

**THE RIGHT TO BASIC EDUCATION FOR ORPHANS AND VULNERABLE
CHILDREN: IS KENYA UP TO THE CHALLENGE?**

BY

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FOR THE AWARD OF A DEGREE OF MASTERS OF LAW (LLM) OF THE
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DEDICATION

I dedicate the research to my children; Seth, Mumo and Mary Ken Maithya. They mean the whole world to me, their inspiration and encouragement was overwhelming. To my wife Faith for keeping fort while I was away for many days on this mission. And to my late mum Regina Kanyaa who motivated me at an early age to keep reading. Though gone to be with the Lord her spirit has been my inspiration. To my father Elijah Munyithya Ngunga for taking care of me and my siblings from a very tender age during the difficult moments of my mum's ailment and demise. And to my sister in law Alice Maundu whose prayers have kept me strong as a father, student and a public servant.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ACRWC	African Charter on the Right and Welfare of the Child
CEB	County Education Board (CEB)
CEDAW	Covenant on the Elimination of Discrimination Against Women
CNCP	Children in Need of Care and Protection
CRC	Convention on the right of the child
DBE	Department of Basic Education
ECED	Early Childhood Education Development
ECOSOC	Committee on Economic, Social and Cultural Rights
EFA	Education For All
ERS	Economic Recovery Strategy
FAO	Food and Agricultural Organization
FPE	Free Primary Education
GDP	Gross Domestic Product
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights and the
ICESCR	International Covenant on Social, Economic and Cultural Rights
IEP	Individual Education Plan
ILO	International Labour Organization
IPRC	Identification and Placement Review Committee
ISA	Intensive Support Amount
KESSP	Kenya Education Sector Support Programme
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission on Human Rights
KNUT	Kenya National Union of Teachers
KUPPET	Kenya Union of Post Primary Education Teachers
MDG	Millennium Development Goals
NCESS	National Committee for Education Support Services
NCSNET	National Commission on Special Needs in Education and Training
NGO	Non-Governmental Organizations
OVCs	Orphaned and Vulnerable Children
SEPPA	Special Education Per-Pupil Amount

UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
UPE	Universal Primary Education
WHO	World Health Organization
WMES	Welfare Monitoring and Evaluation Survey

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ABSTRACT

The right to basic education is a key component of a child's survival, protection and development. This is particularly important with regard to Orphaned and Vulnerable Children (OVCs). It is for this reason that international human rights law encapsulated in, among others, the Universal Declaration of Human Rights (UDHR), International Covenant on Social, Economic and Cultural Rights (ICESCR), the United Nations Convention on Rights of the Child (CRC) and Convention on Elimination of All forms of Discrimination Against Women (CEDAW), maintain that states have an obligation to promote, fulfil and protect the right to basic education. Kenya is not only a signatory to all these human rights instruments but has gone further to integrate international law through its novel constitutional dispensation which came into force in 2010.

In 2013, the Kenyan parliament enacted the Basic Education Act and therefore meeting its obligation under international law which required state parties to protect the right to basic education. Despite the enactment of a specific legislation to address the plight of OVCs, the country's protection of the core content of the right to basic education in terms of adaptability, accessibility and availability has not been realised. This study postulates that this is because the right to basic education has been interpreted to be progressive which means that it can be limited anytime resources are in short supply. As a consequence, many OVCs are not able to access basic education for various reasons, including, poverty, adverse effects of HIV/AIDS, child labour, and biased cultural norms.

While looking at Kenya, Canada and South Africa, the researcher interrogates the extent to which these countries have gone to address the right to basic education in their respective jurisdictions. The study contends that South Africa and Canada have made better strides in the realization of basic education for OVCs. The researcher thence suggests best practices and programmes based on a human rights approach to promote the right to basic education in Kenya. Some of the recommendations include: legislative and policy reforms; harmonization of judicial decisions; and addressing harmful cultural practices. Generally, the study evaluates the successes and challenges of these international instruments and national legislation in addressing the plight of OVCs with respect to their right to basic education and suggests recommendations for innovative policies in human rights monitoring, protection and promotion which must be adopted to protect OVCs.

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CHAPTER ONE

INTRODUCTION

1.0 Introduction and background

In all aspects of the school and its surrounding education community, the rights of the whole child, and all children, to survival, protection, development and participation are at the centre. This means that the focus is on learning which strengthens the capacities of children to act progressively on their own behalf through the acquisition of relevant knowledge, useful skills and appropriate attitudes; and which creates for children, and helps them create for themselves and others, places of safety, security and health interaction.¹

The quotation above sums up the essence of basic education for children in general and for orphans and Vulnerable children (OVCs) in particular. Basic education is an important and fundamental right affirmed under international and regional human rights documents.² This is supplemental to domestic legal and policy instruments.³ Kenya has domesticated international law in view of section 2 (5) and (6) of the Constitution.⁴ Having ratified international human right instruments, Kenya has an obligation to ensure compliance with its provisions. In this regard, Kenya has committed to ensuring the right to education and must see to it that all regardless of their status or disposition have access to quality and relevant education. Education is social good that would equip them with full potential to contribute to the social, economic and political development of the nation.⁵

The right to education is a very important right. It promotes individual freedom, enables individuals to participate in democratic processes and empowers the marginalized to participate in development activities.⁶ In the United States of America, the Supreme Court in

¹ Bernard A K, *The Child-Friendly School: A Summary* (UNICEF: New York, 1999) 2.

² Article 28, UN Convention on the Rights of the Child, 1577 U.N.T.S 3, adopted on 20 November 1989 (entry into force 2 September 1990); Article 13, International Covenant on Civil and Political Rights, 999 U.N.T.S 171, adopted on 16 December 1966 (entry into force 23 March 1976); Article 26, The Universal Declaration of Human Rights, G.A res 217A (III) (1948); UNESCO Convention against Discrimination in Education 429 U.N.T.S 93, adopted on 14 November 1960 (entry into force 22 May 1962); The Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S 13, adopted on 18 December 1979 (entry into force 3 September 1981; The Millennium Development Goals, June 2011; The Dakar Framework for Action (2000) on Education for All; Article 27, The African Charter on Human and Peoples' Rights, , CAB/LEG/67/3 rev. 5, adopted on 27 June 1981 (entered into force 21 October 1986); Article 11, The African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, adopted in 1990 (entered into force 29 November 1999).

³ Kenya Sessional paper No. 1 of 2005 on Education and Training; Kenya Education Sector Support Programme (KESSP); Ministry of Education's Strategic Plan; Kenya's EFA plan of Action.

⁴ Article 2 (5), Constitution of Kenya 2010: The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

⁵ Bernard A K, *The child-friendly school: A summary* (n 1).

⁶ UNESCO, 'The Right to Education' available at <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/right-to-education>, (accessed 26 November 2013).

the case of *Brown v. Board of Education of Topoka*, underscored the importance of this right when it stated:

*Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and great expenditure for education demonstrates our recognition of the importance of education to our own democratic society....it is the very foundation of good citizenship.*⁷

It is education that puts the beneficiaries of the rights at a strategic position to enable them realize the other rights and freedoms. It has been classified as a socio-economic right and has generally presented as being subject to progressive realization.⁸ Whether OVCs can approach the courts seeking to enforce a positive obligation of the right is arguably dependent on how the concept of progressive realisation of right informs the obligation of the state towards OVCs. The Constitution, while recognising this right, does not particularize the specific obligations that it bestows upon the state towards children in general or OVCs in particular. It has a general clause specifying the obligations to respect, observe, fulfill, protect and promote but it does not go a step further to exemplify what, for instance, the obligation to fulfill means in relation to that right.⁹ It is not incongruence to infer that it is thus the courts that are to determine those specific obligations in the light of the concept of progressive realisation. This partially justifies this study because the Bill of Rights is 'juvenile' and courts have not been confronted with many specific cases on the issue of the content of the right.

As mentioned, the Constitution has declared free and compulsory basic education as a right.¹⁰ Despite this commitment to ensure basic education, OVCs have a difficulty in accessing the basic education. The right to education is a peculiar right in that circumstances determine largely whether and how that right will be exercised. Children with able parents will find it easy to access basic education. Even in the darkest moments in Kenya's history, some children still enjoyed high quality education. That was not and has never been the case with OVCs. Their circumstances, often identified with poverty, lack of parental care and protection, long distances from the nearest schools, wrong curriculum, lack of school fees and uniforms, gender and the absence of an enabling legal environment directly implicates on their ability to enjoy this right.¹¹ It is arguably towards them that the Bill of Rights

⁷ *Brown v. Board of Education of Topoka* 347 US 483 (1954).

⁸ Veriava F and Coomans F, 'The Right to Education' in Brand D and Heyns C, *Socio-Economic Rights in South Africa* (Pretoria University Law Press: Pretoria, 2005) at 57.

⁹ Article 21, Constitution of Kenya, 2010.

¹⁰ *Ibid.* Article 53 (1).

¹¹ Achoka J S K, 'Access to Basic Education in Kenya: Inherent Concerns', (2007) 2 (10) *Educational Research and Review*, 280.

recognized access to education as a right. Despite this infeasible reality OVCs in Kenya are at a relative disadvantage as a result of a system that is bent on catering for the interests of children who are not necessarily orphaned or vulnerable.¹² As a result the right to basic education is hard to realize for such children as is envisaged by the law. Specific situations that ominously affect the right to children include a difficulty in accessing education facilities or institutions, shortage of teachers, inadequate learning materials (since their parents are poor and cannot pay fees), poor and inadequate feeding programmes, and a non-responsive curricula.¹³

This situation is the thesis of this study which examines the prospect and status of realisation of the right to basic education for OVCs in Kenya. The analysis will involve gaps in the current legal and policy framework at domestic and international law as well as challenges of actualizing the right to basic education. This is benchmarked against Canada and South Africa. The two jurisdictions have been chosen because other than being commonwealth countries, both have progressive and new constitutions that are strong on the protection of the right to basic education for OVCs.

1.1 Background

1.1.0 History of the Right to Basic Education in International Law

The right to basic education is fairly recent in international human rights law just as is the case with all socio-economic and cultural rights. After the 2nd World War the United Nations Charter was signed in San Francisco at the conclusion of the UN Conference on International Organizations.¹⁴ The major objective of the organization was to solve problems of an economic, social and cultural nature, to promote human rights and fundamental freedoms of all mankind.¹⁵ However although the UN Charter did not expressly mention the right to education, Article 55 has a broad view on the promotion and protection of socio-economic rights and the right to education in particular.¹⁶

¹² Ibid.

¹³ Association for the Development of Education in Africa (ADEA), *Triennale on Education and Training in Africa-Towards Inclusive and Equitable Basic Education System: Kenya Experience*, (Triennale on Education and Training in Africa: Ouagadougou, Burkina Faso, February 12-17, 2012).

¹⁴ Steiner J, Alston P and Goodman R, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press: Oxford, 3rd ed, 2007) at 242.

¹⁵ Article 1 of the UN Charter.

¹⁶ Article 55 (a-c), UN Charter: (a). higher standards of living, full employment, and conditions of economic and social progress and development; (b). solutions of international economic, social, health, and related problems; and inter- national cultural and educational cooperation; and ©. Universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The right to free and compulsory education in Africa and indeed in the world had its international legal backing from the 1948 Universal Declaration of Human Rights (UDHR),¹⁷ the 1989 Convention of the Rights of the Child (CRC),¹⁸ the 1990 World Summit for children and the 1990 world Conference on Education for all held in Jomtien (Thailand). Of great interest is the UN CRC translated the needs of children in 96% of the countries in the world to their education.¹⁹ The UDHR was the first international legal instrument with provisions on education as a socio-economic right.²⁰ Moreover it served as a foundation for 2 binding UN human rights instruments, the International Covenant on Civil and Political Rights (ICCPR)²¹ and International Covenant on Economic, Social and Cultural Rights (ICESCR).²²

The ICESCR entered into force on 3 January 1976 as a UN treaty devoted to socio-economic rights and has received wide recognition around the globe. Kenya ratified the ICESCR in 1992 and by that very act it acquired an obligation to promote, fulfill, respect and protect socio-economic rights. With regard to the right to education, it stipulates that state parties recognize the right of everyone to education and agree that education shall be directed to the full development of human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms.²³

1.1.1 History of Regional Legal Instruments on Right to Education

Regional legal instruments were introduced with mixed results for the protection of the right to education.²⁴ In America, the American Convention on Human Rights came into force in 1969.²⁵ However, only one article in this convention was devoted to socio-economic rights.²⁶

¹⁷ Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

¹⁸ The UN Convention on the Rights of the Child, adopted on 20 November 1989 1577 U.N.T.S (entry into force 2 September 1990).

¹⁹ Limukii K E, 'The Free Education Policy in Kenya: A Critique', (2012) 4 (1) International Journal of Education Administration and Policy Studies, 1.

²⁰ Article 26 of the UDHR.

²¹ The International Covenant on Civil and Political Rights, adopted on 16 December 1966 (entry into force 23 March 1976).

²² The International Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966, 993 U.N.T.S (entry into force 3 January 1976) .

²³ Article 13 of the ICESCR.

²⁴ Gawanas B, 'The African Union: Concepts and implementation mechanisms relating to human rights' Konrad Adeneur & Stiftung available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf (accessed on 26 November 2014).

²⁵ The American Convention on Human Rights, adopted in San Jose, Costa Rica on 22 November 1969, O.A.S.Treaty Series No. 3 (entered into force on 18 July 1978) after the eleventh instrument of ratification (that of Grenada) was deposited.

To correct this discrepancy the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights was signed. The protocol focused solely on socio-economic and cultural rights. In Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms was also adopted but did not have provisions for socio-economic rights.²⁷

In Africa, the African (Banjul) Charter on Human and Peoples Rights (ACHPR) was adopted in 1981 and entered into force on 21 October 1986.²⁸ In its preamble, the charter is categorical that special attention needs to be given to socio-economic right and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.²⁹ The Charter recognized socio-economic rights and emphasized the right to education. The Charter provides for the right to education and training in guaranteeing equal opportunity and access in the sphere of education and training.³⁰ The African Charter on the Right and Welfare of the Child (ACRWC) came into effect in 1990. As a Charter dedicated to children, the preamble acknowledges that the situation of most African children remains critical due to the factors of their socio-economic, cultural, traditional and natural disasters.³¹ The Charter recognized that due to the needs of children's physical and mental development, they require particular care with regard to health, physical, mental, moral and social development. It would, therefore, seem that the Charter saw the necessity of socio-economic rights with regard to children. It also took into account that every child had a right to education.³²

²⁶ Article 26 of the American Convention on Human Rights, 1969 only urges state parties to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view of achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social educational, scientific and cultural standards set forth.

²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, was signed in Rome on 4 November 1950 (entered into force on 3 September 1953).

²⁸ African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, (*entered into force* 21 October 1986).

²⁹ Theoha M E, *Realising the Right to Education in Lesotho* (University of Pretoria: Unpublished LLM Thesis, 2011) at 11.

³⁰ Article 12, the Protocol to the African Charter on Human Peoples' Rights on the Rights of Women in Africa.

³¹ Theoha M E, *Realising the Right to Education in Lesotho* (n 30 above).

³² Article 11 of the African Charter on the Rights and Welfare of the Child.

1.1.2 Development of the Right to Education in Kenya

Before the British colonial government, Kenyan communities had their own systems of education.³³ It was an informal system of education where the parents of the child, relatives and the community at large took part. The education imparted was based on cultural practices and traditions of the community as well as skills passed down with the family through apprenticeship.³⁴ This system was not as we know it today; it had no formal structures like class rooms or teachers and no schools, nor were any formalised subjects taught. The whole community was involved in the education process.³⁵ Indigenous knowledge formed the basis for organization and transmission of education. Thus the system of education during the pre-colonial period could be described as informal.

Before 1960, free and universal primary education had not been extended to African children in any of the East African British colonies, racial discrimination in primary education was still intact.³⁶ Children were taught by parents and the community at large since children belonged to the community.³⁷ The colonial government brought with it formal education. Before that the concept of modern education was introduced by the missionaries who introduced reading and writing as a way of spreading Christianity and “civilization.”³⁸ This was coupled with the introduction of basic skills such as carpentry and gardening around the mission canters. This type of education began in 1800s along the coast.

With the coming of colonialism, formal education was introduced but based on racial basis (African, Asian and European) with different curricula.³⁹ The construction of the Kenya Uganda railways facilitated the expansion of education further into the interior. The first such school for Europeans was opened in 1902, 1910 for the Asian community and 35 mission schools for Africans.⁴⁰

³³ Amukowa W, ‘A Call to Reform Secondary Schools in Kenya’, (2013) 3 (1) American International Journal of Contemporary Research, 197.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Wosyanju C, ‘The System of Education in Kenya, available at <http://www.international.iupui.edu/Kenya/resources/Education-in-Kenya.pdf>, (accessed on 20 September 2013).

³⁷ Ibid.

³⁸ Amukowa W, ‘A Call to Reform Secondary Schools in Kenya’ (n 34).

³⁹ UNESCO, *Challenges of implementing free primary education in Kenya: assessment report. Kenya*. (Ministry of Education, Science and Technology: Nairobi, 2005) at 9.

⁴⁰ Eshiwani, G, *Education in Kenya since Independence* Nairobi (East African Educational Publishers: Nairobi, 1992) at 9.

This system lasted until 1963 when upon attaining independence, the country's philosophy changed fundamentally as the country was in desperate need for middle and upper level manpower to jumpstart the commercial and industrial sectors.⁴¹ Thus education was restructured to realize the new expectations. The goals of education after independence were set at changing peoples' attitudes and establishing social equality.⁴² Education was therefore seen as a way of training high skilled labour for manpower needs of the state through the medium of formal education. This became the official policy of education in Kenya for a long time.

The aims of education after independence were two fold. First, the government sought to give access to Kenyans who had been denied education, and secondly, train personnel to take over from departing colonial workers.⁴³ The First National Development Plan (1964-1969) underlined the correlation between education and development.⁴⁴ Similarly, Sessional Paper No. 10 of 1965 underlined the importance of education for economic growth. However, these did not provide for free basic education to all children. The Second Five Year National Development Plan also prioritized universal primary education but could not provide education for all.⁴⁵ Subsequent national developments funds continued to emphasize the link between education and national development. One of the foremost impediments to accessing education was tuition fees, which was abolished in primary schools in 1974 for the first time and a spurred enrolment in primary schools. In 2003, Kenya re-introduced the free primary education.

In 2005, the Government adopted Sessional Paper No. 1 of 2005 on policy framework for education, training and research. This policy paper adopted Education for All (EFA) and the Millennium Development Goal. This Policy document also outlined the philosophy, vision, mission and goals for education, expanding access, equality and improving quality of education. It was the basis upon which the Constitution was promulgated and the Basic Education Act was enacted.

⁴¹ Amukowa 'A Call to Reform Secondary Schools in Kenya' (n 34) at 198.

⁴² Eshiwani G, *Education in Kenya since Independence* Nairobi (n 41).

⁴³ Omwami, E M and Omwami, R K, 'Public Investment and the Goal of Providing Universal Access to Primary Education by 2015 in Kenya', (2009) 1 International Journal education Development, 1.

⁴⁴ Republic of Kenya: *National Development Plan* (Government Printer: Nairobi, 1964-1969) at 305.

⁴⁵ Ibid. Development Plan (1970-1974) at 453.

In 2010 Kenya promulgated its Constitution where basic education is as social-economic right in the Bill of Rights.⁴⁶ The other rights included the right to: “the highest attainable standard of health, which includes the right to health care services, including reproductive health care, to accessible and adequate housing, and to reasonable standards of sanitation, to be free from hunger, to have adequate food of acceptable quality, to clean and safe water in adequate quantities, and to social security...”⁴⁷ The Constitution guarantees every person’s right to education.⁴⁸ The Constitution further guarantees every child’s right to free and compulsory basic education.⁴⁹ It also requires the Government to undertake measures to provide education to disadvantaged and marginalized children such as the disabled.⁵⁰ The Constitution further apportions responsibilities both between the National and devolved governments.⁵¹

The Basic Education Act was enacted in 2013. It repealed the Education Act (Chapter 211) and the Board of Adult Education Act (Chapter 223). It also conforms to the Constitution as it was enacted after the promulgation of the Kenyan Constitution 2010. Part IV of the Act outlines the right to free and compulsory basic education. It also states that it is the duty of the State to provide free and compulsory basic education. The Act outlines the duties of the Cabinet Secretary and parents in ensuring that children access free and compulsory primary education.

