

**PROGRESSIVE REALIZATION OF THE RIGHT TO BASIC
EDUCATION IN KENYA: AN ANALYSIS**

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DECLARATION

I **Vivian Wecheta Mwende** do hereby declare that this is my original work and has not been submitted nor is it pending submission for a degree in any other University or Institution. All sources of information have been acknowledged.

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DEDICATION

I dedicate this thesis to all Kenyans, specifically those who seek for their right to basic education to be fully implemented and actualized.

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Basic Education Regulations, 2015.

Kenya National Examinations Council Act, 2012.

Kenya Institute for Curriculum Development Act No 4 of 2013.

Science, Technology and Innovation Act, 2013.

The Kenya National Commission on Human rights, Act No. 14 of 2011.

The Commission on Administrative Justice, Act No. 23 of 2011

The National Gender and Equality Commission, Act No. 15 of 2011.

INTERNATIONAL INSTRUMENTS

The Universal Declaration of Human Rights.

International Covenant on Civil and Political Rights.

The International Covenant on Economic, Social and Cultural rights.

United Nations Convention on the Rights of the Child.

Convention on the Elimination of All Forms of Discrimination against Women.

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ABBREVIATIONS AND ACRONYMS

| | |
|----------|--|
| ACHPR - | The African Charter on Human & People's Rights |
| ACRWC - | African Charter on the Rights & Welfare of the Child |
| AU - | African Unity |
| CAJ - | Commission on Administrative Justice |
| CEDAW - | Convention on the Elimination of All Forms of Discrimination against Women |
| CESCR - | Committee on Economic, Social and Cultural Rights |
| CRC - | United Nations Convention on the Rights of the Child |
| CRPD - | The Convention on the Rights of Persons with Disabilities |
| ESC - | Economic, Social and Cultural Rights |
| ESQAC - | Education Standards and Quality Assurance Council |
| FPE - | Free Primary Education |
| ICESCR - | International Covenant on Economic, Social and Cultural Rights |
| ISCED- | International Standard Classification of Education |
| KICD - | Kenya Institute for Curriculum Development |
| KNCHR - | Kenya National Commission on Human Rights |
| KNEC - | Kenya National Examinations Council |
| MDG - | Millennium Development Goals |
| MOEST - | The Ministry of Education, Science and Technology |
| NGEC - | National Gender and Equality Commission |
| NHRIs - | National Human Rights Institutions |
| OAU - | Organization of the African Unity |

| | |
|----------|--|
| SDG - | Sustainable Development Goals |
| SDGs - | United Nations Sustainable Development Goals |
| TSC - | Teachers Service Commission |
| UDHR - | Universal Declaration of Human Rights |
| UN - | United Nations |
| UNESCO - | United Nations Educational, Scientific and Cultural Organization |

ABSTRACT

Kenya's education sector has achieved milestones since promulgation of the Constitution. However due to challenges of high population and unsustainable utilization of resources, Kenya is faced with many challenges that require urgent reforms to be able to sustain the ever increasing demand for education; free and compulsory education; and education for industrialization in line with the vision 2030 and Constitution 2010. This study seeks to adopt a doctrinal approach in critically examining the capability of the measures which are taken by State and its organs to progressively realize the right to basic education in Kenya within the legal, policy and institutional framework in place.

The purpose of this study is to understand the challenges facing the basic education system which result from the failure of the State to put in appropriate means in realization of the right to basic education. This paper discusses current challenges in the legal, policy and institutional framework, presents government proposals for reform and recommends way forward towards achieving an enabling basic education sector that supports industrialization by the year 2030, thus making Kenya a middle income nation.

CHAPTER ONE

1.1 INTRODUCTION

Education is the process of facilitating learning, or the acquisition of knowledge, skills, values, beliefs, and habits. Education can take place in formal or informal settings and any experience that has a formative effect on the way one thinks, feels, or acts may be considered educational.¹

Notably, basic education has been described as education below the level of tertiary education or post-secondary education to include preschool education through secondary education.² It includes: early childhood education, primary or elementary education or secondary education.³

The Jomtien Conference⁴ approved the basic education under expanded vision which was created to contain education for youths and adults in school together with other training skills by use of informal education. This is a theoretically outlook which is reinforced by the World Bank.⁵

Following the International Standard Classification of Education (ISCED),⁶ the basic education contains the first phase of education which is primary education and lower secondary education as the second stage. In developing countries, basic education often includes pre-primary education and/or adult literacy programs.

The focus of this thesis on basic education will include early childhood education and primary or elementary education.

Education is an important instrument in changing the process of every state. It is measured as a necessary approach to development of human capital in terms of economic success, technological and scientific improvement, social equality basis and the lead of political culture

¹Dewey, John, 'Democracy and Education: An Introduction to the Philosophy of Education' (1916) 1-4.

² Education System in Malaysia, Ministry of Higher Education, Malaysia (2009).

³ Ibid.

⁴ Background Document prepared by the World Conference on Education for All, 'Meeting Basic Learning Needs: A Vision for the 1990s (Jomtien, Thailand 5-9 March 1990).

⁵ Lockheed, M. E., & Verspoor, A, 'Improving Primary Education in Developing Countries' Washington, D.C: Published for the World Bank, Oxford University Press, 1991)

⁶ The International Standard Classification of Education (ISCED) is a statistical framework for organizing information on education maintained by the United Nations Educational, Scientific and Cultural Organization (UNESCO). It is a member of the international family of economic and social classifications of the United Nations.

and socialization range.⁷ United Nations Education, Scientific and Cultural Organization⁸ argues that the level of education of country is the main signs of the level of development of that country. When the country has educated population and a commitment to uphold human rights, a government is in a good position to avoid conflict and advance the country's development. ⁹Commenting on this subject, the then United Nations (UN) Secretary General Kofi Annan stated thus: 'Knowledge is power. Information is liberating. Education is the premise of progress, in every society, in every family.'

The recognition of the noble role of education in society has for years informed the developments and reforms in the education sector in Kenya. Since independence, the sector has undergone major transformations with more than 10 reviews by Special Commissions established by the Government. Notably, these reviews were necessitated by the quest to address the pertinent issues of access, relevance, quality and efficiency of the education system in the country. Some of the commissions include the 1964 Ominde Commission,¹⁰ the 1981 Mackay Commission,¹¹ the 1988 Kamunge Commission¹² and the 1999 Koech Commission.¹³

In 1981, the education system was changed from the initial 7-4-3-1 to the 8-4-4 system. Under the 8-4-4 system, one of the main objectives was to provide learning opportunities that will allow pupils to obtain basic knowledge and skills for the world in the context of economic and human resource needs of the nation. Recently, there has been debate concerning the cost, relevance, efficiency of this system. Notably, the Koech Commission was established to investigate the

⁷World Bank, 'Education in Sub-Saharan Africa: Policies of Readjustment, Revitalization and Expansion' (1998 Washington, D.C) available at <<http://documents.worldbank.org/curated/en/1988/01/440255/education-sub-saharan-africa-policies-adjustment-revitalization-expansion>> accessed 7 October 1999.

⁸United Nations Educational, Scientific and Cultural Organization, hereinafter UNESCO.

⁹UNESCO, 'EFA, Global Monitoring Report: The Role of the Organization and Social Context of Schools' (2005) available at <<http://portal.org/education>> accessed 3 February 2015.

¹⁰The Ominde Commission was established in 1964 with a mandate of reforming the education system from the colonial set up. It was the blueprint that laid the foundation of post-independence education.

¹¹ The Mackay commission recommended the removal of A-Level education and established Moi University as a Second public university and further introduced the 8-4-4 system.

¹² The Kamunge commission (1988) focused on education financing, quality and relevance.

¹³Koech Commission (1999) available at

<http://www.elimu.net/Policy_Law/Education_Policies/Koech/Koech_Report-Executive_Summary.htm>accessed 12 November 2016

appropriateness of the 8-4-4 system but the government reneged on its implementation citing cost, structural, and institutional limitations.¹⁴

1.2 BACKGROUND TO THE STUDY

The Kenyan Constitution which was promulgated in August, 2010 ushered in a new dispensational order in the public sphere. Among the key provisions entrenched in the supreme law is a comprehensive Bill of Rights which encompasses social, cultural, civil, economic, political and group rights.

Notably, the human rights are based on principles of dignity and freedom. Both are severely compromised when human beings cannot meet their fundamental needs. The social, Economic, and cultural rights are economic human for example, the right to housing, right to education, right to adequate living standard, right to health and the right to science and culture.¹⁵ Economic and social rights guarantee that every person be afforded conditions under which they are able to meet their needs.¹⁶

The socio- economic rights in Kenya are given under the Article 43(1) of the Constitution and the right to education is given for under Article 43 (1) (f).

The new Kenyan Constitution necessitated reforms in the Education sector to ensure conformity to constitutional provisions. The Basic Education Act¹⁷ was enacted to provide weight to Article 53 of the Constitution, to promote and regulate free basic education and make it compulsory. The Act stipulates the principles that ought to inform the provision of basic education at Section 4. These include: the right of each child to compulsory and free basic education and promotion of quality and relevance.

¹⁴Ogega Nyaberi, 'A Policy Analysis of Formal Education in Modern Multi -Ethnic Kenya: A Case for Cultural Hybridization' in A. Arnold, A. Kuo, E. Delacruz, & M. Parsons (eds), *Globalization, Art, and Education Anthology* (2009).

¹⁵ Office of the High Commissioner, United Nations Human rights (OHCHR), 'Economic, Social and Cultural Rights,' available at <<http://www.ohchr.org/EN/Issues/ESCR/Pages/ESCRIndex.aspx>> accessed 12 November 2016

¹⁶ National, Economic & Social Rights Initiative, 'Economic & Social Rights,' available at <<https://www.nesri.org/human-rights/economic-and-social-rights>> accessed 12 November 2016

¹⁷ The Basic Education Act, No. 14 of 2013 which repealed the Education Act Cap 206.

The Children Act¹⁸ further provides the right to education. Each child is entitled to compulsory free basic education whose provision shall be the onus of the government.¹⁹ Notably, the Children Act is framed to conform to Article 28 of the Convention on the Rights of the Child.²⁰ That Kenya is a signatory to a number of international treaties cannot be gainsaid. By dint of Article 2 (5) of the Constitution, international law is considered to be part of Kenyan law and thus applicable in Kenya. Kenya was also a signatory to the MDG which obliged signatories to provide for universal primary education by 2015.²¹

In particular, Universal Primary Education in the literal sense would mean everyone in a population having a full primary school education. By universal, this means all children of the target population have access to a school and secondly, participate. Primary education denotes and implies that this is the first level of education leading on to higher levels of education.²²

The Jomtein Conference resolved that basic education should meet what was defined as ‘Basic Learning Needs.’ These were to constitute those areas comprising the two necessary learning tools which are, verbal expression, literacy, numeric and problem solving, another one is basic learning content like; skills, knowledge, values and attitudes which are essential to human beings for survival, for developing their full faculties, for living and working in dignity, for participating entirely in development, for improving lives quality, for making knowledgeable decisions, and to carry on learning. Each country would determine the specifics of what went into the basic education curriculum and offer this education through the conventional primary school or through alternative cost effective forms.²³ Article 5 of the Jomtien Declaration states that; ‘the key delivery system of basic education of children out of the family is primary schooling.’

Free and Compulsory Basic Education therefore means that the State is required to ensure that basic education for all is free and that all children are mandated to attend primary schooling. By

¹⁸ The Children Act, No. 8 of 2001.

¹⁹ Section 7 of the Children Act.

²⁰ *United Nations Convention on the Rights of the Child*, 20 November, 1989 (entered into force 2 September 1990) hereinafter CRC.

²¹ Millennium Development Goal No. 2.

²² Thomas Webster, ‘Globalization of Education Policies: Extent of External Influences on Contemporary Universal Primary Education Policies in Papua New Guinea’ (2000).

²³ *Supra* n. 4.

this, the State is required to ensure access and participation of primary educational for all at no cost.

Instructively, the Kenyan State introduced Free Primary Education (FPE) in 2003. A Task Force on the Implementation of Free Primary Education was established to guide the implementation of this initiative. The task force recommended the abolition of all kinds of fees, levies and user charges that had for decades kept a large number of children and youth out of school. These charges were to be supplanted by public funding so as to make primary education free.

Understanding the right to basic education is reliant on the progressive realization standard.²⁴

Progressive realization simply means that the right cannot be realized immediately. The concept defines a central aspect of States' responsibilities in connection with socio-economic rights. At its core is the duty to take suitable actions to the full realization of the social, cultural and economic rights to the full of the resources available. The reference to 'resource availability' reflects a recognition that the realization of these rights can be hindered by a lacking the resources and can also be attained simply over sometime. Similarly, it shows that States defiance with its responsibilities to take the suitable measures is considered in the light of the resources, financial and others that are available to it.²⁵

Progressive realization imposes an immediate responsibility to take correct steps to full understanding of the social, cultural and economic rights. The shortage of resources cannot validate inaction or indefinite rearrangement of measures to implement those rights. The states should prove that they are putting more effort to advance the satisfaction of socio-economic rights, even when resources are limited. For instant, regardless of the resources available to it, as a matter of priority, a state should try to find that every person has access to, at the very least, lowest levels of rights, and aim the programs that will protect the poor, the marginalized and the disadvantaged.²⁶

²⁴Ochiel J Dudley, 'Gender Rights and Wrongs: Critique of the Supreme Court Decision on the One Third Gender Principle,' November 11 2013, available at < <http://kenyalaw.org/kenyalawblog/gender-rights-and-wrongs-critique-of-the-supreme-court-decision-on-the-one-third-gender-principle/> > at 21 February 2014.

²⁵ OHCHR, Frequently asked questions on Economic, Social and Cultural Rights, Fact Sheet No. 33 available at <<http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>> accessed 12 November 2016

²⁶ Ibid

Further, States should make continuous efforts to develop the satisfaction of socio-economic rights. This shows that, while their full understanding that can be attained gradually, the steps towards that aim should be done with a sensibly little time. Those kind of steps must be thoughtful, concrete and targeted as evidently as possible, using all applicable means, including for the most part but not only the implementation of legislative measures.²⁷

To this end, the right to basic education being a socio-economic right requires the affirmative government action for its realization.²⁸ It imposes an obligation on the government to provide access and participation of all children to primary education. The State should thus take procedures that are considered, clearly possible and targeted using all suitable means to the maximum level of the resources to realize the right to basic education.

This is provided for under Article 21(2) of the Constitution which provides that the State will take judicial, strategy and other different measures, which include standards setting to accomplish the enlightened realization of the rights assured the under Article 43 where right to education is one of the rights.

1.3 STATEMENT OF THE PROBLEM

Article 43(1) (f) the Constitution of Kenya 2010 provides for the right to education. Other key constitutional provisions on the right to education include Article 53(1) (b)²⁹. Article 21 (2) of the constitution obligates the state to use policy, legislative and other suitable measures, which include setting of standards and to attain the progressive realization of the rights assured under Article 43.

Basic Education Act was enacted to provide result to Article 53 of the Constitution.

The introduction of the constitutional and other statutory provisions on education is evident that the State has made various positive steps towards realizing the rights to education.

Be that as it may, the education sector has been bedeviled by quite a number of challenges. These challenges range from issues such as infrastructural inequities, dilapidated facilities in

²⁷ Ibid

²⁸ Oliver C Ruppel, Third Generation Human Rights and the Protection of the Environment in Namibia, available at <<http://www.humanrights/ruppel11>> accessed 8 December 2009.

²⁹ Article 53(1) (b) of the Constitution provides for the right to free and compulsory basic education for children.

most public schools, teacher -welfare concerns, teacher-learning facilities, managerial skills, students' mobility from public to private and within public schools and mismanagement of funds.³⁰

There is also an acute shortage of teachers in the country. It is estimated that the country lacks 14,000 teachers in both primary and secondary schools. The teacher to student ratio stands at 1:100 in most public primary schools. More so, teachers' welfare has also been a concern.³¹

Notably, the United Nations Sustainable Development Summit Report³² held from 25th-27th September 2015 acknowledges the enormous progress in achieving the target of universal primary education. Nevertheless the report points out that the progress has also faced tough challenges in developing regions due to high levels of poverty, armed conflicts and other emergencies. In Sub-Saharan Africa for instance, children from the poorest households are four times more likely to be out of school than those of the richest households. Disparities between rural & urban areas also remain high. More than half of the children that have not enrolled in schools live in Sub-Saharan Africa.

In addition, the issue of capacity of retention/completion and transition to the next level of schooling is of concern. Statistics indicate that in 2010 about 746,000 pupils completed primary school but 260,000 did not get a place in secondary schools and in 2011 over 775,000 pupils completed primary schools and 205,000 missed secondary placements.³³

These challenges regards satisfying the greater public demand for quality education and training both as a human right and as an essential investment in the quest to attain the status of a newly industrialized country.

³⁰KENPRO, 'Challenges Facing the Implementation of Free Primary Education in Kenya' (2010) *KENPRO Online Papers Portal* available at <www.kenpro.org/papers> accessed 13 November 2016

³¹ Okwach, A. and George, O, 'Efficiency of Primary Education in Kenya: Situational Analysis and Implications for Educational Reform' (1997) Nairobi: Institute of Policy Analysis and Research.

³² United Nations Sustainable Development Summit Report, available at <www.n.org/sustainabledevelopment/education> accessed 16 November 2016.

³³ KNCHR, 'Living and Voting with Dignity and Justice: A Human Rights Manifesto' (2012).

That these challenges existed before the promulgation of the Constitution and continue to exist six years after the promulgation of the Constitution cannot be gainsaid. This can be attributed to the fact that the Constitution only lays down the framework that offers right to basic education and the implementation standard thereof which is progressive realization. It does not set the parameters for the actual realization including what measures and action are to be undertaken by State to progressively realize right to basic education. Similarly the national statutes on implementation of this right have also adopted the Constitutional approach of providing for the right and the standard for its implementation thereof. Specifically, the Basic Education Act only has provisions to provide rights of a child to get compulsory free basic education. How this is to be achieved is not indicated. Similarly, the Children's Act contains provisions that obligate the government of taking necessary steps to full of the available resources it has to gradually realize the rights of a child. The steps that ought to be taken are not fully elaborated.

Notably, Article 2(5) and 2(6) of the Constitution provides that international law that Kenya approved and the overall international law rules will form part of the laws of Kenya. There are various international instruments ratified by Kenya ranging from the UDHR, ICESCR, CRC, CRPD ACHPR and ACRWR that provide for the right to basic education and progressive realization of this right. Remarkably, most of these instruments are specific on how advanced understanding of the rights to basic education is to be achieved. Specifically, Article 2(1) of the ICECR requires all State parties to undertake steps separately through the international support and co-operation, mostly the technical and economic to the maximum of the resources which are available to achieve increasingly the full understanding of the rights in the Covenant which encompasses the right to education. The covenant also identifies one of the means as the adoption of legislative measures.

In this regard, Article 21(4) of the Constitution obligates the State to ratify and implement legislation to fulfill the international obligation in respect of the human rights and the fundamental freedoms. Up to date there is no legislation that has been enacted in Kenya to provide effect to Article 21(4) of the Constitution or other measures taken. As a result, the obligations declared in the international instruments cannot be given effect to and therefore the continued challenges with the application of progressive recognition of the right to basic education.

1.4 RESEARCH OBJECTIVES

1.4.1 Main Objective

To determine how the State can progressively realize and actualize the right to basic education as envisaged in the Constitution and international mechanisms.

1.4.2 Specific Objectives

1. To identify the role of the State and its organs in ensuring the fulfillment and universal enjoyment of the right to basic education.
2. To identify what measures the State can put in place to effectively and fully accomplish the advanced realization of the right to basic education.
3. To suggest ways by which, the government can negate the challenges that are currently bedeviling the basic education sector in Kenya.

1.5 LEGAL QUESTION

How adequate is Kenya's legal framework in ensuring the progressive realization of the right to basic education?

