STATUTES

The Constitution of Kenya

The Children Act (Cap 141, Laws of Kenya)

ACRONYMS AND ABBREVIATIONS

| | |
|---------------|--|
| ACRW | Africa Charter on the Rights and Welfare |
| ADR | Alternative Dispute Resolution |
| CRC | Conventions on the Rights of the Child |
| FGM | Female Genital Mutilation |
| ICPD | International Conference on Population and Development |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| NGOs | Non-Governmental Organizations |
| UNCRC | United Nations Convention on the Rights of the Child |
| UN | United Nations |
| UK | United Kingdom of Great Britain and Northern Ireland |

ABSTRACT

The right to participate by children is a global issue that has received attention and this is witnessed regionally and specifically in Kenya. This was the inspiration to carry out the current study examining the various laws and clauses that have been implemented globally, regionally and locally in an effort to boost children participation. Interest theory of rights which is a leading theory in children participation was the anchor for this study as it touches on both human rights and how they inculcate children participation in society. To achieve the aim of the study, specific objectives were set including; establishment of the inclusivity practices that infringes on children rights to fully participate in all development matters that involve children in accordance to Article 12 of CRC; exploring the challenges in implementing the children's right as enshrined under Article 43(1) (a) of the Constitution of Kenya; and determination of the relationship between effective implementation of participation rights in Children Act 2012 and Article (53) of the Constitution of Kenya 2010 on one hand and the cultural practices on the other. The study used a qualitative approach in which desktop review and mining of articles as well as previous studies dealing with children participation were the main focus. From the results of the qualitative analysis, the study found that principles of children inclusion in sustainable development activities have a strong foundation that would guarantee children participation, except that cultural practices in most parts of Kenya, the African region and globally as a whole makes it very difficult for child participation. In conclusion, the study observed that Kenya is very quick to ratify most of the international laws, but there was a complication in which rights and activists' groups have tended to focus on participation of girl child leaving out the boy child hence weakening the efforts to improve children participation in sustainable development activities. The Constitution of Kenya 2010 focused on the family unit putting children strictly under the family; this is a wrong assumption that has led to children misrepresentation at many forums where their full participation is required. The study recommends review of current legal frameworks to inculcate children in decision making while clearly setting aside provisions for all children including those without family units in order to be all inclusive. Further studies are also recommended on key articles in the constitution that require review for inclusivity of children participation in Kenya.

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CHAPTER ONE

INTRODUCTION

1.0. Background

The right of participation is embedded in the basic rights of children as defined by the Conventions on the Rights of the Child (CRC) as well as the Africa Charter on the Rights and Welfare (ACRW) of the child¹. The key mantra of CRC is that ‘For every child, every right’. CRC has increased the enforcement of children into participation in the choice of nutrition and clean drinking water as well as having a say in their education while participating in other decision-making like a choice of career and community project involvement.

On its part, the ACRW by African member states has fully recognized the existence of a child recognizing the need to promote and protect child participation in a family environment of happiness, love and understanding breeding room for participation in community plans and activities. Specifically, the people considered as children range from 1 to 18 years as generally viewed across the globe, regionally and locally in Kenya. However, in practical terms, children that are considered aged enough to participate range from 6 to 10 years in most western countries and 11 to 14 years as the beginning age bracket across most of the world communities including Asia and Africa².

¹ KLRC at <https://klrc.go.ke/index.php/constitution-of-kenya/113-chapter-four-the-bill-of-rights/part-3-specific-application-of-rights/219-53-children>. Accessed 10.11.2020

² Lloyd, K., & Emerson, L. (2017). (Re) examining the relationship between children’s subjective wellbeing and their perceptions of participation rights. *Child indicators research*, 10(3), 591-608.

In European countries, emphasis has been placed on the rights to participate by adolescents specifically in matters concerning their health and education based on international law³. Under this law, adolescents have a right to be heard from the family level, community level and international level with the free expression of opinion fully respected for decision-making⁴. However even in the developed world where this right to participate begins at a very low age, many scholars caution on the challenge of manipulated adolescents who could distort the whole concept of participation with underlying parental or guardian influence⁵.

In Asia, this right to participate has everyday challenges including gender and class systems which make the participating rights vary from region to region, for example different in India as compared to China, Japan and the Middle East⁶ even when international law is factored in⁷. This clearly implies that the rights of participation by what society defines as children is dependent on the regional community and gender definitions which is also experienced in Africa as opposed to being standalone⁸.

³ Correia, N., Camilo, C., Aguiar, C., & Amaro, F. (2019). Children's right to participate in early childhood education settings: A systematic review. *Children and Children Services Review*, 100, 76-88.

⁴ Lundy, L. (2018). In defence of tokenism? Implementing children's right to participate in collective decision-making. *Childhood*, 25(3), 340-354.

⁵ Todres, J. (2020). Children's Right to Participate: Insights from the Story of Malala. In *Literary Cultures and Twenty-First-Century Childhoods* (pp. 25-40). Palgrave Macmillan, Cham.

⁶ Balagopalan, S. (2019). Why historicize rights-subjectivities? Children's rights, compulsory schooling, and the deregulation of child labor in India. *Childhood*, 26(3), 304-320.

⁷ Frödén, S., & Quennerstedt, A. (2020). The child as a gendered rights holder. *Childhood*, 27(2), 143-157.

⁸ Abebe, T. (2019). Reconceptualising children's agency as continuum and interdependence. *Social Sciences*, 8(3), 81.

Some African societies across West Africa define right to children's participation matters at hand whether it is health, peacemaking or education but the dictates of how the matter concerns children remain in the hands of the adults generally disregarding what the international and regional law says⁹. Some scholars have argued that the right to participate in events like street protests, succession and property or witness contests might present false participation since in most cases the children do not have full knowledge of the background issues raising present matters¹⁰.

Locally, Kenya as a signatory to both CRC and ACRW as well as having implemented the new Constitution with a clear section on the rights of children in chapter 4 section 53 still has issues with many sectors on the right to participation by children¹¹. Accommodating of children's right to participate is continually linked to the decision of the adults in the children's environment or community¹². Across Kenya, key examples of the complications in children's right to participate include education matters being linked to the adult paying the child's fees, health dependent on the gender of the child as well as health professionals in the community while migration or participation in many other activities are also dependent on community acceptance and decision making of adults¹³.

⁹ Fokala, E. M. (2017). Implementing children's rights to participation in family decision-making processes in Africa.

¹⁰ Akanle, O., & Okewumi, E. O. (2020). *Children in Families: Contexts of Experiences and Participation in Nigeria*. In *Bringing Children Back into the Family: Relationality, Connectedness and Home*. Emerald Publishing Limited.

¹¹ KLRC at <https://klrc.go.ke/index.php/constitution-of-kenya/113-chapter-four-the-bill-of-rights/part-3-specific-application-of-rights/219-53-children> Accessed 10.11.2020

¹² Mahr-Slotawa, J. (2020). The Children's Right to Participate in the Comprehensive School Health Programme in Kenya—How can this right become a reality? A participatory research project with children in three primary schools in Kiambu County in Kenya.

¹³ Nderitu, R. W. (2016). *Towards a Human Rights Approach to Realisation of Free Primary Education in Kenya* (Doctoral dissertation, University of Nairobi).

The above is evidenced even at Kenya's law courts in many children's cases in which there is always a representation of children defined as people below 18 years with the general assumption that they cannot on their own make correct decisions leading to their non-participation¹⁴. The basic building blocks for the right to children's participation are deeply rooted in societal norms and community upbringing which include religion and many rites of passage across Kenya¹⁵.

Even though the 1994 International Conference on Population and Development (ICPD) has brought several issues that propagate children's right to participate, the socio-economic disadvantages in the country largely make it difficult for the realization of the same¹⁶. At the same time, the mixing of issues considered as human rights is not yet explicitly captured under standalone children's rights¹⁷. The Children Act Kenya (Cap 141, Laws of Kenya) makes several provisions to protect children in adoption, care, and protection, parental responsibility, custody, and fostering.

However, the direct and clear definition of how children should participate on various fronts under Cap 141, Laws of Kenya still remains unclear. The Kenyan Parliament enacted the Act to incorporate the international and regional laws governing the welfare of children and integrate the

¹⁴ Rap, S. (2019). The Right to Effective Participation of Refugee and Migrant Children: A Critical Children's Rights Perspective. United Nations University–Institute on Comparative Regional Integration Studies (UNU-CRIS) Working Paper Series, 3, 1-30.

¹⁵ Mogute, (2019). Investigating Female Children's Rights to Family Property and Its Implication on Children's Justice in Kisii County, Kenya.

¹⁶ Maithya, I. (2018). Countering Involvement of Kenyan Children in Terrorism Through Realization of Their Socio-Economic Rights. *Journal of Law and Ethics*, 3, 107.

¹⁷ Munthali, J. (2018). Social Norms or Child Labour?: The Case of the Maasai Community in Kenya. In *Global Ideologies Surrounding Children's Rights and Social Justice* (pp. 88-104). IGI Global.

provisions of the various Kenyan laws affecting children to highlight their means of participation¹⁸. Under Section 14 of the Children Act and Section 53 (c) of the Constitution of Kenya as well as The Penal Code, the law protects children from harmful practices and customs that have adverse effects on their health, social welfare, dignity, and life¹⁹

Further, across the country in general, cultural beliefs and practices prohibit children from making their own independent decisions especially under their parents or guardian care. Specifically, many cultures across Kenya make it difficult or impossible to accommodate any modern or deviant opinion from the traditional view that is heavily guarded by the communities of different generations in Kenya²⁰ community²¹. The children are therefore seen to have rights under all the above-mentioned international and local laws but all in all, the children's participation remains silent, yet it is clear that to have rights is not the same as to have participation.

Even though Articles 7 and 8 explain the freedoms of expression and association respectively, they only appear to say the child is capable and that their freedom of association has to conform to the law which in one way limits the child participation since country laws might have supreme powers of stopping such associations or expressions thereby defeating the children path to participation. An example is in Article 15 where ACRW advocates for the protection of children against harmful cultural practices, but it is common to find children participating in such practices with or without

¹⁸ Eva Palmqvist, 'Children's Rights in Kenya – an Analysis Based on the CRC Reports' (2006) <<https://resourcecentre.savethechildren.net/library/childrens-rights-kenya-analysis-based-crc-reports>> accessed 18 June 2020.

¹⁹ Kenya Law. 'The Constitution of Kenya' <<http://kenyalaw.org/kl/index.php?id=398>> accessed 18 June 2020.

²⁰ Mogute, M. (2019). Investigating Female Children's Rights to Family Property and Its Implication on Children's Justice in Kisii County, Kenya.

²¹ Bett versus Republic accessed on 10.08.2020 at www.kenyalaw.org/Criminal_Appeal_10_of_2017.pdf

their will. This is an indication that either the international laws or the local laws have not factored in the children's vulnerability in deciding which activities they can freely participate in and which ones they can make a decision not to participate in. In general, the laws both in CRC, ACRW and Constitution of Kenya focus on the rights including what children require and what should not happen to children, but lack the tools to focus on children participation.