1.2 Statement of the problem

Orphaned and vulnerable children (OVCs) in Kenya are finding it increasingly difficult to access basic education. This is despite the fact that the right to basic education has been afforded three-tier recognition as a right and not as an appeal to charity. Three tier because it is recognised under domestic regime, regional (African human rights system) and global (United Nations System). As shall be discussed in this study, law, policy and practice largely fail to consider that the plight of OVCs thus impeding their access to education. That is why the effect is felt-that there are children who have a difficulty enjoying education as a right. There are no pragmatic measures that the law, policy and practice have adapted to see to it that the right to access basic education is not just a mere paper right, not of any practical

⁴⁶ Article 43, (1) (f), Constitution of Kenya, 2010.

⁴⁷ Ibid. Article 43 (1) (a-e).

⁴⁸ Ibid. Article 43(1) (f).

⁴⁹ Ibid. Article 53(1).

⁵⁰ Ibid. Article 54 (1) (b): “to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person”

⁵¹ 4th Schedule part 1(15), (16) and part 2(9), Constitution Kenya 2010.

significance. ‘Human rights’ are a value that constitutions as well as other laws have afforded recognition as values that can ensure social justice and dignity. Sadly though, these values are not self-enforcing. They require very pointed and specific mechanisms through which they are reduced from paper to action for the good of those they seek to assure dignity and social-justice for.

1.3 Theoretical framework

There are two competing legal theories that explain the right to basic education. These theories would also justify pointed measures at addressing the plight of OVCs. These are the socialist theory and the liberal theory. The relevance of the two theories is that they address who between the state and the private sector should provide basic education. The liberal theory postulates that non-state actors should be the prime providers of education and thus view education as a private right.⁵² The socialist theory on the other hand views education as a public right and that the primary task of the state is to ensure the economic and social well-being of the community through government intervention and regulation.⁵³ Socialist theory recognizes that individuals have claims to basic welfare services against the state and education is viewed as one of these welfare entitlements.⁵⁴

This study, drawing inspiration from social theory demonstrates the need for the adoption of measures that ensure realization of the right to basic education for OVCs. This theory is the most defensible theory on realization for the right to basic education for OVCs and resonates with international and domestic legal reality. This explains why these ideals were first captured in the 1936 Constitution of the Union of Soviet Socialist Republics (USSR).⁵⁵ It was the first constitution to recognize the right to basic education with a corresponding obligation of the state to provide it.⁵⁶ The Soviet Constitution guaranteed free and compulsory education at all levels. A system of state scholarships and vocational training in state enterprises

⁵² Dieter K B, *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers: Boston, 2005) at 23.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Constitution of the Union of Soviet Socialist Republics (USSR),1936.

⁵⁶ Article 121 provides that Citizens of the USSR have the right to education. This right is ensured by universal, compulsory elementary education: by education, including higher education, being free of charge; by the system of state stipends for the overwhelming majority of students in the universities and collages; by instruction in schools being conducted in the native language, and by the organization in the factories, state farms, machine and tractor stations and collective farms of free vocational, technical and agronomic training for the working people.

ensured that all post-secondary school children were taken care of. Subsequently the right to education featured strongly in the constitutions of socialist states.⁵⁷

The socialist theory of education has three main claims: first, basic education is viewed as a traditional creator of social inequality and social stratification.⁵⁸ Secondly, basic education is a major contributor towards the ability of a human being to participate in the social, economic and political life of a nation. And thirdly, the easiest way to attain social health and order is through the acquisition of basic education. Halsey is of the view that the quality of education worsens as one goes down the social ladder with OVCs being the most affected.⁵⁹ This theory has broadened the study to include other aspects of marginalization and gender,⁶⁰ ethnic⁶¹ and international differentials and the effect they have on access to basic education.⁶²

The second claim is that basic education greatly contributes towards the ability of a human being to participate in the formulation of policies that affect him/her. This has been called structural functionalism which has a firm belief that society leans towards social equilibrium and social order.⁶³ Society is viewed in terms of the human body where basic education is the key component or organ that keeps the society healthy.⁶⁴ The third claim of the socialist theory is that the easiest way to attain social health and order is when everyone accepts the general moral values of their society which is carried through the medium of education.⁶⁵ The aim of education should ideally be to socialize children who would otherwise not get such an opportunity to do so elsewhere. Socialization in this context is defined as the process through which the new generation learns the knowledge, attitudes and values that will mould them

⁵⁷ China, Finland and Denmark are examples of countries with strong socialistic leanings towards the right to basic education.

⁵⁸ Heath A F, 'The Political Arithmetic Tradition in the Sociology of Education', (2000) 26 (3-4) Oxford Review of Education, 313.

⁵⁹ Halsey A H, *Origins and destinations: Family, Class, and Education in Modern Britain* (Clarendon Press: Oxford, 1980) at 24.

⁶⁰ Gorard S, 'Reappraising the Apparent Underachievement of Boys at School', (1999) 11(4) Gender and Education, 450.

⁶¹ Heath A F and S Y Cheung (ed), *Unequal Chances: Ethnic Minorities in Western Labour Markets* (Oxford University Press: Oxford, 2007) at 29.

⁶² Heath A F and Sullivan A, 'Introduction: The Democratization of Upper-Secondary Education', (2011) 37 (2) Oxford Review of Education, 130.

⁶³ Bessant J and Watts R, *Sociology Australia*, (Allen and Unwin: Sydney, 2nd ed, 2002) at 18.

⁶⁴ Ibid.

⁶⁵ Harper G, *Society, Culture, Socialization and the Individual*, in Stafford C and Furze B (eds) *Society and Change* (Macmillan Education, Australia: Melbourne, 2nd ed, 1997) at 57.

into productive citizens.⁶⁶ These attributes and values can be accomplished through formal and informal curriculum for OVCs.⁶⁷

Moreover, in legal philosophy, the state is portrayed the custodian of rights while citizens are its beneficiaries. Rights are moral claims against the society,⁶⁸ claims essential to the survival and preservation of mankind. It is for this reason that the Constitution of Kenya provides that rights are not granted by the state but belong to the citizens.⁶⁹ According to Henkin, the state has certain obligations to children other than provision of basic education.⁷⁰ They are characterized by three fundamentals: they are enforceable, individual, universal and practical. In terms of enforceability, practicability and enforceability, rights are not just desirable. They are not appeals to charity or concessions. They should be capable of being enforced. They should not be paper rights. Recourse should be available so that in the event of breach, the citizenry have recourse in the courts to seek to enjoy those rights.⁷¹

It is in view of this that the right to basic education has generally been categorized as part of second generation rights,⁷² encapsulated in the wider rights popularly known as social and economic right. The distinction between social and economic rights and political and civil rights in terms of the role of the government in fulfilling them is that, whereas the social and economic rights are positive rights, political and civil rights are categorized as negative rights.⁷³ These rights are positive in the sense that they require the government to do something while civil and political are negative in the sense that they require the government to refrain from interfering in the enjoyment of the rights.⁷⁴ It is as a result of this distinction that the doctrine of progressive realization of the right to basic education is used to justify government's failure or inability to fulfill the right. Even though such differences have been created, certain scholars have maintained that social and economic rights are just as important

⁶⁶ Nyerere J K, *Education for Self-Reliance* (Government Printer Dar Es Salaam, 1967).

⁶⁷ Ibid.

⁶⁸ Henkin L, *Age of Rights* (Columbia University Press: New York, 1990) at 7.

⁶⁹ Article 19 (3) (a), Constitution of Kenya, 2010.

⁷⁰ Henkin L, *Age of Rights* (n 70) at 7: "It is the responsibility of the state to provide bread, to keep him safe from his wolves and to take him to hospital while sick. This is called the correlative duty of rights."

⁷¹ Donnelly J, *Universal Human Rights in Theory and Practice* (Cornell University Press: New York, 2nd ed, 2003) at 290.

⁷² Leckie S, *Economic, social and Cultural Rights: A Legal Resources Guide* (University of Pennsylvania Press: 2006) at 45.

⁷³ Halstead P, *Unlocking Human Rights* (Hodder Education: London, 2009) at 7.

⁷⁴ Ibid.

as civil and political rights.⁷⁵ In fact, deeply interrogated, social and economic rights supersede civil and political rights.

1.4 Definition of Key Terms

1.4.0 Orphans and Vulnerable children (OVCs)

The term Orphan and Vulnerable children (OVCs) is a concept that is understood differently by different people. This is because the term can be defined depending on the circumstances prevailing at a particular time and place:

“The concepts of orphan and vulnerable child are social constructs that vary from one culture to another. In addition, these terms take on different definitions that can be at odds with one another depending on whether they were developed for the purpose of gathering and presenting quantitative data or for developing and implementing policies and programs. It is important to make this distinction and establish a ‘firewall’ between definitions developed for one purpose versus the other.”⁷⁶

The Children’s Act in Kenya does not use the term OVCs but refers to such children as those in need of care and protection (CNCP).⁷⁷ The World Bank categorizes OVCs depending on what exactly affects them, for example war affected children, orphans, street children, HIV/AIDS affected children, disabled children and child laborers.⁷⁸ The term OVCs was adopted due to the lack of precision in defining orphan hood in the face of HIV/AIDS. This study uses the context encapsulated in section 119 of the Children’s Act.

1.4.1 Child

The definition of a child in international law varies depending on which particular purpose the instrument seeks to serve. The UN Convention on the right of the child (CRC) defines a 'child' as a person below the age of 18, unless the laws of a particular country set the legal age for adult hood younger. The Committee on the Rights of the Child, the monitoring body for the Convention, has encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18. This definition is consistent with the one adopted in Kenya under the Children’s Act which defines a child as “... any human being under the age of eighteen years.”⁷⁹ This study has adopted the latter definition.

⁷⁵ Donnelly J, *Universal Human Rights in Theory and Practice* (n 73) at 290; See Lumumba P L O and Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary* (Strathmore University Press: Nairobi, 2014) at 199-203.

⁷⁶ World Food Programme Report, 2007 at 12.

⁷⁷ Section 119, Children’s Act 2001.

⁷⁸ Subbarao K and Coury D, *Reaching Out to Africa’s Orphans: A Framework for Public Action* (World Bank: Washington, 2009) at 1.

⁷⁹ Section 2, Children Act (No. 8 of 2001 of the Laws of Kenya).

1.4.2 Orphans

The term orphan derives from a Greek word known as *orfanos*⁸⁰ which means a child whose parents are dead or have abandoned them permanently. UNICEF defines an orphan as a child who is below 18 years old and has lost one or both parents and a vulnerable child as one whose parents are terminally ill.⁸¹

1.4.3 Assessing vulnerability: Orphaned and Vulnerable children (OVCs)

Vulnerability arises when an individual is at a heightened or increased exposure to risk as a result of one's circumstances.⁸² The status of OVCs and access to education has traditionally not been treated as a legal issue but a social, economic and partly psychological one. The CRC was not formulated with OVCs in mind.⁸³ This can be seen from the fact that none of its provisions mentions OVCs.

However, OVCs have been defined by Deirdre as those who do not have the capacity to protect themselves physically, emotionally, economically and socially.⁸⁴ This is besides having restricted access to basic needs such as housing, shelter, health care and social welfare. The children may have both parents, but the child's rights could be denied. This definition must be seen in a certain context of the child.⁸⁵ The context for many children is the absence of fulfillment of basic rights and the identification of problems in the environment. Although there is not an agreed definition of vulnerable children, there is consensus on the basic set of facts indicating vulnerability. This arises from the gaps in the provision of needs or specific needs that exist in the community. Vulnerability is not an absolute attribute; there are degrees of vulnerability depending on the situation of the child.⁸⁶ There are a number of factors that should be considered when assessing the degree of vulnerability. These factors include:

- (i) any physical or mental handicap or any other long-term difficulty that would make it difficult for the child to function independently,

⁸⁰ Liddell H G & Scott R, *A Greek-English Lexicon*, on Perseus

⁸¹ UNICEF, OVCs Programming (Orphans and other OVCs) including Children affected by HIV and AIDS in West and Central Africa: Conceptual and Programming Gaps– Progress in the Response – Challenges and the way Forward (Working Paper (draft) – UNICEF – West and Central Africa Regional Office (WCARO) – November 2008) at 25.

⁸² Republic of Kenya; Ministry of Home Affairs and NACC; National Programme Guidelines on OVCS (2003) at 7.

⁸³ Deirdre F (ed), *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* (Kluwer Law International: The Hague, 2000) at 169-182.

⁸⁴ *Ibid.* at 175.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* at 180.

- (ii). illness, either HIV or other major illnesses,
- (iii). emotional or psychological problems,
- (iv). abuse at emotional, physical or sexual level,
- (v). not cheerful, dull, does not perform well in class, miserable, dirty with torn clothes, sleepy,
- (vi). use of drugs e.g glue, alcohol, cigarettes, khat, cocaine,
- (vii). neglect of schoolwork,
- (viii). does not receive sufficient healthy food and constantly shows signs of hunger, constantly shows signs of not sleeping well, poor hygiene or cannot engage in personal care,
- (ix). the child does not have clothing or has dirty clothing all the time, does not receive care, particularly love guidance and support.⁸⁷

There are also family situations that make children vulnerable. These include the following:

- (i). caregivers are not able or willing to care for the children under their care
- (ii). alcoholic, poor and emotionally disturbed parents
- (iii). handicapped (physically and mentally) or chronically very sick parents e.g confined in bed
- (iv). household is overcrowded or the ratio of children to caregivers is too high
- (v). divorced parents
- (vi). abusive family or parents or caregivers not equipped to provide the care giving role
- (vii). lack of financial resources to adequately care for the child
- (viii). lack of parental guidance and direction.⁸⁸

As shown above there are different factors that contribute to the vulnerability of children. Each factor would contribute to a child's vulnerability. Each adds up to the cumulative load that the child eventually carries. For this reason provision of basic education to vulnerable children presents unique challenges to the state.

1.4.4 Basic education

Various definitions have been attempted to exemplify the right to basic education. Basic education is defined in section 2 the Basic Education Act No. 14 of 2013 as “the educational programmes offered and imparted to a person in an institution of basic education and includes adult basic education and education offered in pre-primary educational institutions and

⁸⁷ Skinner D, Tsheko N *et al*, *Defining Orphaned and Vulnerable children* (HSRC Publishers: Cape Town, 2004) at 11.

⁸⁸ *Ibid*.

centers.” Achoka,⁸⁹ considers basic education as the minimum education that every Kenyan must have for progressive existence in society. It is instructive to note that in the context of Kenya, basic education does not only mean primary or secondary education, it is “education offered at both primary and secondary levels in the Kenyan 8-4-4 education system (8 years primary, 4 years secondary and 4 years minimum university.”⁹⁰ According to UNESCO "education" refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.”⁹¹

While under international law basic education is defined as primary education which would mean that it refers to those children who are below majority age.⁹² However, a careful reading of section 23 (2) of the Children’s Act,⁹³ as read with section 28, and the courts judgment over the same in *John Mbatia Kibebo and Another v. Eliud Kibebo Mbatia*⁹⁴ and *Wambua v. Wambua*⁹⁵ advances the view that basic education transcends the age of majority.⁹⁶

1.4.5 Paper rights

The term ‘paper rights’ does not exist in any human rights instruments. It has been used in this study to refer to a state where rights exist in documents but are of no meaningful significance. Indeed, rights are not self-enforcing.

1.5 Research Objective

The main purport of this study is to investigate the extent to which OVCs access basic education in the light of the commitments Kenya has made both at the domestic and international level to ensure that every child has access to basic education.

1.5.0 The specific objectives

The specific objectives of the research will be as follows:

1. To investigate the meaning of the right to basic education for OVCs in Kenya

⁸⁹Achoka J S K, ‘Access to Basic Education in Kenya: Inherent Concerns’, (2007) 2 (10) Educational Research and Review, at 1.

⁹⁰ Ibid.

⁹¹ Article 1 (2), Convention against Discrimination in Education Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960, [*Hereinafter UNESCO*].

⁹² Article 13, ICESCR.

⁹³ No. 8 of 2001 of the Laws of Kenya.

⁹⁴ *John Mbatia Kibebo and Another v. Eliud Kibebo Mbatia*, Civil Case 169 of 2008) [2013] eKLR.

⁹⁵ *Diana Ndiele Wambua v. Dr. Paul Makau Wambua*, Civil Cause No. 30. of 2003 [2003] eKLR.

⁹⁶ International Commission of Jurists (Kenya Chapter), *Rule of Law Report 2012/2013: Towards Progressive Implementation of Economic, Social & Cultural Rights* (ICJ: Nairobi, 2014) at 106.

2. To examine the legal and administrative framework intended to assure and secure the right to education for OVCs.
3. To identify and analyse the variant factors that inhibit the realisation of basic education for vulnerable in Kenya as against the commitment to ensure basic education.
4. To analyze practices elsewhere in the protection of the right to basic education for orphaned and OVCs and the lessons there from.
5. To suggest recommendations that would ensure better realisation of education for OVCs in the light of what the right to education means, the factors that inhibit it, the legal and administrative background and best practices.

1.6 Research questions

The research questions for this project are as follows:

1. What is the relevance of the right to basic education and what does it mean for orphaned and OVCs?
2. How does the Kenyan legal and administrative arrangements seek to ensure the right to education and how does it address the specific concerns of children?
3. To what extent have the problems encountered by OVCs in accessing basic education in Kenya been addressed by the legal and administrative framework?
4. What international best practices can Kenya learn from as it promotes, protects and fulfill the right to basic education for OVCs?
5. What can be done to improve the realisation of the right to basic education for OVCs?

1.7 Hypothesis

The right to education imposes on the state a number of obligations which include the obligation to protect, respect and fulfill the right to education. It is unlikely that the right to basic education for the Kenyan OVCs child will be realised just because a constitutional provision has provided that children have a right to basic education. The state is required to devise measures that address the various challenges that inhibit the realisation of the right to education for OVCs. Most likely, the concept of progressive realisation of rights will provide leverage for the government to fail to fulfill its obligations towards the right to education. If the state becomes blind to these challenges and hides under the veil of the notion of progressive realisation, the right to education would remain a mere paper right and of no substantive meaning.

1.8 Literature review

Despite the central role played by education in the personal and intellectual development of human beings and the nation at large, there is a dearth of information particularly in terms of the protection, enforcement and fulfilment of the right to basic education for OVCs in Kenya. What is available is mainly foreign information that in most cases deals with jurisdictions that are fairly more advanced than our own. However it is hoped that this study will fill in the gap that exists in analyzing the challenges that are faced by OVCs in accessing basic education, Kenya's compliance with international legal obligations and what can be learned from international best practices.

The challenges that face OVCs in the slums of Nairobi are quite undesirable keeping in mind that basic education is a basic right that should be offered to slum children.⁹⁷ This partly explains why they comprise a major percentage of OVCs in urban centres. The problem is compounded by their poor status that makes basic education out of reach for a majority of them. This sharply contradicts with Achoka,⁹⁸ who views basic education as the minimum education that every Kenyan child must have for progressive existence in society and as a crucial factor in the overall participation in decision making in society.

It is with this view that the study considers some of the advantages that would accrue if children in informal settlements are offered free basic education. For example it would create a window through which rights can be claimed and protected. It is recognized that without basic education OVCs would be incapable of functioning to full capacity.⁹⁹ Education also makes children develop skills, capacities and confidence to enable them demand for their rights. With the knowledge and information accessed, they are able to discern the extent to which they can enjoy the other rights and demand government action in fulfilling its obligations.

Beyond the right based education, it is considered that for education to be meaningful, it must be available, accessible, acceptable and adaptable.¹⁰⁰ The government's obligation in respect of this right is to respect, protect and fulfil the right to education by having mechanisms

⁹⁷ Mitullah W, *Understanding Slums: Case Studies for the Global Report on Human Settlements: The Case of Nairobi, Kenya* (Nairobi, 2003) at 17.

⁹⁸ Achoka J S K, 'Access to Basic Education in Kenya: Inherent Concerns', (2007) 2 (10) *Educational Research and Review* at 1.

⁹⁹ *Ibid.* at 6.

¹⁰⁰ Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999).

through which education will be available, accessible, acceptable and adaptable. The challenge for ECED education in informal settlements is that it is the least supported by the government. Thus being community or privately owned, they have poor infrastructure which compromises on the quality. Likewise FPE is equally challenged by poor or inadequate infrastructure, overcrowding especially in urban informal settlements. All these challenges arise because the government despite enacting various laws does not have an integrated and coherent policy on basic education.¹⁰¹

Achoka¹⁰² provides background information in highlighting challenges in the provision of basic education in informal settlements a majority of whom have been addressed by the new Constitution. However it has a gap in the sense that it was written before the passage of the new Constitution which makes basic education a fundamental right, thus these changes have not been encapsulated. This is in addition to recent reforms and policy initiatives that have focused on the attainment of Universal Primary Education (UPE) and the key concerns of access, participation, equity, quality and relevance. There is an increasing concern for both the internal and external efficiencies within the education system by the government.¹⁰³ Additionally, it only caters for a small segment of OVCs (slum dwellers).