1.6 RESEARCH HYPOTHESIS

1. The right to basic education has not been effectively enforced and realized in Kenya.
2. The principle of progressive realization of rights is integral in fully actualizing the universal right to basic education.
3. The current measures- policy, legislative and other suitable procedures that the state takes to implement the rights to basic education in Kenya are not adequate.
4. Reforms of the current legal, policy and institutional framework will ensure effective progressive realization of the right to basic education.
5. The basic education sector in Kenya is faced with several challenges.

1.7 RESEARCH QUESTIONS

The research project aims to answer the following questions:

1. What are the tenets of basic education?
2. What is the importance of a suitable legal, policy and institutional framework to progressively understand the rights to basic education?

3. What are the legal, policy and institutional reforms that would be required to progressively realize the right to basic education in Kenya?
4. What is the State doing to progressively realize the right to basic education?

1.8 SCOPE AND LIMITATIONS OF THE STUDY

The research will only focus on analyzing the adequacy of Kenya's legal framework in ensuring the progressive realization of the right to basic education. Accordingly, this research will look at the measures put in place by the State to apply the rights to basic education. The paper will examine the free primary education (FPE) programme as an action to progressively realize the right to basic education. The research will also look at what other measures have been implemented by the State after the promulgation of the Constitution of Kenya in 2010, which categorically espoused the principle of progressive realization.

Further, measures taken in other contemporary developing African jurisdictions in fulfilling the State's commitments and obligations in the basic education sector will also be examined.

In specific, the study will analyze how the progressive realization principle has been applied in South Africa in implementing the right to basic education. This is because, the country has a progressive Constitution with a comprehensive bill of rights which Kenya heavily borrowed from.

1.9 RESEARCH METHODOLOGY

The research will adopt a doctrinal approach to provide a systematic exposition of the legal framework governing the basic education sector whilst analyzing the relationship between the legal framework and the status of application of the right to basic education in Kenya. It will thereafter explain the areas of difficulty and, perhaps, predict future developments.

The study is also inquisitive, analytical and prescriptive. It delves into an inquiry on the appropriateness of the progressive realization principle in implementing the right to basic education.

This study will employ the qualitative method in providing insights into the problem and developing ideas or hypotheses more exhaustively for potential quantitative research. This is important since it permits the research to go beyond statistical results usually reported in

quantitative research. The objectives of this study will be better assessed using the qualitative method.³⁴

The thesis will thus utilize primary and secondary sources of materials. Primary sources will include statutes, common law instruments, case law and international instruments. The secondary sources will include books, journal articles, newspaper articles, media reports, conference papers and online sources.

1.10 THEORETICAL FRAMEWORK

This research is based on several theories. The first theory is based on John Locke's theory on the concept of the social contract. Locke argues that life before the social contract was almost total bliss. One major defect was however, that in this state of nature property was inadequately protected. It was in order to rectify this flaw that man forfeited under a social contract some of his rights. Locke attaches considerable importance to man's right to property as envisaged in this quote "God owns the earth and has given it to us to enjoy; there can therefore be no right of property. But by mixing his labour with material objects, the laborer qualifies the right to the thing he has created."³⁵

According to Locke's theory, the State exists to preserve the natural rights of its citizens. When government fails in this task, citizens have the right and sometimes even the duty to withdraw their support and even to rebel. According to Locke, the social contract preserved the natural rights to liberty, life and property and enjoyment of the private rights which are the pursuit of happiness engendered, in civil society, the common good. Locke's natural right to freedom is circumscribed by the law of nature and its injunction that we should not harm each other in life, health, liberty or possessions.³⁶As such, the State exists to preserve the right to basic education of its citizens under the social contract which they forfeited. In the same manner, the law prohibits individuals against harming each other in the perseveration of natural rights and pleasure of the private rights which contains right to basic education.

³⁴ Olive M. Mugenda and Abel G. Mugenda, 'Research Methods; Quantitative and Qualitative Approaches' (1999) 155-208.

³⁵ Locke, John, 'Two Treatises of Government and A Letter Concerning Toleration' (2003 Yale University Press).

³⁶ Ibid

The second theory that this study is based on is H.L.A Hart's Will Theory.³⁷The theory equates rights with a party being given by the law exclusive control over another person's duty such that the individual who has the right is a small scale sovereign.³⁸ This theory sees rights and duties as being two sides of the same coin. Every right must therefore have a corresponding duty. The will theory asserts that all rights confer control over others duties to act in a particular way.

According to Bhalla,³⁹ the liberty of an individual is expressed through his will and therefore it is this human will that constitutes the main element in the concept of right because law grants human freedom by granting rights. The main object of the law is therefore to grant the widest possible expression to human will. The will theory equates rights with a party being an exclusive power or small scale sovereign by the law over another person's duty.⁴⁰ For instance a promisee is a sovereign over the action of the promisor in the sense that the promisee has the power to waive the promisor's duty to keep the promise. The will theory therefore presupposes a situation whereby the right holder is always in a position of power.

The purpose of founding this work on the will theory is because it implies a corresponding relationship between a right and a duty As such; the right to basic education has the corresponding duty of its fulfillment which is upon the State. Further, the beneficiaries of the right to basic education are the right holders who are in the position of power and have the human will and it is the responsibility of the State to correspond to this will and fulfill their rights.

The third theory that this study is based on is the interest theory. The interest theory is first found in the works of Jeremy Bentham but later espoused by Ihering.⁴¹ The theory is associated with the utilitarian school which equates having a right with being the intended beneficiary of another person's duty.⁴²

³⁷HLA Hart, 'Legal Rights' (1907-92).

³⁸HLA Hart, 'Legal Rights' in Brian Bix *Jurisprudence: Theory and Context* at Chapter 10 "Rights and Rights Talk" (6th edn, Carolina Academic Press, Durham, North Carolina, 2012) 129.

³⁹J.C. Gray, 'The Nature and Sources of the Law' (Macmillan, New York 1924) 69.

⁴⁰H L A Hart *Essays on Bentham: Studies on Jurisprudence and Political Theory* (Chapter 7, Clarendon Press: Oxford University Press, New York 1982).

⁴¹Ihering, R. Von, 'Law as a means to an End', Husik (tr), I. Vol. V *Modern Legal Series*, (Rothman Reprinters Inc., New Jersey 1968) 370.

⁴²Raymond Wacks, 'Understanding Jurisprudence: An Introduction to Legal Theory' (3rd edn, Oxford University Press Inc., New York).

Bentham explains the interest of the individual as follows ‘a thing is said to promote the interest, or to be for the interest of an individual when it tends to add to the sum total of his pleasures; or what comes to the same thing to diminish the sum total of his pains.’⁴³

This theory holds that a person holds a right when the right protects his interests or benefits him. According to this theory, the function of a right is to further the right holders’ interest thus making the right holder better off. The function of the right to basic education is when all children benefit from quality primary education.

Further, in this theory, interests are considered to already exist in the life of the community and are not created by the State. The role of the state therefore is merely to recognize such rights and extend its protection to the advantage of the community.⁴⁴ The Constitution of Kenya recognizes this fact and provides that fundamental freedoms and the rights which are in the Bill of Rights belong to every person which is not decided by State. In this case, the function of the State is to further the access and participation of every child to the access of free and compulsory primary school education.

Lastly, this research is based on the Capability Approach as described by Amartya Sen. He defines it as an approach that emphasizes on the good importance of peoples capability of attaining the kind of lives which they have a good reason to value.⁴⁵

The Approach of capability tries to give different concerns that Sen had about existing approaches to the assessment of well-being, which are the Individuals can vary so much in their abilities to change the same resources into valued functionings which are beings and doings. For instant, people with physical disabilities can require specific goods to attain the mobility, and also pregnant women have exact nutritional requirements to have good health.⁴⁶

So, assessment should be delicate to real attainments functioning’s and active freedom which is the capability. Additionally, realism is difficult and evaluation should redirect that difficulty instead of taking short-cut by eliminating all kind of information from the consideration in advance. For instant, even if it may look clear that happiness matters for the assessment on how

⁴³Legal Right and Social Democracy: *Essays in Legal and Political Philosophy* (Chap. 8, Clarendon Press, Oxford 1982) and ‘Rights in Legislation’ in PMS Hacker and J Raz (eds), *Law, Morality and Society* (Clarendon Press, Oxford 1977).

⁴⁴D.N. MacCormick ‘Rights in Legislation’ in *Law, Morality and Society* (Clarendon Press, Oxford 1979) 192.

⁴⁵ Amartya Sen, ‘Equality of What?’ (1979) Stanford University: Tanner Lectures on Human Values Available from <<http://www.iep.utm.edu/sen-cap/>> accessed 13 November 2016

⁴⁶ Ibid

people are doing well, it is not exactly obvious that it is the only feature that mostly matters and therefore nothing else is to be considered. So, the evaluation of how good people are doing should search for being likely open-minded⁴⁷

When valuing the well-being, Sen contends that the one important thing to consider is to check is what people are capable of being and doing. Sen gives an example of a normal bicycle. It has the features of transportation but it will depend on the characteristics of those who try to use it to determine if it's for transport. It can be considered a mostly a useful tool for many people to spread their mobility, but it will clearly not provide mobility to an individual with no legs even when that individual finds that bicycle interesting. We should however be in a position to understand in our evaluative system that that person lacks transportation.⁴⁸

Therefore, the Capability Approach emphasis mostly on the quality lives of people that they are able to accomplish. Life quality is examined as the main concepts of functioning's and capability. This functioning is in a condition of being and doing. For example, having a shelter and being well-nourished. These are well-known from the commodities put to attain them just like the bicycling is known from owning a bike. Capability also refers to a set of valued functioning's that an individual has easily access to. Therefore, the capability of an individual represents the actual freedom of a person to choose between various functioning combinations of different types of life that she has reason to value.⁴⁹

In this context, the right to basic education requires specific measures to be realized which are the functionings and the capability of all children to access it. Evaluation of the effective implementation of the right to basic education must take several factors into consideration. The Constitution, national statutes and international instruments provide for the right to basic education; but whether this will be actually fulfilled depends on the mechanisms put forth by the government to enforce it.

⁴⁷ Ibid

⁴⁸ Amartya Sen, 'Commodities and Capabilities' (1985)

⁴⁹ Ibid

1.11 LITERATURE REVIEW

The Constitution envisages a difference between the realization social-economic and of civil and political rights. According to Ochiel J Dudley, the political and civil rights should be realized instantly, the cultural, social and economic rights can be considered by understanding the progressive standard.⁵⁰The Kenyan constitution drafters in the year 2010 had this information and the article clearly knows the use of the progressive realization standard to the cultural, social and the economic rights which are under the Article 21(2). This is in line with the International Agreement on cultural, social and Economic rights⁵¹ that instructs State bodies to take necessary steps particularly in technical and economic to the fullest of its resources which are available, with an outlook to attaining gradually the full understanding of socio-economic rights.

Ochiel Dudley therefore draws a distinction on the application of socio-economic rights and civil and political rights which are dependent on the progressive realization standard. However, the social-economic right is comprised of basic education which is the ambit of this study.

States should thus strive to take all necessary steps possible to the maximum of its available resources to ensure that the right to basic education is realized. This paper analyses the adequacy of Kenya's legal framework in ensuring the progressive realization of the right to basic education. Review of the relevant national, regional and international legal framework on the subject will thus be very informative.

The right to basic education being a socio-economic right ought to be made practical and enforceable. Practicability means the right is not a mere aspiration but attainable practicable claim that can be enforced by a legal system and this imposes an obligation on society to satisfy this claim. The State must develop institutions and procedures; put in place and mobilize resources that will enable the citizens to access the right.⁵² As such, the right to basic education ought to be made practicable and enforceable. Enforceability means the legal system imposes an obligation on the State and its organs to develop institutions and procedures; put in place and mobilize resources that will enable all children to access this right.

⁵⁰Ochiel J Dudley, 'Gender Rights and Wrongs: Critique of the Supreme Court Decision on the One Third Gender Principle,' November 11 2013, available at < <http://kenyalaw.org/kenyalawblog/gender-rights-and-wrongs-critique-of-the-supreme-court-decision-on-the-one-third-gender-principle/> > at 21 February 2014.

⁵¹*The International Covenant on Economic, Social and Cultural rights*, 16 December, 1966 (entered into force 3 January 1976), hereinafter ICESCR.

⁵² Steiner HJ, P Alston & R Goodman (Eds.), 'International Human Rights in Context: Law, Politics, Morals,' (3rd ed, 2008) 265.

Charles Taylor postulates that it is the duty of a state to take measures that will enable the citizens make practical enjoyment and benefit from the rights.⁵³ The State has to take positive measures that enable and assist individuals and communities to enjoy the right to basic education by means at their disposal.⁵⁴ By giving effect to the right to basic education in Kenya, the State will have achieved its obligation under the constitution of ensuring that the right is realized.

It has been presumed that most States will argue the basis of non-implementation of socio-economic rights on lack of adequate resources. However a State cannot escape obligation to implement the right to basic education on the ground that the basic resources were not obtainable. An analysis of resources should include both internal and external resources and are not inadequate to financial or human resources; the information and technology are the essential resources.⁵⁵ Suffice to say, one would argue on what could constitute available resources within the reach and budget of a particular country. Article 21(2) of the Constitution provides that the State will take the judicial, policy and other measures to achieve the progressive realization of socio-economic rights. Here, the Constitution is too open-ended on what will be taken into account to implement the right to basic education for instance, hence the argument of Robertson on what could constitute available resources. Nevertheless, Article 2(1) of the ICESCR is specific to the steps that State organs should undertake which include the economic and technical, to the maximum of its accessible resources. Therefore lack of resources should not be the reason for non-implementation.

In the same regard, Lilian Chenwi urges States to struggle to fulfilling and improving the satisfaction of socio-economic rights to its possible maximum extent, even when there is lack of enough resources.⁵⁶ This is the position that the Kenyan State should adopt in the implementation of the right to basic education in Kenya.

⁵³ Charles Taylor, 'Human Rights: the Legal Culture in UNESCO, Philosophical Foundations of Human Rights,' (1986) 49.

⁵⁴ *Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 13, and the Right to Education (Twenty-First Session, 1999) Contained In Document E/C.12/1999/10.

⁵⁵ Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to the Realizing Economic, Social, and Cultural Right,' (1994) *Human Rights Quarterly* 693 -697.

⁵⁶ Lilian Chenwi, 'Unpacking Progressive Realization', Relation to Resources, Minimum Core and Reasonableness, and some Methodological Considerations for Assessing Compliance' (2013) De Jure available at <<http://www.dejure.up.ac.za/images/files/vol46-3-2013/Chapter%205.pdf> > at 21 February 2014.

On the contrary, Moellendorf⁵⁷ has argued that the notion of available resources is ambiguous. It can mean that the capitals that any government Ministry or sector has been assigned and has accounted for the defense of the right. On the other hand, it may also mean that any resources which the State can organize to safeguard the right. He recognizes that these are two great versions of what the term means and it may be held to involve something between these extremes. However, he does not offer alternatives on how available resources can be utilized to the maximum to achieve the intended result.

This ambiguity as espoused by the scholar is evident in Article 20(5) of the Constitution that gives the guiding ethics to be applied by the Court in applying any right which is under Article 43. If a State claims of not having the resources to apply the right to basic education, the court will require the State to demonstrate that the resources are not accessible. In distributing resources and the State will give main concern to guaranteeing the extensive possible amusement of the right having regard to the main circumstances which include the liability of specific groups or persons where children fall in this category. On the contrary, Article 20(5) provides that the Court, tribunal or any authority cannot interfere with a decision by a State organ concerning the distribution of available resources, only on the basis that it would have reached to a different conclusion. This is contradictory.

Professor Anne Skelton has also criticized the nature of the principle of progressive realization and the ambiguity of the maximum and minimum capacity to which socio-economic and cultural rights should be enforced and realized. She argues that the maximum extent of available resources does not imply that poor (developing) countries can avoid responsibility; it is rather a call for prioritization of children within the State budget.⁵⁸ This approach should be applied for the realization of the right to basic education.

Similarly, Audrey Chapman posits that the current standard of progressive realization that is used to assess the performance of States is very difficult to monitor.⁵⁹ Evaluating progressive

⁵⁷ Moellendorf, 'Reasoning about Resources: Soobramoney and the Future of Socio-economic Rights Claims' (1998) *South African Journal on Human Rights*, 14;2, 327-333.

⁵⁸ Professor Ann Skelton, 'Children's Socio-Economic Rights and Funding of Social Services' *Presentation to the South African Financial and Fiscal Commission* (May 2014, Published by Centre for Child Law).

⁵⁹ Audrey Chapman, 'A New Approach to Monitoring the International Covenant on Economic, Social and Cultural Rights' (1995) 55 *International Commission of Jurists Review* 23.

realization within the context of the availability of resources requires the availability of comparable statistical data from several periods in time in order to assess the trends. He recommends a ‘violations approach’.⁶⁰

Whether or not this is the school of thought that the Kenyan State hold in their failure to fully appreciate and implement the progressive realization of the right to basic education is an issue that remains for assessment and scrutiny.

Moreover, the Kenyan Constitution is not specific on resources as a means for enforcement and realization of socio-economic rights. It is very indeterminate and this is left to the courts for interpretation on what are the measures envisaged in Article 21(2).

The Committee of the ICESCR adopted the concept of minimum core approach to give practical enforcement to progressive realization of socio-economic rights. This is the key to providing clear content to these rights, and ensuring that they have enforceable practical implications for government policy that benefit the worst off in society. The minimum core requirement ensures the satisfaction of, at the very least, minimum crucial levels of each of the rights.⁶¹

In order for each State party to be capable of attributing its failure to meet at least its minimum main obligations to shortage of available resources, it must show that every effort has been made to use all the resources that are at its outlook in an effort to content, as a matter of importance, those minimum duties.⁶²

Consequently, the minimum core obligations are paramount as they set out the minimum parameters of a particular right that the State should aspire to achieve as a first step towards realization of the right. With regard to the right to education, the right to basic education is the minimum parameter.

This articulation by the Committee is in itself plagued by paradox.⁶³ General Comment 3 states,⁶⁴ ‘...the obligation to guarantee the contentment of, at the very least, the minimum important levels

⁶⁰ Ibid

⁶¹The Committee on Economic, Social and Cultural rights was formed under ECOSOC Resolution 1985/17 of 28 May 1985 to provide General Comments or Recommendations on how the provisions of the ICSECR should be interpreted, hereinafter known as CESCR.

⁶² Ibid.

⁶³Chowdhury, Joie, ‘Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights: A Comparative Perspective,’ *Cornell Law School Inter-University Graduate Student Conference Papers*, Paper 27 available at <http://scholarship.law.cornell.edu/lps_clacp/27>.

of each of the rights is mandatory upon every State party.’ Further on, it continues, ‘....it must be noted that any assessment as to whether a State has settled its minimum core responsibility must also take account of the resource constraints which are applying in the country concerned.’⁶⁵ If the minimum core brings with it the sense of the non-negotiable, then should it be contingent on anything? The intention of the Committee was to articulate a basic level of content which if States failed to meet, would result in there being a heavy burden of proof to demonstrate lack of available resources.⁶⁶ The language used is thus very onerous and does not propose means by which the minimum core obligation should be used to give practical enforcement to socio-economic rights. States can easily postulate lack of resources as a result of non-implementation.

Nonetheless, Thomas Hammarberg has suggested the minimum core as the concept to lead the clarification of the economic and social rights which are protected in other international human rights mechanisms.⁶⁷

Further, Bard-Anders Andreassen suggested that the minimum standards will provide the foundation for a more progressive, if restrained, reallocation of resources rather than more extensive efforts, thus satisfying the self-centeredness of the developed States.⁶⁸

The minimum core thus put efforts on the inquiry of the underlying goals of human rights and the protection of helpless and marginalized groups from most dangerous forms of deprivation and suffering. It supports the indivisibility and interdependence and as a result, the justiciability of all human rights. The Constitution adopts this approach in Article 53(1) (b) which provides for the right of the child to free and compulsory basic education. The Basic Education Act was enacted to give effect to Article 53. It is therefore imperative to analyze the steps the Kenya State has taken to satisfy the minimum essential levels of the right to education.