1.1. Statement of the Problem

The challenges arising from failure to have a uniform approach to what constitutes children's rights, the nature of the environment in which the rights are applied as well as the cultural background of various global communities makes the realization of children's participation even harder. Locally, the near-total non-participation of children in all matters concerning their lives is complicated through the non-harmonization of Article 43 (1) (a) and Article 53²² of the constitution of Kenya.

Parental guidance plays a role in complicating the continuous non-inclusion of children's rights in legal terms since it has been witnessed that the children will always rely on the adults for the interpretation and upholding of all decisions. The right of children to participate as a result of the distortion between other rights mixed with human rights makes it difficult to fully implement and practice these participation rights. The study will therefore establish the relationship between

²² National Adolescent Sexual And Reproductive Health Policy 2015 accessed on 23.08.2020 at www.knasrhp.org/2015STEPUP_KenyaNationalAdolSRHPolicy.pdf

children's rights, culture and the right to participate as proclaimed in the Kenya Constitution, CRC and ACRW²³.

This research will argue that the exclusion of participation rights in the Kenyan law, Article 53 of the Constitution as well as the Children's Act²⁴ is a structural barrier to the realization and development of a policy framework on children's participation in decision-making. To add to this, the COVID-19 pandemic has further complicated children's rights and their freedom to participate in decision making cutting across literally all cultures. This study seeks to qualitatively establish the solutions in the inclusivity of children to participate from the general post-primary school age of 13 years in Kenya.

1.2. Justification of the Study

Despite having clearly defined children's rights in the CRC, ACRWC, and the Kenyan Children Act 2012, children globally and Kenya, in particular, continue to experience various forms of abuse and exclusion in decision-making. This study specifically is beneficial to the departments of children and courts dealing with children participation in community activities. In particular, law practitioners are set to benefit from the findings and conclusions as well as recommendations derived from this study. Stakeholders in the scope of children participation both local, regional and global will benefit from reviewed literature and findings of the study. Finally, this study adds knowledge to the base of scholarly world in terms of legal direction in matters concerning children

²³ OHCHR, 'Convention on the Rights of the Child. Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 44/25 of 20 November 1989 Entry into Force 2 September 1990, in Accordance with Article 49' (2002) <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 6 July 2020.

²⁴ Children's Act, Chapter 141 2012.

participation in community affairs both social and economic. Through clauses and articles of law for Kenya and international levels, the study will help redefine the means of protecting and enhancing children's effective participation.

1.3. Research Objectives

1. To establish the inclusivity practices that infringe on children's rights to fully participate in all development matters that involve children in accordance to Article 12 of CRC.
2. To explore the challenges in implementing the children's right as articulated under Article 43(1) (a) of the Constitution of Kenya.
3. To determine the relationship between the effective implementation of participation rights in the Children Act 2012 and Article (53) of the Constitution of Kenya 2010 on one hand and the cultural practices on the other.

1.4. Research Questions

1. What inclusivity practices infringe on children's rights to participate in community matters in accordance with Article 12 of CRC
2. What are the challenges in implementing the right to participate as articulated under Article 43(1) (a) of the Constitution of Kenya?
3. What is the relationship between the effective implementation of participation rights in Children Act 2012 and Article (53) of the Constitution of Kenya 2010 on one hand and the cultural practices in Kenya?

1.5. Hypothesis

The hypotheses to be tested in the proposed research:

H₀₁: There is no relationship between inclusivity practices and implementing the right to participate as articulated under Article 43(1) (a) of the Constitution of Kenya

H₀₂: There is no relationship between challenges of participation rights in Children Act 2012 and Article (53) of the Constitution of Kenya 2010

H₀₃: There is no relationship between the effective implementation of participation rights in the Children Act 2012 and Article (53) of the Constitution of Kenya 2010 on one hand and the cultural practices in Kenya.

1.6 Theoretical framework

Human rights are ethical yardsticks used to assess the government's treatment of its people. Current political debates seem to focus on the violation, abuse, or denial of human rights by the government, caregivers, or other individuals²⁵. The legislature develops legal documents, proliferates, and integrates them within the constitution to ensure adherence to human rights provisions. However, the inclusion of the human rights laws within the Constitution does not necessarily mean that they are implemented or respected. The role of religious beliefs in violating the rights of children can be assessed through the Interest Theory of Rights.

The Interest Theory explains that human rights exist if a particular human interest is sufficiently essential to justify the forcing of duties on others to protect, respect, and fulfill this interest.²⁶ More specifically a person has the right to have a particular interest respected, protected, and fulfilled if

²⁵ Burton, S., & Reid, J. (Eds.). (2017). *Safeguarding and Protecting Children in the Early Years*. Routledge.

²⁶ Fagan, Andrew, *Human rights: confronting myths and misunderstandings* (Cheltenham, UK; Northampton, MA: Edward Elgar 2009) 23-31.

and only if, there is a sufficient reason for holding some other person to be under a duty. As such, this theory acknowledges that the freedom of another person may be limited in order to protect and further a sufficiently weighty human interest. In the case of the proposed study, the interest is the harmful religious beliefs that tend to limit the freedom and rights of the children²⁷.

Children are vulnerable beings as they rely on their parents or adults within their immediate environment for their growth and development. Historically, children were treated passively as the existing laws for the interventions of adults to ensure the realization of children's rights. As a result, society viewed them as dependent beings and perceived as incapable of exercising free choice²⁸. Concerning the rights of children, the Interest Theory carries three foundations for the conceptual frameworks of human rights. First, there is a need to consider not merely the interest that ground a right but also the obligations of the duty bearer responsible for the fulfillment of those interests and second an explicit recognition of the struggle to regulate power in the production of rights²⁹

Lastly, there is need to consider awareness of the need for reflective practice when examining the underpinnings of human rights for children in a world characterized by diversity³⁰. Thus, according to the theory, children having human rights is grounded by sufficiently high interest, which means that their parents or guardians bear the corresponding duty. As a result, the rights of

²⁷ Boot, Eric, *Human duties and the limits of human rights discourse* (Cham, Switzerland: Springer 2017) 43-49.

²⁸ Sheehan, Rosemary, Helen Rhoades, and Nicky Stanley, *Vulnerable children and the law: international evidence for improving child welfare, child protection, and children's rights* (Philadelphia: Jessica Kingsley Publishers 2012), 74-82.

²⁹ Follesdal, Andreas, *Kantian Theory and Human Rights* (New York: Routledge 2014) 4-9.

³⁰ Fagan (2009).

children can only be respected when the guardian or parents can realize the benefits of the children's interest³¹.

1.7 Literature Review

1.7.1. The Principles of Participation and Children's Rights

Four general principles underpin all rights of children. The principle of non-discrimination ensures that children have equal rights to cultivate their potential in all circumstances and times³². The principle of non-discrimination underpins the right to access an education irrespective of the child's sex, race, culture, nationality, faith, incapacity, ancestry, sexual orientation, or other statuses³³. The principle of the best interests of the child acknowledges that the primary contemplation in all activities and choices concerning a child must be his or her best interests.

The right to survival and development is the third principle that underpins the rights of children. It emphasizes the importance of guaranteeing that children access essential services and equal opportunities to achieve their full development³⁴. The principle encompasses rights to a child with a disability. The fourth principle centers on the views of a child. Under this principle, the voice of children should be heard and valued in all matters concerning their rights. The principle obliges those in power to check with children before making choices that affect them.

³¹ Boot (2017).

³² Lansdown, G. (2009). The realisation of children's participation rights: Critical reflections. In *A handbook of children and young people's participation* (pp. 33-45). Routledge.

³³ Lundy, L. (2018). In defence of tokenism? Implementing children's right to participate in collective decision-making. *Childhood*, 25(3), 340-354.

³⁴ Tisdall, E. K. M. (2017). Conceptualising children and young people's participation: Examining vulnerability, social accountability and co-production. *The International Journal of Human Rights*, 21(1), 59-75.

Article 24 of the UN Convention on the Rights of the Children (CRC) articulates the rights of children under international law. The CRC is the most widely endorsed instrument highlighting international human rights, and it incorporates all previous treaties about the right of the children³⁵. The UN adopted the CRC on 20th November 1989 following ten years of comprehensive and careful drafting. All the countries have ratified it except the United States of America and Somalia.

Further, it is recognized as the first legally binding instrument that integrates the whole spectrum of human rights, economic, social, cultural, political, and civil rights. It acknowledges that children have their rights and provides no hierarchy of human rights. As a result, the articles of the CRC are interrelated, indivisible, and interdependent³⁶. The inherent human rights within the CRC include the right to life, right to parental care, right to education, right to religious education, and right to health among others. The right to health clause states that all children have a right to medical care, and parents and the government should provide this right³⁷.

Children rights under the CRC are “inclusive” as they extend beyond protecting children from immediate infringements such as denying them access to healthcare to covering a broad range of rights and freedoms that are essential to children's health such as access to health education, non-discrimination, and protection from harmful traditional practices.³⁸ The Children Act Kenya gives effect to the CRC principles of the right of children and the African Charter on the Rights and

³⁵ Office of the High Commissioner for Human Rights (United Nations), *Convention on the Rights of the Child* (2017) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>> accessed 6 July 2020.

³⁶ Center for Health and Human Rights, *How is children's health a human rights issue?* (2014)

<https://www.hhrguide.org/2014/03/16/how-is-childrens-health-a-human-rights-issue/> accessed 06 December 2020.

³⁷ UNICEF, *The African Charter on the Rights and Welfare of the Child* (2012) <https://www.unicef.org/esaro/African_Charter_articles_in_full.pdf> accessed 06 December 2020.

³⁸ Un General Assembly. *Convention on the Rights of the Child*, 20 November 1989, Annual review of population law § (1989). <https://doi.org/10.1145/2001576.2001741>.

Welfare of the Child (ACRWC). The ACRWC builds on the fundamental principles of the UN CRC and highlights issues that are critical and unique to the African context³⁹.

Regarding children's rights to health under Article 14, the ACRWC states that children have the right to enjoy the highest, attainable mental, social, and spiritual health and acknowledges the importance of safe drinking water, nutritious food, and adequate healthcare. Article 1 of the ACRWC urges nations to discourage any cultural, religious, and traditional practices that are inconsistent with children's rights. Under Article 26, the ACRWC calls for countries to address the needs of children living under ethnic, religious, and racial discrimination⁴⁰

The UN Convention on the Rights of the Children enshrines participation among its guiding principles and a primary element to the implementation of other rights. Article 12 (Art. 12) of the CRC articulates the principle of participation. Part 1 of the Article asserts as follows: -

“States 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”.