The right to education as enshrined in UDHR, UNCRC has been very well received by the Kenya Government.¹⁰⁴ Kenya has not only ratified these instruments, but it has made them part of its domestic law pursuant to Article 2 (5) and (6) of the Constitution.¹⁰⁵ Likewise various legislations such as the Children's Act, 2001, the Basic Education Act, 2013 have been passed to protect the right to basic education. This is in addition to policy frameworks such as Sessional Paper no. 1 of 2005 on Education, Training and Research for 21st century and the education pillar of Vision 2030.

¹⁰¹ Sava L A & Orodho J A, 'Socio-economic factors influencing pupils' access to education in informal settlements: A case of Kibera, Nairobi County, Kenya' (2014) 2 (3) International Journal of Education and Research.

¹⁰² Achoka J S K, 'Access to Basic Education in Kenya: Inherent Concerns' (n 100 above).

¹⁰³ Draft Report Baseline Survey on the Right to Basic Education and Parental Involvement in School Governance in Kenya Tracking awareness, information and responsibility among stakeholders in basic education. A study Commissioned by: Kenya National Association of Parents, November 2009.

¹⁰⁴ Ibid.

¹⁰⁵ Article 2 (5): The general rules of international law shall form part of the law of Kenya; article 2 (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

In a survey carried out by the Kenya National Association of Parents to determine the awareness, information and responsiveness among stakeholders in basic education.¹⁰⁶ The issues examined in this survey revolved around the right to basic education in terms of awareness of international protocols, charters, national law, policy rules and guidelines. The findings showed that both parents and children were not aware that education is a basic right solely there was very little sensitization done on this group on those rights.

The education sector in Kenya has seen many laws, task forces, committees, commissions, working parties aimed at reforming the education sector.¹⁰⁷ However little attention has been paid to the education needs of OVCs. According to Don Bonyo¹⁰⁸ the current framework is guided by Sessional Paper No. 1 of 2005, with the Kenya Education Sector Support Programme (KESSP) being the framework for education service provision in Kenya. The Education Act¹⁰⁹ and the Basic Education Act¹¹⁰ do not expressly mention OVCs but continue with the age old formal education that is unsuitable for OVCs. This is the outcome of an education system that sidelines the participation of OVCs in the formulation of the basic education policy.

The gaps existing in the provision of basic education according to Bonyo are the structure of the education system and curriculum which promotes formal education thus further marginalizing OVCs. There is also the question of access and equity, a key consideration under international law¹¹¹ and the Constitution,¹¹² failure to attain access and equity is due to systemic state failure and historical injustices. The other gaps in the legal framework are with regard to education financing and investment that are skewed in favor of children not from vulnerable backgrounds. But perhaps the most important gap is the failure by policy makers and legislators to align issues facing education to the regulatory and legal framework. This

¹⁰⁶ Draft Report Baseline Survey on the Right to Basic Education and Parental Involvement in School Governance in Kenya Tracking awareness, information and responsibility among stakeholders in basic education. A study Commissioned by: Kenya National Association of Parents, November 2009.

¹⁰⁷ The Ominde Commission, 1964; The Presidential Working Party on the Second University in Kenya led by Mackay, 1981; The National Conference on Education and Training, 2003 whose recommendations led to the development of Sessional Paper No 1 of 2005.

¹⁰⁸ Don Bonyo E, *A Critique of Kenya's Education Reform Process and Task Force Report* Presented at the Discussion Forum on Education Sector Reforms held at the Panafric Hotel, Nairobi, on Wednesday 11th April 2012.

¹⁰⁹ Chapter 211 of the Laws of Kenya.

¹¹⁰ No. 14 of 2013

¹¹¹ Article 26, UDHR; Article 28 and 29, CRC.

¹¹² Article 43 (1) (f) and 53 (1) (b), Constitution of Kenya.

has been made worse by the failure to provide guidelines on how to harmonize Articles 43 (1) (f) and 53 (1) (b) of the Constitution to the sector.

OVCs right to basic education is so important that it provides the basis upon which to access and enjoy other rights such as the right to human dignity, the right to participate in policies that affect him/her and the right to development.¹¹³ This is possible so long as the Government pursues policies that are in the best interest of the child with regard to the right to basic education for OVCs. This is the position held by the United Nations Convention on the Rights of the Child.¹¹⁴ Henkin¹¹⁵ defines rights as moral claims against the society, pointing out that human rights and the right to education in particular is a legitimate entitlement to all human beings.¹¹⁶ He observed that human rights are not mere aspirations or assertions of the good and proceeds to point out that to call it a right is not merely to assert that it is desirable or that the benefits indicated are necessary, but it means it is of “right” not by appeal to grace or to charity.¹¹⁷ He observes that the idea of a right implies some entitlements.¹¹⁸

South Africa has taken an integrated approach in responding to the inability of OVCs especially those affected by HIV in accessing basic education.¹¹⁹ It began in 1998 when the National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions and its gazettelement in 1999.¹²⁰ This policy focused on among other things, the prevention of HIV spread among learners using knowledge and skills building through the life orientation learning area programme. Thus SA became the first country to adopt a formal policy on HIV/AIDS in the education sector.

This programme was accelerated through the National Response Acceleration Action in the department of basic education (DBE). The two worked out a strategy to realize the strategic plan in schools using an integrated strategy on HIV/AIDS.¹²¹ HIV/AIDS as a developmental challenge, the impact of HIV on the education sector and educational outcome, lessons from

¹¹³ Baltin A, Kahru M, *et al*, *We, the World and Human Rights* (Jaan Tonisson Institute Tallinn, 1997).

¹¹⁴ Article 28, UN Convention on the Rights of the Child, Adopted on 20 November 1989 (entry into force 2 September 1990,

¹¹⁵ Henkin L, *Age of Rights* (Columbia University Press: New York, 1990) at 7.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Department of Basic Education, *Integrated Strategy on HIV and AIDS 2011-2015 Full Report* (Department of Basic Education: Pretoria, 2011) at 2.

¹²⁰ *Ibid.* at 3.

¹²¹ *Ibid.*

available evidence on effective responses, schooling as a protective factor – the role of prevention, a duty of care in schooling, alignment with the NSP, alignment with Government’s outcomes focus and a sustainable, integrated response.¹²²

1.9 Scope of the Study

The scope and of the right to basic education contains four critical elements namely: availability, accessibility, acceptability and adaptability. The essential features or the core content of the right to basic education are elaborated by the General Comment on the right to education.¹²³ These elements were formulated in collaboration with UNESCO. For OVCs, basic education is available when educational institutions exist in sufficient quantity within a state. Accessibility refers to the ability of education institutions to be accessible to everyone without discrimination. Accessibility also includes attributes of physical and economic accessibility. Education should also be acceptable in form and substance with the relevant curricula and teaching methods. Adaptability of education connotes its ability to be flexible to meet changing needs.

1.10 Research methodology

The research method used is the review of existing data on the right to basic education for OVCs. Two types of data were collected: primary and secondary data. Primary data for this study was gathered through questionnaire and administered interview method. OVCs were interviewed using the highest ethical standard of confidentiality.¹²⁴ This was meant to protect them against stigmatization and discrimination since some of them were HIV positive.

In total 120 respondents were interviewed comprising 100 OVCs and 20 adults. This research was conducted in number of educational institutions spread over Nairobi namely: Kabete Approved School, Good Samaritan Children’s Home and Flomina Children’s Home (both in Mathare), Imani Children’s Home (Kayole) and Christ Chapel Primary School in Huruma. Other institutions included Elimu Yetu Coalition, Kenya Institute of Curriculum Development, Kenya Law Reform, the Children’s Department, the Kenya National Commission on Human Rights (KNCHR) and CRADLE. The similarity between the respondents is that they were involved in one way or the other in the promotion of the right to basic education either as teachers, academics or policy makers. Some of the children and the

¹²² Ibid.

¹²³ Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999).

¹²⁴ Donald Kombo, *Proposal and Thesis Writing* (Pauline Publications: Nairobi, 2006) at 94.

teachers come from the same school. Different issues emerged from interviews and discussion. The data is analysed using spreadsheet programme and variables finally presented in the form of pie charts and bar charts.

Secondary data was found necessary because some of the answers to the questions in the research are theoretical and hence the answers can be found in books, journals articles, reports, newspaper reports, conference papers, thesis, dissertations and legal commentaries. Literature review was obtained from libraries such as the University of Nairobi law Library, the Kenya Institute of Special Education at Kasarani (KISE), Kenya Institute of Education (KIE), CRADLE, Ministry of Gender, Children and Social Services, Elimu Yetu Coalition and Centre for Human Rights and Peace Resource Centre of the University of Nairobi.

CHAPTER TWO

LEGAL FRAMEWORK FOR BASIC EDUCATION IN KENYA

2.0 Introduction

This chapter seeks to expose the extent to which OVCs access to education as been affirmed both under domestic and international law. A curious reading of the legal and regulatory framework does not show how pointed obligations are fleshed out in these instruments to require that the government considers the plight of OVCs and come up with special mechanism to see to it that the right to education does not remain as a mere paper right. This segment thus gives an analysis of the law and the extent to which it recognises and affirms the right to education for OVCs. The foundational origin of the universal right to education is intricately included in the dignity jurisprudence of the UDHR.¹²⁵ The right to education first appeared internationally as a human right in 1948. The declaration then proclaimed the right to education and required education to be free at the ‘elementary and fundamental stages’.¹²⁶ It also required technical, professional and higher education to be made progressively available and accessible. The aims of education were set out to develop the human personality and promote peace and understanding among nations.¹²⁷ The UDHR of 1948 forms the basis upon which other conventions, treaties or recommendations on education have been developed.¹²⁸

Subsequent human rights instruments took the Universal Declaration affirmation a notch higher by recognizing basic education as a right. These are the International Covenant on Civil and Political Rights¹²⁹ and the International Covenant on Social, Economic and Cultural Rights.¹³⁰ What is important to note regarding the essence of education is the fact that it is alluded to by the international Bill of Rights. Article 13 of ICCPR a link is established

¹²⁵ Article 26, The Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948; Lonbay, J, ‘Implementing the Right to Education in England’ in R Beddard and D Hill (eds), *Economic Social and Cultural Rights: Progress and Achievements* (St Martin’s Press: New York, 1992) at 27.

¹²⁶ Article 26(2), UDHR.

¹²⁷ Ibid.

¹²⁸ Ibid: “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.”

¹²⁹ Article 13, International Covenant on Civil and Political Rights, adopted on 16 December 1966 (entry into force 23 March 1976).

¹³⁰ Article 13 and 14, ICESCR.

between educational and dignity.¹³¹ The ICESCR which espouses social, economic and cultural rights presents the role of education as the promotion of the realization of economic and social rights.¹³² Other instruments that recognize the right include: UNESCO Convention against Discrimination in Education (1960),¹³³ the Declaration on the Rights of Disabled Persons¹³⁴ and the United Nations Convention on the Rights of the Child.¹³⁵

Evidently there is general support for the right to basic education in international law. In this study, international legal instruments include treaties as international agreements within the definition of the Vienna Convention,¹³⁶ legally binding parties thereto, and soft law documents such as declarations, resolutions, standard setting documents that are adopted by international and regional bodies.¹³⁷ Various international legal instruments provide for the right to basic education. The International Bill of Rights (UDHR, ICCPR and ICESCR.) represents a human right approach to basic education at the international level.

2.1 International Law on the Right to Basic Education

2.1.0 Universal Declaration of Human Rights (UDHR)

The UDHR does not mention OVCs in any of its main provisions. It only acknowledges that elementary education must be compulsory. The UDHR was conceived after the Second World War that had witnessed massive human rights violation.¹³⁸ Second, although it is a declaration and not a treaty, it has been argued that it has developed and acquired the status of customary international law.¹³⁹ This means that as the provisions of UDHR are norm in international law which states have an obligation to enforce. The preamble of the declaration recognizes the inherent dignity and inalienable rights of all human beings which must be based on freedom, justice and peace. It affirms the relationship between rights and dignity,

¹³¹ Article 13, 18(4) of ICCPR: “education shall be directed to the full development of human personality and the sense of its dignity.”

¹³² Ibid.

¹³³ UNESCO Convention against Discrimination in Education, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960 and entered into force on 22 May 1962.

¹³⁴ United Nations General Assembly Resolution 3447(XXX) of December, 1975.

¹³⁵ Article 28, UN 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): requires member states to make primary education free and compulsory.

¹³⁶ Vienna Convention on the Law of Treaties (VCLT), adopted 23 May 1969, 1115 U.N.T.S 331 (entered into force January 27, 1980).

¹³⁷ Dieter K B, *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers: Boston, 2005) at 86.

¹³⁸ Halstead P, *Unlocking Human Rights* (Hodder Education: London, 2009) at 26.

¹³⁹ Ibid.

including the right to basic education. Some of its objectives are set out as to develop a common standard of achievement to be brought about by education in order to promote and eventually secure universal recognition and observance of human rights and fundamental freedoms.¹⁴⁰ The most significant impact of the declarations is the union of all rights and their indivisibility into civil, political, economic, social and cultural rights. The theory behind it being that the non-realization of any of the rights leads to human beings living in indignity.¹⁴¹ Indeed, failure to realize the right to basic education makes it difficult for human beings to realize all the other rights and access human development. However this right is subject to limitation under Article 22, which refers to an individuals' entitlement to the realization of economic, social and cultural rights "in accordance with the resources of the each state", thereby subjecting the scope of the state's duty to the extent of the resources available.¹⁴²

In a nutshell, the most important elements of Article 26 (1), includes the provision of a right to every person to education. This provision makes elementary and fundamental education free of charge.¹⁴³ Elementary education used in this text refers to formal schooling for children of primary school age, while fundamental education refers to education for children, youth and adults who could have missed an opportunity to access primary education. The latter education is offered outside the regular primary education system.¹⁴⁴ Under the UDHR, elementary education is envisaged to be compulsory, while technical and professional education must be made generally available to those who need it.¹⁴⁵

2.1.1 UNESCO Convention against Discrimination in Education

UNESCO's Convention against Discrimination in Education (CADE, 1960)¹⁴⁶ was the first international instrument dealing specifically with education to receive binding force in international law. It is very important among a number of standard-setting instruments adopted by UNESCO in the field of education, which develops the right to education in its various dimensions. The right to education is an integral part of UNESCO's constitutional mandate whose foundational basis is deal with systemic issues that hamper the realization of

¹⁴⁰ Preamble, UDHR.

¹⁴¹ Ibid. Article 26.

¹⁴² Coomans F, 'Identifying the Key Elements of the Right to Education: A Focus on Its Core Content' available at www.crin.org/docs/Coomans-CoreContent-Right, (accessed on 24 April 2014 at 53).

¹⁴³ Beiter, K D, *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers: Boston, 2005) at 90.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960

the right to education.¹⁴⁷ UNESCO is charged with the mission of advancing among nations “...the ideal of equality of educational opportunity without regard to race, sex, or any distinctions, economic or social.”¹⁴⁸ It aims at combating discrimination in education in general based on race, colour, sex, language, religion, political or other opinion, national or social origins, economic condition, or birth.¹⁴⁹

The significance of the Convention arises from the fact that it is mentioned in international instruments on the right to education adopted by UNESCO.¹⁵⁰ It has particularly influenced the UN in articulating the right to education. For example Article 13 of ICESCR on the right to free and compulsory primary education was drafted upon proposals from UNESCO. The ICESCR was also inspired by the provisions of the convention.¹⁵¹ The General Comment 13 on the right to education succinctly elaborated by the Committee on Economic, Social and Cultural Rights (CESAR) has been done in collaboration with UNESCO. This is in addition to appearing in resolutions on the right to education that have been adopted by the United Nations High Commission on Refugees (UNHCR).

The most important contribution of the convention on the right to education is with respect to its elaboration on the principle of non discrimination and the equality of opportunities in education.¹⁵² These are the key principles germane to ensuring accessibility, availability, acceptability and adaptability for education for all (EFA).¹⁵³ This underscores the primacy of the convention as the cornerstone of the international human right to education. The Convention continues to play a leading role in ensuring that education is truly inclusive. Specific reference is made to the poor, marginalized, vulnerable groups, the youth denied equal access to education, the rural and urban poor and those affected and infected with HIV/AIDS.¹⁵⁴ Sadly though, this document does not make any specific mention of either orphans or vulnerable children.

¹⁴⁷ UNESCO, *UNESCO Convention against Discrimination in Education (1960) and Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: A comparative analysis* (UNESCO: Paris, 2006) at 1.

¹⁴⁸ Preamble, UNESCO Convention.

¹⁴⁹ Daudet Y and Eisemann P M, *Commentary on the Convention against Discrimination in Education* (UNESCO: Paris, 2005) at 2.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Preamble, Article 1, UNESCO Convention.

¹⁵³ Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999).

¹⁵⁴ Article 5 (c), UNESCO Convention.

2.1.2 International Covenant in Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) embodies what some people describe as ‘first generation rights’. These essentially civil and political rights¹⁵⁵ that include the right to life, right to association and speech, freedom of conscience, freedom from slavery to name but a few. The Human Rights Committee (HRC)¹⁵⁶ is created under the Covenant to monitor compliance and hearing of complaints of individual state violation of rights ratified under the Optional Protocol to the Covenant.¹⁵⁷ The function of the Optional Protocol is to avail individuals an opportunity to redress violation of human rights at the domestic level. Kenya ratified this Covenant in 1992 and therefore is bound by its provisions. Although the Covenant embodies civil and political rights, it has found it necessary to emphasize that individuals cannot enjoy those rights if they do not have some education. Parents are required to ensure that religious and moral education of their children is provided, promoted and enforced.¹⁵⁸

2.1.3 International Covenant of Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (CESCR) has been said to comprise what is declared as “second generation rights.” These are styled as collective rights that require the state to take certain measures such as using public expenditure, providing basic standards of living and respect for the culture of its citizens.¹⁵⁹ The rights protected include, those to education, health, mental health, social security, work and cultural life. The government is required to galvanize resources and progressively realize these rights for the benefit of its citizens. Article 26 of UDHR, has been reaffirmed and made more detailed by Article 13 and 14 of the ICESCR in the recognition of the right to free and compulsory basic education. The general obligation of the state is to respect, fulfill and promote the realization of the right to basic education.

Article 13 of the ICESCR,¹⁶⁰ underscores the centrality of the right to basic education for OVCs as the foundation of human dignity. This is because the education human beings to

¹⁵⁵ Preamble, ICCPR.

¹⁵⁶ Article 28, ICESCR.

¹⁵⁷ General Assembly Resolution 2200A (XXI), 21 U.N. GAR Suppl. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

¹⁵⁸ Article 18 (4), ICCPR.

¹⁵⁹ International Commission of Jurists, *Handbook on Human Rights for Judicial Officers* (ICJ: Nairobi, 2007) at 3.

¹⁶⁰ Article 13 (1), ICESCR: The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further

effectively participate in democratic processes, promotes tolerance, understanding among nations, ethnic and religious groups as well as a critical tool in ensuring global peace. To achieve these objectives states are mandated to ensure primary education is free and compulsory.¹⁶¹ States are further mandated to make primary education accessible and available especially measures to allow progressive realization of free primary education. States need to also provide adequate conditions for continuous improvement of teaching materials and standards, physical infrastructure, ensure religious and moral education.¹⁶² Where the state has permitted primary institutions to offer primary education, conformity to minimum standards should be maintained.¹⁶³ Article 14 provides guidelines through which to implement free and compulsory primary education. A period of two years is provided within which progressive implementation of free and compulsory primary education is realized.¹⁶⁴

The Covenant has put in place a monitoring system through the Committee on Economic, Social and Cultural Rights (ECOSOC) whose mandate is to ensure compliance and implementation of rights in the Covenant. The sources of information for the Committee are reports submitted by individual states, the International Labour Organization (ILO), World Health Organization (WHO), Food and Agricultural Organization (FAO), Non-Governmental Organizations (NGOs) and the UN Habitat.

2.1.4 The UN Convention on the Right of the Child (CRC), 1989

The Convention on the Right of the Child is a legally binding international instrument that sets out in a comprehensive manner the protection of the right of the child. Principle 7, Article 28 and 29, constitute a codification of the right to education albeit formulated in a weaker format than that of Article 13 and 14 of ICESCR. However the CRC is said to introduce novel elements to the protection of the right to basic education encompassed in the

agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

¹⁶¹ Ibid. Article 13 (2) (a): Primary education shall be compulsory, available and free to all.

¹⁶² Ibid. Article 13 (3): The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

¹⁶³ Article (13) (4).

¹⁶⁴ Article (14): Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

ICESCR. For example Article 28 of the convention while recognizing the right to education views it as one that should be attained progressively, which contradicts the indivisibility of human rights. For example how the right to basic education can be progressive yet compulsory is not adequately dealt with.