⁶⁴CESCR’s Report on the Fifth Session, Supp. No. 3, Annex III, P 10, U.N. Doc. E/1991/23 (1991) [General Comment No. 3], paragraph 10.

⁶⁵ Ibid.

⁶⁶ Supra n.38

⁶⁷ Thomas Hammarberg, ‘Children in Economic, Social and Cultural Rights,’ (2011) at 353, 366-67.

⁶⁸ Bard-Anders Andreassen, Tor Skålnes, Alan G. Smith & Hugo Stokke, ‘Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach to the Economic and Social Rights,’ in Bard-Anders Andreassen, (ed) *Human Rights in Developing Countries*, (1988) 333, 342.

Nevertheless, this concept has been a focus to vigorous scholarly debate. The Critics of the approach argue that an absolute, universal minimum core is impossible to articulate given the highly contextualized nature of socio-economic needs and challenges that countries face.⁶⁹

Different degrees of the economic wealth and various social structures among the countries may result in different conceptualizations of the minimum core of socio-economic rights.⁷⁰ Therefore, any universal conception of these rights is thought to be trimmed, honed, and shorn of deontological excess.⁷¹ Critics also maintain that providing the minimum core is unreasonable due to resource limitations and the competing needs and interests. They also suggest that it creates obligations that are completely positive and therefore beyond the competence of judiciaries, undermining considerably democracy.⁷²

This controversy notwithstanding, the minimum core approach is essential in assessing the minimum obligations that have been put in place by the Kenyan State in guaranteeing that the right to education is realized.

Notably, judiciary has a critical role to play in realization of rights. Specifically it has an obligation to guarantee the progressive realization of socio-cultural and economic rights is enforced. Courts in other jurisdictions have disallowed the minimum core and in its place approved a sensibleness approach for evaluating government policies on the establishment of socio-economic rights. Fundamental reasonableness wants the courts to consider at the beginning the needs and the interests of the applicants. The courts must then regulate whether the needs and interests fall within the range of the right in question and the weight to be given to them. Simply against this framework should a government policy is assessed.⁷³ Reasonableness approach helps in identifying whether the State has put in place reasonable measures in enforcing socio-economic rights besides fulfilling the minimum essentials of a right.

⁶⁹Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content,' (2008): *Yale Journal of International Law* (Vol.33:113)

⁷⁰ Karin Lehmann, 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22:1 *American University of International Law Review* 163 at 183–184.

⁷¹Supra n.44 at 113.

⁷²Pieterse, 'Possibilities and Pitfalls,' in Stu Woolman and Michael Bishop, (eds.), *Constitutional Conversations* (Cape Town: Pretoria University Law Press, 2008) 305 at 313–321

⁷³Kwadrans, Ania, 'Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?' (2016) 25 *Journal of Law and Social Policy* 78-108.

According to Cecile Fabre, progressive realization of socio-economic rights provides the judiciary with two courses of action. It can either ask the government to implement welfare policies or to allocate resources in such a way as to respect people's social rights, or it can draft policies itself and decide in greater detail how resources should be allocated. It should remind the government that it is under a duty to take a particular action but it should not tell the government how to fulfil this duty precisely so as to allow for the greater scope in democratic decision-making.⁷⁴ Article 20(5) of the Constitution tends to adopt this approach and provides for the guiding principles to be used by the Courts in applying any of the rights under Article 43. If the State explains that it doesn't have the required resources to implement the basic education right, the court will require the State to indicate that the resources are not available or limited. When assigning the resources, the State will give priority to ensure that there is extensive enjoyment of the right in regard to the main circumstances, which include the liability of specific groups or individuals where children fall in this category.

Henry J. Steiner and Phillip Alston observe that over the years, Indian courts as well as the legislature have redefined the relationship between fundamental rights and directives principles in the Indian Constitution.⁷⁵ The Indian Supreme Court has developed the directive principles from being clearly non-justiciable to their providing the basis of a right of action through adoption of a more balanced and integrated approach in the interpretation of the concept of progressive realization of socio-economic rights.

It is therefore imperative to analyze the implementation of the right to basic education in Kenya and what interpretation the Kenyan courts have taken in the application of the progressive realization standard to the right to basic education. The approach taken can largely determine the realization or otherwise of the right. Courts have a huge and influential role to play in realization of this right. In doing so, the jurisprudence from courts in India, South Africa and Canada will be highly instructive.

⁷⁴ Cecile Fabre, 'Constitutionalizing Social Rights' (1998) 6 *Journal of Politics and Philosophy*, pp.280-283.

⁷⁵ Henry J. Steiner & Phillip Alston, *International Human Rights in Context: Law, Politics and Morals*, (2nd ed, 2000), pp.284-285.

It is evident that from the literature review, the realization of the right to basic education can only be assessed by the progressive realization standard. States should thus strive to apply all reasonable steps possible to the full of the available resources it has to ensure that right to basic education is realized. The state cannot escape obligation to implement the right on the ground that the essential resources were not accessible. It also manifest that application of the right to basic education as envisaged in the Constitution and other national statutes is indeterminate and does not provide a specific standard of assessing progressive realization which has also not been addressed sufficiently by the different scholars mentioned. There is thus need for more scholarly work on the jurisprudence of the progressive realization of the socio-economic rights in Kenya. This study seeks to fill the apparent gap in the literature on the subject by analyzing the adequacy of Kenya's legal framework in ensuring progressive realization of the right to basic education.

1.12 CHAPTER BREAKDOWN

CHAPTER ONE

Introduction: This chapter gives a synopsis of the study. It introduces the topic of the study; provides a background to the study; gives the statement of the problem, research objectives, research question and research hypothesis; sets out the scope & limitation of the study; the chapter also gives the research methodology and provides an introduction to the literature review.

CHAPTER TWO

Literature Review : This chapter will analyze in detail various scholarly work mentioned with an aim of being able to assess the adequacy of the principle of progressive realization of the right to basic education in Kenya's legal framework.

CHAPTER THREE

The Principle of Progressive Realization of the right to Basic Education: Legal, Policy and Institutional Framework in Kenya: In this chapter, the researcher will look at the policy, legal and institutional framework in place in Kenya which actualizes the principle of progressive realization of the right to basic education.

CHAPTER FOUR

The Adequacy of Kenya's Legal Framework in Ensuring Progressive Realization of the Right to Basic Education: This chapter will analyze the adequacy of the legal framework in Kenya. It will evaluate whether the legal framework in place has facilitated the actualization of the right to basic education in Kenya.

CHAPTER FIVE

Conclusions and Suggestions: This chapter will provide a summary of the thesis. It will state the findings of the thesis with regard to the adequacy of the principle of progressive realization of the right to basic education in Kenya. Further, this chapter will consider the implications of the findings in Kenya's legal framework. Finally, the chapter will indicate the limitations encountered during the study and provide directions for future research.

CHAPTER TWO

2.0 THE CONCEPT OF PROGRESSIVE REALIZATION AND THE RIGHT TO BASIC EDUCATION IN KENYA

2.1 INTRODUCTION

This chapter will analyze the concept of rights and the emergence & status of socio-economic rights. The views of different scholars with regard to socio-economic rights will also be analyzed.

In addition, this chapter will look at education as a socio-economic right and basic education as its minimum tenet.

The chapter will also analyze the obligations of the State in regard to human rights; particularly, the obligation of the State to respect, to protect and fulfill the right to basic education.

The chapter will further examine the concept of progressive realization and how it can be utilized to realize the right to basic education.

Finally, the chapter will study the role of the courts in application and interpretation of the progressive realization principle in realization of the right to basic education.

2.2 SOCIO-ECONOMIC HUMAN RIGHTS

A right may be defined as an entitlement to perform or not to perform certain actions, or to be or not to be in certain states.⁷⁶

Vinogradoff⁷⁷ for instance defines it as an attitude of demand, though not everyone can form such an attitude for instance infants and lunatics.

Allen⁷⁸ on the other hand defines it as a legally guaranteed power to realize an interest while Gray⁷⁹ defines it as a power of enforcing the correlative duty though this is not always the case in criminal law. It is apparent from that above that the definition of rights elicits more confusion than it does clarity as is evidenced by the definitions of various theorists.

⁷⁶ Leif Wenar, 'Rights' in Edward N. Zalta (ed) *The Stanford Encyclopaedia of Philosophy*(2005) p.1 <<http://plato.stanford.edu/entries/rights>> accessed 4th November, 2014.

⁷⁷ Paul Vinogradoff in 'The Foundation of a Theory of Rights' (1924) in *Collected Papers*, (Oxford 1928) p. 367

⁷⁸ C.K. Allen, *Legal Duties and Other Essays in Jurisprudence* (Clarendon Press, Oxford 1931) p. 183

⁷⁹ J.C. Gray, 'The Nature and Sources of the Law' (Macmillan, New York 1924) p.18

The former refers to rights which are derived from nature rather than from the rules of society, or positive law. The latter refers to rights conferred by a given legal system. This therefore means that rights may both be inherent or granted depending on the right in question.

On the other hand, human rights can be defined in relation to the theories of the right, of the good and justice in society.⁸⁰ They are those moral rights which are owed to each man or woman by every man or woman solemnly by reason of being human.⁸¹ The very nature of human rights informs various characteristics which include: Universality, individuality, paramountcy and enforceability.⁸² This means that human beings are enabled to the rights through virtue of them being individuals. One cannot be deprived of these rights. The State in this case has a duty to take measures that will enable the citizens make practical enjoyment and benefit from the rights.⁸³

The significance effect of these features is that the human rights should be protected by law; and the rule of law. Also, the disputes in regards to these rights should be taken for judgment through a skilled, fair and self-governing tribunal, by relating procedures which will ensure that there is fairness and equality to all the parties, public knows and openly confirmed.⁸⁴ Human rights terms are can be used to represent a broad range of rights starting from right to life to the right to a cultural identity. They contain all fundamental necessities for a distinguished human being. These rights can be well-organized and stated in different ways.⁸⁵

Notably, there have been various attempted categorizations of human rights, examples include: negative rights in contradistinction to positive rights, procedural rights in contradistinction to substantive rights, individual rights in contradistinction to group rights, private law rights in

⁸⁰Supra n.52 at 3.

⁸¹ L.K Thakur, 'Comparative and International Human Rights,' (2000) 1-8.

⁸²*Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993) [3]. The *Declaration* was adopted by the 171 member states of the UN which attended the World Conference on Human Rights in 1993.

⁸³ Supra n.30.

⁸⁴ Icelandic Human Rights Center, *Definition and Classifications of Human Rights*, available at <www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/definitions-and-classifications>.

⁸⁵ Ibid.

contradistinction to public law rights, fundamental rights in contradistinction to basic rights among others.⁸⁶

This controversy notwithstanding, the separation of human rights to three generations as suggested by Karel Vasak, a Czech jurist in 1979 at the International Institute of Human Rights in Strasbourg,⁸⁷ has gained more prominence and recognition all over the world. In this connection, a distinction is made among three categories of human rights usually referred to as the three generation of human rights. The three types line up with the three doctrines of the French Revolution which are the liberty, fraternity and equality.

The first-generation rights are the civil-political rights which deal with liberty and participation in political life. They are strongly individualistic and negatively constructed to protect the individual from the State. These rights draw from those articulated in the United States Bill of Rights and the Declaration of the Rights of Man and Citizen in the 18th Century. Civil-political rights have been legitimated and given status in international law by Articles 3 to 21 of the Universal Declaration of Human Rights⁸⁸ and the ICCPR. These rights include inter- alia: the right to a fair trial; right to life; right to liberty; the right to privacy; equality & freedom from discrimination; freedom from slavery, servitude and forced labour; the freedom of conscience, the religion, belief & the opinion; the freedom of expression; the freedom of association; the freedom of assembly, the demonstration, picketing & the petition; the political rights and property rights.⁸⁹

The second-generation are the socio-economic rights which guarantee equal conditions and treatment. They are not rights directly possessed by individuals but constitute positive duties upon the government to respect and fulfill them. These rights are held and exercised by all people collectively or by specific subsets of people.⁹⁰ They began to be recognized by governments after World War II and, like first-generation rights, are embodied in Articles 22 to

⁸⁶ Ibid

⁸⁷ Karel Vask, 'Human Rights: A thirty-Year Struggle: the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights,' *UNESCO Courier* 30:11, available at <http://www.umn.edu/humanrts/un-orgs.htm> at 20 November 2009.

⁸⁸ *The Universal Declaration of Human Rights*, adopted on 10 December 1948, hereinafter UDHR.

⁸⁹ Supra n. 29.

⁹⁰ Oliver C Ruppel, *Third Generation Human Rights and the Protection of the Environment in Namibia*, available at <http://www.humanrights/ruppel> at 8 December 2009

27 of the UDHR. They are also enumerated in ICESCR. Examples of these rights include: labour relations, the right to the main achievable standard of health, the right to accessible and adequate housing; the right to be free from hunger and to have sufficient food of suitable quality, right to clean and safe water, the right to social security and the right to education.⁹¹

The third-generation are the collective-developmental rights of peoples and groups held against their respective States and aligns with the final tenet of fraternity. This grouping has been distinguished from the other two categories in that its realization is predicated not only upon both the affirmative and negative duties of the State, but also upon the behavior of each individual. They constitute broad class of rights that have gained acknowledgment in international agreements and treaties but are more contested than the preceding types.⁹² They have been expressed largely in documents advancing aspirational soft law, like the Rio Declaration on Environment and Development in 1992, and the 1994 Draft Declaration of Indigenous Peoples' Rights. Rights in this category include right to natural resources; the right to economic and social development; communication rights; right to participate in cultural heritage; right to intergenerational equity & sustainability; right to peace; right to see the world and gender related rights.⁹³

Socio-economic rights have generally been considered as rights which require affirmative government action for their realization. They are often styled as group rights or collective rights, in that they pertain to the well-being of whole societies. Indeed the great controversy regarding these rights concerns their enforceability. Writers reluctant to recognize these rights as human rights have often based their arguments on the assumption that courts are unable to enforce affirmative duties on States and those rights are, therefore, mere aspirational statements. Similarly, critics have opined that, regardless of the political system or level of economic development, all States have the ability to provide the financial and technical resources for the realization of affirmative obligations such as education and an adequate standard of living.⁹⁴

⁹¹ Supra n. 71.

⁹² Twiss Summer B, 'History, Human Rights, and Globalization,' (2004) 32:1 *Journal of Religious and Ethics*, 39-70.

⁹³ Supra n. 71.

⁹⁴ Parker C, 'Human Rights Law' (2002) 39.

Some jurists consider that, these rights do not belong in a bill of rights because a government with insufficient means simply cannot fulfill its duties. Others consider that they should be enshrined in a bill of rights. Professor Charles Diamini observes as follows:

The first generation rights are negative in nature, they prohibit the government from doing something to the individual and consequently it is relatively easier to observe them. Second and third generation rights impose certain obligations on the government to provide certain needs. Their satisfaction depends on the resources the government has, for this reason these rights are more difficult to enforce.⁹⁵

Dennis Davis states in light with second generation rights: ‘whether economic and environmental rights should be incorporated in a bill of rights as first generation rights or should be formulated as directives of State policy is debatable, but a constitution that excludes such rights will inevitably distort the meaning of human rights within the modern context.’⁹⁶

A further question concerning the enforceability of these rights is whether the emphasis should be on the right or the duty to provide the necessary services.⁹⁷

2.3 THE RIGHT TO BASIC EDUCATION

It is notable that the Bill of Rights in the Constitution of Kenya has recognized socio-economic rights under Article 43 and also provides the implementation mechanism of their realization under Article 21(2). The Courts have also been given directive principles to be applied in the application and enforcement of these rights under Article 20(5).

The right to education is among the rights enumerated in Article 43. Similarly, Article 53 provides for the right of each child to the access of free and compulsory basic education.

Normative legal instruments, international, regional and national including the ICESCR, CRC, ACHPR, ACRWC, Basic Education Act and the Children’s Act recognize the right to education and lay down international legal obligations for the right to education.

⁹⁵ Professor Charles Diamini, ‘The South African’s law Commission’s Working paper on Group and Human Rights, Towards A Bill of Rights in South Africa (1990) available at <<http://www.southafricanlawcommission.org/articles19065/html>> accessed 8 December 2009.

⁹⁶ Dennis Davis, ‘Liberty, Commerce and Prosperity and a Bill of Rights, in South Africa’s Crisis of Constitutional Democracy: Can the USA Constitution Help? (Robert A. Licht and Bertus de Villiers eds;1994) 87, 100

⁹⁷ Ibid

These instruments promote and develop the right of every person to enjoy access to education of good quality, without discrimination or exclusion. Further, the instruments bear witness to the great importance that attach to normative action for realizing the right to education. It is for governments to fulfil their obligations both legal and political in regard to providing education for all of good quality and to implement and monitor more effectively education strategies.⁹⁸

General Comment No. 13 on the right to education gives the essential features of the right to include: Availability meaning the effective educational institutions and the programmes has to be available in adequate amount within the state party jurisdiction. The accessibility, meaning the educational institutions and programmes have to be available to every person, without discrimination within the jurisdiction of the State party; the acceptability, meaning the form and constituent of education, which include the curricula and teaching methods, should be acceptable (e.g. relevant, culturally appropriate and of good quality) to the students and, in suitable cases, the parents and Adaptability meaning that education should be flexible so that it can adjust to the needs of changing the societies and communities and respond to the needs of students within their various social and cultural settings.

Besides, basic education has been described as education below the level of tertiary education or post-secondary education to include preschool education through secondary education.⁹⁹ It includes: early childhood education, primary or elementary education or secondary education.¹⁰⁰

Basic education is also considered as a broad pool of knowledge that everyone, children, youth and adults alike are entitled to, at any stage of their lives, as a right. Basic education in formal schooling is primary education.¹⁰¹

The scope of basic education has also been understood to include the basic learning needs of young children before they reach school-going age i.e. the early childhood care and initial education.¹⁰²

⁹⁸UNESCO Website, 'The Right to Education,' available at <<http://www.unesco.org/new/en/right2education>>

⁹⁹ Education System in Malaysia, Ministry of Higher Education, Malaysia (2009).

¹⁰⁰ Ibid.

¹⁰¹UNESCO, 'Operational Definition of Basic Education,' (2007).

The Jomtien Conference¹⁰³ adopted basic education under what was coined ‘the expanded vision’ to include education for out of school youth and adults in literacy and other basic skills training through non formal education, a view theoretically supported by the World Bank.¹⁰⁴

According to the International Standard Classification of Education (ISCED),¹⁰⁵ basic education contains the primary education which is the first step of the basic education and the lower secondary education as the second stage. In developing countries, basic education often includes pre-primary education and/or adult literacy programs.

In the same manner, General Comment No. 13 on the right to education¹⁰⁶ provides that the Primary education contains the basics of accessibility, availability, adaptability and acceptability that are common to education at all level and at its forms. In determine what is primary education; it indicates that primary education is not equal with basic education but there is a close correspondence between the two. However, the Committee approves the position taken by UNICEF: the Primary school education is the main component of basic education.”¹⁰⁷

Similarly it provides that primary education contains two characteristics which are, being compulsory and available free to all.

In the Kenyan context, the components of basic education includes:

- i. Early childhood education
- ii. Compulsory and free primary education
- iii. Free day secondary education

This study will focus on early childhood education and compulsory free primary education to determine what measures have been put forth to realize education at this levels.

¹⁰³ Background Document prepared by the World Conference on Education for All, ‘Meeting Basic Learning Needs: A Vision for the 1990s (Jomtien, Thailand 5-9 March 1990).