Part 2 avers that, *“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.”*⁴¹

39 UNICEF, *The African Charter on the Rights and Welfare of the Child* (2012)

<https://www.unicef.org/esaro/African_Charter_articles_in_full.pdf> accessed 06 December 2020

40 Un General Assembly. Convention on the Rights of the Child, 20 November 1989, Annual review of population law § (1989). <https://doi.org/10.1145/2001576.2001741>. Accessed 10.11.2020

⁴¹ Ibid

The principle of participation expressed in Article 12 is inseparably connected to other children's rights expressed in Article 13, which describe a child's right to express own opinions and have access to sufficient information and Article 14, which accords children the right to freedom of thinking, conscience, and faith. Other rights include those expressed in Articles 15, 16, and 17 that touch on the right to association and peaceful assembly, privacy, and access to facts from different domestic and global sources respectively.

The participation of children should be sufficient, broad, and important within a range of engagement. Ruiz-Casares et al. argue that sufficiency denotes the appropriateness of involvement bearing in mind children's cognitive and emotional growth and development, their best interests, personal viewpoint, and objective factors. Art. 23 of the CRC articulates the rights to participation for children who may be intellectually or physically disabled children⁴² Participation should influence decision-making and therefore a dynamic process that changes over time. Participation should be framed as a band of arrangements that may promote children empowerment and positive development. This right, therefore, is seen as embracing child-driven participation, and child-adult collaborations⁴³

Some typologies of participation have been advanced, each with its strengths and limitations[&]. Ruiz-Casares states that deciding the time and the way to involve children, and the level of participation such as through information sharing, voicing of preferences, negotiating, and making suggestions or the final decisions requires paying attention to several aspects. These include the

⁴² Ruiz-Casares, Mónica, Tara M. Collins, E. Kay M. Tisdall, and Sonja Grover. "Children's Rights to Participation and Protection in International Development and Humanitarian Interventions: Nurturing a Dialogue." *International Journal of Human Rights* 21, no. 1 (2017): 1–13

⁴³ Ibid

best interests of the child, the specific context such as where a child lives, and social structures as these aspects influence the level and the way children participate in the larger societal framework⁴⁴. Adult involvement can hinder or promote children's participation. Wong et al. argue that adult involvement in the protection of children can lead to their exclusion from processes that affect them when the adults become overprotective. Equally, Wong notes that adult involvement can promote children participation to avoid their manipulation and tokenism⁴⁵. In the past three decades, international human rights agencies protecting children have developed laws that respect children in respect to their participation in the decision affecting them, provision of basic needs to children, protection against neglect, discrimination, and exploitation, and preventing children from harm.

The participation of children in decision-making should be based on their evolving capacities and meaningful⁴⁶. Under the current international legislation, children have a right to enjoy the "highest attainable standard of health" and have access to facilities that provide treatment and rehabilitation services⁴⁷. Securing the best interest of the child is the basic principle of the children's rights as guaranteed in the CRC charter. More specifically, Article 3 of the CRC indicates that the interest of the child should be the "primary consideration of all actions directed toward the children". This principle highlights all the human rights approaches that target the protection and promotion of the health rights of children⁴⁸.

⁴⁴ Shier, Harry. "Pathways to Participation: Openings, Opportunities, and Obligations." *Children and Society* 15, no. 2 (2001): 107–17. <https://doi.org/10.1002/chi.617>.

⁴⁵ Wong et al., 2010, 100

⁴⁶ Burton, S., & Reid, J. (Eds.). (2017). *Safeguarding and Protecting Children in the Early Years*. Routledge.

⁴⁷ Center for Health and Human Rights (2014).

⁴⁸ Office of the High Commissioner for Human Rights (United Nations 2017)

Thus, the best interest of the children should guide the implementation of all children's rights legislation by states and other measures essential for the realization of the human rights of children and adolescents. Despite such recognition, the implementation of children rights in some settings is based on the interests of their parents or guardians rather than their own best interest⁴⁹. Burton and Reid indicate that advocates of the liberation of children argue that parents' control over their children is unnecessary and immoral as it is a form of unjustified inequality. Moreover, they say that children should have the same moral and legal status as adults. As such, giving the children autonomy over their human rights is likely to prevent all forms of violation or abuse they are subjected to by society and adults⁵⁰.

Boot notes that the liberationism paradigm disagrees with the specific rights that should be granted to the children but maintain that paternalism is unjust. Although this view is likely to enhance the rights of the children, it would challenge the moral and legal status of the parents⁵¹. Children have the capacity to share important viewpoints not only visual but also through verbal communication. In an example from the U.K, children had a different perspective of their ideal play environment. Adults thought that a play area covered by grass was ideal as a play environment for children; but when children were involved in choosing the ideal play area, they desired a concrete environment because it did not hide shattered glasses, dog feces, and thrown away needles used by drug addicts⁵².

⁴⁹ Center for Health and Human Rights (2014).

⁵⁰ Burton, S., & Reid, J. (Eds.). (2017). *Safeguarding and Protecting Children in the Early Years*. Routledge.

⁵¹ Boot (2017).

⁵² Stepney and Wapping Community Child Health Project. *Stepney Community Nursing Development Unit research and development programme 1993–5*. London.

The involvement of children in designing a children's discovery center in London led to the creation of a center relevant from children's perspectives. This led to the attraction of more children⁵³. Children are allowed to express opinions on all issues concerning them. The scope of the right to participation of children as set out in Articles 12 and 13 of the UNCRC is broad as it extends to all activities and decisions that affect the lives of children including Sexual Reproductive Health. Therefore, children have a right to participate in the family setting, school, their health care, local groups, and at the national civil level⁵⁴.

The right to participation also applies both to matters that affect them individually and those that affect them indirectly such as parental divorce. The right to the participation of minors also extends to court-based and alternative dispute resolution (ADR) processes, religious laws, and indigenous and traditional law systems. The scope of the right to participation of children, therefore, requires the relevant professionals to engage in child-inclusive practices. Children's right to participation in family law decision-making processes has been recognized in many countries globally. These rights are considered important as evidence by case law, legislation, and policy globally. Several legislative provisions have been adopted regarding child participation in family law proceedings globally. These provisions concern children's participation in adversarial and non-adversarial family disagreement courses⁵⁵.

⁵³ Miller, Judy. *A Journey of Discovery: Children's Creative Participation in Planning*. London: Save the Children, Children's discovery centre, 1999.

⁵⁴ Taylor, Nicola, Robyn Fitzgerald, Tamar Morag, Asha Bajpai, and Anne Graham. "International Models of Child Participation in Family Law Proceedings Following Parental Separation/divorce." *International Journal of Children's Rights* 20, no. 4 (2012): 645–73. <https://doi.org/10.1163/15718182-55680006>. Accessed 10.1.2021

⁵⁵ Taylor et al., (2012)

Taylor et al. noted that child participation in confrontational family law disputes remains a relatively rare occurrence in some parts of the world. Child participation in family law processes differs in various ways; children can contact the judge directly or use their representative to receive information and explanation about the court's verdict. Court officials including judges and prosecutors are the legal professionals that commonly seek children's participation, though children themselves could apply to participate in some countries⁵⁶. Nonetheless, the procedures of a country's legal system, a proactive bench, UNCRC, and other human rights accords are some of the factors that promote child participation in legal issues. The barriers to child participation include resistance from the bench and bar, limited recognition of the UNCRC, and variations in a country's legal systems, and the belief in some quotas that child participation is optional, rather than a right⁵⁷

1.7.2. Empirical Studies in Participation and Children's Rights

This section is specifically meant to highlight the empirical studies of similar focus on participation and children's rights on a global, regional and local contextualization in the recent past as a foundation for the current study. The empirical studies focus on the methodologies, findings, and conclusions leading to recommendations in order to help generate a gap for the current study.

Horgan, Forde, Martin, and Parkes, have focused on the aspect of performative to the social movement for the participation of children in homes, school, and community activities based in Ireland. The study highlights UNCRC's Article 12 sampling 94 children from ages 7 to 17 in

⁵⁶ Ibid

⁵⁷ Ibid

rural, sub-urban and urban regions of Ireland. The sampling was randomly done using focus group discussions stratifying the children into two groups of 7 to 12 and 13 to 17-year-olds⁵⁸.

In their findings, Horgan *et al* established that the input of children was largely shaped by adult attitude and processes in the homes, the good relations in the children's environment, the dominant voice in their homes, and the importance the society makes them perceive of their participation. The choice of good clothes or foods also was found largely dependent on adult approval especially in the homes and schools where uniforms were treated as a law on their own. In conclusion, Horgan *et al* point out that children are influenced to participate only by the adults in their environment and any deviant attitude might be frowned upon. In their recommendations, the society was required to make more efforts in releasing children to make some decisions in opening up their level of participation⁵⁹.

Tisdall has focused on the concept of participation by children and young people with specific reference to vulnerability, their accounting to social norms as well as their involvement in co-production⁶⁰. In a study encompassing the challenges of tokenism, limited impact and unsustainability by children, Tisdall examines the UK children with respect to these challenges. The study covers 102 children randomly selected and through observation, their participation in activities of production is recorded. During the study findings, it is observed that representation of children in activities leading to decision making is broadly minimal with the assumption that

⁵⁸ Horgan, D., Forde, C., Martin, S., & Parkes, A. (2017). Children's participation: Moving from the performative to the social. *Children's Geographies*, 15(3), 274-288.

⁵⁹ Horgan *et al.*, (2017)

⁶⁰ Tisdall, E. K. M. (2017). Conceptualising children and young people's participation: Examining vulnerability, social accountability and co-production. *The International Journal of Human Rights*, 21(1), 59-75.

the adults in their lives are an adequate representation for the needs of the children. Tisdall also concludes that paying attention to the role of the state or government is very difficult to achieve in children or young people as they have not been programmed or customarily trained to have that focus. Co-production was also found to be a source of vulnerability for children as they are almost wholly under the control of adults and they have no voice to go against the parental or adult directions to be involved in the co-production of goods and services⁶¹.

In their study focusing on heuristic children's rights education practice, Mannion et al⁶² used a socio-economic environment with deprived privileges to assess children's participation in school affairs. The aim was to establish how young people can be used in decision-making exercises at the school level. Using online surveys, the study targeted students in high-performing schools as compared to those in poorly performing counterparts. Results indicated that students from the high-performing schools had a higher provision of support in decision-making across multiple forums including forming decision-making groups, giving suggestions on curriculum amendments, and connecting with the wider community.

Covell⁶³ has examined the right of children to participate in film classification which according to the general public is very critical in young people's lifestyles. Under UNCRC Article 17 (e), classification of films helps meet child protection and hence without their participation, the scholar

⁶¹ Ibid

⁶² Mannion, G., Sowerby, M., & I'Anson, J. (2020). Four arenas of school-based participation: towards a heuristic for children's rights-informed educational practice. *Discourse: Studies in the Cultural Politics of Education*, 1-18.

⁶³ Covell, T. (2017). Children's participation rights in film classification systems. *The International Journal of Children's Rights*, 25(2), 438-455.

argues that Article 12 of the Convention is contravened. The global study by Covell covered 17 countries and agencies involved in children's affairs. Results indicated that countries providing a forum for children to participate in classification are most likely to be in the progress of attaining children's rights. Such inclusive programmes include the discussion forums, review panels with children participants, and provision of websites where children can have an independent approach in reviewing films for classification purposes.