Article 29, takes a holistic view and codifies the role of education for children. Education should contribute to the development of a child's personality, talents, physical abilities, respect for human rights and fundamental freedoms, parental respect, culture, language, values and preparation of a child to participate in policy formulation. Such education should also help children in the protection of the environment.

2.2 Regional Legal Instruments that Protect the Right to Basic Education

The right to education is recognized and affirmed by African human rights instruments under the auspices of the African Union (AU).¹⁶⁵ The objectives of the AU broadly include the achievement of a greater solidarity and unity, accelerate economic and political integration on the continent, and promote peace, security and stability. These instruments include: the African (Banjul) Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and other relevant human rights instruments.¹⁶⁶

2.2.0 The African Charter on the Rights and Welfare of Children (ACRWC)

The ACRWC is the African counterpart of CRC. Just like the CRC, it has explicit provisions on the right to education. Article 11 of ACRWC, protects the right to basic education as a prerequisite to development, respect for human rights, morals, traditional culture and tolerance for other ethnic, religious and tribal groups. The view of the ACRWC is that the provision of basic education provides the only opportunity for a child to participate in every aspect of policies formulated that affects him/her. It is the only route to the development of a vulnerable child, could provide security and protection to child and acts in the best interest of a child in realizing the entire child's right set out in legal instruments.

2.2.1 The African Youth Charter

The African Youth Charter¹⁶⁷ is the first legal framework in Africa to support national policies, programmes and action in favour of youth development. The necessity of having a

¹⁶⁵ Preamble, Constitutive Act of the African Union (2000) OAU Doc. CAB/LEG/23.15, entered into force on 26 May 2001.

¹⁶⁶ Ibid. Article 3 (h).

¹⁶⁷ Adoption: 2 July 2006, entry into force: 8 August 2009.

charter developed for the African youth was stated in the African Union Strategic Planning 2004-2007 to ensure that youth issues are embedded in a legal framework and taken seriously with the deserved attention and care. The Charter refers to the rights, freedoms and duties of young people in Africa, including the right to education. Article 13¹⁶⁸ is specific that basic education should be free and compulsory while recognising the right of every young person to education of good quality. It refers to multiple forms of education including non-formal and informal. It defines the aims of education and establishes States' obligations. Article 20 allows for gender equality and the use of African languages in teaching, as a measure to reduce the barrier of using foreign languages.¹⁶⁹

The Charter facilitates the institutionalization of youth participation in political debates, decision making and development processes at national, regional and continental levels, on a regular and legal basis; for positive and constructive contribution.¹⁷⁰ It contributes to the strengthening of the capacity building programmes for young leaders in Africa. It also opens the possibility of dialogue and more opportunity for exchange on youth development issues and facilitates relevant actions for improvement through education, training and skills development.

2.3 Constitutional Foundation for the Right to Basic Education

The Constitution of Kenya took a rights based approach to education, by introducing basic education as a human right. It recognizes that every child has the 'the right to free and compulsory basic education.'¹⁷¹ The Constitution does not define what free and compulsory education is though in the ordinary sense, free and compulsory could mean "unrestricted" access to "unavoidable" education. Most strikingly, the constitution does not particularise any specific and pointed content, scope and application of the right to basic education. As pointed out in the introduction, the content of this right can only be determined by parliament through legislation or judges through interpretation. To facilitate the enjoyment of these rights, the Constitution ascribes duties to both the national and devolved governments in relation to education. Pre-primary, childcare facilities, home-craft centres and village

¹⁶⁸ Article 13 (4)(a): Provide free and compulsory basic education and take steps to minimise the indirect costs of education

¹⁶⁹ Article 20 (1)(f): Introduce and intensify teaching in African languages in all forms of education as a means to accelerate economic, social, political and cultural development.

¹⁷⁰ Kabumba B, *The Human Rights Content of the African Youth Charter: A Preliminary Assessment* (Open Society Institute: Kampala, 2009) at 4.

¹⁷¹ Article 53 (1) (b) and 43 (f), Kenya Constitution, 2010.

polytechnics are under the province of devolved or county governments.¹⁷² The national government is in charge of setting education policy, standards, curricula, examination. The national government also grants charters to universities in addition to regulating primary and secondary schools and institutions of higher learning and special education institutions.¹⁷³

With a view to giving this right some institutional mechanization, the Constitution further establishes the Teachers Service commission under Article 237. The Commission registers, recruits, assigns, promotes and disciplines teachers. The Commission is mandated to review standard of teacher and educational personnel training, review supply and demand of teachers and advices the National government on teacher issues. This ensures that students access better quality education since their teachers are well trained.

2.4 Statutory Recognition of the Right to Education

A number of statutes and policy papers have been published to regulate and operationalize access to basic education in Kenya. The statutes include the Children's Act, 2001, the Basic Education Act, 2013 and the Persons with Disabilities Act. The policy statements comprise the Sessional Paper No. 1 of 2005 on Policy Framework for Education, Training and Research, the Economic Recovery Strategy (ERS), 2003 and Kenya's Vision 2030. Some of these were developed before the current Constitution was in place but to date facilitating the right to education as contained in the Constitution of 2010.

2.4.0 Basic Education Act, 2013

Since article 43 of the Constitution does not define the exact content of the right to basic education, it is section 4 of the Basic Education Act that shades light on what the aims and ends of basic education as well as the parameters that define the exercise of this right. The principles outlined in section 4 of the Act include: the right of each child to free and compulsory basic education; equitable access to basic education to the youth; promote quality and relevance; accountability in decision making in institutions; right to equal standards of education in schools to all children; and protection from discrimination and promotion of independent thinking, innovation and creativity. Additional principles include: cohesion, tolerance and promotion of peace; elimination of tribalism, gender discrimination and hate speech; promotion of stakeholder participation; and provision of technical, human and financial capacity.

¹⁷² Ibid. 4th schedule, part 2(9)

¹⁷³ Ibid. 4th schedule, part 1(15), (16).

The right to free and compulsory basic education to every child is outlined under part IV of the Act. This right is coupled with certain duties for both the parent and the cabinet secretary in charge of education. On the one hand, the cabinet secretary is mandated to implement the right of a child to free and compulsory basic education, the Cabinet Secretary.¹⁷⁴ Therefore, the Cabinet Secretary is to provide for the establishment of pre-primary, primary, and special needs school. Additionally, the cabinet secretary is required to establish boarding schools in arid and semi-arid areas and academic centers for gifted students. This must be done in consultation with the National Education Board and the County Education Board.¹⁷⁵

The duty to provide free and basic compulsory education forbids public schools from charging any tuition fees.¹⁷⁶ This is in respect of pupils who are Kenyan citizens, however non-citizens could pay fees. Any charges imposed on any public school have to be approved by the Cabinet Secretary. This is because the Secretary is required by law to provide free and compulsory basic education. The Act prohibits any child from being sent away from school or refused access to school on account of failure to pay any charges approved by the Cabinet Secretary.¹⁷⁷ In addition, a receipt must be issued for any such levies paid.

Similarly, education institutions are restricted from charging admission fees.¹⁷⁸ Proof of age for admission is determined from a valid birth certificate. However since many children may not have birth certificates for varying reasons, section 33(2) of the Act specifies that no child is to be denied admission for want of proof of age. This removes any refusal on technicality in terms of the age of the child. No child is also to be denied admission to a public school and tests are not to be used to deny admission but to determine level at which a child will be admitted.

The Act imposes a responsibility towards parents. From this it would appear that the responsibility is to both the parent as well as the state. Every parent whose child is a Kenyan or whose child resides in Kenya has a duty to ensure that the child attends a school or institution.¹⁷⁹ In addition, it is the duty of the parent to present a child for admission to a school or an institution.¹⁸⁰ Failure to comply with Sections 30(1) and 31(1) by a parent is an offence punishable by a fine not exceeding one hundred thousand shillings or an

¹⁷⁴ Section 28(1), Basic Education Act 2013,

¹⁷⁵ Ibid, Section 28 (2).

¹⁷⁶ Ibid, Section 29 (1).

¹⁷⁷ Ibid, Section 29 (2) (b).

¹⁷⁸ Ibid, Section 32.

¹⁷⁹ Ibid, Section 30(1).

¹⁸⁰ Ibid, Section 31(1).

imprisonment of one year or both. However, the parent does not commit an offence if he can provide to the County Director of education a satisfactory reason why the child is not in school.¹⁸¹ This section indeed illustrates that a parent has a right as well as a duty to participate on the character development of the child.

Dignity is the foundation of human rights, including the right to basic education. For that reason, the Basic Education Act seeks to ensure the dignity of children mainly by prohibiting the subjection of any child to ‘torture and cruel, inhuman or degrading treatment or punishment whether physical or psychological’.¹⁸² This prohibition creates a good learning atmosphere for the child. Additionally, children are to be incentivized to complete their basic education. Section 35 of the Act prohibits holding back of children in a certain class and stipulates the condition for expulsion due to delinquency. A child can only be expelled from school according to guidelines issued by the Cabinet Secretary and after all alternative remedies have been exhausted and the child or the child parents has been given an opportunity to be heard.¹⁸³

Basic education has everything to do with personal all-rounded development of a child and for that reason the Act prohibits holiday tuition. Any person who makes a child to attend holiday tuition commits an offence punishable by a fine not exceeding one hundred thousand shillings or an imprisonment not exceeding one year or both. In addition, Section 36 of the Act prohibits employment of children of school going age if such employment prevents them from attending school. Any person who employs or prevents a child of school going age from attending school commits an offence punishable by a fine not exceeding five million or an imprisonment not exceeding five years or both. Considering that employment of children could inhibit their educational development.

Section 64 of the Act establishes the Education Standards and Quality Assurance Council and outlines its functions which include setting, maintaining, administering, monitoring and evaluating quality and standards in basic education. The council supervises and oversees curriculum implementation and delivery. In addition it monitors assessments and examinations in schools. The council appoints Quality and Assurance officers to help them carry out their mandate.

¹⁸¹ Ibid, Section 30(4).

¹⁸² Ibid, Section 36.

¹⁸³ Ibid, Section 35(3).

State institutions charged with providing education are required to maintain and promote standards in basic education. These institutions include the office of the cabinet Secretary, the Standards and Quality Assurance Council, the National Education Board, national quality assurance bodies, the County Education Boards and the Teachers Service Commission.¹⁸⁴ The Cabinet Secretary shall also collaborate with stakeholders to establish the National Qualifications Framework. This framework will define and set standards for qualifications, recognize attainment of those standards of qualifications and facilitate linkages and credit transfers especially for educators and education institutions.¹⁸⁵ In addition, the Cabinet Secretary shall make regulations relating to standards and quality and relevance in consultation with relevant stakeholders.¹⁸⁶

The structure of basic education is pre-primary, primary, secondary and middle level institutions of basic education. The progression on the structure should be commensurate with each learner's abilities.¹⁸⁷ Basic education institutions are categorised as either public or private schools. For a public school to be converted to a private school the National Education board has to be consulted and the Cabinet Secretary's approval be obtained. This approval seeks to prevent illegal privatisation of public schools.

The Cabinet Secretary is charged with the duty of establishing institutions for children with special needs under Section 44 of the Act. Special needs children include children with disabilities and specially gifted and talented pupils. The law requires the Cabinet Secretary to provide trained teachers, infrastructure, education resources and equipment to such institutions. County Education Boards are also charged with the duty to provide child guidance service to special needs children within their counties. Similarly he is 'responsible for the overall governance and management of basic education'.¹⁸⁸ The Cabinet secretary can by regulation allow any agency to govern and manage basic education. The Secretary is also required to establish governance and management structures for efficient management of basic education. Such structures should allow collaboration, decentralization of decision making and efficient and effective delivery of basic education services. The Act also provide

¹⁸⁴ Ibid. Section 67.

¹⁸⁵ Ibid. Section 68.

¹⁸⁶ Ibid. Section 72.

¹⁸⁷ Ibid. Section 42(1).

¹⁸⁸ Ibid. Section 53(1).

for the appointment of the Director-General of Education and County Director of Education to help the Cabinet Secretary in the management of basic education in the country.¹⁸⁹

Private educational institutions are required to be registered before they can operate. Any person may establish a private educational institution but subject to conditions outlined in section 50(2) of the Act. Registration would be denied, under the Act, if the proprietor is disqualified by chapter six and article 10 of the Constitution, if teachers in the school are not registered by the Teachers Service Commission, if the school premises are unsuitable for children or if the proprietor or manager has been convicted of an offence against children. Every public institution must have a board of management. These include pre-primary institutions, primary and secondary schools, adult and continuing education center, multipurpose development training institute and middle level institutions of basic education.¹⁹⁰ Every school is required to have a parents association. In addition, every private school must establish a parents' teachers association. It is expected that the institutional arrangement will consider the plight of OVCs.

2.4.1 The Children's Act

The Children's Act¹⁹¹ essentially ratified children's rights as contained in the CRC. After ratifying the CRC, Kenya had an obligation to promote and protect the rights of the child in tandem with its international obligations. The Children's Act was the first piece of legislation to take a human rights approach to the right to basic education. This was pursued within the broad framework of protecting children's rights pursuant to Article 28 of the CRC.

Section 8 addresses matters of religious education and the language of instruction. It provides that "Every child shall have a right to religious education subject to appropriate parental guidance. The Minister shall make regulations giving effect to the rights of children from minority communities to give fulfilment to their culture and to practice their own language or religion." This section makes specific reference to children from marginalized minority communities. It does in fact acknowledge that children have peculiar challenges that might prevent them from accessing education.

¹⁸⁹ Ibid. Section, 54(3) and (4).

¹⁹⁰ Ibid. Section 55(1).

¹⁹¹ The Children's Act No 8 of 2001.

2.4.2 Persons with Disabilities Act

The Persons with Disabilities Act,¹⁹² is not set out to specifically address OVCs, however the researcher firmly believes that its provisions if faithfully implemented would have a positive impact on disabled children. Section 18 of the Act, disallows discrimination in accessing education on account of ones disability status. After admission of a disabled person, learning institutions are required to take into account the special learning needs of people with disabilities.¹⁹³

The most important provisions are those with respect to the establishment of special schools and institutions to cater for the deaf, blind and other forms of disabilities.¹⁹⁴ Moreover the National Council for Persons with Disabilities created under section 3 (1), has the mandate to establish an integrated system of special schools and non formal education centers for persons with disabilities.¹⁹⁵ With respect to the health of disabled persons, the council is charged with duty of implementing health programmes to prevent, identify cases of disability, rehabilitate them and avail to them medical services.¹⁹⁶ Further, if a learning institution is situated in a built up area, access to buildings, roads and other social amenities should be made available and easily accessible.¹⁹⁷ Whereas these provisions sound very good, they are mere paper right as the council is seriously underfunded thereby leaving disabled children to there own devices. It is a firm belief by the researcher that if these provisions are enforced, the plight of disabled children would be lessened. For the moment, a disabled child would have to sue in order to enjoy these rights.

2.5 Policy Framework in Basic Education

2.5.0 Economic Recovery Strategy (ERS)

The ERS is an economic recovery action plan and blueprint introduced by the NARC government in 2003 to guide economic policy in Kenya.¹⁹⁸ The action plan harmonized strategies for accelerated economic growth with the country's poverty reduction measures. Although the ERS is a political process, it has a component of equity and a social economic agenda that aims at reducing inequalities in access to the productive resources as well as

¹⁹² Preamble The Persons with Disabilities Act No 14 of 2005.

¹⁹³ Ibid. Section 18 (2): "Learning institutions shall take into account the special needs of persons with..."

¹⁹⁴ Ibid. Section 18 (3).

¹⁹⁵ Ibid. Section 19.

¹⁹⁶ Ibid. Section 20.

¹⁹⁷ Ibid. Section 21.

¹⁹⁸ Ministry of Planning and National Development, *Kenya Economic Recovery Strategy for Wealth and Employment Creation 2003 – 2007* (Government of Kenya: Nairobi, 2003).

basic goods and services. The plan is based on a social contract between the government and the citizens with the overall goal of improving their well being. The strategy considered education as a prime mover of national development.¹⁹⁹

The social pillar of the strategy views education as a stepping stone to conquering inequality and poverty in the country. The social pillar further recognizes the existence of high levels of inequalities and poverty and its linkage with education and the acquisition of skills.²⁰⁰ The broad objective of the education component within the ERS is to achieve 100% primary school enrolment and reduce disparities in access to quality education.²⁰¹ According to the Welfare Monitoring and Evaluation Survey (WMES) of 1997, the high cost of education is identified as a major impediment to schooling with 30.7% of pupils out of school. Non attendance of school leads to declining enrolment rates. Other challenges include inefficiency illustrated by the high drop out rates of approximately 5-6% and repetition of 15-16%. This is in addition to regional and gender disparities and the marginalization of arid and semi arid areas.²⁰² The governments' response to these challenges is the introduction of free primary education and revision of the curricula as well as reduce financial burden of education. Other interventions include: optional staffing, provision of textbooks, sensitization of communities on the essence of education, in service trainings, increasing bursary allocations and reviewing of education curricula to meet socio-economic environment of some of the learners.²⁰³

Continued reforms in the education sector saw the introduction of free primary education (FPE), informed by the need to improve access and equity in the provision of education.²⁰⁴ The government of Kenya introduced free primary school education in 2003. This was an illustration of the government's commitment to the implementation of universal primary education (UPE) provided for in the Educational Act, the Dakar Framework for Action and the millennium development goals (MDG). However many respondents had mixed feelings about the policy, because although school fees had been abolished it had been replaced by other levies that still inhibit access to basic education. This underscores the fact that poverty still remains a major setback to achievement of UPE. Introduction of FPE had many advantages as it abolished school fees, abolished unnecessary levies and reduced burden on

¹⁹⁹ Ibid. at 31.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² See generally Welfare Monitoring and Evaluation Survey (WMES), 1997.

²⁰³ ERS at 32.

²⁰⁴ Limukii K E and Mualuko N J, 'The Free Education Policy in Kenya: A Critique', (2012) 4 (1) International Journal of Education Administration and Policy Studies, 1.

households in financing education.²⁰⁵ Achieving UPE is a positive indicator of the nations' commitment to human rights in conformity with international human rights law.²⁰⁶ However it resulted into a major increase in enrolment, leading to overcrowded classes which compromise quality.

2.5.1 Sessional Paper No. 1 of 2005

The Sessional Paper No. 1 of 2005 on Policy Framework for Education, Training and Research was published before the enactment of the new Constitution. It was however progressive and contained the Government's policy on education and training in Kenya. Policy 1.27 states the overall rationale of the Sessional Paper is to give every Kenyan the right to education. It is not legally binding and therefore its breach cannot be remedied by the Courts. It establishes a time frame within which its goals of access to education will be met. This is directed towards everyone in general and women, special need persons and the youth specifically. This also includes promoting open distance learning, improving duality and relevance of education and addressing gender disparities in literacy. In addition, the Ministry in charge of education is required to monitor and evaluate the attainment of the set goals according to the timelines.

The Sessional paper outlines the challenges that have constrained access to early childhood education, primary schools, secondary schools, special needs schools and adult education centers. These include poor policy and planning, limited community involvement, limited trained teachers, and no clear admission age guidelines. These have been partly addressed by the Basic Education Act that outlines the responsibilities for the institutions in charge of education. The Government has also improved access by providing bursaries to poor and disadvantaged children. In addition, the Constituency Development Fund has been used to build schools and provide resources that help create an enabling environment for access to education.

2.5.2 Kenya's Vision 2030

Kenya has set up Vision 2030 that aims at making the country a middle income country that provides a high quality life to all its citizens by the year 2030.²⁰⁷ The adoption of the vision came after the successful implementation of the Economic Recovery Strategy for Wealth and

²⁰⁵ Ministry of Education, Science and Technology, *Kenya Education Sector Support Programme 2005-2010: Delivery of Quality Education and Training to all Kenyans* (MOEST: Nairobi, 2005) at 13.

²⁰⁶ Kenya P, *An Assessment of the Impact and Sustainability of Free Primary Education in Migwani Division Kenya* (Oxford Brokers University, Unpublished Master of Arts Thesis: Oxford, 2008) at 19.

²⁰⁷ Government of Kenya, *Kenya: Vision 2030* (Government Printer: Nairobi, 2007).

Employment Creation 2003 – 2007 which has seen the country's economic growth take an upwards trajectory since 2002, when gross domestic product (GDP) grew from a low of 0.6% to a high of 6% per annum in 2006.²⁰⁸ The vision is based on 3 pillars: the economic, social and the political. The economic pillar aims at improving the prosperity of Kenyans through an economic development programme covering all the regions of Kenya and achieves a GDP of 10% per annum beginning 2012.²⁰⁹ The political pillar on the other hand aims at realizing a democratic political system founded on issue based politics that respects the rule of law and protects the rights and freedoms of every Kenyan.