¹⁰⁴ Lockheed, M. E., & Verspoor, A, ‘Improving Primary Education in Developing Countries’ Washington, D.C: Published for the World Bank, Oxford University Press, 1991)

¹⁰⁵ The International Standard Classification of Education (ISCED) is a statistical framework for organizing information on education maintained by the United Nations Educational, Scientific and Cultural Organization (UNESCO). It is a member of the international family of economic and social classifications of the United Nations.

¹⁰⁶ Implementation of the ICESCR, General Comment No. 13 (Twenty-first session, 15 November -3 December 1999).

¹⁰⁷ Advocacy Kit, Basic Education 1999 (UNICEF), section 1, page 1.

To this end, it can be denoted that, education is both a human right in itself and a necessary means of understanding other human rights. It ought therefore to be protected and fulfilled by the State. Similarly, basic education is an important component of the right to education and gives the minimum parameters for the fulfillment of the right to education. The right to basic education ought to be made practical and enforceable; practicability means that the right is not a mere aspiration but attainable practicable claim that can be enforced by a legal system and this imposes an obligation on society to satisfy this claim. The State must develop institutions and procedures; put in place and mobilize resources that will enable the citizens to access the right.

Charles Taylor postulates that a State has a responsibility to take measures that will enable the citizens make practical enjoyment and benefit from the rights.¹⁰⁸

2.4 STATE OBLIGATIONS WITH REGARD TO THE SOCIO-ECONOMIC RIGHTS

Human rights are established on a relation between two parties. The two parties are the claimant of a right and the entity that has an obligation to ensure that the claim is met. Individual human beings are the claimants or the rights holders and the government/State is the entity, also considered as the principal duty bearer. Each right therefore carries with it corresponding obligations by the State. Only the State can guarantee human rights and not those with a moral obligation. This is the essence of human rights: not to establish humane ethics, but to put obligations on States for certain minimum norms of conduct for all persons. Human rights are thus violated if the corresponding State's obligations are breached.¹⁰⁹

In the same manner, the name of a right recognizes the standard each right recognizes.¹¹⁰ For instance: the right to education recognizes the standard of having access to education. This standard recognized by a human right describes a certain quality of life. Such a quality of life can be called its human rights standard. By recognizing this standard, the human right recognizes first of all the idea that everyone should enjoy this standard at all times and the State

¹⁰⁸ Charles Taylor, 'Human Rights: the Legal Culture,' in UNESCO, *Philosophical foundations of Human Rights* (1986) 49.

¹⁰⁹ Rolf Kunneman, 'Obligation of States and Non-State actors,' in Circle of Rights; *Economic, Social & Cultural Rights Activism: A Training Resource, Module 9*, available at <<https://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module16.htm>>

¹¹⁰ CESCR have enumerated the State parties' obligations with regard to socio-economic rights.

has the duty to do its best to make sure that they do not destroy this standard. As such, the Kenyan State authorities must not keep people from educating themselves. An obligation of this type is called an obligation to respect the human rights standard, or, the *obligation to respect*. Such obligations are sometimes also called negative obligations, since they tell States what they must not do.¹¹¹

Positive obligations, on the other hand, oblige States not to abstain from certain action, but to take action. An obligation of this type is called an obligation to protect the human rights standard, or the '*obligation to protect*.' This obligation is usually taken to be the main function of States, which will prevent permanent harm from being imposed upon the members of society. This entails the States to prevent harms of rights by any person or any non-state actor, to evade and remove enticements to violate rights by the third parties and to provide the access to legal medications when violations have occurred in order to prevent more deficiencies. In this regard, the Kenyan State should ensure that children are not prevented from attending school.¹¹²

Another positive States' obligation is *obligation to fulfill* the standards of human rights. This is the key State obligation in relation to socio-economic rights. This State obligation requires appropriate measures to be taken to make sure that the human rights standard is attained. In this case, the Kenyan State has to guarantee access to education both in public and private sphere. Nevertheless, the State has to make the resources available, if necessary, and provide legal guarantees for the education. Therefore, the State is ultimately the source of last resort as far as the human rights standards are concerned.¹¹³

The main characteristics of States' obligations could thus be summarized as: States have to respect, protect and fulfill the related human rights standards. These obligations are called the generic obligations. They were first proposed by Henry Shue¹¹⁴ who denoted that for every basic right; civil, political, social, cultural and economic there are the main three types of correlative obligations: 'to void depriving', 'to protect from deprivation' and 'to aid the deprived.'

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Henry Shue, 'Basic Rights: Subsistence, Affluence & U.S Foreign Policy,' (2nd ed, 1996) 52.

The legal standards of the right to basic education encompass two broad components: enhancement of access of all to education on the basis of equality and nondiscrimination, and freedom to choose the kind (public/private institutions) and content (religious and moral) of education. Both aspects represent the spirit and cardinal essence of the right to education.¹¹⁵ These two components represent the main features of the right to education which are the availability accessibility, acceptability and adaptability. Availability means functional education institutions and programmes which are offered in plenty amount within the jurisdiction of the State. Accessibility means, the education institutions & programmes have to be accessible to everyone without discrimination within the jurisdiction of the State. Acceptability means that the form and substance of education, including curricula and teaching methods have to be acceptable to students and in appropriate cases parents. Adaptability means that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social & cultural settings.¹¹⁶

Therefore, the generic obligations of the right to education can be espoused as follows: the obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to facilitate requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to provide the right to education. States parties are obliged to provide this right themselves by the means at their disposal.¹¹⁷

In reference to the essential features of the right to education; States must respect the availability of education by not closing schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfill by facilitating the acceptability of education through taking positive measures to ensure that

¹¹⁵ *Supra* n. 52

¹¹⁶ *Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, the Right to Education* (Twenty-First Session, 1999) Contained In Document E/C.12/1999/10.

¹¹⁷ *Ibid*

education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.¹¹⁸

Manfred Nowak also adopts this and posits that, the obligation to fulfill refers to the State's obligation to take legislative, administrative, judicial and practical measures necessary to ensure that the rights in question are implemented to the greatest extent possible.¹¹⁹

Notably, a fundamental aspect of States' obligations is that of non-discrimination. The principle of non-discrimination in the implementation and enforcement of human rights emphasizes the fact that everyone is entitled to the enjoyment of human rights irrespective of his or her color, gender, religion, ethnic, social or national origin, political or other opinion, property, birth or other status. The principle of non-discrimination prohibits distinctions, exclusions, restrictions and limitations in the execution of a State's obligations that are not based on the nature of the obligation. States are obligated to eliminate discrimination by abolishing without delay any discriminatory laws or regulations; and eliminate discrimination by refraining from discriminatory practices in implementing laws, regulations and programs.¹²⁰ In providing for the right to basic education, the Kenyan State should avoid any discrimination whatsoever. It is against this backdrop that the Constitution under Article 54 and 55 provide that persons with disabilities and the youth are entitled to access relevant educational institutions, facilities and training. As such it prohibits exclusions with regard to the right to basic education. Further, Article 20 (4) of the Constitution provides that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.

¹¹⁸ Ibid

¹¹⁹ Manfred Nowak, 'Introduction to International Human Rights Regime,' (2002) 49.

¹²⁰ Supra n. 114

Similarly, the concept of obligation posits that States have to achieve certain results and perform or not perform certain actions.¹²¹ This has been termed as ‘*the obligation of result*’ and ‘*the obligation of conduct*.’ The obligation of result means the obligation to attain a particular outcome through active implementation of policies and programs. The obligation of conduct on the other hand, means that a State has to undertake a specific step (act or omission). The action or conduct must be rather specific. If the action is as unspecific, the obligation of conduct is a mere obligation of result. These concepts of obligation of conduct and obligation of result provide an effective tool for monitoring the implementation of socio-economic rights.¹²² The obligation of result of the right to basic education will be achieved when all the children in Kenya can satisfactorily access and participate in primary education when quality, relevance and efficiency in the system is taken cognizance of. The obligation of conduct on the other hand, can be attributed to the specific steps taken by the State after the promulgation of the Constitution. This includes enactment of the Basic Education Act as one of the legislative measures.

Closely related with the concept of obligation is the realization of rights.¹²³ Full realization of rights explains that the State has to implement the rights to make sure that the beneficiaries enjoy their human rights. States have to strive to ensure that there are no gaps in the programs to meet the generic obligations to protect or fulfill and ensure that the victims find an effective remedy. This then would be a situation of ‘full implementation.’ Moreover, States must see to it that these programs and the remedies for their malfunctioning are known to the people and are accessible to them.¹²⁴ This is not the position with regard to application of the right to basic education. As stated in the preceding chapter, the basic education sector is faced with numerous challenges that have hindered its full realization even after the promulgation of the Constitution. This can be attributed to the gaps in the law with regard to realization of this right among other factors. Suffice to say, the legal framework in place provides for mechanisms of remedies in case of violations. The issue of concern is on interpretation by the courts on the actions taken by the State to implement the right to basic education in order to reach a desired conclusion on the suitable remedies to issue.

¹²¹ Supra n. 114

¹²² Supra n. 114.

¹²³ Supra n. 114.

¹²⁴ Supra n.114.

2.5 THE PROGRESSIVE REALIZATION PRINCIPLE TO ACTUALIZE THE RIGHT TO BASIC EDUCATION

An obligation to fulfill socio-economic rights is only incumbent upon a State if the State has the resources and infrastructure to meet this obligation.¹²⁵ Whether a positive obligation is binding may therefore depend on the resources available. States quite often try to defend themselves against allegations of breaching a certain positive obligation by claiming that this obligation was not binding on them due to lack of resources. A judgment on such claims requires an analysis of the resources available. The availability of resources refers to the resources of society and not only the resources within the current budget. It is true for most States that the executive is bound to the budget cleared by the legislature. It is equally true that the legislature, as much as the executive, is part of the State under the auspices of separation of powers and therefore must observe human rights obligations and the maximum resources provision. If a legislature denies a government the budget necessary to meet the State's obligations, although these resources are available in society, this has to be considered a violation of human rights by the legislature. If States claim that some obligations are not binding due to lack of resources, the burden of proof should be with the State making such claims.¹²⁶

Resources therefore means financial, human personnel, means put in place, technical measures by experts, legislative measures, standards and other measures.

Ochiel J Dudley posits that the political and civil rights must be realized immediately, the economic, social and cultural rights can be considered by the progressive realization standard. This is because these rights have generally been considered as rights which require affirmative government action for their realization.

Likewise, it is assumed that because resources are required for the realization of socio-economic rights, they are incapable of immediate implementation. This means that these rights need to be progressively achieved.

For that reason, progressive realization means that the right cannot be realized immediately.

¹²⁵ Supra n. 114.

¹²⁶ Supra n.114.

The ICESCR allows States to work towards full realization by ‘taking steps’ towards full implementation of the rights to the maximum extent of their ‘available resources.’ This is what is often termed the ‘progressive realization standard.’¹²⁷

General Comment No.3 of the CESCR describes the concept as a central aspect of States’ obligations in connection with socio-economic rights. At its core is the responsibility to take correct measures to the full realization of economic, social and cultural rights to the maximum of the resources available. The reference to ‘resource availability’ reflects a recognition that the realization of these rights can be hampered by a lack of resources and can be attained simply over a period of time. Equally, it means that a State’s compliance with its obligation to take appropriate measures is assessed in the light of the resources, financial and others available to it.¹²⁸

The concept thus essentially contextualizes rights, allowing developing countries to work towards implementation in accordance with their resources, so long as progress continues to be made.¹²⁹

It also means that the State should take steps to accomplish the Constitution goal by effectively meeting the necessary needs of all people in the society. The accessibility should be increasingly enabled. Legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. The right should be made more available not only to a larger number of people but to a wider range of people as time develops.¹³⁰ It needs that the State should hurry sensible and progressive schemes to improve vast areas of deprivation. Even where people already have access to socio-economic rights, progressive realization places a duty on the State to improve the nature and the quality of the services to which people have access.¹³¹ It needs

¹²⁷ Elizabeth Shura, ‘New Strategies for Progressive Realization Assessments of Economic, Social, and Cultural Rights: Cambodian AIDS-Related Orphans and Vulnerable Children as the Hard Case’ (2008) 5 *Fordham International Law Journal*.

¹²⁸ CESCR, General Comment 3, *The Nature of States Parties Obligations*, Article 2(1).

¹²⁹ *Supra* n. 125.

¹³⁰ The Interpretation of the concept was stated in *Government of South Africa v Grootboom*, *Constitutional Court of South Africa*, Case CCT 11/00, 4th October 2000, para 45.

¹³¹ The interpretation of the concept was stated in *Minister of Health & Ano. v New Clicks South Africa (Pty) Ltd & Others*, 2006 (8) BCLR 872 (CC), para 705.

very cautious planning and fair measures which are made known in advance to those that are most affected. Organized and predictable processes are important.¹³² The measures adopted must be flexible so as to adapt to the changing situations.¹³³

The concept of progressive realization recognizes the policies which are articulated by the State will need to be studied and revised to guarantee that the realization of social and economic rights is gradually achieved. It requires increasing the access to a right on an advanced basis, mainly for the poor and disadvantaged groups. It requires that access be continuously broadened and policy measures should be flexible.¹³⁴

Instructively, for progressive realization of rights to be actualized, the State needs to develop and implement various measures. The ICESCR under Article 2(1) defines steps to include those taken individually by a State and those taken through international assistance and cooperation. Article 21(2) of the Constitution uses the operative word ‘shall’ to mandate the State to take the steps indicated thereunder. Measures are defined in the covenant to include economic and technical to the maximum of a State’s available resources. Likewise, Article 21(2) enumerates the measures to be taken to include legislative, policy, standards and other measures.

Barbara Von Tigerstrom¹³⁵ advances that the development of effective measures for the realization of economic, social and cultural rights as an endeavour of utmost urgency and importance. These measures include legislative, constitutional reforms and other measures. Among these is the use of non-judicial institutions which have a role in protecting human rights and which may, in particular, be well placed to monitor, protect, and promote economic, social and cultural rights. The non-judicial institutions identified by the writer includes: the institution of the ombudsman and national human rights institutions (NHRIs). These institutions collect and disseminate information about government performance hence give meaningful contribution to

¹³²The interpretation of the concept was stated in *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd & Others* 2005 (8) BCLR 786 (CC), para 49.

¹³³ Ibid

¹³⁴ *Mazibuko and others v City of Johannesburg and Others*, 2010 (3) BCLR 239 (CC), paras 40 & 67.

¹³⁵ Barbara Von Tigerstrom, ‘Implementing Economic, Social and Cultural Rights: The Role of National Human Rights Institutions,’ in Isfahan Merali and Valerie Oosterveld, (eds.) *Giving Meaning to Economic, Social and Cultural Rights* (2001) 140-159.

monitoring a State's progress in implementing its obligations under the national and international instruments, both in terms of noting general trends and in identifying specific problem areas.

Reasonable measures involve the establishment and implementation by the State of a coherent, well-coordinated, and comprehensive programme directed towards the progressive realization of a particular right in question. Moreover a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted by the State to meet its obligations. In order to comply with its obligations, the State will be required not merely to legislate but also to act in a way that is designed to achieve the intended result. Furthermore, a reasonable programme must be balanced and flexible and make appropriate provision for attention to education crises for instance and to short, medium and long term needs. The reasonableness or otherwise of governmental action must therefore be judged in relation to the ends, purposes, or obligations that the Constitution imposes.¹³⁶

Robertson¹³⁷ notes that the pace of implementation depends on the resource availability to a State. This is because States have to take full advantage of their available resources to ensure that these rights are fully realized without discrimination of any kind. However, a State cannot escape the obligation to adopt a plan of action on the ground that the necessary resources are not available. Resources in this context imply the resources both within a State (internal resources) and those available through international assistance and co-operation (external resources). Furthermore, resources are not limited to financial or human resources; information and technology, for example, are also resources essential in fulfilling rights.

Similarly, McLean in his discussion of the difference between maximum resources and available resources within the context of progressive realization denotes that: available resources are the resources that the State has made available or all resources that are potentially available to meet the State's obligations. She adds that the latter would require an assessment by the courts as to know whether the State has made suitable budgetary allocation to realize the right in question.¹³⁸

¹³⁶ Ibid.

¹³⁷ Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to the Realizing Economic, Social, and Cultural Right' (1994) *Human Rights Quarterly* 693 -697.

¹³⁸ McLean, 'Constitutional Deference, Courts and Socio-Economic Rights in South Africa' (2009) 195.

Lilian Chenwi notes that, the progressive realization qualification requires a State to strive towards fulfilment and improvement in the enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints. With regard to South Africa, she observes that a consideration of the progressive realization approach to socio-economic rights is warranted on the basis that the concept of ‘desperate need’ does not seem to deliver much in terms of the enforcement of these rights, as the courts tend to focus more on ‘access’ than on ‘improvements in access.’¹³⁹

Sakiko Fukuda and others¹⁴⁰ have noted that a country’s performance in terms of economic and social rights fulfillment depends on both the actual socio-economic rights outcomes people enjoy, as indicated by socio-economic statistics that proxy for particular rights, and a society’s capacity for fulfillment, as determined by the amount of economic resources available overall to the duty-bearing State.

Henry J. Steiner & Phillip Alston argue that the greatest challenge with economic, social, cultural rights is to identify effective approaches to implementation i.e. the means by which these rights can be given effect and governments can be held accountable to fulfill their obligations. They also state that the principal reasons for the relative under-development of these rights include:

- i. The ambivalence of most governments, but particularly those from the third world countries.
- ii. Lack of innovative legal and other approaches to implementation by those governments that clearly support the concept.¹⁴¹

They continue to state that human rights imply rather a conception of government as designed for many purposes and seasons. The rights deemed to be fundamental include not only freedoms which government must not invade, but also rights to what is essential for human well-being, which government must actively provide or promote. They imply a government that is activist,

¹³⁹ Supra n. 33.

¹⁴⁰ Fukuda-Parr, Lawson-Remer & Randolph, ‘Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment,’ (2008) *Department of Economics Working Paper Series 200822* University of Connecticut 13.

¹⁴¹ Supra n. 75.

intervening, committed to economic-social planning for the society, so as to satisfy economic-social rights of the individual. These rights imply that all individuals are entitled to have society supply their basic human need and other economic - social benefits if the individual cannot do so. The rights therefore require major governmental planning and programs and are conditioned upon availability of resources.¹⁴²

However, Moellendorf¹⁴³ has pointed out that the notion of available resources is ambiguous. It may mean those resources that a Ministry or Department has been allocated and has budgeted for the protection of the right. Alternatively, it may mean any resources that the State can marshal to protect the right. He recognizes that these are two extreme versions of what the term means and it may be held to involve something between these extremes.

In the same regard, Professor Anne Skelton¹⁴⁴ in her paper titled: ‘Children’s Socio-Economic Rights and Funding of Social Services’ criticizes the nature of the principle of progressive realization and the ambiguity of the maximum and minimum capacity to which socio-economic and cultural rights should be enforced and realized. She argues that the maximum extent of available resources does not imply that poor (developing) countries can avoid responsibility; it is rather a call for prioritization of children within the State budget. In her article she brings out the conflicting provisions of two international conventions; the United Nations Convention on the Rights of the Child (CRC)¹⁴⁵ and the ICESCR in the application of the principle of progressive realization. The ICESCR in its provisions allows for progressive realization but the CRC does not except in specific Articles. Socio- economic rights under ICESCR are therefore indeterminate and the threshold of observance is ambiguous.

Professor Skelton further draws more criticism to the provision of the UN 2003 General Comment of the UN Committee on the Rights of the Child in its provision that Article 4 of the CRC reflects a realistic acceptance that lack of resources, financial and others can hamper the

¹⁴² Supra n. 34.

¹⁴³ Moellendorf, “Reasoning about Resources: *Soobramoney* and the Future of Socio-economic Rights Claims,” (1998) *South African Journal on Human Rights*, 14:2, 327-333.