Adonteng-Kissi⁶⁴, in studies contextualizing Ghana, has focused on the child labour practices and how parents perceive them with respect to human rights. The Ghana study used a sample of 60 responding parents aged about 31 years through semi-structured interviews through purposive sampling in the rural and urban areas of Ghana regions. The analysis was through framework analysis with results transcribed from the recorded findings⁶⁵. Adonteng-Kissi found that parents engaged children in works and production with the belief that it helped them both personally and in integrating into society. The study also found that even in the face of cultural practices, knowledge of human rights helped parents and society avoid any excessive usage of children in working or production. The study recommended more application of UNCRC conventions to help parents balance cultural practices and the rights of children⁶⁶.

⁶⁴ Adonteng-Kissi, O. (2018). Parental perceptions of child labour and human rights: A comparative study of rural and urban Ghana. *Child abuse & neglect*, 84, 34-44.

⁶⁵ Ibid.

⁶⁶ Ibid

Locally, Marsh et al⁶⁷ have focused on the right to participate by Kenyan children in the rural areas targeting the health sector in particular on the views of both children and adults. Using focused group discussions from 56 participants in eight rural areas of Kenya, the study explored views on decision-making concerning the health of groups and individuals. Through voice recordings and inductive as well as deductive methodology, the study applied framework analysis to derive results. Findings indicated that small responsibilities could be allocated to young people but with parental control depending on the knowledge level of the parents given the low literate rates in the rural societies. The perception of high risk by the parents and adults also limited the participation of the young people. Marsh et al conclude that adolescents if given freedom can productively participate in health and other complex community matters. The scholars recommended expanded diversity studies to help strengthen the case for children's participation in matters both social and development including health.

Both qualitative and quantitative data were analyzed through the computer program SPSS. The study findings established that key factors leading to the violation of children's rights include the ingrained cultures of the society, poor parenting, influence that is negative by peer groups, and religious influence in the environment of the child⁶⁸. Geoffrey and Kungu recommended broad consultation with stakeholders and the government in the implementation of UNCRC conventions. This according to the scholars requires developing processes that help eliminate repugnant

⁶⁷ Marsh, V., Mwangome, N., Jao, I., Wright, K., Molyneux, S., & Davies, A. (2019). Who should decide about children's and adolescents' participation in health research? The views of children and adults in rural Kenya. *BMC medical ethics*, 20(1), 41.

⁶⁸ Marsh et al., (2019)

practices in the local settings in order to help inculcate children of one region into the national thinking mode⁶⁹.

1.7.3. Empirical Studies Gaps

From the foregoing review of empirical studies, there is a gap inspiring the current study. First, the study by Hogan et al has focused on the Irish people with sampling through stratification and application of focus groups. This study has a unique setting of the developed world as well as the use of focus groups in data collection. The current study is locally based and will test a different data collection different from focus groups hence researching on children's rights under different approaches. Furthermore, the study by Marsh et al focused on children placed under adults while the current study will differ by picking on all children both those under adults and the ones, not under adults' care, for example, street children over 13 years but below Kenya defined children age of 18 years.

Second, the study by Tisdal also carried out in the UK has focused on the children and their participation in production only whereas the current study will look beyond only participation covering cultural practices and sexual reproduction aspects. Again this study was carried out on children under some form of guardianship or parenthood whereas the current study will seek to involve all children under guardianship as well as freelance children.

⁶⁹ Ibid

Finally, the study by Geoffrey and Kung'u has focused on adolescent sex and factors that play a key role in Bomet East County. This current study will look at the wider aspect of children's rights, participation, and infringement of sexual and reproductive health thus filling the gap that the above studies have created.

In summary, Article 23 of the CRC has granted children the right to participation in different processes, but the implementation of children's rights faces several challenges. The gap in the literature review is that in many societies, culture remains a major barrier to effective children's participation. This gap informs this research to offer suggestion on ways to strengthen children's rights to participation in a culturally diverse state by harnessing cultural diversity.

1.8 Research Methodology

The research will utilize a qualitative approach in getting data for the purpose of analyzing children's participation in Kenya. This will be exploratory in this field of participation as it fits the population of the study.

1.8.1 Desk Review

The study will apply a qualitative technique involving desk study or textual analysis⁷⁰ reading through participation law sections as well as documents or papers on children's participation. For the textual analysis, documents and policy, as well as conference papers from global, regional and local sphere, will be carefully perused on the position of children participation.

⁷⁰ Cooper, D. R. & Schindler, P. S.. (2014) Business Research Methods. - McGraw-Hill/Irwin - Boston. I

1.8.1.1 Textual Analysis

The study will carry out a thorough review of documents, books, and papers concerning the participation of children. This will also involve reviewed papers previously used to form laws and policies on children's participation. Documents from law associations and organizations concerned with children's matters will be perused for further information over the same. Statistics concerning children's participation in various forums will be checked as well. A comparison of the global, regional and local participation of children will be examined from the sources to be mined.

1.8.1.2 Internet Exploration

The study will also compliment the mined texts from secondary sources with materials on participation from specific databases on the internet focusing on the right of children to participate. The internet exploration will also capture conferences and workshops that have involved the issues concerning children's inclusivity in all community decision-making forums. Specific websites and journals will be the focus of this internet exploration to optimize mined data on the internet front.

1.8.2 Qualitative Analysis

The study will carefully prepare and organize the summarized data in note form using the documents to be explored. Each set of data on participation will be explored and reviewed to create a conceptualization of thematic codes from the data⁷¹. From the codes, the research will generate and revise common themes that are aligning with the study objectives and questions.

⁷¹ Ibid

Similarly, the study will examine relationships⁷² from the internet material in order to create a display of data with similar themes categorizing children's participation. Finally, from the common themes, a comprehensive summary will be presented to respond to the questions of the study.

1.9. Chapter Breakdown

This research is structured as follows:

Chapter 1

This chapter introduces the study topic of children's rights and participation. It includes the introduction and background, the statement of the problem, the justification of the study, research objectives, research questions, the hypotheses, the theoretical framework, literature review and, the research methodology in outline format.

Chapter 2

In chapter 2, the study will focus on core principles on the rights of children and participation.

Chapter 3

In chapter 3, the study focuses on the children participation principles according to the global international laws of participation by the United Nations as ratified by various regional bodies and countries.

⁷² Ibid

Chapter 4

This chapter will focus on the participation of children in the Kenyan context providing cases as presented in papers and conferences as well as court cases involving children participation.

Chapter 5

The research findings and recommendations are presented.

CHAPTER TWO

CORE PRINCIPLES ON RIGHTS OF CHILDREN AND PARTICIPATION

2.0 Introduction

In chapter one, the basic foundations of children's rights and participation were discussed to bring out the practice in global, regional, and local contexts. Participation is a concept of life in which persons take part or are actively involved in a specific action. In particular, public participation could also be referred to as citizen involvement in activities that define a project or route map for community decision-making. Public participation therefore deeply defines the involvement of individuals for a position to make decisions that are recognizable towards a specific activity or project in the community⁷³.

In practice, public participation is composed of 5 main steps including informing the people, consulting exhaustively, ensuring people involvement, effective collaboration of all participants and finally empowering the full action recognizable in the community as a project by the participants⁷⁴. Children of any age have a portion or role to play in participation of community activities⁷⁵. As one of the key principles on the rights of children, child participation is directly related to the rights of the child⁷⁶. The chapter aims is to explore exactly how participation is

⁷³Funk, W. (2009). Public participation and transparency in administrative law-Three examples as an object lesson. *Admin. L. Rev.*, 61, 171

⁷⁴ Nowrot, K., & Sipiorski, E. (2021). Towards a Republicanisation of International Investment Law?: Conceptualising the Legitimatory Value of Public Participation in the Negotiation and Enforcement of International Investment Agreements. In *Private Actors in International Investment Law* (pp. 157-173). Springer, Cham.

⁷⁵ Abbot, C. (2020). Losing the local? Public participation and legal expertise in planning law. *Legal Studies*, 40(2), 269-285.

⁷⁶ Deacon, H. J. (2018). Understanding the work that 'culture' does: A comparative perspective on cultural rights provisions in the Constitution of Kenya 2010. *African Studies*, 77(2), 171-188.

embedded in the core principles behind the rights of children⁷⁷. These principles include non-discrimination/equality, best interests of the child, survival/development, and participation/inclusion.

The chapter is thus arranged to explain each of the four principles giving their practical application as well as challenges faced in that application globally, regionally, and locally. Finally, the study attempts to summarize the way forward on how these principles could be strengthened to bring out child participation and decision-making in society. The five sections of the chapter will include non-discrimination and equality, best interests of the child, survival and development of children, participation and inclusion of children, and finally the way forward in child participation under these four principles.

2.1 Non-Discrimination and Equality

Non-discrimination is described as the guarantee to let people act or exercise their rights without considerations for their race, gender, colour, sex, language, birth, national origin, age, marital status, and any other social as well as non-social background. Equality on the other hand defines the state of a person enabled to have access to opportunities, status or rights⁷⁸. CRC and ACRW both advocate for non-discrimination and total equality in the rights of children across board in the community.

⁷⁷ Okyere, C. Y. (2020). The effect of internet services on child education outcomes: evidence from poa! Internet in Kenya. *Journal of Development Effectiveness*, 1-15.

⁷⁸ Tomuschat, C. (2019). Equality and Non-Discrimination under the International Covenant on Civil and Political Rights (pp. 691-716). de Gruyter.

Child participation as pointed out in many studies⁷⁹ cannot happen if there is any form of discrimination⁸⁰ or lack of equality in terms of any demographic considerations including gender, age, race, regional origin among others. Children at all levels in society have faced open discrimination for example villagers are treated differently from urban children in some schools while on other occasions, a girl of the same age with another child who is a boy receives different treatment in being accepted to participate in activities⁸¹.

Both CRC and ACRW talk of child rights and the same is equally advocated for in the Kenyan law, but for real participation of children to occur, the discrimination based on various categorization continue to hinder full or even partial participation by children of many ages. In Article 2, the classification of religion, race, education, and political background of children attempts to give equal opportunities for every child to have the rights of participating. However, there is lack of clear distinction between general discrimination and specific children discrimination which in many cases is swept under general population considerations leading to a little guarantee of this espoused Children's participation as protected under the children's rights Acts⁸². To avoid discrimination, the land laws have to provide protection from public authorities to provide an environment for children to participate as envisaged in Article 2 of CRC.

⁷⁹ Collins, T. M. (2017). A child's right to participate: Implications for international child protection. *The International Journal of Human Rights*, 21(1), 14-46.

⁸⁰ Burger, K. (2017). The role of social and psychological resources in children's perception of their participation rights. *Children and youth services review*, 79, 139-147.

⁸¹ Besson, S. (2005). The Principle of Non-Discrimination in the Convention on the Rights of the Child. *The International Journal of Children's Rights*, 13(4), 433-461.