Access to basic education falls under the social pillar.²¹⁰ The social pillar aims at building a just and cohesive society with social equity in a clear and secure environment. Under the flagship project of education and training, it envisages at reducing illiteracy by increasing access to education, improve transition rate from primary to secondary school and raising the quality and relevance of education.²¹¹ Other goals include the integration of all special needs into learning and training institutions, achieving 80% adult illiteracy rate, increasing enrolment by 95% and increasing transition rates to technical institutions and universities from 3% to 8% by 2012. It is also envisaged that within the same period international ranking for performance of Kenyan children in mathematics and technology would be undertaken. In more specific terms the strategy involves integrating early childhood into primary education and developing programmes for learners with special needs. To deal with the financial burden of education, the vision sort to roll out the voucher programme in 5 poor districts.²¹²

2.6 Judicial Appraisal of the Constitutional Right to Basic Education in Kenya

There has not been a case that specifically considers the plight of OVCs and give a rendition on how the government should see to it that OVCs have access to education. Some of the cases, as shall be demonstrated, touch in one manner on the other on the right to basic education even just by mere mention. First, courts have interpreted enforcement of these rights as violating the doctrine of separation of powers. This is a liberal and not post liberal reading of the Kenyan constitution which is arguably a transformative Constitution. Secondly, courts have previously limited their jurisdiction through stringent *locus standi* requirements. This is a pre-2010 regressive culture that seem to have been carried forward. As

²⁰⁸ Ibid.

²⁰⁹ Ibid at 1.

²¹⁰ Ibid.

²¹¹ Ibid. at 16.

²¹² Ibid.

can be seen in *Wangari Maathai v. Kenya Times Media Trust*²¹³ Kenyan courts pre- 2010 were very averse to public spirited cases with flimsy *locus standi*²¹⁴ restrictions. The situation later improved as is evident in the case of *Ruturi and Another v Minister of Finance and Another*²¹⁵ where the court stated that procedural trappings and restrictions could not bar the jurisdiction of the court, or let justice bleed on the altar of technicality. It should be noted however that while this handbook lauds the progressive nature of the CoK, 2010 certain limits have to be placed on this direct access to courts to avoid opening the floodgates or opening “a can of worms” as complete permissiveness of courts would seem to suggest. Thirdly, courts have argued that the state does not have sufficient funds to realize social, economic and cultural rights. The courts have taken a generalized view of the right to basic education.

With the promulgation of the constitution of Kenya, 2010, the courts have had the opportunity to interpret the core continent of socio-economic rights including the right to education. In *Michael Mutinda Mutemi v. Permanent Secretary, Ministry of Education and 2 others*²¹⁶ the petitioner whose son was admitted to Othaya Boys High School for secondary education in 2013 petitioned the court to find the violation of the right to education as he could not pay school fees and was getting a very small amount as bursary from the Constituency Development Fund (CDF) for his son. Lenaola J. underscored the importance of socio-economic rights as not being subordinate to civil and political rights. The judge found the state to have failed to demonstrate concrete policy measures, guidelines and progress towards realisation of socio-economic rights and particularly the right to education. The court also discredited the use of progressive realisation as a defence for non-fulfilment of socio-economic rights. The court took the example of South Africa in the case of *Section 27 and 2 others v. Minister for Education*²¹⁷ where Kollapen J. sitting at the High Court in South Africa at North Gauteng made declarations that included that the failure by the Limpopo Department of Education and the Department of Basic Education to provide text books to

²¹³ See for instance *Wangari Maathai v. Kenya Times Media Trust* HCCC No 5403 1989. The plaintiff sought a temporary injunction restraining the defendant from constructing a proposed complex in a recreational park in central Nairobi. The court held that the plaintiff had no *locus standi*. Even though the plaintiff alleged that there were breaches of Government or Local Government Laws, it was not alleged that the plaintiff was able or has any right to bring an action in respect of these alleged breaches of law; See also Christopher Stone, ‘Should Trees Have Standing? Towards Legal Rights for Natural Objects’ (1972) 45 Southern California Law Review, 450

²¹⁴ From Latin, where it literally means ‘place of standing’. It signifies the right to be heard in a court of law.

²¹⁵ *Ruturi and Another v. Minister of Finance and Another* [2002] KLR 61.

²¹⁶ *Michael Mutinda Mutemi v. Permanent Secretary, Ministry of Education and 2 others* [2013] eKLR

²¹⁷ *Section 27 and 2 others v. Minister for Education* Case no.24565 of 2012.

schools in Limpopo was a violation of the right to basic education, and that the two departments should develop a “catch-up/remedial” plan for affected Grade 10 learners in Limpopo. Lenaola J. ordered that the appropriate remedy in the circumstances of the case was that the respondents would file a report in 30 days detailing the measures taken by the respondents upon the petitioner’s application for the petitioners to file a report within 30 days in response that the constituency Development Fund had given o his application for a bursary.

In *Wambua v Wambua*²¹⁸ the issue was whether the provision of basic education could be extended beyond the age of majority. The plaintiff was 22 years old whose mother had separated from the father. She joined medical school and sought her father’s assistance in the payment of University fees. The father refused arguing that at her age she could not enjoy parental responsibility from him. Justice Koome held that parental responsibility could be extended beyond the 18 birth day.²¹⁹

In *John Mbatia Kibebo and Another v. Eliud Kibebo Mbatia*,²²⁰ the applicant was seeking fees for law school that had been denied by the parents. This case was not about basic education in the strictest sense of the word but law school and post-graduate level training at that.²²¹ The court found that this was ‘an integral part of legal education’ and not just ‘further education’, the view taken by the court is that the denial the plaintiff this stage of education would be a violation of his right to education as it would amount to an incomplete education for the child. The parent was compelled to bear the cost of the fees. The decision is a manifestation of the importance courts in Kenya attach to the right to education. It also reinforces the proposition that basic education is not just primary, secondary or university education.

²¹⁸ *Diana Ndiele Wambua v. Paul Makau Wambua* (Civil Cause No. 30. of 2003) [2003] eKLR

²¹⁹ Section 28 of the Children Act which states: “Parental responsibility in respect of a child may be extended by the court beyond the date of the child’s eighteenth birthday if the court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made.”; *Wambua v. Wambua* at para. 22.

²²⁰ *John Mbatia Kibebo and Another v. Eliud Kibebo Mbatia*, Civil Case 169 of 2008) [2013] eKLR.

²²¹ The equivalent of bar school in other countries. It is a requirement before admission to the bar of advocates in Kenya.

2.7 The Relationship between the Right to Basic Education with other Rights

The right to basic education is not a standalone but is closely related with other rights. In India the Supreme Court has linked the right to basic education to the right to life. In *Unni Krishnan and Ors. v State of Andhra Pradesh and Ors.*,²²² where the court was of the view that socio-economic rights are capable of being enforced by any court of law. Further, the court said that “the right to life and liberty inhere in every man... Therefore, if really Article 21, which is the heart of fundamental rights, has received added meaning from time to time, there is no justification as to why it cannot be interpreted in the light of Article 45, wherein the State is obligated to provide education up to 14 years of within the prescribed time limit.”²²³

Courts in Kenya have taken a rather broad view of the right to basic education and are not afraid to link it to enforcement of other rights. The industrial court in Kenya has linked the right by teachers to go on strike under Article 41 of the Constitution as infringing on the right to access basic education. In *the Teachers Service Commission v. Kenya Union of Post Primary Education Teachers (KUPPET)*²²⁴ and *Teachers Service Commission v Kenya National Union of Teachers (KNUT)*,²²⁵ the issue was whether the right to education was infringed upon by the teachers’ strike. It considered that the balance of these rights required that the teachers’ strike be lawfully carried out to ensure that if possible, requisite conciliation processes can be used to avert the downing of tools by teachers – ‘The employer of the teachers and by extension the Government must secure and protect the rights of the teachers in order to safeguard the rights of the children.’ Although specific orders have not been given by courts in Kenya on basic education, progress is noticeable in the enforcement of socio-economic rights as analyzed below.

Kenya’s Constitution²²⁶ and the Elections Act have attached certain academic qualifications as a requirement for public office.²²⁷ Failure to fulfill it would translate into frustration of political ambition. The University Act has granted the Commission for Higher Education (CHE) the mandate to vet certificates obtained outside Kenya. In the *R v Commission for*

²²² 1993 AIR 2178, 1993 SCR (1) 594.

²²³ *Unni Krishnan and Ors. v. State of Andhra Pradesh and Ors.*, 1993 AIR 2178, 1993 SCR (1) 594.

²²⁴ Industrial Court Of Kenya, Petition Number 22 OF 2013 [2013] eKLR.

²²⁵ Industrial Court Of Kenya, Petition Number 23 Of 2013 [2013] eKLR.

²²⁶ Article 38, Constitution of Kenya 2010.

²²⁷ Section 22, Elections Act, Chapter 7 of the Laws of Kenya.

Higher Education ex parte Peter Soita Shitanda,²²⁸ the High Court used the right to education to justify judicial review. The court held that the right to education would not be meaningful if the qualification is not recognized. A government body must give reasonable grounds for non recognition.

Conditions such as forced evictions that make it difficult for children to access basic education have formed part and parcel of courts' intervention. In the *Mitumba Village Case*,²²⁹ the issue was whether the demolition of informal settlements together with informal schools amounted to a violation of the right to basic education. In this case, the school that formed part of *Mitumba Village* was demolished despite the existence of a court order for conservation. The court held that forceful eviction amounted to a violation of the right to basic education.

Similarly, in the *Muthurwa Estate Case*,²³⁰ the state forcefully evicted tenants from a state corporation's residential estate. What was unique about this eviction was that it was done in the middle of the term, The court relying on the ICESCR General Comment 7 on forced evictions,²³¹ to uphold the plaintiff's claim stating that forced evictions were to be carried out in a manner that would not violate already protected rights such as those on basic education and housing. The very act of forceful evictions violated rights.

2.8 Conclusion

This chapter reviewed the right to basic education as is legally recognized in Kenya. It showed that there is sufficient recognition of the right to basic education for all children. Whether these provisions are of any practical meaning is the subject of the subsequent analysis which considers the plight of OVCs in the light of what the law says they should get and what the realities on the ground reveal as concerning the right to basic education. Chapter three addresses the challenges of realising basic education to OVCs in Kenya.

²²⁸ High Court At Nairobi, Miscellaneous Civil Application 30 Of 2013, [2013] eKLR, par. 19.

²²⁹ *Mitu-Bell Welfare Society v. The Hon. Attorney General & 2 Others*, High Court at Nairobi, Constitutional and Judicial Review Division, Petition No. 164 Of 2011 [2013] eKLR.

²³⁰ *Satrose Ayuma and 11 Others V Registered Trustees Of The Kenya Railways Staff Retirement Benefits Scheme and 3 Others*, High Court At Nairobi, Constitutional And Judicial Review Division, Petition No. 65 Of 2010 [2013] eKLR

²³¹ CESCR General comment 7. (General Comments) The right to adequate housing (Art.11.1): forced evictions: 05/20/1997.

CHAPTER THREE

CHALLENGES OF ACHIEVING BASIC EDUCATION IN KENYA FOR ORPHANS AND OVCs

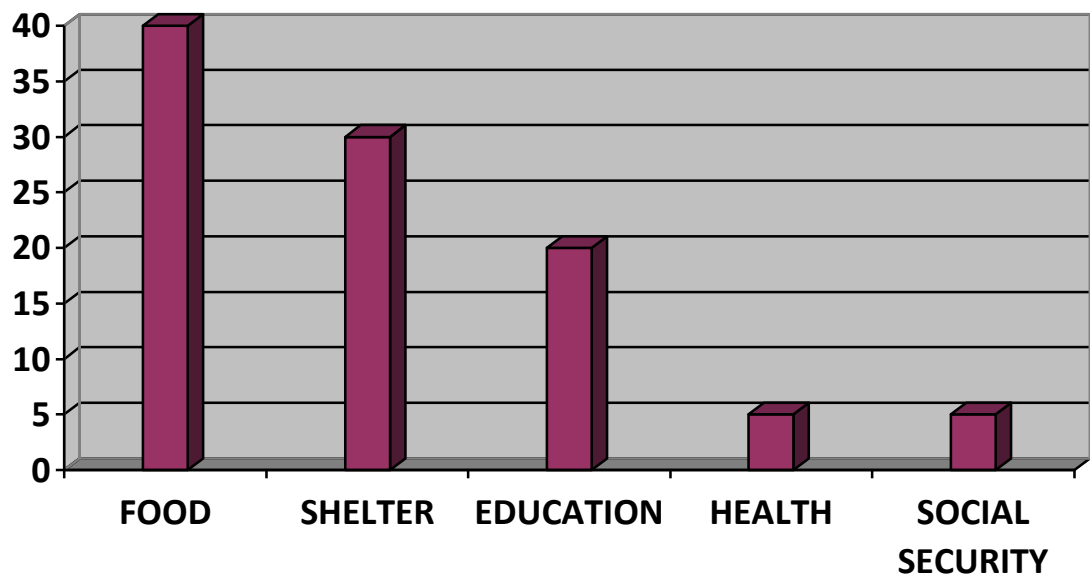
3.0 Introduction

This chapter is an analysis of the challenges inhibiting the achievement of the right to basic education in Kenya. Data for this part has been obtained through administering a questionnaire and analysis of primary data collected from the OVCs on the one hand and teachers, principals, care givers, advocacy groups and policy makers on the other. The outcome of the fieldwork underscored and corroborated secondary data to the effect that poverty, non enforcement of the law, financial constrains and gender factors were the biggest impediments to accessing basic education. In view of ethical demands consent of the participants was obtained, whereas the confidentiality of the informants was protected especially with respect to OVCs. The chapter also addresses the essential components of the right to basic education namely: accessibility, acceptability, adaptability and availability.

3.1 Challenges Faced by OVCs in Accessing Basic Education

This section enumerates some of the challenges which shall be used in the subsequent analysis to show the extent to which the law has responded to the peculiar demands of OVCs. The data discloses that accessing basic education is not a stand alone right it is depended upon the realization of other rights as well. The right to food was ranked first by 8 or 40 % of the adult respondents as the most important right because it determines whether the child will attend school or not. This was followed by the right to shelter by 6 or 30% of the respondents. The right to education was supported by 4 or 20% of the respondents. The right to health care received only 2 or 5% support by the respondents. While the right to social security and the right to protection from inhuman treatment at was supported by 2 or 5% of the respondents.

Diagram 1: Statistical Representation of Demands for Socio-Economic Rights in Nairobi



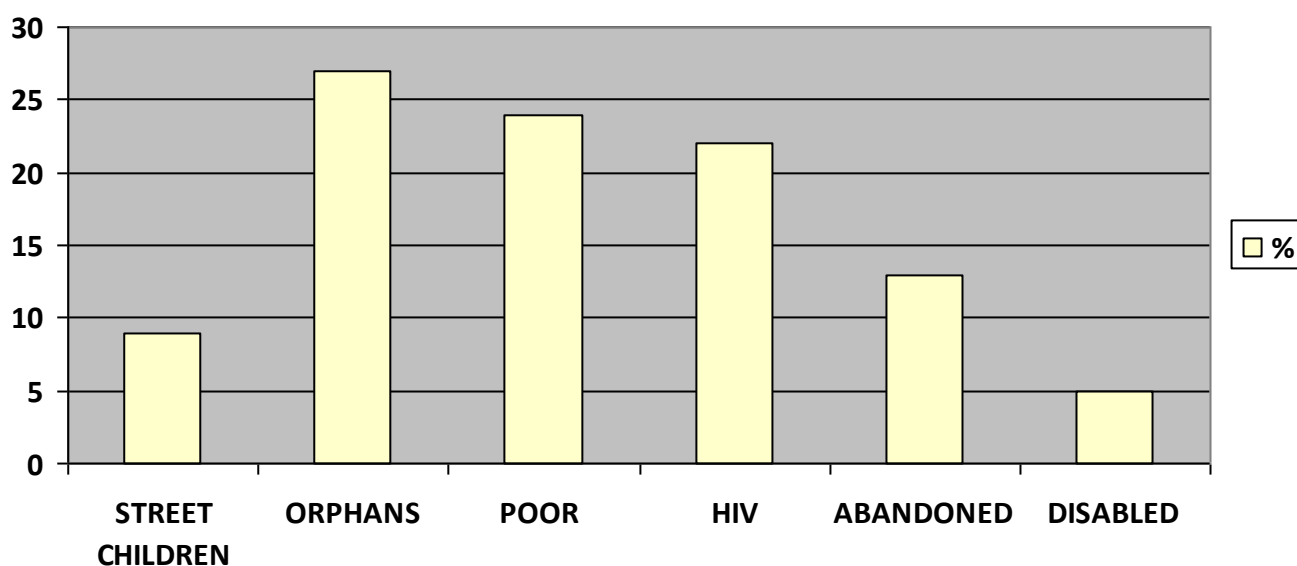
(The statistical representation is derived from the data collected from various respondents and analyzed using spreadsheet programme and variables presented in the form of bar charts. Refer to chapter 1, section 1.9.).

These findings support documented data to the effect that OVCs are faced by a myriad of factors that affect the realization of the right to basic education. They include: harmful cultural practices, lack of facilities which affected the quality of education offered to the pupils. The pupils travel for long distances to get to the nearest schools and they oftenly get to school when they are tired. The law has not adequately addressed them coupled by the lack of food and tendency by children to work so as to supplement family income. Consequently many pupils do not regularly attend school.

3.1.0 Orphaned and Vulnerable children (OVCs)

The view of the respondents is that children who are found in a situation of particular vulnerability in institutions of learning included, street children, orphans, children affected by HIV, children from very poor families, abandoned children, disabled children. Out of the total 100 children interviewed, 9 (9%) were street children, 27 (27%) were orphaned children, 24 (24%) were children from very poor families, 22 (22%) were children affected by HIV, 13 (13%) were abandoned children, 5 (5%) were disabled children.

Diagram 2: Categories of OVCs



(The statistical representation is derived from the data collected from various respondents and analyzed using spreadsheet programme and variables presented in the form of bar charts. Refer to chapter 1, section 1.9.).

This finding is in line with the view that vulnerability in children has often been narrowly interpreted in terms of the child’s capacity for self-protection.²³² In its ordinary usage, the term vulnerable means ‘exposed to the possibility of being attacked or harmed, either physically or emotionally.’ The enactment of the Convention on the Rights of Children (CRC) emanates from the failure of traditional human rights instruments to effectively address the plight of children²³³ who by their very nature are perceived to be vulnerable. Broadly, though, as it ought to be, a vulnerable child is child who ‘has very restricted access to basic needs.’²³⁴ Basic needs include right to food, shelter, basic education, security and health care. Indicators of vulnerability include physical and mental disabilities; sexual, physical or sexual abuse; chronic illness such as HIV/AIDs by either child or parents; drug abuse either by child or parents; lack of or inadequate food, healthcare and hygiene; high poverty levels and unsafe environment in the community; children involved in armed conflict

²³² Preamble, CRC: “the child by reason of his physical and mental immaturity, needs special safeguards and care including appropriate legal protection before as well as after birth.”

²³³ Situma F, ‘Domestic implementation of the 1989 UN Convention on the Rights of the Child: The Kenyan case’ (2013) 9 (1) LSKJ.

²³⁴ Tshoko S *et al*, *Defining Orphaned and OVCS* (HRSC Publishers: 2004) at 10.

and absence of parents either through death or neglect.²³⁵ A child is defined as an ‘individual who has not attained the age of eighteen years’.²³⁶ In this paper, researcher will extend the definition of OVCs to include children in marginalized areas.

3.1.1 Harmful cultural practices

Harmful cultural practices especially retrogressive practices such as early marriage, female genital mutilation hinder access to education for young female OVCs who ones exposed to the practice drop out of school. This practice is still prevalent in Northern Kenya.²³⁷ Access to education may reduce instances of female genital mutilation as children become more aware of their rights and can seek legal redress in recognized institutions. In communities that practice female genital mutilation, young girls are forced to leave schools to get circumcised. Once young girls have been circumcised they are considered women and are often married off. Early marriages lead to increased school dropouts. For example in Kinangop 28 girls dropped out of school last year to get married.²³⁸

3.1.2 Resource Constraints

The quality of education can be assessed on two limbs, first is the availability of qualified teachers. It has been noted that the advent of Free Primary Education led to increase in enrolment of OVCs in schools without increasing the number of teachers.²³⁹ This has been followed by fall in quality of education.²⁴⁰ In fact, it is posited that the free primary education leaves orphans and OVCs receiving the poorest quality of education since they have the least choice.²⁴¹ It is such children that moved into school, thanks to free primary education (FPE). According to Kaimenyi, there is little value addition in schools and that the quality has fallen adding that low cost private schools offer better quality education at a lower cost per unit than public schools.²⁴² It is OVCs who have limited choices who are the recipients of this low quality education. It has gotten to level where students would rather attend low cost private schools than attend public schools.