¹⁴⁴ *Children’s Socio-Economic Rights and Funding of Social Services* ; Professor Ann Skelton; Presentation to the South African Financial and Fiscal Commission; May 2014; Published by Center for Child Law.

¹⁴⁵ *United Nations Convention on the Rights of the Child*, 20 November, 1989 (entered into force 2 September 1990) hereinafter CRC.

full implementation of economic, social and cultural rights in some States thus introducing the defense of progressive realization to the provisions of the Convention in general. She thus proposes that from the onset, socio - economic rights should be accorded a measure of determinacy so that as a result, children's socio - economic rights are enforced at an international recognized standard.¹⁴⁶

Similarly, Audrey Chapman states that, the current standard of progressive realization that is used to assess the performance of States is inexact and renders these rights very difficult to monitor. Evaluating progressive realization within the context of the availability of resources requires the availability of comparable statistical data from several periods in time in order to assess the trends. He recommends a 'violations approach,' as a more feasible and effective alternative. The violations approach advocated here focusses on three types of violations: violations resulting from actions and policies on the part of governments; violations related to patterns of discrimination; and violations taking place due to a State's failure to fulfill the minimum core obligations contained in the ICESCR.¹⁴⁷

Further, the Attorney General of Kenya, Professor Githu Muigai acknowledges the difficulty facing progressive realization of socio-economic rights by noting that: 'under the new Constitution of Kenya, we are confronted by very noble claims but effecting them is posing a challenge. The Constitution spelt out a raft of socio-economic rights but the State is constrained in enforcing them with diminishing resources and capacity.'¹⁴⁸

To practically enforce the progressive realization concept, the international community¹⁴⁹ has adopted the concept of minimum core approach to socio-economic rights that is key to providing clear content to these rights, and ensuring that they have enforceable practical implications for government policy that benefit the worst off in society. The minimum core obligation ensures the satisfaction of, at the very least, minimum essential levels of each of the rights. In order for a

¹⁴⁶ Supra n.137.

¹⁴⁷ Supra n. 34.

¹⁴⁸ Standard Digital, *Kenyans being denied socio-economic rights, says Attorney General Githu Muigai*, 19th November, 2013 available at <https://www.standardmedia.co.ke/m/?articleID=2000098069&story_title=Kenyan-being-denied-socioeconomic-rights-says-Attorney-General-Githu-Muigai> at 6 December 2013.

¹⁴⁹ Supra n. 36

State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

This concept can also be described as looking at the minimum legal content of the socio-economic rights and taking measures to satisfy the rights at the most minimum or critical levels. Further, it recognizes the essential level of various rights, for instance, the rights to food, health, housing and education and seeks to meet these essential levels at their most basic.¹⁵⁰

The minimum core has been equated with a presumptive legal entitlement, a non-derogable obligation, and an obligation of strict liability. This concept can thus be understood to derive from this normative foundation for fundamental rights.¹⁵¹

Thomas Hammarbergs has proposed the minimum core as the concept to guide the interpretation of the economic and social rights protected in other international human rights implements.¹⁵²

Bard-Anders Andreassen and other advocates from the development field suggested in the 1980s that minimum standards would provide the basis for a more progressive, if restrained, redistribution of resources rather than more extensive efforts, thus placating the self-interest of developed States.¹⁵³ These commentators also sought to delimit economic and social entitlements to their barest forms in order to avoid the disruption of production incentives, which would work against their practical success.¹⁵⁴

Katharine G young¹⁵⁵ on the other hand criticizes the minimum core approach taken by States as a trimmed concept that reproduces a simple rights strategy which suggests that maximum advantages are made by reducing goals. She argues that these positions, despite being classified as non-derogable are superficially persuasive for resolving the challenges of economic and social rights implementation and instead are hopelessly incompatible in practice.

Tara Melish also criticizes the concept and denotes that;

¹⁵⁰ Supra n.36.

¹⁵¹ Supra n.36.

¹⁵² Thomas Hammarberg, 'Children in Economic, Social and Cultural Rights,' (2011) at 353, 366-67.

¹⁵³ Supra n.43.

¹⁵⁴ Ibid.

¹⁵⁵ Supra n. 44.

Indeed the economic and cultural contexts of States vary and the universality or congruence assumed by international legislation is ineffective. The minimum core of a country such as the Ivory Coast is incomparable to the minimum core of Belgium. This results in juridical confusion at the international level and subsequently affecting implementation at a national level.¹⁵⁶

These skeptics counsel abandonment of the minimum core.

The lowest core responsibilities should thus be understood in an extensive structure of progressive realization as it does not suggest that governments should fulfill a simple minimum and then do nothing much after.¹⁵⁷ States have an obligation to realize a minimum level or provision of a right immediately and then to develop the level of provision past the minimum on a progressive basis.¹⁵⁸

2.6 ROLE OF THE COURT IN APPLICATION OF THE PROGRESSIVE REALIZATION PRINCIPLE

The judiciary has a critical role in realization of rights. Specifically it has an obligation to make sure the progressive realization of economic and socio-cultural rights is enforced.

According to Cecile Fabre, progressive realization of socio-economic rights provides the judiciary with two courses of action. It can either ask the government to implement welfare policies or to allocate resources in such a way as to respect people's social rights, or it can draft policies itself and decide in greater detail how resources should be allocated. It should remind the government that it is under a duty to take a particular action but it should not tell the government how to fulfil this duty precisely so as to allow for the greater scope in democratic decision-making.¹⁵⁹ He further argues that although the court lack the requisite expertise and skills in

¹⁵⁶ Tara Melish, 'Rethinking the 'Less as More,' Thesis: Supranational Litigation of the Economic, Social, and Cultural Rights in the Americas,' (2006)39 *New York University Journal of International Law*, 171, 177-78.

¹⁵⁷ *Supra* n. 140.

¹⁵⁸ Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence,' (2003).

¹⁵⁹ Cecile Fabre, 'Constitutionalizing Social Rights' (1998) 6 *Journal of Politics and Philosophy* 280-283.

analyzing budgetary reports and policies, there is no reason why specialized judges could not be trained to acquire those skills, or could not seek advice from independent experts.¹⁶⁰

Cass Sunstein¹⁶¹ observes that not all positive rights are the same and therefore some, for example right to education, are more readily subject to judicial enforcement than others such as the right to a clean environment. He further notes that many positive rights are unenforceable by the courts because courts lack the tools of bureaucracy and do not have a systematic overview of government policy.

Henry J. Steiner and Phillip Alston observe that over the years, Indian courts as well as the legislature have redefined the relationship between fundamental rights and directives principles in the Indian Constitution.¹⁶² The Indian Supreme Court have developed the directive principles from being clearly non-justiciable to their providing the basis of a right of action through adoption of a more balanced and integrated approach in the explanation of the concept of progressive realization of socio-economic rights. Therefore, the approach taken by Kenyan courts in interpretation of the concept can largely determine the realization or otherwise of the rights. They have a huge and influential role to play in progressive realization of these rights. This paper examines the adequacy of Kenya's legal framework in ensuring the progressive realization of the right to basic education. In doing so, the jurisprudence from courts in India, South Africa and other jurisdictions will be highly informative.

Carlos Joel Tchawouo Mbiada examines and analyses the jurisprudential approach regarding the enforceability of socio-economic rights in South Africa. He notes that courts have to develop a method that will enable the enforceability of these rights.¹⁶³

Conversely, Tara Melish¹⁶⁴ highlights the challenges of implementation of human rights legislation by the judiciary and the correlation between implementation nationally and

¹⁶⁰ Ibid.

¹⁶¹ Cass Sunstein, 'Against Positive Rights' (1993) *East Europe Constitutional Review* 35.

¹⁶² *Supra* n.29 at 284-285.

¹⁶³ Carlos Joel Tchawouo Mbiada, "A Jurisprudential Analysis of the Enforceability Of Socio-Economic Rights in South Africa: A Constitutional Discourse," (2010) available at <<http://www.memoireonline.com/04/10/3363/Ajurisprudential-analysis-of-the-enforceability-of-socio-economic-rights-in-South-Africa-a-constit.html>> at 6 December 2013.

internationally. She denotes that the implementation stage of litigation including implementation of negotiated friendly settlements often presents the most difficult, time-consuming, and resource-intensive hurdle to successful real-world change. This is particularly true at the supranational level, where, given the requirement of exhaustion of domestic remedies, national authorities have already demonstrated a disinclination to enforce human rights guarantees through domestic procedures, often vigorously defending those decisions in supranational proceedings.

The judiciary further guided by the administrative principle of reasonability may work counterproductively to the realization of social - economic rights. As far as the above criticism is concerned, the court will rule a certain policy or constitutional program if it is coherent, reasonable, and made in moral faith. She discusses the cases of *Grootboom*¹⁶⁵ and *Treatment Action Campaign*¹⁶⁶ where despite the fact that the court declared the government's policies unconstitutional. It is clear that the principle of the legal review in most cases will be whether the specific policy or program is sensible. It can thus be demonstrated that, the courts have not been willing to declare, in respect to any of the cases brought before it, that the individual applicants have the direct right to acquire the socio economic goods in question.

Moreover, Phillip Alston and Nehal Bhuta¹⁶⁷ in their case study on education as a fundamental right in India argue that India is a developing country facing considerable resource challenges, particularly in light of its rapidly growing population and the fiscal constraints of the State and federal governments. However, India has a well-developed judicial system and a recent history of constitutional rights litigation that, in the breadth of issues that it has touched upon and the scope of remedial judgments delivered, is almost unparalleled in either the developing or the developed world. That notwithstanding, the education level in the country is very low.

The study also analyzed the role played by the courts in India in the struggle to recognize and give effects to the right to education. Nevertheless, the authors cautioned that it would be a mistake to focus only on litigation as the key to promoting the realization of this right.

¹⁶⁴Supra n.149.

¹⁶⁵*Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

¹⁶⁶ *Ministry of Health vs. Treatment Action Campaign* (TAC) (2002) 5 SA 721 (CC).

¹⁶⁷ Phillip Alston and Nehal Bhuta, 'Human Rights and Public Goods: Education as a Fundamental Right in India,' in Phillip Alston & Mary Robinson, (eds.) *Human Rights and Development* (2009) 242-265.

2.7 CONCLUSION

Having looked at the concept of a right and human rights in general, it is evident that the concept of human rights has had a lot of controversies, beginning with the issue of categorizations; the status of socio-economic rights and the concept of progressive realization of these rights. Be it as it may, it cannot be disputed that human rights, are rights which man cannot be deprived of and this includes socio-economic rights.

In fulfilling the generic obligations in regards to the right to basic education; Kenyan State should escape the measures that can hold back or prevent the satisfaction of the right to basic education; to prevent third parties from meddling with the pleasure of the right to basic education; to provide for the right to education at means at their disposal and take constructive measures that will enable and help people and societies to like the right to basic education.

Notably, this chapter has revealed that the right to basic education is a socio-economic right which can only be realized by the progressive realization standard.

The principle of progressive realization of rights is integral in fully actualizing socio-economic rights; specifically the right to basic education. This is because realization of this right can only be achieved over time and is dependent on the resources and other measures that are put forth by the State. Free and compulsory basic education can only be actualized if the government enables all children to access and participate in primary education. It has to make sure that the value of education is relevant and efficient. In this case, the State should put aside considerable amount of financial resources to acquire adequate infrastructure for the primary education institutions, education facilities and equipment, for payment of teachers among others. The policies and standards for the free primary education should also be adequate to achieve the intended result. Similarly, the legal framework that supports realization of this right has to be adequate. Granted all this can only be progressively realized.

The chapter has also established the essential role of the courts in enforcing the progressive realization of the right to basic education.

However, there is need for more jurisprudence on the alternative steps that have to be taken by the States' to make sure that the irrational concept of progressive realization is viable. If

reasonable measures have been put in place within the available resources of the State and steps have been taken to satisfy the minimum core essential of a right and the right is yet to be realized; what more can be done to ensure full realization.

This research attempts to address this gap by analyzing the adequacy of Kenya's legal framework in ensuring the progressive realization of the right to basic education.

CHAPTER THREE

3.0 LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK OF THE PRINCIPLE OF PROGRESSIVE REALIZATION OF THE RIGHT TO BASIC EDUCATION IN KENYA

3.1 INTRODUCTION

This chapter will provide a situational study of the institutional framework, policy and legal in Kenya with an aim of establishing how it has actualized the progressive understanding of the right to basic education. This will include, national, regional and international framework ascribed by Kenya.

The chapter will also indicate the implications of the legal, policy and institutional framework in Kenya on progressive realization of the right to basic education.

3.2 THE PRINCIPLE OF PROGRESSIVE REALIZATION OF RIGHTS

Progressive realization simply means that the right cannot be realized immediately. The ICESCR allows States to work towards full realization by ‘taking steps’ towards full implementation of the human rights to the extent of their resources which are obtainable. This is what is often termed the ‘progressive realization standard.’¹⁶⁸

The General Comment No.3 of CESCR describes the idea as a core feature of the States responsibilities in association with the socio-economic rights. Its obligation is to take the correct actions to the understanding of the cultural, social and economic rights to the fullest of their properties which are obtainable. The orientation to the availability of resources, it redirects acknowledgment that the comprehension of these rights can be hindered due to inadequate resources and also they can be accomplished for a period of time only. Similarly, it means that

¹⁶⁸ Elizabeth Shura, ‘New Strategies for Progressive Realization Assessments of Economic, Social, and Cultural Rights: Cambodian AIDS-Related Orphans and Vulnerable Children as the Hard Case’ (2008) 5 *Fordham International Law Journal*.

the compliance of a state with its responsibilities is to take the correct actions and it is measured in the light of the resources which are accessible and financial.

3.3 LEGAL AND POLICY FRAMEWORK IN KENYA

Basic education principle of the progressive realization has been articulated greatly in various national and international legal instruments which have been ratified by Kenya. Instructively, the Kenyan constitution 2010, offers under the Article 2 (5) that the overall international law rules will be part of Kenyan law. Furthermore, the Article 2(6) illustrates that any of the treaty or agreement which is approved by Kenya will be part of Kenyan law under the Constitution.

A critical legal framework analysis is explained hereunder.

3.3.1 The Constitution of Kenya, 2010

The 2010 Kenyan Constitution contains a detailed Bill of Rights under Chapter Four being an important part of democratic State of Kenya and also the structure policies for social, economic and culture. ¹⁶⁹The new constitutional regime, in the history of Kenya and as the first time, recognized the socio-economic rights under Article 43.

Specifically, the Constitution under the Article 43 (1) (f) explains that each individual has rights to access education or rights to education. The right is reiterated in Article 53 (1) (b) which explains that children have the right to compulsory basic education and Article 54 (1) (b) clarifies that individuals with disabilities have also the right to access educational institutions. This will thus include the children with disabilities.

Education has been classified among the socio-economic rights, including healthcare rights services, available and sufficient housing, and adequate food of acceptable quality, safe water and social security. Other provisions relate to property rights, labour relations' rights and environmental rights under Art. 40, 41 and 42 respectively.

The Constitution therefore recognizes and protects the right to education. Its provision in the supreme law of the land is one of the measures towards its fulfillment.

¹⁶⁹*The Constitution of Kenya*, (2010), Art. 19(1).

Of great importance, is Article 19 (3) of the Constitution mentions that a state does not grant the fundamental freedom and rights provided in the bill of rights but then they belong to every individual. This Article goes in line with John Locke's social contract theory which posits that man surrendered all his rights under the social contract. The rights pre-existed the social contract and the function of the State therefore is to defend the natural rights of the citizens which is basically the right to basic education.

Remarkably, the concept of progressive realization as articulated by Article 20 (5) of the Constitution creates a scenario where, if the State claims impossibility to implement a socio-economic right under Article 43, the Courts in its determination are directed by the principles given:

- a) It is States' duty to indicate if there are no resources that are available.
- b) When assigning the resources, the State should provide significance in making sure that there is extensive possible pleasure of the rights or necessary freedoms in regards to main situations, which include exposure of certain groups.
- c) The tribunal, court or any other organs should not meddle with the choice made by a State body regarding to the distribution of resources obtainable, only when it would have reached to a different conclusion.

However, Article 20(5) can be said not to be very sufficient. Subsection (a) gives the weight of resistant of the State to prove that resources are not adequate or available for satisfaction of particular right. On the contrary, subsection (c) prevents the court from interfering with any decision made by a State organ regarding the allocation of the resources available. The court of law is therefore not given absolute powers to assess whether the resources channeled to the right to basic education for instance were adequate or otherwise in realizing that right.

Moreover, Article 21(1) indicates the important duty of the State and each State Structure is to observe, respect, protect, promote and accomplish fundamental rights and freedoms contained in the Bill of Rights. By this, the Constitution has provided for the generic obligations according to the right to basic education.

The article 21(2) further illustrates that the State should use lawmaking, strategy and other procedures, which includes standards settings to fulfill the enlightened understanding of the rights assured under the Article 43. This is a central provision to be applied in assessing the advanced recognition to basic education rights. However, the Constitution is too open-ended on the parameters to be considered in the implementation of the right to basic education. For instance, what are the policies and other measures envisaged. The word ‘other measures’ is too broad and not determinable.

Nevertheless, this Article 2(1) of ICESCR is specific towards the steps that State organs should undertake which include the technical and economical to the fullest of its accessible incomes.

The Republic of South Africa constitution, 1996 has also adopted a specific approach in application of the progressive realization principle. For instance section 29 explains that everybody has the right to access basic education, also as well as the adult basic education. In this case, the measures are ‘reasonable’ and they ought to be made ‘available’ and ‘accessible.’

It is notable, that Article 21(4) obligates the State to ratify and apply the law and accomplish the international requirements according to the fundamental freedoms and human rights. Nonetheless, there is no legislation that has been passed in Kenya to give outcome to Article 21(4) in the Constitution or other measures taken. As a result, the obligations declared in the international instruments cannot be given effect to and therefore the continued challenges with implementation of the enlightened consciousness of the rights to basic education.

Article 22 (1) gives each individual the right to establish court proceedings demanding the right or the freedom which is in the bill of rights when it is violated, threatened and denied. This gives the remedial mechanisms to a victim for non-implementation of the right to basic education. There are various cases that have been determined in regard to understanding of the basic right to education. However, the same analysis will be done in the subsequent chapter.

Notably, the Constitution makes it difficult to amend the provisions relating to the Bill of Rights as it subjects it to a referendum.¹⁷⁰ This shows the essence of human rights including socio-economic rights.

¹⁷⁰ Article 255 of the Constitution of Kenya, 2010

In the same manner, Article 259 (1) (b) provides that the Constitution will read in a way that improve the fundamental freedoms, rule of law and human rights which are in the Bill of Rights.

3.3.2 Children's Act, 2001

This is a Parliament Act that makes provision for the responsibility of the parents, maintenance, fostering, guardians, adoption, custody, adoption, caring and protecting of children. It also provides the children administration institutions and gives effect to the values of the African Charter on the welfare and rights of the Child and the Convention on the Rights of the Child.

Section 3 obligates the Government to take the necessary procedures to the extreme of its available possessions with an outlook to accomplishing increasingly the complete realization of the rights of the child together with all safeguards for the rights and welfare of a child. These 'necessary steps' are not elaborated which creates a gap when holding the government responsible for non- realization of education basic rights

The Section 7 (1) illustrates that each child should be allowed to education and the providing of which will be the concern of the parents and the Government.

Similarly, Section 7 (2) provides that every child will also be allowed to access the free education which will be enforced in the agreement on Article 28 of United Nations Convention on the Rights of the Child.

To this end, this provisions only give the general right of basic education without being specific on how it will realized.

3.3.3 Basic Education Act, No. 14 of 2013

This is a Parliament Act that gives effect to Article 53 in the Constitution. It promotes and regulates free and compulsory basic education; provides for accreditation and registration.

Part IV of the Act provides the rights of a child to free and necessary basic education.

Specifically, Section 28 tasks the Cabinet Secretary for Education to implement the rights of all children to access compulsory and free education and in consultation with the National Education Board and the relevant County Education Board.