⁸² Pösö, T. (2019, February). 6 The non-discrimination principle in child protection. In *Child Rights and International Discrimination Law: Implementing Article 2 of the United Nations Convention on the Rights of the Child*. Routledge.

Non-Discrimination and equality in children's affairs have been highlighted as being key in children's participation in health issues in which they require access to facilities during the search for treatment in Kenya⁸³. In this case, the child is granted the right to health facilities but in deeper understanding, this child has not been given a chance to select the type of health facility to visit, and most likely, a provision for being treated equally in that health facility is not provided for by the current Articles in Kenya law. Other cases in Kenya, as well as regional states, indicate that whereas steps have been made to reduce discrimination of many categories including gender, race, and age, a lot needs to be accomplished to achieve any form of equality that can protect the rights of children to participate⁸⁴.

On a similar note, the principle of non-discrimination and equality continues to be elusive long after the Salamanca Statement in Kenya since children with special needs have not had the full opportunity to be absorbed in the education systems, health facilities, and other institutions where children require participation⁸⁵. The Basic Education Act⁸⁶ in Kenya gives a chance for children to get early development enabling them to participate in normal childhood activities but then a hitch is found in the Articles advocating for equality in which the children are deemed to have equal rights yet enforcement for their participation is not assured. Specifically, children with

⁸³ Maithya, I. M. (2017). A critique of Kenya's human rights framework that protects children living with HIV's right to access 'comprehensive treatment'. *International Journal of Human Rights and Constitutional Studies*, 5(2), 144-158.

⁸⁴ Msipu Phiri, J. (2017). The right to inclusive education for children with intellectual disabilities. A comparative legal analysis of the progress being made in Zambia, Kenya and South Africa. *A Comparative Legal Analysis of the Progress being Made in Zambia, Kenya and South Africa*.

⁸⁵ Gachago, V. W. (2018). An exploration of inclusive education for children with special educational needs in Kenya twenty years after the Salamanca Statement (Doctoral dissertation, Nottingham Trent University).

⁸⁶ Nthenge, M. (2017). The Basic Education Act of 2013 as a tool for advancing early childhood development and education for children with disabilities in Kenya. *Afr. Disability Rts. YB*, 5, 3.

disabilities are supposed to be protected by the Act but in reality, there is no provision for their equal participation or non-discrimination to be enforced in enhancing the participation. Even though Article 10(2) of the Constitution of Kenya enumerates equality and non-discrimination as part of national values and governance, children participation and the inclusion of children of all categories in sports participation remains elusive since training is mainly geared towards adult participation⁸⁷.

In this case, there is provision for participation but clearly, lacking in equality and non-discrimination since the trained capacity does not have an opportunity to train as many disabled children as possible. In other words, silent discrimination and inequality is leading to very low participation of the children living with disabilities in sports. Failure to have this equality and non-discrimination highly leads to poor children participation starting from schools in which children trying their hand in politics have high rates of failure if they have any form of disabilities while trying to be prefects or captains in their various fields since there is no strong article enforced to avoid the inequality and clear discrimination against such children⁸⁸. In summary, as much as Articles exist, setting ground for equality and non-discrimination would provide an environment of participation by all including children.

⁸⁷ Bukhala, P. W. (2017). Enhancing inclusive sports participation through volunteer coaches: The case of Camp Shriver at Kenyatta University, Nairobi, Kenya. *African Journal for Physical Activity and Health Sciences (AJPHEs)*, 23(1.1), 13-27

⁸⁸ Owiti, O. D. (2019). *A Review of The Law Relating To Political Participation Of Persons With Disabilities In Kenya* (Doctoral dissertation, University of Nairobi).

2.2 Best Interests of the Child

A key principle of child rights and participation is the need to have the best interests of the child when creating the environment for the child participation. The interests of all categories of children are normally dictated upon by adult Articles for example the Act governing orphans and children with disabilities. There is the protection of vulnerable people in the Act but in societies, the best interests of such children do not come into sharp consideration leading to skewed performance or participation by such groups of children⁸⁹. Some of the best interests of such vulnerable children include love, good health, clothing, and participation in activities for other children.

However, the participation by vulnerable children especially in physical activities does not have adequate support in law for implementation or enforcement leading to poor performance by the children which ends in them missing the very principle of the best interests of the child⁹⁰. As pointed out in Kenya versus Sierra Leone comparative study, the best interests of the child are well documented but the practitioners on the ground have always got away with wrongs that should not be left resolved simply because there are no provisions for enforcing and synchronizing the interests and real participation⁹¹.

Another aspect of child interests involves parents leaving their children to the society, for example, the over-reliance on modern technology especially online stuff in which parents wish their children

⁸⁹ Kiambi, E. G., & Mugambi, M. M. (2017). Factors influencing performance of orphans and vulnerable children projects in Imenti North Sub county, Meru county, Kenya. *International Academic Journal of Information Sciences and Project Management*, 2(1), 179-196.

⁹⁰ Nduru, A. W. (2020). *Evaluation of Children Participation in Physical Activities During Recess in Selected Primary Schools in Nairobi City County, Kenya* (Doctoral dissertation, Kenyatta University).

⁹¹ Wessells, M., & Kostelny, K. (2017). Child rights and practitioner wrongs: Lessons from interagency research in Sierra Leone and Kenya. *Handbook of children's rights: Global and multidisciplinary perspectives*, 579-595.

to have the very best but there is no law stopping the children from wrongly applying technology leading to lifestyle diseases in children that affect their natural participation as opposed to previous generations that actively participated in sports and community activities⁹². The parents, in this case, have to blame for lack of understanding their children's best interests but all the same, the government has not initiated or put in place any law that can enforce child participation in sports and other physical activities. Urbanization has worsened the situation with children not easily mingling with others away from the school environment. The government by allowing internet access to people of any ages opens up children to participate without the knowledge of their parents which to an extent does not necessarily promote the best interests of the children.⁹³

2.3 Survival and Development of Children

In order for children to participate, they surely have to survive and be developed to reach that level and environment of participation. The principle of survival and development⁹⁴ would need to have the community providing an environment that enables children to survive all life hazards while being nurtured to participate in activities of the community as citizens. By survival, the key areas would have to be hunger, education sustenance, nutrition, and living through any form of conflict. However, the opposite is very true since laws of the country have not enforced any clause that can protect the children from malnutrition, community conflicts, lack of education and sustainable programmes that could ensure a child development.

⁹² Wachira et al. (2018)

⁹³ Okyere, C. Y. (2020). The effect of internet services on child education outcomes: evidence from poa! Internet in Kenya. *Journal of Development Effectiveness*, 1-15.

⁹⁴ Hart, R. A. (2013). *Children's participation: The theory and practice of involving young citizens in community development and environmental care*. Routledge

The international human rights laws, as well as global economic reforms, have put in place child survival and development but ratification and actualization do not push the child agenda fully to enable participation in many activities. Hence, individual countries have not protected children learning or economic activities of regions that would ensure an environment of the envisaged participation⁹⁵.

Similarly, the technology approach using health workers as the key in promoting child development does have challenges in that access to most children is not guaranteed, yet in law, there is a clause seeming to direct the community to support child health development. In fact, there is no action taken to control how the health workers can get accountable for missing or skipping a specific area of conflict or poor accessibility to the children zone that require survival and development support leading to such children never getting any form of opportunity to participate in activities⁹⁶. What is even more clear is that the health workers normally look for children or families with problems with the wrong assumption that all other families are able to nurture the survival and development of their children in preparation for community activity participation.

Unfortunately, Articles on Human Rights in the country have not fully taken care of the children's participation and always cover it lightly under children rights and even worse, giving it a blanket cover under the human rights clauses. Malnutrition even in the agricultural areas of Kenya is not

⁹⁵ Boyle, E. H., & Kim, M. (2009). International human rights law, global economic reforms, and child survival and development rights outcomes. *Law & Society Review*, 43(3), 455-490.

⁹⁶ van Heerden, A., Sen, D., Desmond, C., Louw, J., & Richter, L. (2017). App-supported promotion of child growth and development by community health workers in Kenya: feasibility and acceptability study. *JMIR mHealth and uHealth*, 5(12), e182.

fully addressed and always left to parents who take their children to hospital thus leaving the communities with unresolved malnutrition children even as Articles on children's rights continue to appear to cover the participation of children. Simply put, the malnourished children cannot participate but the government in most cases will not point to malnutrition as a key item in the non-participation of children in common community activities⁹⁷.

It is also clear that the survival and development of children under medical care for example in hospitals do not get a positive approach since such children are almost considered invalid to participate for instance in clinical research, yet their experience could be the true reflection of how health activities can be run. Instead, the children normally have all their views unheard or put into a forum of implementation implying that their participation in matters of health remains as recipients and never as contributors to their survival and development that would guarantee them participation overseen and enforced by Articles in law by governments⁹⁸. In the family setup, the government has not enforced any law to make parents develop their children in academic skills like mathematics or numerical counting leading to the children either having poor participation in schools or failing to sustain school life⁹⁹.

⁹⁷ Po, J. Y. T., Bukania, Z., Muhammad, L., & Hickey, G. M. (2020). Associations between maternal participation in agricultural decision-making and child nutrition in semi-arid Kenya. *Journal of Hunger & Environmental Nutrition*, 15(5), 712-737.

⁹⁸ Akech, S., Ayieko, P., Irimu, G., Stepniewska, K., English, M., & Clinical Information Network authors. (2019). Magnitude and pattern of improvement in processes of care for hospitalised children with diarrhea and dehydration in Kenyan hospitals participating in a clinical network. *Tropical Medicine & International Health*, 24(1), 73-80.

⁹⁹ Anyango, B. L. (2020). Influence of Parental Participation on the Development of Numeracy Skills Among Pre-primary School Children in Lugari Sub-county, Kakamega County. Kenya (Doctoral dissertation, University of Nairobi).

2.4 Participation and Inclusion of Children

The fourth principle of child survival and development dwells on the participation or inclusion of children in community activities. This directly touches on the study title with the word participation understood to mean the decision-making ability or noticeable contribution towards the sum implementation of a plan towards the development of the children themselves or the community as a whole¹⁰⁰. The children's participation is further clouded by the more focus given to the inclusion of women in all forums. This comes on the background of agitation for gender equality for example in the two-thirds rule in leadership equitable distribution of matters involving the Kenyan society¹⁰¹. This leaves out mainly the children's participation as a periphery issue further limiting the chances of fully achieving children's participation in society. Additionally, the human rights Articles that provide for children protection and safe accommodation does not have a fallback for some groups like the street or abandoned children leaving them to the charity or well-wishers to involve such children in common community activities like reading and writing.

Even in the current COVID-19 pandemic period, such children are not fronted as most vulnerable, and high chances exist that they might even never get to be heard or made to participate in measures concerning pandemic prevention or containment¹⁰². Whenever children are to participate in activities for the community, the country has struggled to pinpoint through law who decides where, when, and how children can participate for example in medical and economic research. The

¹⁰⁰ Elder, B. C., & Kuja, B. (2019). Going to school for the first time: inclusion committee members increasing the number of students with disabilities in primary schools in Kenya. *International Journal of Inclusive Education*, 23(3), 261-279

¹⁰¹ MacEwen, M., & Evensen, D. (2021). Mind the gap: Accounting for equitable participation and energy democracy in Kenya. *Energy Research & Social Science*, 71, 101843.