²³⁵ Ibid, at 11.

²³⁶ Article 260, Constitution Kenya, 2010, Section 2, the Children Act No. 8 of 2001.

²³⁷ See <http://www.paxgaea.com/HRKenyaConst.html> accessed 30 March 2014.

²³⁸ Ibid.

²³⁹ Orodho J A *et al*, ‘Basic Education in Kenya: Focus on Strategies Applied to Cope with School-based Challenges Inhibiting Effective Implementation of Curriculum’, (2013) 11 (1) International Journal of Education and Research, 1.

²⁴⁰ UNICEF, *Promoting Quality Education for Orphans and OVCS: A sourcebook of Programme Experiences in Eastern and Southern Africa* (2009) at 6.

²⁴¹ Ibid

²⁴² Kimenyi M S, ‘The Bad Economics of Free Primary Education’, *The Saturday Nation*, September 13, 2013) 18-19.

The second limb is based on the curriculum. There is need to develop curricula not only for formal education but also non formal institutions.²⁴³ In fact 17 % of the respondents strongly agreed that more emphasis should be put into informal education, as the essence of basic education is to equip children with basic and fundamental life-skills. However, research by Uwezo Kenya found that ten percent of class eight students cannot successfully do class two numerical tests.²⁴⁴ This shows that a good number of students cannot absorb the curriculum they are being taught or that no effective learning is going on in school. This number may probably be mostly constituted by OVCs for two reasons. First, they have limited choices in relation to the quality of education they receive. Second, they lack or have inadequate access to parental guidance and direction in relation to their right to basic education.

3.1.3 Poverty and General Financial Constraints

31% of the respondents interviewed viewed poverty as a major factor that makes it difficult for OVCs to access basic education. Uwezo Kenya has identified poverty as a common feature among the OVCs.²⁴⁵ Absolute poverty is viewed in terms of lack of or inadequate resources.²⁴⁶ This means that children from poor families do not have adequate resources to enable them enjoy the right to education. They may not be able to meet out of pocket costs required to enjoy free primary education. These out of pocket costs include cost of school uniforms, books and other educational materials. For poor families, this often extends to inadequate and poor nutrition. Children from poor families often lack food and may leave school.²⁴⁷

Children from poor families also do not have access to healthcare. Poverty locks them out of hospital and consequently out of school. For example, according to the Ahadi Trust, children suffering from jigger infestation in Kenya cannot attend school as they are technically disabled and cannot right and are the subject of ridicule by fellow students in school.²⁴⁸ Relative poverty is determined by the society someone lives in.²⁴⁹ OVCs are invariably poor relative to children from able families. Poverty is expressed not in the inability to access basic

²⁴³ Orodho J A *et al*, 'Basic Education in Kenya: Focus on Strategies Applied to Cope with School-based Challenges Inhibiting Effective Implementation of Curriculum'.

²⁴⁴ Uwezo Kenya, 2011 Kenya Annual assessment Report accessed on September 15th, 2013 available at http://www.uwezo.net/wp-content/uploads/2012/08/KE_2011_AnnualAssessmentReport.pdf, accessed on 20 September 2013.

²⁴⁵ Ibid.

²⁴⁶ Van der Berg S, *Poverty and Education* (International Institute For Education Planning, Paris, 2008) at 1.

²⁴⁷ Ibid..

²⁴⁸ Ahadi Trust: *Help Remove my Jigger!* available at <http://www.jigger-ahadi.org/helpremovemyjigger.html>, (accessed on 20 September 2013).

²⁴⁹ Van der Berg S, *Poverty and Education* (International Institute For Education Planning, Paris, 2008) at 2.

education but the absence of choice and variety of basic education institutions. Thus OVCs access the lowest quality education as it is what is available. Low quality education offers little opportunity for escaping the poverty cycle. Thus the poor have little education and therefore remain poor.

The Free Primary Education Programme adopted in 2003 improved access to education in Kenya. However, it has been noted that there are issues that prevent access to education. Financial constraints have been shown to hinder access to education by OVCs,²⁵⁰ they include the cost of buying uniforms, books and other academic materials such as wheel chairs and crutches for physically disabled children.

Another group of OVCs who are mostly affected by this factor are disabled children. Children with physical or mental disabilities are faced with a greater challenge to access education unlike their counterparts. Disabled children are entitled to enjoyment of a full and decent life in conditions which ensure dignity, promote self reliance and facilitate the child's active participation in the community.²⁵¹ However they face challenges owing to the special care they are to receive. The children need to go to special schools which are expensive to most parents owing to the poverty levels in the country and more often than not end up dropping out of school.

Children with disabilities, the gifted and talented and those with special needs often find themselves in difficult circumstances in accessing quality education. Cases of under-enrolment of children with disabilities in formal schools point to the fact that the education system does not effectively cater for children with special needs including the exceptionally gifted children.²⁵² The needs of OVCs are largely similar to those of other children in various aspects, but they differ in that these children require additional support. Students with special needs include those who cannot read clearly. For example, children with writing disability form the highest proportion yet they are most neglected in the system.²⁵³

²⁵⁰ Glennerster R *et al*, *Access and Quality in the Education in the Kenyan Education System: A Review of the Progress, Challenges and Potential Solutions* (Prepared for the Office of the Prime Minister of Kenya, 2011) at 11.

²⁵¹ Article 23 CRC.

²⁵² Wango G, *Kenya New Constitution and Education: Education in Kenya under the New Constitution* (2011) at 23.

²⁵³ *Ibid*.

In as much as the Ministry of Education in Kenya has a special needs education policy that is intended to improve the quality and access to education for children with special needs, it is evident that a majority of these children do not access quality education.²⁵⁴ Education must move towards inclusiveness to improve access to education for all children including children with disabilities, the gifted and talented and others with special needs. The OVCs cash transfer programme managed by the Children's Department was mentioned by some respondents as one good practice aimed at retaining OVCs in School.²⁵⁵ This has also been extended to poor parents who would go a long way in improving access to education for OVCs. However many of them viewed it as having minimal effect since it involved very few families. For it to be effective there was need for it to be expanded.

3.1.4 Poor and Insufficient Infrastructure

Poor infrastructure in school constitutes lack of adequate learning facilities. Increased enrolment in primary schools was not accompanied by increased capacity. According to one respondent²⁵⁶ this put pressure on existing facilities such as classrooms. In addition most public primary schools unlike private primary school do not have libraries, computer and science labs. Most public primary schools also do not have infrastructure such as electricity and this limits learning times in these schools compared to private schools. These affect the quality of education that poor and OVCs can access in public schools.

Second, infrastructure can be the means to access schools. Children in arid and semiarid areas have to travel long distance to access school. In addition, due to nomadic lifestyle of pastoral families, children often move from place to place according to seasons and thus accessing a school becomes difficult. This has been partly addressed by the Basic Education Act that requires the Cabinet Secretary to establish boarding primary schools for students from pastoral communities.²⁵⁷ It has been suggested that reducing the distance to schools could increase pupil enrolment and attendance.²⁵⁸

3.1.5 Parental Care and Protection

Parental attention is a matter that the African Charter makes reference to. The percentage of children who lacked parental care and protection were 36% split into 9 children or 9% street

²⁵⁴ Interview with Omari (Law Lecturer), Kenya (9 January 2014).

²⁵⁵ Interview with Joel, Kenya (22 December 2013).

²⁵⁶ Ibid.

²⁵⁷ Achoka J S K, 'Access to Basic Education in Kenya: Inherent Concerns', (2007) 2 (10) Educational Research and Review, 276

²⁵⁸ Ibid.

children and 27 children or 27% were orphaned. Education is a parental obligation that most parents take a keen interest in. This is not an advantage enjoyed by orphaned children. Children who are orphaned for whatever reason lack parental care and protection. Nobody may therefore have a keen interest in the academic progress of children except themselves. This certainly affect those children that want to be prompted to do what is required of them, as is a characteristic of most children.

3.1.6 Children Affected by HIV/AIDS

HIV/AIDS has complicated the ability of OVCs to access basic education. Twenty two out of 100 or 22% of children interviewed were affected with HIV/AIDS. For these children, attention is diverted to caring for the parents rather than the parents caring for the children. Such children find it difficult to realize the right to basic education. HIV/AIDS is now considered by UNESCO²⁵⁹ and legal scholars²⁶⁰ as the greatest threat to child development in many parts of the developing world and responding to those indirectly affected by the epidemic is almost a forgotten issue.²⁶¹ UNESCO views AIDS as a major barrier to education in the world especially with regard to achieving education for all. To that extent, programmes, policies and commitment are needed to take into account the impact of HIV to the learners, educators, education institutions and the entire education sector. In addressing its impact, it must be recognized that access to education affects the implementation of other development goals that are related to poverty reduction, health access and education expansion. These goals encapsulated in the Millennium Development Goals (MDGs) cannot be achieved if the AIDS epidemic in the education sector is not addressed.

AIDS affects the demand, quality and supply of basic education in several respects especially as children fall ill or are taken out of school and as fewer households are financially able to support their children's education. This is even made worse when educators (teachers, Headmasters and administrators) fall ill of the disease. When this happens, high absenteeism is reported hence interruption in the teaching and poorer quality education, loss of trained and experienced teachers leads to a further shortage of human resource. There is an imbalance as many teachers leave the rural areas to towns where medical attention is readily available.

²⁵⁹ UNESCO, *Good Policy and Practice in HIV/AIDS and Educational Booklet 1: Overview* (Booklet Series) (UNESCO: Paris, 2008), Forward.

²⁶⁰ Grainger C, *Children Affected by HIV/AIDS: Rights and Response in the Developing World* (Working Reference No.23) (Save the Children Fund: London, 2001) at 14.

²⁶¹ Ibid.

The impact of HIV on access to basic education OVCs arises from the fact that a majority of those affected are the most productive part of the population.²⁶² Orphans are singled out as the most visible and distressing effects of the epidemic.²⁶³ Adult sickness or death from AIDS, high number of orphans illustrates the extent of this impact. Therefore HIV affects the children's economic status, social and cultural context and attitudes to, and knowledge of HIV, access to basic services and the legal and policy environment.

Economically, the death of a parent in a poor household from HIV creates a quick transition to extreme poverty making it harder to access basic education.²⁶⁴ Beside the kind of attitude and knowledge a community has towards HIV affects how children will cope with the epidemic. This is further influenced by the Government, employers and other institutions respond to it. Response to these attitudes could lead to stigmatization in schools, discrimination against affected children by pupils and teachers, reduced ability of families to pay for school fees, shoes, uniforms, books, etc, increased demand for children's labour at home or in the workplace, need for children, particularly older ones, to care for sick relatives, lower expected return on the investment in children's schooling and rising mortality among teachers and trainers.²⁶⁵

Access to other basic services such as health care, home care and other forms support will determine whether or not a child will go to school. Children who take care of sick parents will not go to school while children who are able to access social welfare services will find it easier to manage and cope with these adverse effects. However the absence of clear laws and poor enforceability of the available ones relating to the protection of children in the absence of parental care makes children more vulnerable and limits their chances of accessing basic education. For that reason, HIV/AIDS must be treated as a broader developmental issue rather than a narrow public health issue. This is because children affected by HIV find it difficult to access not only education but health care and welfare services as well. Besides some of the children may themselves be infected, thus the effect of HIV on access to education becomes very widespread. This leads to a chain reaction of factors that deny

²⁶² Ibid. at 7.

²⁶³ Ibid at 14.

²⁶⁴ Williamson J, *Children and Families Affected by HIV/AIDS: Guidelines for Action* (UNICEF: New York, 1995) at 35.

²⁶⁵ Baggaley R, 'HIV Stress in Primary School Teachers in Zambia', (1999) 77 (3) Bulletin of the World Health Organization, 19.

children the basic necessities of life make it difficult for OVCs to attend school. Some of these factors include: lack of food, clothing, protection, and healthcare.

3.1.7 Insecurity (in the Marginal Areas of Arid and Semi-Arid areas)

Insecurity also interrupts access to education institutions. Clan fighting and general insecurity has led to high literacy levels in Northern Kenya. There have been reported instances when children have been a subject of attack in schools. This has been a recurrent phenomenon in Northern Kenya. The problem is further exacerbated by poverty and nomadic lifestyle of most inhabitants of Northern Kenya and arid and semi-arid areas. .

In 2012 alone, it is estimated that more than 80,000 people were displaced owing to inter-communal violence in Moyale, Tana Delta, Isiolo, Mandera and Wajir.²⁶⁶ In addition, attacks on schools have become an emerging issue, confirmed in an assessment by the Ministry of Education through the Education Sector and in the findings of the district steering group in Isiolo. Between November 2011 and October 2012, varied incidents of violence in Isiolo, Moyale and Tana delta districts disrupted learning in schools, affecting at least 6,000 pupils and displacing communities.

3.1.8 Diversion of Attention to Look for Livelihood

Reports in Kenya indicate that when children lose either one or both parents or become orphans, they assume the responsibilities ordinarily performed by adults.²⁶⁷ Many of such children engage in child labour to fend for their families, spend time at home looking after their siblings, running errands, performing other chores such as cleaning, cooking and washing clothes. If they are boys, they operate transport business known as *boda boda*. Thus at the end of the day, they are left with little energy to do any meaningful school work. This leads to poor performance and related consequences such as inability to access better schools and ultimately inability to access life sustaining careers. Such responsibilities are the ones that drives others into early marriages with the effect that it prevents them to pursue basic education.

²⁶⁶ Kenya Emergency Humanitarian Response Plan 2013 available at <http://unocha.org/cap/> (accessed on 9/6/2014).

²⁶⁷ Orphaned Children by Aids available at <http://aidskenya.blogspot.com/> (accessed 30 March 2014).

3.1.9 Health and Nutrition Challenges

This is the other phenomenon that has a decisive impact on the realization of the right to basic education.²⁶⁸ Reports from Kenya indicate that there are many children who suffer from poor health and chronic illness such as worms, jiggers, HIV/AIDS, malaria may be too sick to attend or even access schools.²⁶⁹ For that reason, some children have had to drop out of school. Learners from marginalized communities such as those residing in Northern Kenya often perform poorly in examinations.²⁷⁰ Children without parents often go to school without having eaten anything in the morning.²⁷¹ This is due to poverty which is either caused by death or sickness of parents. Such children will more often spend most of their time looking for food and at times looking for employment instead of attending school. As a result, they either underperform at school or drop out from school altogether. The children normally have a single meal if at all in the evening, but go through the whole day without breakfast and lunch. This has negative effect on the child's well-being as it slows down a child's participation in class activities.

3.1.10 Gender equity in education

Some respondents were of the view that a number of good practices have been put in place and if expanded could improve access to basic education. Equal access of boys and girls and all other learners to education, research and training is a key measure of progress towards gender equity.²⁷² Gender equity in educational opportunities is therefore a major issue that requires policy consideration. In Kenya, gender parity at primary and secondary level is slowly being realized. However, gender disparities persist in certain regions especially in arid and semi-arid areas. Disparities are more evident in secondary and higher levels of education including universities and higher institutions of learning. Several obstacles still inhibit girls and women access to education limiting their participation in social economic and political development. These can be summarized as: policy, cultural, attitude, specific measures and monitoring and evaluation.²⁷³

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Conflict in Northern Kenya available at <http://practicalaction.org/page/1437> (accessed 30 March 2014).

²⁷¹ Ibid.

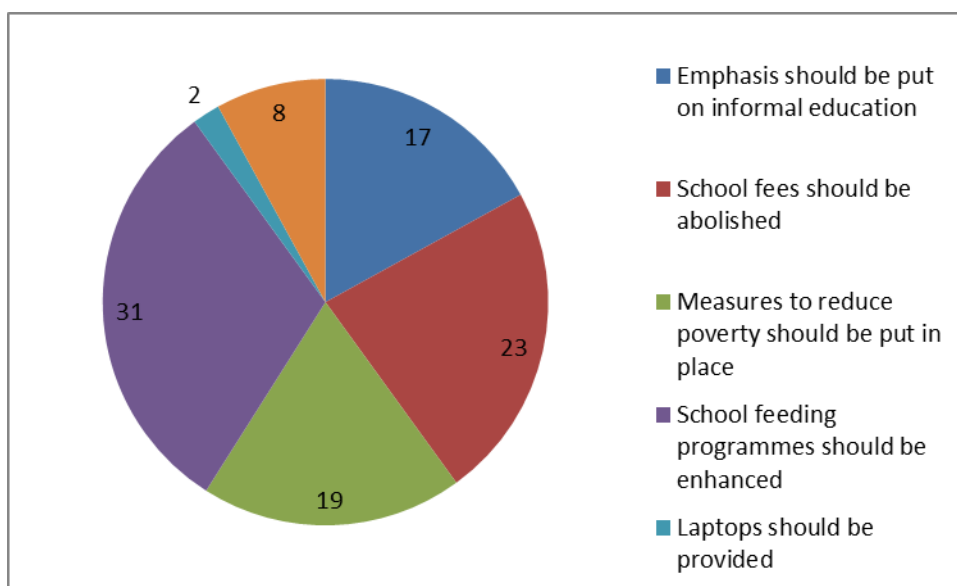
²⁷² Orodho J A *et al*, Basic Education in Kenya: Focus on Strategies Applied to Cope with School-based Challenges Inhibiting Effective Implementation of Curriculum', (2013) 1 (11) International Journal of Education and Research, 1.

²⁷³ Ibid.

3.2 Legal Response to the Challenges

When the question of how best the right to basic education could be promoted and protected was put to the OVCs: 17 % strongly agreed that more emphasis be put to informal education; 23% strongly agreed that fees should be abolished; 19% agreed that measures to reduce poverty should be put in place; 31% strongly agreed that school feeding programme should be enhanced and 2% agreed that laptops should be provided. A further 8% did not know.

Diagram 3: How Best to Promote and Protect the Right to Basic Education



(The statistical representation is derived from the data collected from various respondents and analyzed using spreadsheet programme and variables presented in the form of pie charts. Refer to chapter 1, section 1.9.).

Respondents from among the learners and adults are of the view that education should not just be restricted to formal education, deliberate decisions have to be made to enhance informal education. Further since a majority of those attending school are poor, school fees should be abolished and school feeding programmes introduced as a means of keeping them in school. Informal education would help pupils like Wavinya who at 14 years old has a dream of one day becoming a successful dancer: “I am a girl who loves dreaming a lot and

when I grow up I would love to make a positive impact in the world with my singing talent. I believe in my potential and ability.”²⁷⁴

There exists ambivalence about the enforcement of the right to basic education. This right has been classified together with other rights, known as socio-economic rights.²⁷⁵ These are rights that are subject to progressive realization. These rights include: the right to health care, social security, education, food and shelter. The effect of this ‘progressive’ realisation aspect is that it affords the state a defense in the events of a claim seeking enforcement. Since the constitution does not specifically provide for specific measures to be undertaken by the government in the enforcement of this right, there is no certainty that a child who claims the violation of the right to basic education will obtain a remedy from the courts. The effect of this is that it renders the right to education for OVCs an aspirational rather than a cogent right with a practical meaning.

3.3 Problems of implementation of laws and policies

Majority of respondents were aware of legal and policy frameworks put in place with the aim of reforming access to basic education for OVCs. They include the Constitution, the Children’s Act, the African Charter on the Rights and Welfare of the Child, but the public as major stakeholders had not sufficiently participated in formulation of policy. The constitution for instance recognizes (though not under article 43), the right of children with disabilities to access educational institutions that cater to their needs, reasonable access to all places and means of communication such as sign language and Braille.²⁷⁶ However, most of the laws remain largely unimplemented and as a result, the same challenges that bedevil children and which constrict their access to basic education persist.

3.4 Conclusion

What the foregoing analysis shows is that to a large extent, the law and policies are cognizant of the peculiar needs of OVCs, but their implementation is yet to be achieved. Article 43 which guarantees this right is couched in general terms and its enforcement is dependent on how the court will consider the issue of progressive realisation. Second, while sectorial laws provide for obligations to put into place measures to ensure the realisation of the right to basic education, most of those measures are not implemented at a practical level. For this

²⁷⁴ Interview with Wavinya, Kenya (17 December 2013).

²⁷⁵ Article 43, Constitution of Kenya, 2010.

²⁷⁶ Article 54 (1) (b) (c) and (d), Constitution Kenya.

reason, this paper argues that there is generally a lack of implementation of the right to basic education which renders this right aspirational to a greater extent. To the extent that they lack and do not enjoy this right, for most of them acquiring basic education becomes unattainable.