This is the main statute which offers the results towards the right to basic education and was enacted after promulgation of the Constitution. However, it also contains general provisions with regard to basic education and does give the measures that are determinate in the realization of this right.

For instance, section 39 gives the responsibility of the Government with regard to basic education. The Cabinet Secretary has a responsibility to among others: to offer free and compulsory education to all children. How this is to be provided for is left to the courts for interpretation.

Nevertheless, Section 54 provides for structures of governance and management in education. The institutions of basic education include the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board among others. The structures established shall among others ensure that all levels have effective and efficient delivery of basic education. By fulfilling this, the State responds to its obligations under Article 21(2) of the Constitution.

3.3.4 Universal Declaration of Human Rights (UDHR)

UDHR was declared by United Nations General Assembly in Paris, December 1948 (General Assembly Resolution 217 A) as a shared customary of achievements to all peoples in all nations. It sets out, for the first time, fundamental human rights to be universally protected.

It is not a treaty but was explicitly adopted for the determination of defining the meaning of fundamental freedoms and human rights appearing in the United Nations Charter, which is binding on all member States including Kenya.

It has served as the foundation for two binding UN human rights covenants, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

Article 26 of Declaration indicates that every individual has the right to access education because Education is free, in both basic and the important levels and compulsory. This illustrates the principle of non-discrimination with regard to basic education; free and compulsory basic education which should be in fundamental and basic levels of education.

3.3.5 International Covenant on Economic, Social and Cultural Rights (ICESCR)

This document was approved and released for signing, ratifying and attained by the General Assembly Resolution 2200A (XXI) of 16 December, 1966. It was enforced on 3 January, 1976 according to Article 27 of the Covenant. Kenya assented the treaty on 1 May 1972.

The Article 2 explains how every State organ of the Convention accepts taking the procedures, independently through co-operation and international help particularly the technical and economic, to full of its obtainable resources, with the outlook of attaining increasingly the understanding of recognized Covenant rights by all suitable ways, which include mainly the implementation of judicial processes. Therefore, ICESCR enacts a responsibility to change expeditiously and successfully as likely to the comprehension of the objectives in it. Some thoughtful regressive actions will need the most careful attention and will require to be justified fully by the situation to the whole of all the rights delivered in the Covenant and in the framework using maximum available resources. Moreover, the developing states, with regards to national economy and the human rights, can determine what they would assure for the economic rights to be acknowledged in the current Covenant and to non-citizens.

From this Article, progressive realization measures of basic education rights can be summarized as follows:

- a) Taking steps individually
- b) Taking steps through international assistance
- c) Employing financial and practical measures to full of the resources that are available
- d) Taking the correct ways which include the implementation of legislative procedures
- e) These obligations should be employed within a short period

The Article 13 explains the Article 26 of UDHR. It provides that a State organ to Covenant identifies the right of each individual to access education. Additionally, States bodies to that Covenant also knows, with an outlook of attaining the full understanding of this right by providing for primary education that it will be compulsory and accessible free to everybody among other initiatives.

The Constitution of Kenya adopted some of the parameters of the right to education identified in the Covenant by providing for free and compulsory primary education which is the ambit of this

study. Nevertheless the ICESCR goes further to provide for the improvement of school systems in all stages and improve the material circumstances for the teaching staff. This is omitted in the Constitution save for the provision of system of governance in the Basic Education Act. It is presumed that this system will enhance quality, relevance and efficiency in the basic education sector.

Article 16 obligates States Parties to the Covenant to give information on the methods which they have approved and the improvement made in accomplishing the performance of those rights which are recognized in the Covenant including the right to basic education. Kenya as a signatory is required to provide reports on the progress made in the realization of the right to basic education.

According to Article 22 the Social and Economic Council can bring attention to the other United Nations bodies, their subordinate bodies and specific interventions who are concerned with providing technical support in any of the matters that arise from those reports which may help those bodies to decide, each from within of its line of skills in the suitability of global procedures possible to help to the operative advanced enactment of the Covenant. In this case, the council is well equipped to interpret the realization of the right to basic education.

3.3.6 The United Nations Convention on the Rights of the Child (CRC)

This Convention was approved and released for signing, approval and attained by General Assembly resolution 44/25 of 20 November 1989. It was enforced on 2 September, 1990, in agreement of Article 49.

According to Article 3, the states where all processes regards to the children, if the institutions are accepted by the public or private welfare, the law courts, the governmental bodies or judicial organs, the good benefits of children will be the main concern.¹⁷¹ Children are therefore taken as a vulnerable group whose interests should be taken cognizance of as a matter of 1st priority. Article 21(3) of the Constitution adopts this and provides that all public officers and state bodies have the responsibility to report the essentials of helpless groups in the society including children.

¹⁷¹ Article 3(1) of the CRC.

Article 4 provides that States organs will accept all applicable lawmaking, governmental, and other methods of implementing the rights which are recognized by the Convention. According to the social, cultural and economic rights, the States bodies will agree to such procedures to the extreme level of the accessible resources where they are required inside the international co-operation context. Therefore, this is the recognition of the progressive realization principle.

According to Article 28 it indicates that States organs distinguish child right to education through an outlook to attaining the education right gradually on the basis of providing equal chances and they will in particular be;

- a) See to it that primary education is made free, accessible and compulsory to all.
- b) See to it that educational, career information and guidance is made available to all children and can easily access.
- c) See to it that actions are taken to inspire consistent attending of school and reduce the number of drop-outs.

These are progressive measures envisaged in understanding of the right to basic education.

Moreover, States organs will support and inspire the international cooperation in matters involving education, in precise with an outlook to contributing to the removal of unawareness and illiteracy all over the world and helping access to scientific and procedural knowledge and the modern teaching systems. In this case, specific account will be taken in the needs of developing countries.¹⁷²

Article 44 obligates States Parties to provide to the Committee, through the Secretary-General of the United Nations, reports on the procedures they have approved that will contribute effect to the rights which are accepted in the Convention and on the development made on the satisfaction of these rights in two years of the entry into force of the Convention for the State Party concerned and thereafter every five years.

However, the reports that are made will show causes and problems, if there is any and will affect the point of fulfilment of the responsibilities under the Convention. The reports will also have

¹⁷² Article 28(3) of the CRC

enough information to offer the Committee with a complete understanding of the application of the Convention in the Country that is concerned.¹⁷³

From the provisions of the Convention, progressive realization is espoused and the parameters of the rights of the child are set out. Further, steps to be taken in progressive realization are also enumerated. Finally, steps are required to report on methods approved to provide result to the rights of the child. That Kenya is a signatory to this Convention and therefore mandated to comply with this provision cannot be gainsaid.

3.3.7 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The Convention was approved and released for signing, approval and accorded by the General Assembly Resolution 34/180 of 18 December, 1979. It entered into force on 3 September 1981, in accord with Article 27(1) of the Convention. Kenya ratified the Convention on 9 March 1984.

The Article 10 obligates State organs to take all the correct processes to abolish discrimination against women by offering equal rights as with men in education sector and also ensure source of equality of men and women: however the same circumstances for vocational guidance and career, to access the studies and for the attainment of diplomas in educational formations of all groups in rural as well as in urban areas; this equality will be applied in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training; the reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely among others.

Article 18 directs States Parties to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the Convention and on the progress made in this respect within one year after the entry into force for the State concerned and thereafter at least every four years and further whenever the Committee so requests. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the Convention.

¹⁷³Article 44 (2) of the CRC

This Convention focuses on the elimination of discrimination against women in the field of education and equality of men and women. This is because; discrimination against women in various fields had been in the forefront for many years in most States. The equality is to be ensured at all levels of education including basic education. The Constitution of Kenya adopts this approach as it provides for the right ‘every child’ under Article 53.

3.3.8 The Convention on the Rights of Persons with Disabilities (CRPD)

The Convention was adopted on 13 December 2006 and was opened for signature on 30 March 2007. It entered into force on 3 May 2008. Kenya ratified it on 18 May 2008.

Article 24 recognizes the right of people with disabilities to education with an outlook to understanding the right with lack of discrimination and on the basis of equal opportunity. Article 54(1) of the Constitution is in line with this and provides that a person with any disability is entitled 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. That is the reason, the Kenyan State has developed of special institutions for persons with disabilities such as Kenya School for the Blind or the handicapped among others.

Further, States Parties are required to ensure that:

- a) individuals with disabilities are not left out from the general education system on the base of incapacity, and also children with disabilities are not excluded from free and compulsory primary education and also from secondary education, on the basis of disability
- b) people with disabilities have the rights to have comprehensive, quality and free primary education and secondary education equally with others in the societies in which they live;
- c) People living with disabilities will get necessary support, in the general education system, to help their actual education.
- d) Effective adapted support actions are delivered in the environments that make best use of academic and social development, reliable with the aim of full inclusion.

In fulfilling the right to basic education in Kenya, the Kenyan State should not exclude children with disabilities from accessing the free primary education program. It should also put in facilities and infrastructure compatible for them.

Article 35 obligates each State Party to submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned. Thereafter, States Parties are required to submit subsequent reports at least every four years and further whenever the Committee so requests.

3.3.9 The African Charter on Human & People's Rights (ACHPR)

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. It was adopted by the Organization of African Unity (now African Union) Assembly on 28 June 1981 and came into force on 21 October 1986. Kenya ratified the instrument on 23 January 1992.¹⁷⁴

Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples' Rights where Kenya is one of the State parties.

Article 17 (1) provides that every individual shall have the right to education. Conversely, this is the regional instrument for the protection of human rights in the African region. Its broad provision on the right to education is therefore not adequate.

3.3.10 African Charter on the Rights and Welfare of the Child (ACRWC)

The document was adopted by the Organization of the African Unity (OAU) now AU in 1990 and entered into force on November 29, 1999. Kenya ratified it on 25 July 2000.

Article 11 provides that every child has the right to an education, to develop his or her personality, talents and mental and physical abilities to their fullest potential. This education also includes the preservation and strengthening of positive African morals, traditional values and cultures. Governments should also take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

Article 32 establishes an African Committee of Experts on the Rights and Welfare of the Child to promote and protect the rights and welfare of the child.

¹⁷⁴ African Commission on Human and People's Rights website < www.achpr.org/instruments/achpr/ >

Article 42 gives the mandate of the Committee which includes among others to monitor the implementation and ensure protection of the rights enshrined in this Charter.

Article 43 obligates every State Party to the Charter to submit to the Committee through the Secretary-General of the African Union, reports on the measures they have adopted which give effect to the provisions of the Charter and on the progress made in the enjoyment of the rights within two years of the entry into force of the Charter for the State Party concerned and thereafter, every three years.

Every report made shall contain sufficient information on the implementation of the Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and shall indicate factors and difficulties, if any, affecting the fulfillment of the obligations contained in the Charter.

This Charter is specific on the rights and welfare of the child which includes the right to basic education.

3.3.11 United Nations Sustainable Development Goals (SDGs)

The General Assembly of the United Nations met from 25 - 27 September 2015 in New York in a summit titled: ‘*United Nations Sustainable Development Summit 2015*,’ to formally adopt the sustainable development agenda. The momentous agenda serves as the launch pad for action by the international community and by national governments to promote shared prosperity and well-being for all over the next 15 years.¹⁷⁵ On 1 January 2016, 17 Sustainable Development Goals of the 2030 Agenda for Sustainable Development officially came into force. Kenya is a Member State of the United Nations and therefore required to implement the sustainable development goals.

While the SDGs are not legally binding, governments are expected to take ownership and establish national frameworks for the achievement of the 17 Goals. Countries have the primary responsibility for follow-up and review of the progress made in implementing the Goals, which will require quality, accessible and timely data collection. Regional follow-up and review will be based on national-level analyses and contribute to follow-up and review at the global level.

¹⁷⁵ United Nations Website < www.un.org/sustainabledevelopment/summit/>

The SDGs are built on the success of the Millennium Development Goals (MDGs) and aim to go further to end all forms of poverty. Goal 4 of the SDGs ensures inclusive and quality education for all and promotes lifelong learning.

With regard to the right to basic education, Goal 4 targets are coined on the following parameters:

- a) The access to worth early childhood development, and pre-primary education
- b) Completion of free, equitable and quality primary education
- c) Elimination of gender disparities and equal access to all levels of education which include people with disabilities and children in helpless situations
- d) Acquisition of knowledge and abilities are required to support sustainable development;
- e) The building and upgrading the education amenities that are gender sensitivity, disability providing safe, non-violent, inclusive and suitable learning environments for everybody.
- f) To considerably increase the supply of experienced teachers, including through the international cooperation for teacher training mainly the Small Island developing States, developing countries and least developed countries

3.2.12 Limburg Principles on the Implementation of the ICESCR

A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg and the Urban Morgan Institute for Human Rights met in Maastricht from 2nd to 6th June 1986 to consider the nature and scope of the obligations of States parties to the ICESCR, the considered States parties' reports by the Committee on Economic, Social and Cultural Rights, and international cooperation under Part IV of the Covenant.

The participants unanimously agreed on what have become known as the Limburg Principles. The Principles became an official United Nations Document (E/CN.4/1987/17, Annex) and have been accepted and endorsed by UN bodies in the human rights field. The principles gives interpretation of the obligations and various provisions of the Covenant.¹⁷⁶

A highlight of the principles relating to the progressive realization of rights is paramount.

Principle 6 acknowledges that the achievement of economic, social and cultural rights may be realized in a variety of political settings, there is no single road to their full realization. Successes

¹⁷⁶ Covenant refers to the ICESCR

and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

Principle 11 invites a concerted national effort to invoke the full participation of all sectors of society in achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.

Interpretative Principles specifically relating to Part II of the Covenant

Article 2(1) of the Covenant obligates States to take steps by all appropriate means, including particularly the adoption of legislation; this is interpreted to mean:

- a) Obligations by the State need to be taken immediately;
- b) Appropriate means include: legislative, administrative, judicial, economic, social and educational measures;
- c) Legislative measures alone are not sufficient.¹⁷⁷

To achieve gradually, the maximum realization of the rights; this is interpreted to mean:

- a) The States parties are needed to move as expeditiously as possible to the understanding of the rights.
- b) States should not prevent indeterminately efforts to ensure full comprehension.
- c) The responsibility of the advanced accomplishment exists individually of the increase in resources; it also needs correct usage of the available resources.
- d) Progressive application can be caused not only by increasing the resources, but also by the developing of society resources which are essential for the understanding by everybody of the rights recognized in the Covenant.¹⁷⁸

To the maximum of its available resources; this is interpreted to mean:

- a) The respect for lowest maintenance rights for everyone.

¹⁷⁷ Principle 16, 17 and 18.

¹⁷⁸ Principle 21, 23 and 24.

- b) Its available resources discuss both the resources which are within the State and those that are available from the international community through international co-operation and aid.
- c) To define if correct procedures have been taken in realizing the rights, attention will be paid to reasonable and effective use of available resources and its access.
- d) The realization of rights means the approval of existing necessities and the providing of important services.¹⁷⁹

Violations under the Covenant

There will be violation of the covenant, inter alia if:

- a) The state fails to take measures that the Covenant needs it to take.
- b) The state fails to eliminate quickly the difficulties which it's undergoing on its duty to remove and authorize the immediate accomplishment of a right.
- c) The state fails to apply without delaying a right that the Covenant requires it to deliver instantly.
- d) The state willfully fails to meet the recognized international minimum standard of accomplishment that is required in its powers to meet.
- e) The state intentionally hinders the right progressive realization, except when it is performing inside the limitation authorized by the Covenant or when it has inadequate resources or force majeure;
- f) The state fails to give in reports as it is required under the Covenant.¹⁸⁰

Remarkably, these principles provide profound interpretation of progressive realization features to actualize socio-economic rights. This can be applied in Kenya to assess the progressive realization of the right to basic education. It is necessary to understand that the Kenyan State has not developed such principles or guidelines to guide on the application and interpretation of the progressive realization concept. Nevertheless, the courts in application of the right to basic education can be guided by the above principles since they are international principles applied in the implementation of the ICESCR.

¹⁷⁹ Principle 25, 26, 27 and 28.

¹⁸⁰ Principle 72

3.2.13 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

These guidelines were implemented in Maastricht in January 1997 to explain on the Limburg Doctrines as regards to the nature and scope of economic, social, cultural and economic rights violation and the correct reactions and remedies. Procedures or guidelines are considered to be useful to everybody concerned with the determining and understanding of the violations towards economic, social and cultural rights. Also providing remedies in particular, observing and judging bodies at all levels nationally, regionally and internationally.

A highlight of the procedures is explained here under:

The Obligations to Respect, Protect and Fulfil

There are three different forms of obligations on States which are imposed by the Economic, social and cultural rights. These are the obligations to respect, protect and fulfil. State failure to achieve any of these three duties establishes abuses such rights. Obligation to respect needs the States to stop from meddling with the satisfaction of the economic, social and cultural rights. Secondly, the obligation to protect also needs the States to stop such violations of rights by third parties. Lastly, the obligation to fulfill needs the States to take suitable legal, governmental, financial, judicial and other actions towards realization of such rights fully.¹⁸¹

Obligations of Conduct and of Result¹⁸²

The duty to respect, protect and fulfill each comprises the basics of duties of conduct and the results. The duty of conduct needs action sensibly calculated to understand the satisfaction of a specific right. According to the right to basic education, the duty of conduct can include the acceptance and application of the free and compulsory primary education. Results to obligation need the States to accomplish the particular objectives to content a full substantive standard. In respect to basic education right, for example, obligation results need the participation of all children to primary education to meet the objective 4 of the Sustainable Development Goals.

¹⁸¹ Principle 6 of the Guidelines.

¹⁸² Principle 7 of the Guidelines.

Margin of Discretion

Most countries like the margin of discretion when choosing ways of applying their own obligations. The States prepare and the implementation of all legal norms to existing cases and the situations by the international treaty observing bodies. Local courts have contributed to the improvement of the general minimum standards and the mutual understanding of the scope, the nature and control of economic, social and cultural rights. The full realization of many economic, social and cultural rights will merely be accomplished gradually, it does not change the nature of the legal responsibility of States which need that positive steps be taken as soon as possible and others directly. Consequently, the weight is on the State to prove that it is creating assessable progress towards the full realization of the rights which is in question. In this case, the State cannot use this progressive realization provided in Article 2 of the Covenant as a cause for not obeying nor the State can defend limitations of the rights which are documented in the Covenant due to different backgrounds such as social, religious and culture.¹⁸³

Minimum Core Obligations

The violations of the Covenant can happen when the State fails to be content with what the Economic, Social and Cultural Rights committee has mentioned to as the minimum core obligation to guarantee contentment at the very small, minimum crucial levels of every right.

Therefore, for instant, any State Party in under any important number of people is underprivileged of the best basic forms of education and is violating the Covenant. These minimum main duties apply regardless of the accessibility of resources of the state that is involved.¹⁸⁴

The Availability of Resources

In some cases the agreement with such duties can be taken by many States with a lot of simplicity, and with no important resource effects. Still, in some other cases, the maximum recognition of these rights can be influenced by the accessibility of enough materials and

¹⁸³ Principle 8 of the Guidelines.

¹⁸⁴ Principle 9 of the Guidelines.

financial resources. On the other hand, as it is recognized by Limburg Principles 25-28, and established by the emerging jurisprudence of the Committee on Economic, Social and Cultural Rights, inadequate of resources does not release the States of such least responsibilities in respect of the application of those rights which are the economic, social and cultural rights.¹⁸⁵

The Inability to Comply

When determining the actions or omissions amount to a violation of an economic, social or cultural right, it is necessary to differentiate the incapability from the reluctance of the State to observe its treaty duties. A State demanding that it is incapable of carrying out its responsibilities for some reasons outside its control has the problem of demonstrating that that is a case. For instant, a brief close of an educational institution due to an earthquake, it would be a condition outside the State control, while the removal of the free primary education programme with no suitable replacement programme can be a good of a State being reluctant to accomplish its responsibilities.¹⁸⁶

Violations through Acts of Omission

The violations of social, cultural and economic rights may also occur through the exclusion or failure of States to take the required actions stopping from legal responsibilities. The examples of such violations are:

- (a) The failure to take the necessary steps as needed under the Covenant;
- (b) The failure to change lawmaking which is noticeably unreliable with the duties of the Covenant;
- (c) The failure to apply law or put into force the strategies that are designed to implement the necessities of the Covenant.
- (d) The failure to control the activities of the individuals or groups to stop them from disrespecting the economic, social and cultural rights.