¹⁰² Corcoran, S. L., & Kaneva, D. (2021). Developing inclusive communities: understanding the experiences of education of learners of English as an additional language in England and street-connected children in Kenya. *International Journal of Inclusive Education*, 1-18.

question that arises borders on whether the parents and adult community members should be given the responsibility or the children themselves should be empowered by law to participate.

In Kenyan law, there is a prohibition of involving people below 18 years, the children¹⁰³. Whether this directly or indirectly stops children from participation is a question the current study takes to the field. Finally, the inclusivity of children both in a safe or peaceful environments and areas of conflict continues to be based on the understanding or control of adults with no input of ideas from the very children that are meant to participate¹⁰⁴. This implies the participation of children is clearly out of their own hands and dictated by the adults in their immediate environment

2.5 Core Principles and Children Participation

The foregoing discussion of core principles and children's participation as discussed opens a view into how children participate in community activities. As entrenched in the Children's Act 2001, Cap 141, the Kenyan law states that children are entitled to participation and formulation of policies both at the family and community level¹⁰⁵. The participation of children in several activities that help form policy takes a wide range including parental care, education matters, religion, and health matters.

In laying a foundation for this participation principle, the law both internationally and locally seeks to protect the participation of children through many provisions including a safe environment,

¹⁰³ Marsh, V., Mwangome, N., Jao, I., Wright, K., Molyneux, S., & Davies, A. (2019). Who should decide about children's and adolescents' participation in health research? The views of children and adults in rural Kenya. *BMC medical ethics*, 20(1), 1-16

¹⁰⁴ Wanjiru, J. (2018). Inclusive education for Internally Displaced Children in Kenya: children perceptions of their learning and development needs in post-conflict schooling. *International Journal of Child Care and Education Policy*, 12(1), 1-18.

¹⁰⁵ Kenya Law Retrieved on 28.04.2021 from www.kenyalaw.org/Acts

adequate security, a non-intimidating atmosphere as well as guidance by various law protectors to ensure the child is able to participate. This to an extent is some form of guarantee for enforcement of core principles of participation¹⁰⁶. Internationally, Article 5 of UNCRC points towards equality and non-discrimination where children are involved regardless of their status, but this appears to bring a clash in society with various forms of separation in children pointing towards discrimination¹⁰⁷.

Other scholars point towards the negative participation of children while at the same time trying to utilize the core principles of participation for example child labour and terrorism as well as prostitution¹⁰⁸. In short, the core principles need to be a foundation for children's participation at all levels of society in all activities and this gives an impetus to the current study to take to the field and experience the situation on the ground.

2.6 Conclusion

This chapter has reviewed the relevant literature that binds the core principles on rights of children which give rise to the participation debate. In particular, the key parts in the principles of the children participation have been explained including non-discrimination and equality, best interests of the child, survival and development as well as participation and inclusion. As much as possible, the legal angle of this principle was the guide in linking all these to children's' right to participation.

¹⁰⁶ Cera, R. (2017). Article 5 [Equality and Non-Discrimination]. In *The United Nations Convention on the Rights of Persons with Disabilities* (pp. 157-174). Springer, Cham.

¹⁰⁷ Sandland, R. (2017). A clash of conventions?: participation, power and the rights of disabled children. *Social Inclusion*, 5(3), 93-103.

¹⁰⁸ Maithya, I. (2018). Countering Involvement of Kenyan Children in Terrorism Through Realization of Their Socio-Economic Rights. *Journal of Law and Ethics*, 3, 107.

CHAPTER THREE

INTERNATIONAL LAWS FOR CHILDREN AND PARTICIPATION

3.0 Introduction

The previous chapter focused on the core principles of children's participation in which non-discrimination/equality, best interests, survival/development and participation/inclusion were explored. This forms largely the basis for derivation of international laws applied in the global and regional contexts. The core principles also help strengthen the widespread acceptance of the formed international laws that go across several borders as well as various cultural backgrounds for people in all corners of the world. This is confirmed through the formation of world bodies that oversee the formation and ratification of such laws. Specifically, the main international laws and charters to be examined include ICCPR Article 24 (1), UNCRC Article 31, ICESCR Article 10, and UNCRC Article 12 selected for their impact on the participation of children.

3.1 ICCPR Article 24 (1)

The International Covenant on Civil and Political Rights (ICCPR) Article 24 (1)¹⁰⁹ generally provides for the right of a child to have no discrimination in the right to acquire without discrimination of sex, language, race, religion, origin, all protection measures for their status minors in the family, society and the state where they live. Collins¹¹⁰ has indicated that the rights of a child to participate has had implications for the protection of a child internationally. The main contention is that the international community does not appreciate and respect the participation of

¹⁰⁹ United Nations *Treaty Series*, Vol 999, I, 14668

¹¹⁰ Collins, T. M. (2017). A child's right to participate: Implications for international child protection. *The International Journal of Human Rights*, 21(1), 14-46.

children towards protection issues for the child. This is manifested in the many challenges that limit the recognition of child participation including age discrimination, denial of opportunities, and tokenism that abounds in many child participation environments.

As pointed by Collins¹¹¹, it is more rhetoric in the implementation of the Article 24 (1) provisions than it is found in many nations across the globe both at developed as well as developing nations levels. The Italian case as enumerated by Kanter et al¹¹² shows that the right of children to participate in their education decision-making is implementable. In this case, Italy was among the pioneer countries to implement the ratified Article 24 (1) by having inclusive education with the right of children living with disability fully involved or participating in the choice of their school as well as having their experiences inculcated into their learning environment to improve their learning.

De Bondt and Lauwereys¹¹³ have observed that the right to participate in criminal investigations by children is an important part of Article 24 (1) citing the fact that children are witnesses to many criminal acts in both times of war peace and conflicts arguing that without any influence, they present some of the most honest first-hand witnesses. The scholars further point to the existence of the article alone does not guarantee the free participation of the children in witness position even though the adults in the same environment have an obligation to implement the children participation. However, implementation has proved hard as witnessed in the various European

¹¹¹ Ibid

¹¹² Kanter, A. S., Damiani, M. L., & Ferri, B. A. (2014). The right to inclusive education under international law: Following Italy's lead. *Journal of international special needs education*, 17(1), 21-32.

¹¹³ De Bondt, W., & Lauwereys, H. (2020). Children's rights and child participation in criminal proceedings. In *The Governance of Criminal Justice in the European Union*. Edward Elgar Publishing.

countries as well as the Asian world in which mainly the cultural dictation forces the children to remain under the umbrella of the adults in their lives.

In Nordic countries, the rights of children to participate have been enhanced as pointed out by Haugli¹¹⁴. Specifically, the scholar notes the strong Norwegian government that puts into action the active participation of children as a means of developing a strong nation. So much so that Norway has previously formed Commissions to handle the inclusion of children in labour decision-making organs while protecting them to avoid exposure to unwanted labour practices. Doek¹¹⁵ on his part has pointed out the many health-related environments in which children have the right to participate in their healthcare as implemented in the Netherlands. This means that the children can decide what needs to be improved in their healthcare system including the hospital environment as well as helping select the right staff in the profession suitable for their best comfort.

Since children are not aware of these provisions, Doek¹¹⁶ argues that it is the government effort that makes it possible for children to fully participate in such important exercise. Varadan¹¹⁷ adds that in countries where the UN conventions are actively ratified through the evolving capacities function, the parental guidance framework gives weight to children's participation hence aiding in the implementation of the Article. Examples of such countries include, Canada, Japan, Australia, and France.

¹¹⁴ Haugli, T. (2019). Constitutional Rights for Children in Norway. In *Children's Constitutional Rights in the Nordic Countries* (pp. 39-57). Brill Nijhoff.

¹¹⁵ Doek, J. (2018). Children's Rights in Health Care and the General Principles of the Crc. In *Children's Rights in Health Care* (pp. 48-70). Brill Nijhoff.

¹¹⁶ Ibid

¹¹⁷ Varadan, S. (2019). The Principle of Evolving Capacities under the UN Convention on the Rights of the Child. *The International Journal of Children's Rights*, 27(2), 306-338.

In Africa, Fokala and Rudman¹¹⁸ have observed that the implementation of the Article 24 provisions are hindered by the traditional African definition of age and maturity in which there is an insistence of children remaining under the observation and guidance of their mature guardians or parental care in decision-making incidences. However, the scholars observe that there is increasing participation of children in their healthcare decision-making as witnessed in the South African provinces. Further, in Uganda, Nabasitu¹¹⁹ clearly points to the difficulty in the involvement of girl child in participating in matters of health citing cases of girls barred from establishing when they are to be treated or taken for medical checkups, this being dictated by the adult women in their lives.

Specifically, the victims of sexual abuse are not allowed to be witnesses in the arising court cases citing cultural considerations and the need to protect the community as well as society with respect the Ugandan traditions. Mbaku¹²⁰ on the observation of African country practice points out that even though children appear to participate, they are indirectly forced into such acts as forced labour, forced marriage, and neglected health care. On paper, Mbaku¹²¹ notes that there are documentations to indicate that all children's articles on participation are well implemented but in truth, the African states are exploiting the very children they are supposed to promote their participation independently without coercion.

¹¹⁸ Fokala, E., & Rudman, A. (2020). Age or maturity? African children's right to participate in medical decision-making processes. *African Human Rights Law Journal*, 20(2), 667-687.

¹¹⁹ Nabasitu, D. (2018). Examining measures facilitating participation of female child victims in the prosecution of sexual abuse cases in Uganda's criminal justice system. 1-43

¹²⁰ Mbaku, J. M. (2019). The rule of law and the exploitation of children in Africa. *Hastings Int'l & Comp. L. Rev.*, 42, 287.

¹²¹ Ibid

This is explained through the incidences where the children are put in situations without food leading to their only choice of entering into the labour market. Although it appears voluntary, no provisions are enforced to check this out for example there are literally no implemented measures stopping people below 18 years from working and the society as a whole does not raise eyebrows when such a child is employed rampantly across the continent. In general, it can be said that the provisions of Article 24 as clear as they appear are only well observed in some developed nations but a majority of African states have not made efforts to implement the main structures that could effectively strengthen the implementation of the said Article items. This calls for further reforms in either the Article itself or in related Articles that can make the implementation more practicable for the participation of children universally.

3.2 UNCRC Article 31

One of the most cited rights of children is the right to play and relax and is enshrined in the United Nations Convention on the Rights of the Child (UNCRC) Article 31¹²². Popularly cited as Article 31, the key message contained in it is that children and young people should be able to play and relax freely like adults participating in sports and cultural activities. Specifically, the article states that children and young people have the right to play sports, watch films and do something entirely peaceful to relax their young minds without endangering their environment.