As a result, the strategies employed both at the Ministry of Education level, school level and teacher level have not been effective in ensuring the provision of equitable and quality education as expected and anticipated by the MDGs and Vision 2030. The challenge of implementing basic education in the country has made the achievement of some specific MDG targets in education difficult. The influx of student population after the introduction of FPE in 2003 and FDSE in 2008 has aggravated effective implementation of basic education curriculum. Chapter four is on benchmarks which Kenya can use as lessons from South Africa and Canada on realization of the right to basic education for OVCs.

CHAPTER FOUR

REALISING THE RIGHT TO BASIC EDUCATION FOR OVCs: SOUTH AFRICA AND CANADA AS BENCHMARKS

4.0 Introduction

This chapter evaluates best practices in access to basic education for OVCs in Canada and South Africa, points of departure and the lessons Kenya can learn. Attention is placed on the level of response to the challenges that face access to basic education in the two jurisdictions. The two are a subject of focus because despite the challenges they face, they have made tremendous efforts in making basic education accessible, adaptable, available and acceptable to OVCs. Other than sharing a similar colonial past as members of the commonwealth, both countries have relatively new transformative constitutions that define the right to basic education. The Canadian approach to basic education is that it is devolved to lower levels that allow for better citizen participation as encapsulated in the Charter of Human Rights of 1982.

The right to basic education is protected by the South African Constitution of 1994. The South African legal framework system has been made a lot of progress towards realizing the right to basic education for OVCs. The South African judiciary has also been innovative, creative and activist in human rights protection and has given expansive and purposive interpretation to fundamental rights to address socio-economic rights. This has been done through getting innovative ways of enforcing socio-economic rights such as grant of supervisory orders.²⁷⁷ The doctrine of meaningful engagement allows parties to come up with a settlement with the courts retaining residual jurisdiction to grant appropriate remedies.²⁷⁸ These are lessons Kenya can learn in making basic education more accessible to OVCs.

4.1 The Right to Basic Education for OVCs in Canada

Human rights movement in Canada in the 20th Century is related to the Charter of Human Rights in 1982 which domesticated the Universal Declaration of Human Rights (UDHR). It acknowledges the equality of all Canadians who must enjoy fundamental rights and freedoms

²⁷⁷ *Grootboom v. Oostenberg Municipality and Others* 2000 (3) BCLR 293 A.

²⁷⁸ *Ibid.*

regardless of colour, sex, religion, race or ability.²⁷⁹ There is an increased recognition that discrimination is often based on more than one ground, and that these grounds may intersect thus produce unique experiences of discrimination.²⁸⁰ Canada has in addition ratified international human rights instruments that affirm the importance of education in the life of a child.²⁸¹ As a result OVCs in Canada no longer experience discrimination on account of disability, race and status as they used to.²⁸²

4.1.0 Mitigating Barriers to Basic Education for OVCs in Canada

The Ministry of Education of Canada has a programme under the Education Act to identify and provide for exceptional children.²⁸³ Some of the services they are provided with are special educational programmes and services that exclude the payment of school fees.²⁸⁴ School boards develop methods of identifying special needs as well as set standards that facilitate the identification of procedures.²⁸⁵

4.1.1 Special Education Programmes

The question of accessibility to basic education for OVCs has been taken very seriously by Canadian authorities. This is illustrated by the requirement by the ministry of education for school boards to prepare, update and make public accessibility plans.²⁸⁶ These plans address identical removal and prevention of barriers with people with disabilities. For a start the ministry of education in Ontario has mandated school boards to provide special education programmes and services to exceptional pupils.²⁸⁷ Each school board prepares a special education plan that is reviewed on an annual basis.²⁸⁸ This is in addition to the establishment of Identification Placement and Review Committees that assess special needs for OVCs.

²⁷⁹ Section 1, Canada Charter of Rights and Freedoms (Constitution Act, 1982).

²⁸⁰ *Canada v. Mossop* (1994) 1 Rev. Cons. Stud. 203 at 229.

²⁸¹ UN Convention on the Rights of the Child (CRC) which it ratified in 1991; Canada ratified the Declaration of the Rights of Disabled Persons, Proclaimed by the General Assembly, Resolution 3447 (XXX) of December 9, 1975.

²⁸² Ontario Ministry of Education, *Reach every student: Energizing Ontario education*. (Minister of Education: Toronto, 2008) at 8.

²⁸³ Education Act, R.S.O. 1990, section 1: “exceptional pupil” as one “whose behavioral, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program.

²⁸⁴ *Ibid.* section. 8(3).

²⁸⁵ *Ibid.*

²⁸⁶ Ontarians with Disabilities Act, 2001, S.O. 2001, section 32, section 15.

²⁸⁷ Educational Act, Regulation 606.

²⁸⁸ Special Education Programs and Services, R.R.O. 1990, Reg. 306, section 2 (2),(3).

The question of discrimination is taken very seriously in Canada, in *Eldridge v. British Columbia (Attorney General)*,²⁸⁹ the Supreme Court of Canada was of the view that once the government begins to give service, it is bound to do so in a non discriminatory manner. The issue in this case was whether the Charter of Human Rights of Canada would apply to the decision not to provide sign language interpreters to deaf pupils as part of the publicly funded scheme for the provision of medical care. Secondly, to what extent providing for this service under acts establishing medicare and hospitalization infringes section 15(1) equality rights of disabled.²⁹⁰ The Commission's Disability Policy ensures that services available to the general public are also available to persons with disabilities²⁹¹ it also allows all programmes to cater for the best interest of disabled children and persons.²⁹²

4.1.2 Access to Accommodation

Canada's Disability Policy considers appropriate accommodation to be a prerequisite to accessing basic education because it brings about equality in opportunities. Everyone involved engage in the process in sharing information, and availing accommodation solutions."²⁹³ Accommodation is considered appropriate if it respects the dignity of the learners. In the case of *Eaton v. Brand County Board of Education*²⁹⁴ the court was of the view that sometimes equality may require different treatment that does not offend the child's dignity. The policy of the Ministry of Education is that OVCs should be integrated with other children so long as it is in accordance with parents' wishes.

The Education Act mandates the Ministry of Education to ensure that all OVCs are provided with special education programs and services.²⁹⁵ For such a child, the school board is required to notify the administration about developing an individual education plan (IEP) for the child.²⁹⁶ Used properly, the IEP is a type of accommodation plan for the student that would improve access to basic education.²⁹⁷

²⁸⁹ [1997] 3 S.C.R. 624 at paras. 73 and 78.

²⁹⁰ Ontarians with Disabilities Act, 2001.

²⁹¹ Part 4.3.2.

²⁹² *Disability Policy*, Part 3.1.3(a).

²⁹³ *Ibid*, Part 3.4.

²⁹⁴ [1997] 1 S.C.R. 241.

²⁹⁵ Report of the Task Force on Access to Information for Print Disabled Canadians available at www.nlc-bnc.ca/accessinfo/s36-200-e.html accessed on 14 April 2014.

²⁹⁶ Identification and Placement of Exceptional Pupils, O. Reg. 181/98, section 6 (2).

²⁹⁷ *Ibid*. section 6 (6).

The commission's policy on construction has disability component meant to remove barriers for persons with disabilities.²⁹⁸ The Ontario Building Code for example includes a human rights code which all buildings must comply with such as the construction of special lifts for disabled students in multi storied buildings attached to special ramps.²⁹⁹ Failure to comply with human rights code has been rejected by the courts as a defence in a discrimination suit.³⁰⁰ Great efforts have been made to harmonize the building code and human rights code.³⁰¹ The Supreme Court of Canada has stated in the case of *British Columbia Superintendent of Motor Vehicles v. British Columbia (Council of Human Rights)*, that the disabled must be accommodated in basic education planning³⁰² since the cost of accommodation is however taken up by the state.³⁰³

4.1.3 Identification and Placement Review Committee (IPRC)

The Canadian government efforts to mitigate the negative effects of the barriers highlighted above has relied on formation of IPRC and judicial decision making which has largely been on the protection of the right to basic education for OVCs. IPRC is a body established by regulation 181/98 of the education Act that should be established by school boards. The committee is composed of 3 people one of whom must be the principal or the supervisory officer of the board who also undertake placement for IPRC on whether a pupil is exceptional in a regular class or special education. Information necessary for making of this decision is submitted by parents on the educational health and psychological makeup of the child.³⁰⁴

The IPRC has an appeal process for those not satisfied with the determination of 'exceptionality' and student placement. A notification is made by the IPRC of the decisions that have not been appealed and those that have completed the appeal process to create an IEP for the child. The office of the provincial auditor of Ontario for example has recommended that school boards should advice parents to take there children to IPRC. A document known as a parents guide has a full range of options available for children in need of these services.³⁰⁵ Parents of OVCs are provided with a parents guide right down to the district officer's.³⁰⁶

²⁹⁸ Disability Policy, Part 3.1.3(a).

²⁹⁹ Ontario Building Code Act, S.O. 1992, c. 23.

³⁰⁰ *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474.

³⁰¹ The Commission's full submission to the *Building Code* consultation is available on the Commission available at www.ohrc.on.ca, (accessed on 22 April 2014).

³⁰² [1999] 3 S.C.R. 868 ["*Grismer*"] at para. 41

³⁰³ Disability Policy, at Part 4.4.2.

³⁰⁴ Identification and Placement of Exceptional Pupils, O. Reg. 181/98, section 15.

³⁰⁵ Provincial Auditor's 2001 Annual Report, at 149.

³⁰⁶ *Ibid.* at 150.

4.1.4 Financing Basic Education Programmes in Canada

The Ontario Public School Boards Association identified inadequate funding as the single most important barrier to basic education for disabled children. The Education and Equality Task Force was established to do an independent review of education funding formulae. It concluded that increased levels of funding were necessary to address problems in the funding system.³⁰⁷

The recommendations of the task force were implemented and involved two methods of alleviating funding problems for OVCs. First is the special Education per-Pupil Amount (SEPPA) which relies on enrolment by the school boards. Funds in this category are used for special education programmes and services that address exceptional learners. The Intensive Support Amount (ISA) funding on the other hand is a variable amount that relates to the high needs of exceptional pupils. These pupils either need specialized equipment, programs and classroom support. 5 levels of ISA funding exist depending on how the school board has filed its claim. The criteria of filing claim forms is determined by a number of 'profiles' such as behaviour, deaf, autism, developmental/intellectual, blind/low vision.³⁰⁸ It is the duty of school boards to classify each exceptional pupil in line with specific profile. This implies that in ISA funding system, pupils with severest disability determines how much the school board would get.

The new formula mooted by the ministry of education provides a basic fund for each student through a foundation grant. Another grant known as the Special Education Grant is provided to cater for OVCs.³⁰⁹ This is the fund that is used by the school board for expenses like employing special education teachers as well as specialized equipment. For example in the year 2002/2003, out of a total of a total education budget of \$14.3 billion, \$1.37 went to special education grant.³¹⁰ The attempt by the state to exclude itself from financial responsibility in the provision of basic education for OVCs has been stopped by the Supreme Court of Canada. In *Concerned Parents for Children with Learning Disabilities Inc. v. Saskatchewan (Minister of Education)*,³¹¹ a case which involved the duty of the

³⁰⁷ Investing in Public Education: Advancing the Goal of Continuous Improvement in Student Learning and Achievement, Report of the Education Equality Task Force, 2002, available at <http://www.edfundingreview.on.ca>, (accessed on 10 June 2014).

³⁰⁸ Ibid.

³⁰⁹ Disability Policy, Part 4.2.

³¹⁰ Ibid.

³¹¹ [1998] S.J. No. 566.

Saskatchewan Ministry of Education and various school boards to provide education and educational services appropriate to the needs and circumstances of a child with a learning disability.

4.1.5 Judicial Role on Realisation of the Right to Basic Education to Children with Disability in Canada

The courts in Canada have had occasion to make pronouncements on the right to basic education. This has been made in respect of the right of access to basic education, financing of basic education, accommodation for disabled learners and healthcare. The Supreme Court of Canada enforced the principle of the best interest of the child in the case of *Eaton v. Brant County Board of Education*, on the appropriate placement for a student with a disability.³¹² Emily Eaton, a 12-year old student with a disability, was initially placed in an integrated classroom. After three years, her teachers and assistants concluded that this placement was not in her best interests, and that she should be placed in a specialized classroom. Her parents disagreed. An IPRC determined that Emily Eaton should be placed in a specialized setting. Her parents appealed the decision up to the Supreme Court of Canada. The Court ruled that the decision of the tribunal to place Emily Eaton in a special education class, contrary to the wishes of her parents, did not violate the equality rights provisions of the Charter and did not disadvantage her, because such a placement was in her best interests.

4.2 South Africa's Legal Framework on Basic Education

*“The quality of our education should be measured by the quality of education that we provide for our OVCs.”*³¹³

South Africa has included the right to basic education in its Constitution in an attempt to bridge the gap created by the apartheid regime.³¹⁴ Basic education is particularly important to South Africa because it would bring to the black majority a sense of equality they were denied for more than a century. The Department of Education in South Africa has made a deliberate policy to give the highest percentage of government grants to OVCs and schools that are generally disadvantaged.³¹⁵ This is meant to ensure equitable access to resources for all schools in South Africa out of a realization that disadvantaged schools comprise the bulk

³¹² *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

³¹³ Timmons V and Muthukrishna N, ‘Inclusive Education: A Global Perspective: Insights from Canada and South Africa IASSID World Congress Cape Town, South Africa’ available at www.thutong.doe.gov.za/resourcedownload.aspx?id=37435, (accessed on 13 April 2014).

³¹⁴ Beiter, K D, *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers: Boston, 2005) at 23.

³¹⁵ Department of Education, *National Norms and Standards for School Funding* (Government Printer: Pretoria, 1998b).

of special need pupils. This bias has helped reduce backlogs in the education system, improve facilities and human resources in achieving equity.³¹⁶

The principal of inclusivity of basic education in South Africa is pervasive and includes education programmes that emphasize the mainstreaming of learners with mild disability into ordinary schools.³¹⁷ Further, devolution of education governance onto school governing bodies allows parents to play a bigger role in school management.³¹⁸ The White Paper 6 provides appropriate and adequate funding support that addresses particular education needs of vulnerable learners and institutions.³¹⁹

4.2.0 Access to Basic Education

Basic education in South Africa is based on the belief that it should be available to all who need it without discrimination.³²⁰ Access to basic education means that education should be available to everybody without discrimination in terms of sex, colour, religion, ethnic or tribal orientation.³²¹ The essence of this right is that it should not be restricted whatsoever in the existing educational institutions.

Just like it is affirmed internationally, accessibility includes economic and physical accessibility. For example learners need not walk for long distances in accessing education. Exclusion of learners for various reasons is prohibited (such as administrative entrance fee), inability to pay school fees.³²² In *Matukane and Others v. Laerskool Potgietersrus*,³²³ the High Court held that black learners had been unfairly discriminated against when their application to a dual medium school was rejected on the basis of exclusivity of Afrikaans culture and ethos, which would be detrimentally affected by admitting learners from a different cultural background.

³¹⁶ Lomofsky L and Lazarus S, 'South Africa: First steps in the development of an inclusive education system', (2001) 31 (3) Cambridge Journal of Education, 303.

³¹⁷ Motala S and Dieltiens V, *Educational Access in South Africa Country Research Summary* (Centre for International Education, Department of Education (CREATE): Essex, 2011).

³¹⁸ Ibid.

³¹⁹ Department of Education recently released *White Paper 6: Building an Inclusive Education and Training System* (Department of Education, 2001).

³²⁰ Coomans F, 'Identifying the Key Elements of the Right to Education: A Focus on Its Core Content' available at www.crin.org/docs/Coomans-CoreContent-Right, (accessed on 24 April 2014).

³²¹ Ibid.

³²² Ibid.

³²³ 1996 3 SA 223 (WLD).

4.2.1 Early Childhood Development Services (ECD) South Africa

Early childhood education is given a lot of emphasis in South Africa as being the foundation of the learning process.³²⁴ It is part of the implementing process of the Schools Act,³²⁵ premised on providing Education for All (EFA).³²⁶ In order for the programme to have a positive impact on basic education for OVCs it must have programmes such as health, nutrition and other social services as a component.³²⁷ The centre piece of this programme is the development of National Early Learning Standards, the training of ECD trainers through government's Expanded Public Works Programme, in addition to the development of national norms and standards for purposes of funding ECD's.

These services are offered to schools both in the public and private sector as well as community ECD centers.³²⁸ The department of basic education in 2011 reported that access to basic education to this category of learners was 83%.³²⁹ The programme has come to encompass public health programmes which identify school going children at greater risk of malnutrition and stunting and ensure that they receive adequate nutrition.³³⁰

4.2.2 Special Needs Education

The concept of special education is heavily influenced by international legal trends despite that the South African Constitutional Court has resisted the temptation of adopting the language of the core content to the right to basic education as is set out in international law.³³¹ In the 1990's special needs revolved around the individual's environment.³³² The high incidence of disability in the black population was attributed to poverty, lack of awareness and access to medical and health facilities, political violence and lack of opportunities.³³³

³²⁴ Department of Education, Education for All (EFA) Country Report: South Africa, 2008 at 5.

³²⁵ Section 5(1) of the Act states that public schools 'must admit learners and serve their educational requirements without unfairly discriminating in any way'.

³²⁶ Universal Declaration of Human Rights, 1948; The United Nations Convention on the Rights of the Child 1989; The United Nations Standard Rules on the Equalisation of Opportunities for Disabled Persons, 1993; The World Conference on 'Education for All by the year 2000' (Education for All, 2000).

³²⁷ Ibid.

³²⁸ UNESCO (1994) *Salamanca Statement*, in: Final Report of the World Conference on Special Needs Education: Access and Quality (Salamanca, Spain, UNESCO, Ministry of Education and Science).

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Lomofsky L, 'New paradigms in provision for special education. South Africa and Scotland in comparative perspective, in Morrow W and King K (Eds) *Vision and Reality. Changing education and training in South Africa* (University of Cape Town Press: Cape Town, 1998) at 305.

³³² Adelman, H. S, 'The Next 25 years', (1992) 25 (1) *Journal of Learning Disabilities*, 22–27.

³³³ Human Sciences Research Council, *Education for the Black Disabled* (HSRC: Pretoria, 1987).

Children exposed to deprivation are found to be more at risk of having learning problems.³³⁴ For this reason, all frameworks dealing with basic education policy set out to redress injustice and inequality and past deficiencies.

The National Commission on Special Needs in Education and Training (NCSNET) and the National Committee for Education Support Services (NCESS) has recommended an educational system that is responsive to learners with special needs, with a focus on addressing historical injustices.³³⁵ The previous system catered to the advantaged and urban groups.³³⁶ This would be done through identification of barriers that make it difficult for learners to access basic education. The objective is to minimize, remove and prevent such barrier being a factor in accessing basic education for OVCs.

4.2.3 Basic Education for HIV/AIDS Affected Children

South Africa has one of the highest rates of HIV infection in the world.³³⁷ In 2012 more than three million children in South Africa below 18 years had lost either one or both parents to AIDS.³³⁸ Children in affected families face the added burdens of responsibilities far beyond their capabilities such as nursing a sick or dying parent, raising younger siblings, running the household or family farm, replacing a breadwinner, or struggling for survival on city streets. They must do this while dealing with the natural feelings of grief and abandonment and attend school.³³⁹

HIV/AIDS presents developmental challenges in preventing the spread of basic education.³⁴⁰ Children infected or affected find it difficult to access basic education owing to poverty, child labour, absenteeism and discrimination.³⁴¹ According to UNAIDS basic education is catalyst for prevention of spreading of AIDS.³⁴² It has further been recognized that education has the

³³⁴ Lomofsky L, 'New paradigms in provision for special education. South Africa and Scotland in comparative perspective' in: Morrow W and King K (eds) *Vision and Reality. Changing education and training in South Africa* (University of Cape Town Press: Cape Town, 1998) at 13.

³³⁵ Department of Education, *Quality Education for All. Overcoming barriers to learning and development*, The National Commission on Special Needs in Education and Training and The National Committee for Special Educational Services (Government Printer: Pretoria, 1997b) at 209.

³³⁶ Ibid.

³³⁷ South Africa National Conference on Orphans, OVCs and Youth (OVCSY) -27 May 2013, Durban.

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ Coombe C, 'Mitigating the impact of HIV/AIDS on education supply, demand and quality' in Cornia G A, *AIDS, Public policy and child well-being*. (Italy: UNICEF; 2002).

³⁴¹ Ibid.