¹⁸⁵ Principle 10 of the Guidelines.

¹⁸⁶ Principle 13 of the Guidelines.

(e) Failing to apply full of the resources available to the full understanding of the Covenant;

(f) The failure to observe the recognition of the economic, social, cultural and economic rights, which include the application and development of the measures and indicators for evaluating defiance.

(g) Failure to eliminate quickly the difficulties that are under the duty to remove and permit the instant fulfillment of the rights that are assured by the Covenant.

(h) Failing to implement without delaying the rights which are mandatory by the Covenant to offer immediately.

(i) The failure to meet the established international minimum standard of success, which is in its control to meet.

(j) State failure to take into account its international authorized duties in economic, social and cultural rights sector when entering into the bilateral or the multilateral agreements with other States, multinational corporations or the international organizations¹⁸⁷

State Responsibility

The violations of economic, social and cultural rights are the norm imputable to the State within whose power they occur. As a result, the State accountability should create mechanisms to correct these kind of violations, for example, observing inquiry, trial, and medications for victims.¹⁸⁸

Access to Medications

The individuals who are the victims of the violation on economic, social or cultural right are supposed to have access to operational judicial or any other suitable medications at the national and international levels.¹⁸⁹

¹⁸⁷ Principle 15 of the Guidelines.

¹⁸⁸ Principle 16 of the Guidelines.

¹⁸⁹ Principle 22 of the Guidelines.

Instructively, these guidelines can be used in determining the abuse of the right to basic education. Article 22 of the Constitution of Kenya allows all persons to establish court proceedings demanding that their fundamental freedom or rights in the Bill of Rights has been threatened, denied or violated. It does not however set the specific violations with regard to socio-economic rights.

3.4 INSTITUTIONAL FRAMEWORK

The institutions established to enable the realization of the right to basic education in Kenya include:

3.4.1 The Ministry of Education, Science and Technology (MOEST)

The Ministry derives its mandate from the Constitution of Kenya, Chapter IV, provisions dealing with the right to education which includes children's right to access free and compulsory education.

The functions of education and training are shared among the national and the county governments as contained in Schedule 4 of the Constitution. The functions of the National Government are: education policy, standards, curriculum, examinations, primary schools, special education, the special education institutions and encouraging of sports & sports education among others. These are to be executed and managed by the Ministry.

The functions of the County Government in relation to basic education are: pre-primary education and childcare facilities

This is the central institution mandated to deliver basic education for all children in Kenya and is part of the measures put forth by the State to implement the right.

3.4.2 The National Education Board

The Board is established under Section 5 of the Basic Education Act. It is mandated to guide the Cabinet Secretary, the education department and other related departments on the procedure matters in respect to:

- a) The collaboration with the Quality Assurance and Standards Council, the Teachers Service Commission and various shareholders to encourage values in basic education and the training.

- b) To work with every appropriate authorities and agencies to make sure that all the obstacles to the right to quality education are detached and also the National and County governments to assist in realization of the right to education to all Kenyans.
- c) To initiate the procedures of approval by the Cabinet Secretary on the establishing basic education institutions.
- d) Putting appropriate measures to make sure all children join and remain in school to complete their education requirements.
- e) Putting suitable measures to make sure the appropriate, change to the next level of education, particularly for the helpless and marginalized children;

The policy directive measures envisaged in Article 21(2) are to be developed and implemented by this Board.

Section 5 (3) directs the National Education Board to make and cause to be available to the annual report on the state of education and service delivery in the country.

3.4.3 The County Education Board

Section 17 of the Basic Education Act provides for the establishment of the Education Board in a country for every County. The County Board is an agent of the National Education Board.

With regard to basic education; Section 18 of the Basic Education Act gives the functions of the County Education Boards as follows:

- a) To supervise in discussion with the county government, the operation and organization of pre-primary education which include, early childhood care and other education programmes in the County.
- b) To understand national procedures in education built on the needs of the County.
- c) To recruit proposals for rule reforms.
- d) To collaborate with the managing board, the Principals, the Head Teachers, and other suitable authorities in basic schools management.
- e) To observe the curriculum application in the basic education in every County.
- f) To observe the behavior of examinations and valuations at the basic education and also the training levels in the counties in collaboration with all the important national bodies.

- g) To cooperate with the Teachers Service Commission on teacher management in the County.
- h) To Make and submit a complete school termly annual report which includes the Educational Management Information System data to the Cabinet Secretary on all the areas of its obligation including training services and education, the curriculum, policy application and the based audit report of the school in the County.
- i) Work together with relevant organizations to make sure that all the obstacles towards the right to quality education are detached and the National Government to help in the realization of the right to education in the County.
- j) Put the appropriate procedures in place to enable all children and all school going youths within the County join and remain in school to complete their education.

The Board is put at the County level to coordinate basic education in terms of policy management as envisaged in Article 21(2).

3.4.4 Education Standards and Quality Assurance Council (ESQAC)

Section 64 of the Basic Education Act establishes the Council. The prescribed functions are as follows:

- a) To ensure standards and retain excellence in institutions of basic education;
- b) To manage rules and guidelines that are established for basic education;
- c) To supervise and manage the curriculum application and delivery;
- d) Observe the conduct of assessments and the examination in the institutions when in cooperation with County education.
- e) To monitor and assess the values and quality in basic education.

The functions of the Council are espoused in detail in the Basic Education (Education Standards and Quality Assurance Council) Regulations, 2013. This is also one of the measures implemented in similar with Article 21(2) of the Constitution with regard to basic education.

3.4.5 Kenya National Examinations Council (KNEC)

It is established by the Kenya National Examinations Council Act, 2012. Under this Section 10 of the Act, KNEC is mandated among others to:

- a) To conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels;

- b) undertake research on educational assessment;
- c) promote the international recognition of qualifications conferred by the Council;
- d) Advise the Government on any policy decision that is relevant to, or has implications on, the functions of the Council or the administration of examinations in Kenya.

3.4.6 Teachers Service Commission (TSC)

This Commission is recognized under the Article 237(2) of the Kenyan Constitution, with an obligation to register, recruit, employ, deploy and overall management of teachers in the education sector. It is also required to assess the values of education and to train people who are joining the teaching service. The commission is mandated to address the teacher welfare concerns that impede the realization of the right to basic education.

3.4.7 Kenya Institute for Curriculum Development (KICD)

This is a State Corporation established under the Kenya Institute for Curriculum Development Act No 4 of 2013.

The Institute's core function is to conduct research and develop curricular for all levels of education below the university. The Institute also develops print and electronic curriculum support materials, initiates and conducts curriculum based research, organizing and conducting in-service and orientation programmes for curriculum implementers.

It also evaluates vets and approves the curricular and curriculum support materials for basic education, as well as offering curriculum based consultancy services in basic education and training. This is the standard setting documented in article 21(2) of the Constitution.

3.4.8 National Commission for Science, Technology and Innovation

This is a Commission established by the Science, Technology and Innovation Act, 2013. The Commission is mandated to regulate and assure quality in the science, technology and innovation sector and advise the Government in matters related thereto.

Section 6 of the Act gives the functions of the Commission which include among others, development, in consultation with stakeholders, the priorities in scientific, technological and innovation activities in Kenya in relation to the economic and social policies of the Government,

and the country's international commitments and advising on science education and innovation at both basic and advanced levels;

3.5 CONCLUSION

From this chapter, it is evident that the legal, policy and institutional framework in place provides for the progressive realization of the right to basic education as this is espoused by the Constitution, the national and international instruments.

The legal framework gives the courts the guiding principles to be applied in interpretation of the actions that the State takes to implement socio-economic rights including the right to basic education. However, it has been established that there are ambiguous provisions in the law on the role of the court in determining the actions of the State.

The chapter has also found out that the progressive realization concept as established out in the Article 21(2) of the Constitution in addressing the specific measures is not clearly defined as is the case with the international instruments. Similarly, other legal provisions in the Constitution have not been given effect to; for instance, Article 21(4) of the Constitution.

From the research it is also evident that the national statutes on basic education only have general provisions which provide for the right and do not give the necessary steps and actual measures envisaged in the Constitution. Nonetheless, the international instruments are broad in their provisions and define the necessary steps to be undertaken by States and parameters to determine the broadminded and understanding of the right to basic education.

In addition, this chapter has enumerated the interpretative principles of the ICESCR and the guidelines for deter termination of violations of social and economic rights including the right to basic learning.

The institutions established in Kenya to enable the comprehension of the right to basic education have also been outlined.

In conclusion therefore, the implications of the legal, policy and institutional framework reveals the existence of gaps which need to addressed.

CHAPTER FOUR

4.0 ADEQUACY OF THE LEGAL FRAMEWORK IN KENYA IN ENSURING PROGRESSIVE REALIZATION OF THE RIGHT TO BASIC EDUCATION

4.1 INTRODUCTION

In the previous chapter, this research analyzed the current legal, policy and institutional framework for realization of the right to basic education. This chapter will thus examine the adequacy of the legal, policy and institutional framework in attaining progressive realization of the right to basic education.

The chapter will analyze the adequacy of the measures that have been put in place by the State to realize the right to basic education. Implementation of the generic obligations of the right to basic education will also be reviewed.

The research will also evaluate the free primary education program as one of the measures but specifically the adequacy of the program after the promulgation of the Constitution.

Moreover, the chapter will discuss the application and interpretation approaches taken by the courts relating to progressive realization of the right to basic education.

Lastly, the research will analyze the role of state-owned human rights institution in promotion, protection and monitoring human rights realization in Kenya, specifically the right to basic education.

4.2 HUMAN RIGHTS PROTECTION IN KENYA

The Constitution of Kenya, 2010 has a comprehensive Bill of Rights that contains all category of rights and a framework for social, economic and cultural policies. This has safeguarded the protection of all human rights in Kenya as they have been ascribed in the supreme law of the land.

The Constitution under Article 19(3) (a) prescribes that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. Therefore, the Constitution acknowledges that human rights are rights that are owed to every individual simply because they are human.

Further, Article 20(1) states that the Bill of Rights applies to all and binds all State organs and all persons. This implies the universality and paramountcy of all human rights.

Notably, the Constitution provides under Article 2 (5) that the general rules of international law shall form part of the law of Kenya. Further, Article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. All human rights treaties and conventions ratified by Kenya thus form part of the laws of Kenya, similar to the general rules of international law in the human rights realm.

4.3 THE RIGHT TO BASIC EDUCATION

Article 43 of the Constitution of Kenya provides for the economic and social rights. Subsection (1) (f) provides that every person has the right to education. Further, Article 53 of the Constitution provides that every child has the right to free and compulsory basic education thus providing for the minimum essential features of the right to education.

Similarly, Section 7 (1) of the Children's Act, 2001 provides that every child shall be entitled to education, the provision of which shall be the responsibility of the Government and the parents. Additionally, Section 7 (2) of the Act provides that every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child. The responsibility for realization of the right to basic education therefore rests on the government.

The Basic Education Act gives effect to Article 53 of the Constitution; it promotes and regulates free and compulsory basic education. This is one of the legislative measures proposed in Article 21 (2) to achieve the progressive realization of the right to education.

The national legal framework in place is also in line with international instruments that provide for the right to education. Specifically, Article 13 of the ICESCR provides that State parties recognize the right of everyone to education and that primary education shall be compulsory and available free to all.

Likewise, Article 28 of the CRC indicates that State Parties recognize the right of the child to education, and with a view of achieving the right progressively; they shall make primary education compulsory and available free to all.

The ACHPR under Article 17 provides that every individual have the right to Education. In the same regard, the ACRWC under Article 11 provides that every child has the right to education to develop his or her personality, talents, mental and physical abilities to their fullest potential.

It is therefore evident that the right to basic education has been recognized and protected in the Constitution, statutes and international instruments. Realization of the right to basic education is satisfaction of the minimum core obligations with regard to the right to education. Nevertheless, these are general legal provisions on the right to basic education which should be free and compulsory.

4.4 PROGRESSIVE REALIZATION OF THE RIGHT TO BASIC EDUCATION

Economic, social and cultural rights require affirmative government action for their realization. They can thus not be realized immediately; they are assessed by the progressive realization standard. The right to basic education is no exception.

Progressive realization simply means that the right cannot be realized immediately. It means that the State must take steps to achieve the goal of the Constitution by effectively meeting the basic needs of all in the society. The principle is based on the acknowledgement that States may not have adequate resources to immediately take all steps needed to assure optimal exercise of ESC rights. The obligations imposed means that the States need to take steps through deliberate, concrete and targeted action towards the fulfillment of the rights which must be accomplished as expeditiously and effectively as possible. In this case, the State has to fulfill its obligations with regard to the right to basic education.

An analysis of the steps taken by the Kenyan government to progressively realize the right to basic education is paramount:

4.4.1 Development of Institutions

In Kenya, the Ministry of Education, Science and Technology (MOEST) has been established as one of the government ministries. The principal mandate of the Ministry with regard to basic education is to implement Articles 43, 53 and 54 of the Bill of Rights in the Constitution. Overall, the Ministry is responsible for education management, development of policy, early childhood, education standard and norms, national examination & certification, curriculum development, primary education and special needs.

Under the Ministry, there are various education boards, councils and associations as elaborated in chapter three that have been set up to give effect to the mandate of the Ministry. The Ministry is expected to implement the objects and goals of these institutions so as to give effect to the Constitutional provisions pertaining to education and training of Kenyans.

Having the Ministry in place and the governance structures under it is one of the measures put in place as envisaged in Article 21(2) to progressively realize the right to basic education.

4.4.2 Financial Resources

Implementation of socio-economic rights depends on resource availability. Over the past few years, the Kenyan State has mobilized and put in a considerable amount of resources in the education sector. For instance, in the 2013/2014 national budget, out of the 1.6 trillion budget, 273.7 billion was allocated to the education sector including free primary, secondary education and school feeding program.¹⁹⁰

Similarly, in the 2014/2015 national budget, 294.6 billion was set aside for the education sector. This translated to 27.3% of the total budget of 1.64 trillion.¹⁹¹

Further, in the 2016/2017 budget estimates of Kshs.2, 479.4 billion given on 8 June 2016, 339.3 billion was allocated to the education sector. Out of the 339.3 billion, Kshs. 13.4 billion is set for free primary education. This clearly shows that there has been an increase in financial resources channeled to the free primary education program. The government therefore recognizes the importance of realizing the right to education and has thus mobilized resources for its implementation. The Limburg principle denote that in determining whether adequate measures

¹⁹⁰The National Budget in 2014/2014 at a Glance, July/August 2013, *142 ADILI Newsletter*, available at <<http://www.tikenya.org/phocadownload/userupload/adili%20newsletter%20issue%20142.pdf>>

¹⁹¹ CNBC Africa, Education, ICT and energy take biggest share in Kenya's budget, available at <<http://www.cnbc.com/news/east-africa/2014/06/12/education.-ict-and-energy-take-biggest-share-in-kenya%E2%80%99s-budget/>> at 12 June 2014

have been taken for the realization of rights; attention should be paid to equitable and effective use of and access to the available resources.

In Kenya, reports indicate that there has been massive embezzlement of the funds for the program hence non-effective utilization of the funds to actualize free primary education.¹⁹² As a result, the current challenges facing the basic education sector continue to exist. This includes dilapidated infrastructure in most schools, shortage of adequate facilities and equipment among others.

Suffice to say, it should be noted that the obligation of progressive achievement exists independently of the increase in resources. It requires effective use of resources available, this is not the position in Kenya. Similarly, progressive implementation can be effected not only by increasing resources but by the development of societal resources.

4.4.3 Implementation of the Generic Obligations

All human rights recognize certain standards that need to be achieved. The State therefore has various obligations in order to satisfy these human rights standards. The States' generic obligations can be summarized as: the obligation to respect, protect and fulfill the related human rights standards. This is recognized in Article 21 (1) of the Constitution of Kenya. With regard to the right to basic education in Kenya, the legal framework that safeguards these obligations and its implementation thereof is discussed hereunder:

Obligation to Respect

The obligation to respect requires the State to avoid measures that hinder or prevent the enjoyment of the right to education. Article 20 (2) of the Constitution of Kenya safeguards this by providing that: 'Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedoms.'

Similarly, Article 24(1) provides that a right or fundamental freedom in the bill of rights shall not be limited except by law, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

¹⁹² A system Examination Report of the Systems, Policies and Procedures of the Free Primary Examination Program: conducted by EACC, launched 2016.

Section 29 of the Basic Education Act prohibits public schools to charge or cause parents to pay tuition fees for or on behalf of pupils in schools as a measure that hinders the enjoyment of the right to free primary education. In the same manner, Section 32 of the Act prohibits payment of admission fees to a public school or a basic education institution. Additionally, Section 39 obliges the Cabinet Secretary to ensure that children belonging to marginalized, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education.

Regulation No. 44 of the Basic Education Regulations, 2015 prohibits public schools and other institutions to issue alternative fees structures other than those approved by the Cabinet Secretary.

Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD) recognizes the right of persons with disabilities to education. State parties are required to ensure that persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability.

However, violations arising from the failure to avoid measures that hinder or prevent the enjoyment of the right to education are not adequately addressed in the legal framework.

The obligation to Protect

The obligation to protect requires State parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. Article 22(1) of the Constitution of Kenya allows every person the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.

Regulation No.45 of the Basic Education Regulations, 2015 restricts the Board of Management in a public institution of basic education and training in Kenya to alter or increase fees without written authority from the Cabinet secretary.

To assess the measures taken to protect the right to basic education, the Limburg principles on the implementation of the ICESCR will be informative. principle 72 provides that it will be a violation of the Covenant if a State party inter alia; fails to remove promptly obstacles which it is

under a duty to remove to permit the immediate fulfillment of a right. Similarly the violations approach entrenched in the Maastricht guidelines can be used in the assessment; specifically violations through acts of omission by the State. The failure to regulate activities of individuals or groups so as to prevent them from violating the right to basic education will be a violation.

The obligation to Fulfill

This is the key State obligation with regard to socio-economic rights. It incorporates both an obligation to facilitate and an obligation to provide. The obligation to facilitate requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Obligation to provide requires States parties to provide for the right to education themselves by means at their disposal.

Article 21 (2) of the Constitution of Kenya denotes that the State shall take legislative, policy, and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43 which includes the right to education. This means the State (including all its organs) are enjoined to take measures for realizing socio-economic rights. This provision therefore covers the executive, legislative and judicial branches of the State; as well as constitutional commissions, independent offices; and county governments.

In implementing the legislative measures: the Kenyan State has provided for the right to basic education in the Constitution, the Children's Act and the Basic Education Act. This is also part of the steps envisioned in Article 2 of the ICESCR which requires State parties to take steps, including the adoption of legislative measures with a view to achieving progressively the full realization of the rights recognized in the Covenant.

Instructively, one of the measures proposed in the ICESCR and the CRC as a means of achieving the full realization of the right to education is to make primary education compulsory and available free to all. Article 53 (1) (b) of the Constitution recognizes this and provides that every child has the right to free and compulsory basic education. The Basic Education Act was thus enacted to give effect to the requirements of Article 53 of the Constitution, to promote and regulate free and compulsory basic education in Kenya. This is also in line with the Children's Act which under Section 3 obligates the government to take the necessary steps to the maximum

of its available resources with a view to achieving progressively the full realization of the right of the child.