Davey and Lunday¹²³ gives the example of the United Kingdom where the provisions of this Article have been implemented but not entirely from a rights-based perspective. The scholars

¹²² www.unicef.org.uk

¹²³ Davey, C., & Lundy, L. (2011). Towards greater recognition of the right to play: an analysis of Article 31 of the UNCRC. *Children & Society*, 25(1), 3-14.

argue that the multi-dimensional views of children are not fully inculcated in the implementation of the provisions of this Article. Even though the Article clearly pinpoints the key children's rights, freedom, safety, choice, and inclusion, full exploitation to have all the five implemented citing sports like cricket and rugby that have for long appeared not to have total inclusion and the choice of schools that could enable some children to participate in some sports since they are found in specific schools.

Davey and Lunday¹²⁴ note that a UK committee appointed to look more into the participation of children specifically in sports and games needs to do more to have monitoring and evaluation enforcement for the Article to work fully in favour of children participation. On another note in Europe generally, McNeill¹²⁵ observes that the majority of the nations have forgotten Article 31 as it is popularly known leading to a high rise of obesity and early age crimes as well as anti-social behavior. The true implementation of this Article cannot be fully possible unless there is a change in the town planning, infrastructure changes, curriculum restructuring, and parental pressure to set the ground for real children participation.

In effect, McNeill¹²⁶ says that the false belief that children raised in a war-free developed zone as compared to those raised in a war-zone region have more participation rights to continue to blind observers of child participation. In the comfort zones of the privileged child, parents are not keen on enforcing the play and relax clause whereas the child in the conflict zone has all the freedom to play but with malnutrition as well as lack of guidance. This then leads to both children on the

¹²⁴ Ibid

¹²⁵ McNeill, S. (2019). Article 31 of the CRC-The Right to Play, Rest and Leisure: A Forgotten Right for Children?. *King's Student L. Rev.*, 10, 2.

¹²⁶ Ibid

extreme side lacking the chance to participate in what society has granted as a right through Article 31.

In Africa, Yeboah and Daniel¹²⁷ have given the experience of Ghana in which they point to the negligence of children's knowledge from the indigenous point of view as the key to poor implementation of Article 31. The scholars observe that several policies have been developed with civil rights organizations and government institutions both involved in an attempt to implement the ratified Article 31, but little attention goes into the study of children's rights to participate. The interventions required to help implement the provisions of the Article are well-articulated but lack the blessing of the traditional understanding of the needs of an African child and specifically the Ghanaian indigenous children approach.

The illegality of child labour as indicated in the various laws of Ghana and UN-ratified articles has not deterred the slow implementation of children participation. What pattern emerges is that the laws of the country have all pointed towards the true observation of the rights of children to participate in sports and play but on the ground, Ghanaian children still have trouble reconciling their parental guidance, society restrictions, and their wish to play and relax without being castigated as lazy time wasters.

¹²⁷ Yeboah, S. A., & Daniel, M. (2020). Towards a sustainable NGO intervention on child protection: taking indigenous knowledge seriously. *Development in Practice*, 1-11.

3.3 ICESCR Article 10

In recognizing the right to education, Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹²⁸ provides for the protection of a family as a natural society unit to allow for the participation of children in matters education. In Iranian society, the provisions of this article are also entrenched in the Arab Charter on Human Rights Article 43¹²⁹. The realization that access to education and the right to education as key ingredients of development have opened the Arab and Persian communities to pushing for education for their children.

Veriara and Paterson¹³⁰ note that education has actually emerged as the key vehicle through which the Iranian society and their Arabian counterparts can empower the children to lift themselves out of poverty and hence participate in the community development agenda. The right of children to participate in education matters is thus taken strongly in these societies with their children fully accorded the best education both in Iran and across the Arab world as well being sent across the globe into economically advanced countries of the Western world with advanced education systems.

In Italy, the government faced opposition from its citizens who argued that provisions of Article 10 were interfered with by the Italian authorities through various acts. Craciunean-Tatu¹³¹ argues for the rights of children to participate in health care decisions and that this is only possible if the right to participate in education is guaranteed. It is therefore impossible for this to be practicable

¹²⁸ www.ohchr.org retrieved on 20.06.2021

¹²⁹ Veriara, F., & Paterson, K. (2020). The right to education. In Research Handbook on Economic, Social and Cultural Rights as Human Rights. Edward Elgar Publishing.

¹³⁰ Ibid

¹³¹ Craciunean-Tatu, L. M. (2019). Participation in Scientific Research, Access to Reproductive Rights and the Right to Sexual and Reproductive Health: The Approach of the UN Committee on Economic, Social and Cultural Rights in SC and GP v. Italy Communication. Romanian J. Int'l L., 22, 44.

if the Italian government authorities play any role in the limitation of this provision hence the resort by Italians to accuse their government of sabotaging their family protection. Directly, the lack of family protection defeats the provisions of Article 10. Even though the UN did not view these Italian violations as being true, Craciunean-Tatu maintains that the interference of the government has had a negative impact on the full achievement of the rights of children to participate in matters education.

In Africa, the case of refugee status has played a big role in the distortion of Article 10 and the way parents, as well as governments, provide for total family protection that would lead to full education freedom with the children participating. Kanamugire and Mbao¹³² observe that the state of refugees fleeing their countries to live in South Africa already defies or breaks the provisions of Article 10 in that the family has no protection leading to refugee status of the whole family or children in isolation from the main family. The South African Refugee law clauses have tried to enhance the chances of such families or children having access to full security as well as education.

The separation of parents from their children during refugee flight makes it complex to have the children living in a family environment once they land in their refugee migrant states across the African continent. Most African countries like South Africa have not provided for the creation of laws that can help speed up the reunification process for refugees that are prevalent across the continent making it difficult for provisions of Article 10 to be implemented.

¹³² Kanamugire, J. C., & Mbao, M. L. (2021). Family Reunification in South African Refugee Law: a Critical Appraisal. *Acta Universitatis Danubius. Juridica*, 17(1).

3.4 UNCRC Article 12

The decision-making capability of the child is enshrined in the United Nations Convention on the Rights of the Child (UNCRC) Article 12¹³³ which emphasizes the freedom of the child to freely express their views that would then be recognized in the decisions meant for their benefit as children rights. The Scottish experience as narrated by Mackay and Mathews¹³⁴ indicates that the Scottish government has gone a step further in trying to implement the provisions of the Article by funding a project to test the implementation of the Article across three different services in the country which cut across the rights of children to participate.

Specifically, the sectors included health, education, and organizations where children need to participate in the decision making of programmes or activities. The scholars established using the Laura Lundy model of participation that children in Scotland participated through a proxy in their parents and guardians but to some extent, they were able to participate in few decision-making exercises. However, Jones¹³⁵ categorically notes that there was poor performance across all English-speaking nations in the UK over the participation of children in all the three sectors of health, education, and organizational setup. Jones¹³⁶ adds that pupils, in particular, have poor participation in education policy and practice with literally all decisions undertaken by the adults in the society with zero references to the children's input.

¹³³ www2.ohchr.org retrieved on 19.06.2021

¹³⁴ Mackay, M., & Matthews, R. (2020). Can Scotland be brave?: Incorporating UNCRC Article 12 in practice.

¹³⁵ Jones, T. (2017). Unsatisfactory progress: Article 12 and pupil participation in English schools. *The International Journal of Children's Rights*, 25(1), 68-84.

¹³⁶ *Ibid*

The South African¹³⁷ experience indicates that the country's constitution has played a role in the easing of complications of implementing the conventions of Article 12. As early as 1996, the South African government had put in their constitution provisions that strongly help improve the implementation of most children rights of participation. This was done through the Bill of Rights and the South African Constitutional Court creating a case law body that recognized and enforced the rights of children to participate and further the opportunity for children to enjoy the participation.

In a comparative analysis of the North African implementation of the Article 12 provisions, Chaney¹³⁸ used the Egyptian and Sudanese experience to establish that abuses are silently prevalent thus preventing the children of the North African states from experiencing this provision of Article 12. The civil society and political space in these states have tried to be active in the implementation of the Article 12 provisions but there appear to be dictatorial tendencies in most of these states preventing any progress in children participation.

3.5 International Law Summary

As a result of the four international articles that have acted as the cornerstone of children's participation, it is clear that the provisions of the various articles are differently implemented across the globe and regionally as well. Children's participation is thus partially implemented where other laws exist to support the same, for example in Iran and the Western world, but not to the full extent as experienced in Scotland and Italy.

¹³⁷ Kilkelly, U., & Liefwaard, T. (2019). Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa. *De Jure Law Journal*, 52(SPE), 521-539.

¹³⁸ Chaney, P. (2017). Comparative analysis of state and civil society discourse on the implementation of the United Nations' convention on the rights of the child in North Africa. *The Journal of North African Studies*, 22(1), 6-34.

Regionally in Africa, the refugee status and slow implementation of ratified articles have been the key hindrance to achieving children's participation rights across many spheres of life. This calls for the local Kenyan experience on the implementation of the said articles for comparison with global and regional experiences in the next chapter.

CHAPTER FOUR

PARTICIPARION OF CHILDREN IN THE KENYAN CONTEXT

4.0 Introduction

Following from the previous chapter, the application of the international laws on children's participation has highlighted the difficulties and challenges in the delivery of the law in global as well as regional terms. In particular, different regions have shown an inclination to obey the letter-specific international laws on child participation while completely undermining or setting aside other provisions across many of the laws or clauses. There is however no enforcement in the ratification of such international laws in many cases. This, therefore, gives a chance for the study to explore how the Kenyan context has approached the international laws on the participation of children.

4.1 Ratification of International Laws on Children Participation

The various international laws covering participation by children have been formulated through the push by the United Nations. These laws normally require ratification across the individual nations for their implementation and this has normally involved either creation of new laws by the specific countries or simple inculcation into already existing similar laws. Kenya is no exception to this as discussed in the next sub-sectors of the study. In Kenya, the Bill of Rights¹³⁹ as enshrined in the Kenya Constitution Article 24 has fully covered or embraced the right of all persons or individuals to participate in economic and social rights with the state providing the full family

¹³⁹ www.klrc.go.ke retrieved on 14.06.2021

protection that makes the environment amicable enough for this to be implemented within the borders of Kenya without any discrimination.

The ratification of the Rights of the Child (1989)¹⁴⁰ Convention was accomplished in July 1990 giving way to fairly implementable provisions of the now well-articulated Article 24 (1). At this time, the Kenya government was clearly focused on the right to health by all people which in effect embraced the right to health by children as well. Building from that the Kenya Constitution 2010 makes an improvement by pinpointing the shortcomings of Article 24 (1), Maingi¹⁴¹ highlights the shortfalls in achieving the fundamental freedoms of every person in Kenya.

In the assessment of these limitations, it is established that the protection of public interest as well as the rights of the individual has proved hard to reconcile and fully implement in the country. Such is the shortfall that if one freedom interferes with the rights of another right, then the freedom is limited leading to cases where children are prevented from playing in specific areas for creating noise or disturbance to adults which invariably breaks the rights of the adults to be protected fully as family units. Simply put, balancing the rights and freedoms in Kenya through legal courts or otherwise has proved a tricky item.