³⁴² Ibid.

following impact on HIV and AIDS: access to quality education protects against HIV, education can reach large numbers of children and young people, education reduces the vulnerability of girls, and education can reach those who are not in school. Education can reduce stigma and discrimination as well as provide a cost-effective means of HIV prevention.³⁴³

To reduce the impact of HIV/AIDS on basic education, the Department of Education established Schooling 2025,³⁴⁴ which has 2 strategies: improvement of access to basic education and the recognition of the central role played by healthy teachers and learners for the success of basic education. The integrated strategy has a number of success stories: improved learner and educator retention within the education system through HIV related interventions. This has contributed towards decreased HIV incidence among 15-19 year olds and among educators, school support staff and officials.³⁴⁵ In addition, the DBE has integrated HIV strategy into its policy, evaluation, monitoring and reporting systems. Moreover, sexual and reproductive health education and HIV is mandatory in all schools in South Africa.³⁴⁶

4.2.4 Financing of Basic Education

South Africa spends a bigger share of its gross domestic product on education than any other country in Africa.³⁴⁷ However, economic accessibility is still a challenge in efforts by OVCs to access basic education. This is made much more difficult by the tendency by schools to charge fees to mitigate the shortfall in government allocation. To alleviate economic accessibility, the School's Act gives individual schools the mandate to determine how much fees should be charged. At the same time parents who are completely unable to pay fees are exempted.³⁴⁸ It would appear that the School Act on payment of fees violates international law which envisages that basic education should be free and compulsory.³⁴⁹

To mitigate the negative effects of fee payment, pro-poor funding policies have been put in place that has taken the form of school fee exemption and social grants. The latest measure

³⁴³ Department op. cit. note 301 at 14.

³⁴⁴ Ibid. at 15.

³⁴⁵ South African National AIDS Council. HIV and AIDS and STI Strategic Plan for South Africa 2007 – 2011. Pretoria: South African National AIDS Council; 2007.

³⁴⁶ Department of Basic Education, *Towards a Basic Education Sector Plan (working document)* (Department of Education: Pretoria, 2010) at 15.

³⁴⁷ Ibid.

³⁴⁸ *Du Plessis v. De Klerk* 1996 5 BCLR 658 (CC).

³⁴⁹ *City of Cape Town v. Rudolph*, 2004 5 SA 39 (C), 74H-75J.

involves the designation of 60% of all schools as ‘no fee’ schools.³⁵⁰ The effect of this has been phenomenon, access to basic education in South Africa is extensive, few children do not enroll in schools, daily attendance is high, repetition is low and declining drop outs is rare.³⁵¹ South Africans now enjoys near universal physical access to formal public schooling up to grade 9.³⁵² In 2008, over 90% of school going children of up to 16 years had access to basic education.³⁵³ More particularly areas without schools or overcrowded are targeted. These schools get 60% of the total budget allocation, while 40% of the non recurrent expenditure targets the poorest schools. In implementing this, schools are ranked in the order of the poorest for purposes of resource allocation and depending on the position it lies on the poverty index.³⁵⁴

4.3 Lessons for Kenya

Kenya can learn a few lessons on how to administer basic education from Canada and South Africa. First, is the issue of devolving basic education to the lower levels of state governance systems such as the county or the sub county. For example devolution in Canada allows citizens to participation in issues of selecting OVCs. Devolution encompasses citizen participation and the principle of subsidiarity as major tenets. Citizen participation may be made real by the creation and facilitation of the County Education Board (CEB) to vindicate the principle of subsidiarity. The principle of subsidiarity requires that decision making and implementation are to be effected by the level of government closest to the individual citizen.³⁵⁵ This has not been done in Kenya which leaves the vulnerable seriously exposed.

In terms of financing, the government can learn on how to select those who are in greater need for purposes of assistance. This is because one of the biggest impediments to accessing basic education is poverty. This is exacerbated by a poor method of selecting those who are more vulnerable. In Canada and South Africa the selection process is more transparent and does not just assume that those in primary schools are vulnerable. Adopting these best practices would facilitate better achievement education for all. This is in addition to providing

³⁵⁰ DoE (2010) *Action Plan to 2014: Towards the realisation of Schooling 2025*; Government Gazette, No. 33434.

³⁵¹ Children’s Institute, *Child Gauge* (University of Cape Town: Cape Town, 2008).

³⁵² Stats SA (2007) *General Household Survey, July 2006*. Pretoria: Statistics South Africa.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Sihanya B, ‘Public Participation and Public Interest Lawyering under the Kenyan Constitution: Theory, Process and Reforms’, (2013) 9 (1) Law Society of Kenya Journal, 19.

a more holistic education that has the component of health care attached to schools, which would address HIV/AIDS affected children, nutrition among other interventions.

4.4 Conclusion

This chapter has demonstrated that the right to basic education for OVCs can be attained through various approaches. South Africa views the foundation of education as starting with the ECD programme. This programme has been integrated with the provision of health, nutrition and other social services for vulnerable learners. Special needs such as the disabled, HIV/AIDS affected are given special attention by the Department of Education. This equally applies to learners with special needs who are accommodated in special schools. The National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions makes provision for the increasing need to manage this pandemic in schools and to guarantee the rights of learners and educators living with HIV/AIDS.³⁵⁶ For this category of learners an integrated approach has been adopted where basic education is seen as the biggest weapon against the spread of the disease. The funding of basic education in South Africa has adopted a pro-poor policy. This has taken the form of fee exemption for the very poor in addition to other grants.

In Canada the ministry of education through the Education Act has implemented special provisions for special education programmes targeting vulnerable learners. The Act mandates school boards to prepare update and make public accessibility plans to basic education. Other programmes focusing on vulnerable learners include access to accommodation programmes. The gist of accommodation programmes is to give OVCs special services over and above those given to the rest of the pupils. School boards are further mandated to identify OVCs for special placement known as IPRC. Canada's approach to funding is one of the most advanced. Two methods of funding basic education have been designed. The first one is the Special Education Per-Pupil Amount (SEPPA) which relies on actual school enrolment based on board's documentation. The second one is a special ISA which is a special allocation for special need pupils. These measures if emulated by Kenya would increase access to basic education for OVCs.

³⁵⁶ General Notice 1926 (*Government Gazette* 20372) August 1999.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Conclusion

The main objective of this thesis was to give an assessment of the extent to which the right of basic education is available to OVCs in Kenya and whether or not it complies with international human rights obligations. It is established that the Constitution of Kenya 2010, the Basic Education Act No. 14 of 2013, the Children's Act No. 8 of 2001 and the Persons with Disabilities Act No. 14 of 2003 guarantee the right to basic education of all children including OVCs. It concludes that issues such as poverty, inadequate access to healthcare, food and nutrition, cultural practices and poor infrastructure negatively impact access and quality of basic education to OVCs.

The researcher conducted interviews which identified a number of challenges that impacted negatively on the ability of OVCs to access basic education: these are lack of facilities which affected the quality of education offered to the pupils. The pupils equally travelled for long distances to get to the nearest schools and they often got to school tired in the process. Due to these factors coupled by the lack of food and tendency by children to work so as to supplement family income many pupils do not attend school and therefore are absent from school for the better part of the term. Majority of the respondents were of the view that if basic education is to be realized, these impediments will have to be addressed. This would be in addition to the introduction of informal rather than formal education.

Kenya has followed global trends in placing greater emphasis on education in its scope in terms of legal implementation and enforcement.³⁵⁷ This is aptly reflected in the budgeting policy where approximately 27% of the national annual budget goes into education.³⁵⁸ The economic justification for this emphasis can be found in national and international law together with other policy frameworks. The ILO on its part provides that “there are two principal benefits, the added productive capacity a future generation of workers would enjoy due to increased education, and the economic gains anticipated.”³⁵⁹ At the domestic level,

³⁵⁷ Ministry of Finance, Budget 2013/14 Highlights, available at http://www.treasury.go.ke/index.php/resource-center/doc_download/588-highlights-of-the-2013-14-budgetfinal-june-13th (accessed on 13 April 2014).

³⁵⁸ International Commission of Jurists (Kenya Chapter), *Rule of Law Report 2012/2013: Towards Progressive Implementation of Economic, Social & Cultural Rights* (ICJ: Nairobi, 2014) at 23.

³⁵⁹ International Labour Organization, *Investing in Every Child: An Economic Study of the Costs and Benefits of Eliminating Child Labour*, (ILO: Geneva, 2003) at 3.

Kenya's Vision 2030 views education as the foundation of "human research and development and for rapidly industrializing economy."³⁶⁰ With the passage of a new Constitution, it was expected that the right to basic education would be given more emphasis. However these have remained mere paper entitlements and little effort has been put into realizing the same for OVCs.

While these efforts are generally encouraging, Kenya has been reluctant in affirming the importance of socio-economic rights and the right to basic education for OVCs in particular as it has with civil and political. This is despite the fact that socio-economic rights are enshrined in Article 43 of the Constitution whose implementation should be at par with civil and political rights. Further, Article 2 (5) (6) grants the state the obligation to respect, protect and fulfil the right to basic education especially in international legal instruments ratified by Kenya.

The implementation and enforcement of the right to basic education faces the same problems as those encountered by other ESCR. For a start failure to implement has been due to limited resources and appropriate mechanisms to implement the right. The implementation of these rights is said to be complex owing to the requirement that the state should take measures that facilitate the enjoyment of these rights.³⁶¹ This is in addition to the status enjoyed by these rights as being available for progressive implementation.

Courts of law have not been very useful in the enforcement of socio-economic rights. Examples exist where courts have limited their jurisdiction by taking the view that it would violate the doctrine of separation of powers. The argument being that constitutionally the executive has the sole mandate of implementing socio-economic programmes and not the judiciary. In addition socio-economic rights are seen as being more challenging as they require institutional changes which would involve costs if the rights have to be protected, a task seen as being within the purview of the executive. This is exacerbated by the imprecise nature of socio-economic rights for lacking the basic elements of universal application and absolutism.³⁶²

³⁶⁰ Kenya Vision 2030, The Popular Version, Chapter 3, *Foundations of Vision 2030* (Government of Kenya: Nairobi, 2007) at 8.

³⁶¹ Wiles E, 'Aspirational Principles or Enforceable Rights: The Future for Socio-Economic Rights in National Law', (2006) *International Law Review*, 53.

³⁶² Arwa J O, 'Litigating Socio-Economic Rights In Domestic Courts-The Kenyan Experience', available at www.kelinkenyana.org/wp-content/uploads/2, (accessed on 10 May 2014).

A comparative analysis of the right to basic education between Kenya on one hand and South Africa and Canada on the other shows that Kenya has not done very well. While Kenya's approach to basic education has concentrated on its form, South Africa and Canada have taken deliberate measures to focus on substance in an attempt to correct historical injustices by targeting those children who are marginalized. The implication for Kenya has been that substance or quality has been sacrificed at the expense of access of form. This is reflected at policy and statutory level. For example the cornerstone of the FPE is access to basic education with little emphasis on quality. It would have been expected that the state would cushion the really vulnerable against the payment of fees and other levies. However, this has not happened which has led to further marginalization of OVCs. The state has not taken deliberate measures to target OVCs, the effect has been that children in the slums, orphaned, disabled and those affected by HIV/AIDS have continued to be marginalized and unable to realize the right of basic education.

5.1 Recommendations

5.1.0 Legal and Regulatory review: Devolving Basic Education to the County Government

It is the considered view of the researcher that the entire basic education for OVCs should be one of the functions to be undertaken by the county governments. This is informed by the fact that current constitutional position only requires early childhood, village youth polytechnics to be managed by county government and the rest of primary education, secondary education, post secondary education would remain with the national government. Some of the advantages of devolving the basic education component is that it is the best way of achieving access to basic education for OVCs.³⁶³ This will as well facilitate the principle of subsidiarity which requires that decision making and implementation are to be effected by the level of government closest to the individual citizen.³⁶⁴ Better citizen participation can be done by the creation and facilitation of the County Education Board (CEB) to vindicate the principle of subsidiarity.³⁶⁵

³⁶³ Sihanya, B, 'Public Participation and Public Interest Lawyering under the Kenyan Constitution: Theory, Process and Reforms', (2013) 9 (1) Law Society of Kenya Journal, 17.

³⁶⁴ Ibid.

³⁶⁵ Ibid. at 19.

5.1.1 Need for policy on access to education for OVCs: Legislative Reforms and Policy Reforms

There is need to undertake legal reforms to increase access, acceptability, adaptability and availability of basic education. Access to basic education can be increased through such measures like school health programs, including de-worming, health clinics, jigger fighting campaigns. There is need for the development of non-formal basic education programs, which would be complementary and not replace formal education. There is need for increased investment in infrastructure of public primary schools. This would provide OVCs with similar opportunities as those from well off families.

There is a greater need for the state to make basic education more accessible in the marginalized areas of the Northern Frontier Districts.³⁶⁶ Doing so will reduce the great geographical inequality as shown in the Kenya National Bureau of Statistics (KNBS) report. This need has also been recognized by Vision 2030, which envisages the establishment of one boarding primary school in each of the constituencies of the pastoral areas in addition to the construction of 560 primary schools.³⁶⁷

5.2.0 Judicial Reaction

5.2.0.0 Harmonization of Judicial Decisions

It is necessary to have harmonized standard of judicial decision making in the promotion of socio-economic rights. These contrasting decisions show lack of harmony in the protection of socio-economic rights. Thus the need to harmonize these decisions in support of basic education has never been so urgent. There is need for courts of law to adopt uniformity towards enforcement of basic education.

5.2.0.1 Supervisory Orders

Although the state has an obligation to promote, protect and fulfil economic and social rights, the obligation is more often hardly met. It is recommended that the courts need to be more consistent and use more supervisory orders as a way of ensuring enforcement of basic right to education. Through this the state would be held to account for the protection of ESCR rights. This has been done in other jurisdictions such as South Africa.

³⁶⁶ This is an administrative area in Kenya incorporating the northern arid and semi-arid lands spanning from east to west of the country and is mostly populated by pastoralist nomadic communities.

³⁶⁷ Kenya Vision 2030, Chapter 3, *Foundations of Vision 2030*, Government of Kenya (2007) at 16.

5.2.1 Other Ad hoc measures

5.2.1.0 Harmful cultural practices

To solve the problem of harmful cultural practices, gender equity in education that affect access to basic education for OVCs, there is need to increase civic education among those practicing it on the dangers of such practices. This would include increasing surveillance of FGM for the purpose of prosecuting those committing the outdated practice which is a criminal offence.

5.2.1.0 Increase Resource Allocation

The problem of resource constraints and poverty that affect the access, acceptability and availability of basic education in basic education infrastructural development could be solved through more budgetary allocations from the government. In addition sharing of resources such as teachers between schools that are wealthier and the poor ones can reduce resource constraints. In addition deliberate measures have to be made to invest in basic education infrastructure in terms of constructing more classrooms, provide electricity and provide more teachers.

5.2.1.1 Parental Care and Protection

Children whose access to basic education is affected by lack of parental care and protection can be solved by encouraging Kenyans to actively take up foster parenthood. This should also include relaxing the rules regulating foster parenthood as a measure to expediate the process.

5.2.1.2 Children Affected by HIV/AIDS

Children affected and infected with HIV/AIDS will need a number of interventions. For those infected there is need to provide them with anti-retroviral or treatment for the already sick. Social support groups can be formed to mitigate the negative effects of children affected by HIV.

5.2.1.3 Insecurity

Insecurity in the marginal areas affects access to basic education and to solve it measures have to be taken to increase security through better intelligence gathering

5.2.1.4 Creation of Boarding schools

The creation of boarding schools will solve some of the challenges facing OVCs. For a start it will ensure that the children are provided with healthy and nutritious meals. Drop out rates will go down because the OVCs will no longer have divided attention to leave school in search of livelihood. It is also easier to provide security and medical care in a boarding environment especially for those leaving in marginal areas.

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APPENDIX 1

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16th December 2013

To: Participants in the Questionnaire

As someone currently involved in the advocacy for the protection of the right of OVCs to access basic education, I would greatly appreciate a few minutes of your time to respond to the enclosed questionnaire.

The results of this study will be published to determine the extent to which children in particularly vulnerable situations are able to access education. This information will be used as part of a review of the current legal framework on the child's right to access basic education in Kenya.

You were randomly selected from a pool of respondents that provide basic education to OVCs. You will not be identified by name. All information provided by you will be treated as strictly confidential. The questionnaire should only take 15 minutes to complete.

Your participation is very much appreciated and will allow us to focus on critical issues related to access to basic education by OVCs.

Thanking you in advance

Yours faithfully

APPENDIX 2: QUESTIONNAIRE FOR ADULTS

The following questionnaire is part of a study to determine the success or otherwise of the law on compulsory free basic education for OVCs. Please answer all questions in such a way as to reflect most clearly your experience. Most questions will require you to tick your selected response, while others will require you to give a brief explanation. Do not leave blanks.

We thank you for your contribution to this important research.

1. Introduction

What is your name

(Optional).....

What do you do in this

institution.....

.....

2. What are the activities of your organization relating to OVCs access to basic education.....

.....

.....

.....

3. In your experience, what are the groups of children in a situation of particular vulnerability in your institution?

Street children Yes No

Orphans Yes No

Children affected by HIV Yes No

Children from very poor families Yes No

Abandoned children Yes No

Disabled children Yes No

Do you have data relating to these
situation.....
.....
.....

4. What percentage of children are street children? (Tick where appropriate)

0-25% 26-50% Over 50%

Orphaned children

0-25% 26-50% Over 50%

Children from very poor families

0-25% 26-50% Over 50%

Children affected by HIV

0-25% 26-50% Over 50%

Abandoned children

0-25% 26-50% Over 50%

Disabled children

0-25% 26-50% Over 50%

5. What are the challenges or problems that you encounter when developing actions meant to enhance access to education for OVCs?

Lack of facilities is a major problem

Strongly agree

Agree

Neither agree nor disagree

Disagree

Strongly disagree

Travelling long distances

Strongly agree

Agree

Neither agree nor disagree

Disagree

Strongly Disagree

Absenteeism

Strongly agree

Agree

Neither agree nor disagree

Disagree

Strongly disagree

6. What concrete steps do you consider necessary to better protect the rights and promote the best interests of OVCs access to basic education?

Enhance informal education: Yes No

Abolish School fees: Yes No

Reduce poverty: Yes No

School feeding programme: Yes No

7. Are you aware of good practices, initiatives or programmes that contribute towards enhancing quality basic education to OVCs? Yes No

8. If yes, which are they?.....

.....
.....

9. Are you aware of any exchanges of good practices? Yes No

If yes which

ones.....

.....

.....

10. Please rank the following rights that pertain to children in order of importance:

(‘1’ is the most important activity, ‘6’ is the least important activity)

Importance ranking:

- (a) Right to shelter
- (b) Right to education
- (c) Right to health care
- (d) Right to social security
- (e) Right to food
- (f) Protection from inhuman treatment

13. What are the current legal and policy frameworks aimed at reforming access to basic education for OVCs in Kenya?.....

.....

.....

.....

14. Anything else you would like to add?.....

.....

.....

Thank you very much

APPENDIX 3: QUESTIONNAIRE FOR CHILDREN

1. What is your name
(Optional)?.....
2. How old are
you?.....
3. What is your date of birth? (Please write the corresponding numbers in the spaces
below)

Day

Month

Year

-
4. Are you a boy or a girl? (Tick one box only)

Boy

Girl

5. Do you go to school? Yes No

6. If 'NO' why not?

I do not have parents Yes No

My parents are very poor Yes No

My parents are affected by HIV Yes No

My parents tell me not to go to school Yes No

I do not have school fees Yes No

I am an orphan Yes No

I am an abandoned child Yes No

The school is very far Yes No

I stay on the streets and homeless Yes No

7. Is it a Public or private
School?.....

8. How often do you go to school?

(tick in the appropriate box).

Never

2 times a week

3 or 4 times a week

Nearly every day

Everyday

9. What do you like most about school?.....

.....
.....

10. What don't you like about school?.....

.....
.....

11. Who pays your school fees/Uniform/food?

12. Do you stay with your parents? Yes No (If 'Yes' skip question (11).

13. Why don't you stay with your parents?.....

.....
.....
.....

14. Does your father work for pay now?

Yes, he now works full time

Yes, he now works part time

No, he is now looking for work

No, he is not working at present (unemployed, retired)

15. What is the occupation of your father or mother or guardian responsible for your education)? (Please, describe as clearly as possible)?.....

.....
.....

16. In your opinion, how can the occupation of your father or mother or guardian be defined? (Please tick only one box)

Professional and managerial

Clerical and sales

Skilled blue-collar

Semi-skilled and unskilled

17. If he/she does not work, who pays for your school fees?

18. What concrete steps do you consider necessary to better protect the rights and promote the best interests of OVCs access to basic education?

A. Enhance informal education:

Strongly agree agree Neither agree nor disagree Disagree Strongly disagree

B. Abolish School fees

Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

C. Reduce poverty

Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

D. School feeding programme:

Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

E. Provide laptops

Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

19. Anything else you would like to add.....

.....

.....

Thank you very much