¹⁴⁰ Nyachae, J., & Ogendi, P. (2015). Litigating the Right to Health in Kenya: An Analysis of Selected Cases (pp. 177-194).

¹⁴¹ Maingi, P. S. (2018). A Critical analysis of article 24 on the limitation of rights and fundamental freedoms under the constitution of Kenya 2010 (Doctoral dissertation, Strathmore University).

Maithya¹⁴² points out that the social stigma in health-related discrimination has prevented the children from having full access to both education and health. Specifically, Maithya¹⁴³ identified the lack of laws on guidance to the treatment of children living with HIV to enable full participation in children affairs without appearing to jeopardize their status both among the children and the larger society. In effect, their treatment as normal children leaves them vulnerable and defeats the Article 24 (1) provisions which seek to fully protect the family unit to participate in economic and social activities without discrimination.

Also lacking is guidance on the total inclusivity in education participation as established by Msipu-Phiri¹⁴⁴ whose comparative analysis of Kenya, Zambia, and South African application of children inclusivity in education and health matters. Kabira and Kibugi¹⁴⁵ have also established that the Kenya government in its efforts to have inclusivity of children participating in transformational policy frameworks has received a strong test handling COVID-19 pandemic that sees Article 24 (1) challenged since the government solely cannot protect the Kenyan individual fully as envisaged in the provisions of this Article.

It is also notable that both Article 31 and Article 12 have been inculcated in the Kenya Constitution 2010 under the Bill of Rights¹⁴⁶ with a bit of Article 10 well covered though having limitations as

¹⁴² Maithya, I. M. (2017). A critique of Kenya's human rights framework that protects children living with HIV's right to access 'comprehensive treatment'. *International Journal of Human Rights and Constitutional Studies*, 5(2), 144-158.

¹⁴³ Ibid

¹⁴⁴ Msipu Phiri, J. (2017). The right to inclusive education for children with intellectual disabilities. A comparative legal analysis of the progress being made in Zambia, Kenya and South Africa. *A Comparative Legal Analysis of the Progress being Made in Zambia, Kenya and South Africa*.

¹⁴⁵ Kabira, N., & Kibugi, R. (2020). Saving the soul of an African constitution: Learning from Kenya's experience with constitutionalism during COVID-19. *African Human Rights Law Journal*, 20(2), 436-461.

¹⁴⁶ Ndonge, M. M., & Nyaata, V. *Scholars Bulletin (Humanities and Social Sciences)*.

interpreted under the same Chapter 4. The many cases involving interpretation of the Bill of Rights indicate that both Article 10 and 12 as provided in ICESCR and UNCRC require an extra legal framework for proper implementation with the courts demonstrating bias from the time when dispensing of cases of children participation commenced.

Another question is how children's data¹⁴⁷ can be protected and how they can participate in such protection since all decisions on the verification of the data in question always have been left to the adults and government. Kimani¹⁴⁸ questions Kenya's ability to fully protect the data for children under the umbrella of total family protection by the state citing many displacements as well as instability among family units in Kenya that defeats the purpose of children's participation.

4.2 Sample Conferences and Court Cases on Children Participation

The quest for inclusive children participation has been the main stay of many conferences within the global village, Kenya included, with various groups advocating for a variety of approaches in order to accomplish the elusive goal of children participation. Locally, in Kenya, Chapter 4 of Kenya's Constitution on Bill of Rights demonstrates that the government has adopted a hybrid of international instruments in ratifying and implementing the provisions of the various articles for children's participation.

¹⁴⁷ Kimani, D. (2019). Are We Ready for a Data Bank? An Analysis of the Sufficiency of Kenya's Legal and Institutional Framework on Data Protection and Identity Theft. An Analysis of the Sufficiency of Kenya's Legal and Institutional Framework on Data Protection and Identity Theft (July 23, 2019).

¹⁴⁸ Ibid

The rights of specifically the girl-child have been advocated through Gender and Development conference paper¹⁴⁹ in which modern technology, specifically mobile telephony as an avenue for educational right to participate has come into play. Given the COVID-19 pandemic experience on the global participation levels, the Kenyan approach of education using the mobile telephony platform is a sure path to girl participation in education even though economic challenges, as well as social challenges of the mobile telephony, exist for the girl-child in the digital age¹⁵⁰.

The case of children not getting access to education has severally arisen due to displacements¹⁵¹ in the country either through pastoralism activities, conflicts within the country, or early marriages of girls in some communities as the government fails to provide the envisaged full protection of the family unit enumerated in Article 24 (1). The registration of children has raised many questions in the country with no specific laws set to deflect the difficulties in children's participation rights on their birth data. Cases¹⁵² abound in Kwale and Kilifi Counties at the Kenya coastal regions in which children have little to no rights practiced in their birth data involvement in terms of registration or when exactly to have access to such information. Similarly, Waria¹⁵³ outlines the abundant child marriages lack of clear protection clauses in the Bill of Rights and failure to implement clear sustainable development in many so-called marginalized areas defeats the purpose of Article 24 (1).

¹⁴⁹ Zelezny-Green, R. (2018). 'Now I want to use it to learn more': using mobile phones to further the educational rights of the girl child in Kenya. *Gender & Development*, 26(2), 299-311.

¹⁵⁰ Ibid

¹⁵¹ Wanjiru, J. (2018). Inclusive education for Internally Displaced Children in Kenya: children perceptions of their learning and development needs in post-conflict schooling. *International Journal of Child Care and Education Policy*, 12(1), 1-18.

¹⁵² Biwott, S. K., Okinyi, B., Oyoo, E., Otieno, G., Kamau, D., Wangondu, J., ... & Ruoro, C. Mainstreaming Child Protection and Child Rights in Civil Registration of Births in Kwale and Kilifi in Kenya. *World Journal of Innovative Research*, 4(3), 262495.

¹⁵³ Warria, A. (2019). Child Marriages, Child Protection and Sustainable Development in Kenya: Is Legislation Sufficient?. *African journal of reproductive health*, 23(2), 121-133.

Maringa¹⁵⁴ has noted that the child programmes dotted around the country in Kenya meant for children sustainability have not received adequate legal framework support. Instead, they are led by the funding capability of NGOs. Although the NGOs have the capacity to run the programmes, Kenya Constitution is silent on how they promote the rights of children participation since the Bill of Rights does not highlight how children fully get involved. The cultural rights through Kenyan regions have clashed with the provisions of the Bill of rights as pointed out by Deacon¹⁵⁵ where no part of the Kenyan Constitution 2010 has put in place deterrents for the undesirable cultures that continue to keep children out of decision-making forums thus ensuring children remain non-participatory.

The desire by most people to have equal access to education by all children in Kenya as stated in Article 24 (1) remains elusive especially when disability¹⁵⁶ in children is considered, The provisions of the Bill of Rights clearly pushes for full security provision for the family unit but does not give any special privileges to the children with disability when it points that every citizen is treated without discrimination. This study argues that some form of discrimination would be beneficial to the children living with disabilities since this would guarantee that normal children are discriminated against in situations where those living with disability require special treatment.

¹⁵⁴ Maringa, P. G. (2018). Factors influencing sustainability of children homes programmes managed by Non-Governmental Organizations in Kenya; a case of Mbeere South; Embu County (Doctoral dissertation, University of Nairobi).

¹⁵⁵ Deacon, H. J. (2018). Understanding the work that 'culture' does: A comparative perspective on cultural rights provisions in the Constitution of Kenya 2010. *African Studies*, 77(2), 171-188.

¹⁵⁶ Moyi, P. (2019). Education for children with disabilities: Will policy changes promote equal access in Kenya?. *Comparative and International Education*, 47(2).

4.3 Summary

The foregoing discussions over children's participation rights have opened an avenue for exploration of Kenya's current implementation of both international and local rights of children to participate. Specifically, the discussions sought to explore the ratification of the various key international children's rights pillars namely ICCPR Article 24 (1), UNCRC Article 31, ICESCR Article 10, and UNCRC Article 12. The study thus explored their definition, usage, and ratification locally and the supporting Kenya legislation provisions as well as the usage. In the next chapter, a summary of the whole study, conclusion, and recommendations are made.

CHAPTER FIVE

RESEARCH FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The study aimed to establish the children's participation rights as designed through the international bodies globally and localized through country ratification. Using desk research and data mining from various journal and conference papers, the study was able to come out with findings that will guide a conclusion and recommendations in the following subsections.

5.1 Findings

Generally, from the desktop research and data mining, the study found that principles of children inclusion in sustainable development activities have a strong foundation that would guarantee children's participation. However, the fight between survival and development by the adults under whom the children live in most parts of Kenya, the African region, and globally as a whole makes it very difficult for child participation. Even though the core principles have been carefully inculcated into the provisions of laws governing the Bill of Rights, very little was found to be fully implemented in the Kenya Constitution 2010 that would cement the participation of children in education and other socio-economic activities.

The developed countries of Europe and America, as well as Southern Asian states, have demonstrated the willingness to indulge children in decision making but even there, children still faced resistance from inclusion with the societal as well as community setups that still consider children as requiring directions of parents or adults in their immediate environment. This also arises out of the differences in the interpretation of the Human Rights provisions across the globe

with developed as well as developing countries accused of not observing these rights especially in the Arab and Asian world and widely practiced in the African region. The local legislation is yet to formulate strong structures that can ensure the ratified international laws are protected fully.

5.2 Conclusion

From the desktop research findings, the study concludes that Kenya is very quick to ratify most of the international laws. There is a complication in which feminism and other rights groups try to upgrade the inclusion or participation of the girl-child leaving out the boy-child hence; weakening the efforts to improve children's participation in sustainable development activities. The Kenya Constitution 2010 focused on the family unit putting children strictly under the family yet the assumption that all children exist under a family is wrong leading to children misrepresentation at many forums where their full participation is required.

Currently, the study findings are in line with other scholars who have identified shortcomings of the various provisions of both the international tools and local implementation legal frameworks that fail to clearly identify the children's participation rights. Even though legal experts and children caregivers have strong representation for children, the current structures are all tailored to treat children with the knowledge that children are under care hence their decisions are mostly undervalued if not never considered altogether.

5.3 Recommendations

From the study findings and conclusion, the study comes up with recommendations for actual consideration as well as full implementation as follows:

- a special team set by the government judicial arm should review the current legal frameworks in order to inculcate provisions for children inclusion at all levels of decision-making.
- The policymakers and Kenya legislators are advised to form sub-sectors of the present laws that strengthen the implementation of children participation with consideration for children without family upbringing as well as those under migration status.
- Equally important for this study is that future researchers should explore the possibility of carrying out studies in cultural zones where children are highly marginalized for example
 - in FGM zones of Kisii, Coast, and the former Central Province of Kenya
 - in typical gender segregation cultural zones, including the Kenya South coastal regions and pastoral communities in North Eastern and Rift Valley.

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