However, as already noted that Article 21(2) is not specific on the steps to be taken to achieve the progressive realization of the right to basic education as is set out in the ICESCR. Good reference can be got from the South African Constitution which provides that everyone has the right to a basic education, including adult basic education and to further education, which the State, through reasonable measures, must make progressively available and accessible. The measures identified are reasonable which are to be made available and accessible over time. Further, the Limburg principles provide a good reference for interpretation of the concept of progressive realization which has not been provided.

The fact that the basic education sector is still experiencing basic challenges like lack of teaching materials in most schools 6 years after the promulgation of the constitution is evident that the obligation to fulfill is not being actualized.

4.4.4 Free Primary Education Program

To give effect to the aforementioned provisions, the Kenya government put in place the free primary education program (FPE) from 6th January 2003. The main objective of this programme was to make primary education accessible to all children irrespective of their economic backgrounds. This is in fulfillment with the legal standard of the right to education which requires that the State makes access of all to education on the basis of equality and non-discrimination.

Further, to ensure full and quality participation, the Kenya Government provided funds for purchase of all teaching learning materials, teachers' salaries, and funds for capacity building programmes for education managers to oversee programme implementation. All levies and fees hitherto charged in primary schools were abolished.

The free primary education policy has thus been described as laudable¹⁹³, because of its effect on gross enrolment rate (GER) which increased from 92% in 2002 to 104% in 2003 of the school

¹⁹³KENPRO, 'Challenges Facing the Implementation of Free Primary Education in Kenya,' (2010) *KENPRO Online Papers Portal* available at <www.kenpro.org/papers>

age children population,¹⁹⁴ resulting in more than 1.5 million children who were previously out-of-school joining primary schools. The program was put in place as a means of satisfying the essential features of the right to education which include: availability, accessibility, acceptability and adaptability.

According to the Draft Education Sector Report 2016/17 – 2018/19 MTEF Budget Report,¹⁹⁵ at the primary education level, the continued implementation of free primary education program has seen an increase in enrolment from 9.5 million (4.89 million Male and 4.67 million Female) in 2011 to 9.76 million (4.97 million and 4.78 million male and female respectively) in 2012 . The enrolment increased to 9.86 million (5.02 million and 4.84 million male and female respectively) in 2013 and further to 9.9 million (5.1 million male 4.9 million female) in 2014. The government has also made provision of bursaries by both the national and county governments to the vulnerable groups of learners.

Further, huge progress has been made in ensuring that children remain in school and complete primary cycle of education. Primary completion rate has increased from 83.2% in 2009 and improved to 83.9 (85.8 boys and 82 % girls) in 2013.¹⁹⁶

As a result of the program, access to education in the country has greatly improved; there has been increase of primary schools across the country and enrolment. The education sector has also made significant progress towards enhancing quality, retention, completion and gender parity as well as ensuring adequate supply of qualified human resources required by the labor market.

Notably, under the FPE programme, every pupil is entitled to free writing materials e.g. pencils, pens and exercise books. Reports indicate that in most schools, textbooks are shared in the ratio of one textbook to five pupils. Sharing of textbooks affects accessibility to the books while at home and many students have to do their homework early in the morning the next day when in school. This says something about the amount of work the teachers have to give to the pupils.¹⁹⁷

As a result, access to education materials is one of the components required to facilitate

¹⁹⁴Otachi O, 'Abolishing school fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi and Mozambique,'(2008)

¹⁹⁵ Supra n. 178.

¹⁹⁶ Supra n. 178.

¹⁹⁷ Supra n. 180.

fulfillment of the right to basic education. The challenges experiences affect progressive realization of the right.

Similarly, the program has been bedeviled with a number of challenges that have hampered the implementation of the essential features of the right to education.¹⁹⁸

These include: congested classrooms, limited physical facilities, inadequate and dilapidated infrastructure across all levels, inadequate library resources, insufficient equipment & instructional materials and shortage of qualified teachers, which negatively impact on the quality of teaching and learning on one hand and contribute to indiscipline in schools on the other.¹⁹⁹ Many schools still require renovations of the existing facilities and additional classrooms to be able to cope with the increased enrolments. There has also been delays in disbursing funds to support free primary school education which have frustrated many teachers and put pressure on parents' financial burdens.

Other challenges for the government in providing universal primary school education include uneven distribution of teachers in Kenyans schools. There are also disparities in access to quality education based on gender, language, disability, special groups and region. Further, there has been perennial teachers strike due to poor salaries paid to teachers and this has affected fulfillment of the right to basic education.²⁰⁰

As a result of these challenges, more of the poorest children in Kenya go to public primary schools; the number of children in private primary schools has nearly tripled and school results and overall enrollment in some public primary schools have fallen.²⁰¹

These challenges relate to the resources required to progressively realize the right to basic education. Since they include the infrastructure, facilities, financial resources and human resources that ought to be adequately provided by the State to progressively realize the rights. Its impediments therefore strongly affect the realization of the right to basic education.

¹⁹⁸UNESCO, 'Challenges of Implementing Free Primary Education in Kenya: Assessment Report., Kenya- Nairobi: Ministry of Education, Science & Technology,' (2005).

¹⁹⁹Okwach, A. and George, O, 'Efficiency of Primary Education in Kenya: Situational Analysis and Implications for Educational Reform' (1997) *Nairobi: Institute of Policy Analysis and Research*.

²⁰⁰ Supra n. 178.

²⁰¹ Supra n. 185.

The challenges notwithstanding, it can be noted that there is considerable progress in basic education sector in Kenya but still more has to be done to address the challenges and work towards the full realization of the right to basic education.

4.4.5 Policy Matters

For policy directions, the Ministry of Education, Science and Technology together with the National Education Board, the County Education Board, the Education Standards and Quality Assurance Council and the Kenya Institute for Curriculum Development (KICD) are responsible for inter alia: education policy management; management of education standards and norms; curriculum development; quality assurance in education; teacher education and management and special needs education management.

In addition, Kenya Vision 2030 identifies education as key within the social pillar to steer Kenya into middle-level income country in 20 years. With regard to basic education, Kenya aims to be a regional center of research and development in new technologies. This will be achieved through: integrating early childhood education into primary education; modernizing teacher training; strengthening partnerships with the private sector and developing key programmes for learners with special needs.²⁰²

According to the second MTP of Vision 2030, the government aims to continue strengthening access to universal primary education; the introduction of universal access to computers starting with standard one in 2014; promotion of wider use of ICT as an instrument of instruction and training in schools; lowering of the student/teacher ratio by more recruitment of teachers, and provision of more textbooks and teaching equipment to schools. Education in ASAL counties will be enhanced through special programmes.²⁰³

In the second MTP, the government recognizes that significant progress was made under First MTP but several challenges persist and in particular, quality.²⁰⁴ Further, the universal access to computers has had several challenges until its enrolment in around May 2016.²⁰⁵

²⁰²Kenya Vision 2030.

²⁰³Right to Education Country Factsheet, March 2014, available at <http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Right_to_Education_Country_Factsheet_Kenya_2014.pdf> accessed 16 November 2016.

²⁰⁴Ibid.

²⁰⁵Tom Otieno, 'Kenya: Primary School Pupils Finally Get Much-Awaited Laptops' *Daily Nation*, 4 May, 2016.

The Government will therefore need to focus on addressing low enrolment in areas that remain below the national average, retain students in school up to 18 years, provide education more effectively through a digital platform, and match education and training with the demand for the skills required in the workplace. In addition, the Government will need to hire additional teachers in order to lower pupil-teacher ratio and improve quality as well as ensure that teachers devote the required time to teaching and learning.²⁰⁶

The Policy Framework for Education and Training (2012) is also one of the policy framework put in place by the State. It aims at addressing issues related to quality, service delivery, curriculum, relevance, teacher development and management at all levels as well as trainers in the areas of technology and entrepreneurial skill development.

Notably, the National Education Board has been instrumental in the development of annual status reports on education & service delivery and policy advisories on education. Similarly, there are various milestones reported by the County Education Boards; for instance, the re-registration of both primary and secondary schools.²⁰⁷ Nonetheless, not much has been done by the Boards to evaluate and monitor the free primary education program at a policy level to assess its effectiveness and challenges and thereafter provide recommendations for improvement save for the development of policy advisories which are not eventually implemented. Similarly, the County Education Board has not provided much with regard to policy management of basic education at the County level and yet this is the central institution that is mandated to coordinate and monitor education on behalf of the national and county government by initiating policy reforms among other functions.

Further, there have not been much efforts to give policy directions and management to improve the free primary education by the Education Standards and Quality Assurance Council. During the Education Standards and Quality Assurance Council staff meeting held on 12th January 12, 2016The Cabinet Secretary of the Ministry of Education, Science and Technology in Kenya

²⁰⁶ Supra n. 202.

²⁰⁷ Supra n. 178.

expressed the need for adoption of creative and innovative techniques in ensuring standards and maintaining quality in institutions of basic education. He said the teaching and learning environment was dynamic given the digitization of teaching, learning and also the content of education. Education managers therefore need to be creative and innovative by developing and adopting new learning and teaching modes.²⁰⁸

4.4.6 Role of the Judiciary

Socio- economic rights are justiciable rights but there is need for progressive realization, taking into consideration the specific circumstances of the State.²⁰⁹

However, it is argued that matters touching on allocation of resources should be left to the political authorities rather than the courts.²¹⁰ This is principally on the need for respect to the doctrine of separation of powers and that the Executive is better equipped to determine fiscal and economic policies. Since protection of these rights requires positive action by the State, it involves decisions about the allocation of State resources which courts do not have the expertise or information to make.²¹¹

Nevertheless, exclusion of the courts would be arbitrary and incompatible with the principle that all human rights are indivisible and interdependent. It would curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in the society.²¹² The judiciary therefore has a critical role in realization of rights. Specifically it has an obligation to ensure the progressive realization of economic and social and cultural rights is enforced.

Article 22(1) of the Constitution of Kenya gives every person the right to institute proceedings claiming that a right or fundamental freedom has been denied, infringed, violated or is threatened.

Further, Article 20(5) of the Constitution of Kenya gives the guiding principles to be applied by the courts in interpretation of socio-economic rights provided under Article 43. It provides that:

²⁰⁸Dr Matiang'i calls on council to ensure provision of quality education, available at <<http://www.mygov.go.ke/?p=5569>> accessed 16 November 2016.

²⁰⁹PLO Lumumba (ed.) 'The Constitution of Kenya: Contemporary Readings,' (2011) 65.

²¹⁰Phillip Alston and Ryan Goodman, 'The Successor to International Human Rights in Context: Law Politics and Morals,' (2013) 322.

²¹¹ Ibid at 334.

²¹² Ibid at 322.

If the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles:

- (a) It is the responsibility of the State to show that the resources are not available;
- (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- (c) The court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

Notably, Article 23 (1) of the Constitution of Kenya gives the High court jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

To that end, an analysis of the Kenyan court's interpretation and application of the concept of progressive realization of socio-economic rights is imperative.

Interpretation of the Progressive Realization Principle

The constitutional basis of the courts' decisions on progressive realization is Article 21(2) which requires the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43. The wording of Article 21(2) is that the State 'shall' implement the rights. The Supreme Court of Kenya has had an occasion to explain the use of the word 'shall' in relation to progressive realization *in the Matter of the Principle of Gender Representation in the National Assembly and the Senate*.²¹³ It stated that:

The expression "progressive realization", as apprehended in the context of the human rights jurisprudence, would signify that there is no mandatory obligation resting upon the State to take particular measures, at a particular time.....save where a time-frame is

²¹³*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, Advisory Opinion Application No. 2 of 2012.

prescribed. And any obligation assigned in mandatory terms, but involving protracted measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, is not necessarily inconsistent with the progressive realization of a goal....The word “shall” in our perception, will translate to immediate command only where the task in question is a cut-and-dried one, executed as it is without further moulding or preparation, and where the subject is inherently disposable by action emanating from a single agency. But this word “shall” may be used in a different context, to imply the broad obligation which is more institutionally spread-out, and which calls for a chain of actions involving a plurality of agencies; when “shall” is used in this sense, it calls not for immediate action, but for the faithful and responsible discharge of a public obligation; in this sense, the word “shall” incorporates the element of management discretion on the part of the responsible agency or agencies...From that analogy, we perceive the word “shall” as an emphasis on the obligation to take appropriate action, in the course of the progressive realization of a right conferred by the Constitution.

From the court’s pronouncement, it can be denoted that the expression ‘progressive realization’ is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.²¹⁴

Nevertheless the court failed to come up with a clear definition of the progressive realization standard. It only provided directions on what it should entail and that there is no mandatory obligations resting upon the State to take particular measures to realize a right. The Supreme Court gave approach to be used by the courts in determining the measures that are to be undertaken by the State taking cognizance of the prevailing circumstances. It follows therefore that Article 21(2) of the Constitution does not require a particular measure to be taken and neither does it set a particular time frame within which the socio-economic rights are to be realized.

²¹⁴The meaning has also been explained with reference to the *Concise Oxford English Dictionary*.

The Nature and Extent of the Right to Education

In the case of *Gabriel Nyabola v Attorney General & 2 others*²¹⁵ the court was tasked among other things to determine the nature and extent of the right to education and the State obligation under the constitution, local and international law.

The court indicated that the right to education is one of the new generations of fundamental rights protected under the Constitution. Under the UDHR and the ICESR, the right is recognized as directed to the full development of the human personality and the sense of its dignity. An analysis of the provisions of the Constitution, the Children's Act, Basic Education Act and the international laws imposes on the State an obligation to provide free and compulsory basic education.

The court further noted that progressive realization of the right to education does not mean mere paper policies but deliberate and concrete steps taken to achieve free basic education for all on a non-discriminative basis, deployment of maximum available resources to ensure realization, avoid retrogressive measures and monitor enjoyment of the right. Further, free and compulsory basic education guaranteed to every child under Article 53(1) (b) of the Constitution includes both primary and secondary education as provided by the Basic Education Act, 2013.

Here the court adopted a purposive and liberal approach in the interpretation of the nature and extent of the right to education. The following directives can be derived from the decision of the court:

- a) That it is the obligation of the State to provide free and compulsory basic education;
- b) The State has the burden of proof to illustrate that it has taken deliberate and concrete steps to achieve the right to basic education;
- c) That maximum resources were deployed to ensure realization of the right to basic education;
- d) The State is prohibited from retrogressive measures;
- e) The State is also tasked to monitor enjoyment of the right.

The court applied the Limburg Principles on the interpretation of what is the progressive realization measures required to effect the right to basic education.

²¹⁵*Gabriel Nyabola v Attorney General & 2 others* ²¹⁵[2014] eKLR.

Interpretation of the Generic Obligations with regard to the Right to Education

The court in *John Kiplangat Barbaret & 3 others v Attorney General & 4 others*²¹⁶ indicated that Article 21 (1) of the Constitution, places a fundamental duty on the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. By failing to support the efforts of the marginalized community to realize their right to education, the State acted retrogressively and occasioned the curtailment and the enjoyment by the petitioners, and students of the school, their right to education and also prevented them from benefitting from the law. By this the state was violating the generic obligations with regard to the right to education which is a violation of the Constitution and also provided by the Maastricht Guidelines.

Moreover, the court in this case applied the principle of equality and inclusiveness in the realization of the right to education.

Best Interest of the Child

In most children cases, the court has in several instances provided that the best interest of the child is always of paramount importance.

In the matter of *K v D A L*²¹⁷ the issue was whether the court could set aside orders of payment of school fees at a specified school, transfer of the subject children from one school to another and stay of proceedings pending appeal. The court held that: 'Needless to say that orders for maintenance of children and relating to their education cannot be stayed. Stay of such orders would not be in their best interests. Children have a fundamental right to education. They must be kept in school. Staying the orders would have the effect of forcing the children out of school.'

The court took cognizance of Article 21(3) of the Constitution which places children among the vulnerable groups in society. Their interests thus have to be addressed by the State in implementation of rights and fundamental freedoms. As such, as a first step towards determining progressive realization of basic education; the best interests of the child have to be considered since they are the beneficiaries of this right.

²¹⁶*John Kiplangat Barbaret & 3 others v Attorney General & 4 others*²¹⁶[2014] eKLR

²¹⁷*K v D A L* [2014] eKLR

Availability of Resources

The court has a role to play in assessing the availability of resources. This is because all socio-economic rights would be deprived of their meaning if the government was allowed to determine the extent of its own obligation through its budgetary policies.²¹⁸

The High Court addressed this issue in *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others*²¹⁹ and noted that the realization of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. However, one of the obstacles to the realization of this objective is limited financial resources on the part of the Government.

In the court's opinion, the available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. This was a limited approach adopted by the Court in determining that limited financial resources can be an excuse for non-implementation.

There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual. By stating that the available resources are not adequate, the court appeared to take judicial notice of unavailability of resources. On the contrary, Article 20(5) of the Constitution requires that if the State claims that it does not have the resources to implement the right, it is the responsibility of the State to show that the resources are not available. In the instant case, the pleadings did not disclose any such claim. The State did not claim that the resources were inadequate and consequently did not adduce any evidence to that effect. The court appeared to imply that the State need not allege inadequacy or unavailability of resources and that the court can take judicial notice of that.²²⁰ This kind of judicial thinking does not promote the spirit, purpose and object of incorporating the concept of progressive realization into the constitution.

²¹⁸Seth Muchuma Wekesa, 'Right to clean and safe water under the Kenyan Constitution 2010', (2012) Vol 14 *ESR Review* 5, available at <<http://www.riarauniversity.ac.ke/wp-content/uploads/2013/06/wekesa-ESR-Reviewvol-1.-14-no.-1-2013-copy.pdf>> at 20 January 2014.

²¹⁹*John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* [2011] eKLR.

²²⁰John Okome Arwa, 'Litigating Socio-Economic Rights in Domestic Courts: The Kenyan Experience,' available at <<http://kelinkenya.org/wp-content/uploads/2010/10/LITIGATING-SOCIO-ECONOMIC-RIGHTS-3.pdf>> accessed 20 January 2014.

Nevertheless, in *Musa Mohammed Dagane & 25 others v Attorney General & another*, the petitioner claimed infringement of the constitutional right to adequate housing following forced eviction, the High Court stated that the State must take all appropriate measures taking into consideration the available resources to ensure that adequate alternative housing, resettlement and/or access to basic amenities is available.²²¹

This court appreciated and respected the fact that full realization of socio-economic rights can only be achieved by taking into account the available resources.

Taking Steps for Realization of Socio-Economic Rights

The High Court has in several cases adopted a liberal and purposive approach on the issue of the need to take steps towards realization of these rights. In the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*²²², Mumbi Ngugi J. observed that,

The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the State *feels* it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be ‘*progressive realization*’ of social economic rights, implying that the State must begin to take steps, and I might add *be seen* to take steps, towards realization of these rights. Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the State, when confronted with a matter such as this, to go beyond the standard objection.... Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.”²²³

²²¹*Musa Mohammed Dagane & 25 others v Attorney General & another*, [2011] eKLR.

²²²*Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi High Court Petition No. 164 of 2011 (Unreported).

²²³See also *In the matter of the Principle of Gender Representation in the National Assembly and the Senate* SCK Advisory Opinion No. 2 of 2012 [2013]eKLR, *Jeffer Isaak Kanu v Ministry of Justice, National Cohesion and Constitutional Affairs & 3 others*, Nairobi Petition 556 of 2012, *New Vision Kenya & 3 Others v Independent Electoral and Boundaries Commission & 4 Others*, Nairobi H. C. Constitutional Petition No.331 of 2012.

This statement by the court brings out very important aspects on what the obligation to take steps includes;

(i) That the Constitution does not intend that steps to progressive realization will only be undertaken when the State feels like doing so.

(ii) That the State must not only begin to take steps but must also be seen to do so.

(iii) That the State has an obligation to show how it is addressing or intends to address the progressive realization of the rights and show the policies it is taking and how the policies will benefit the citizens in realization of their rights.

The High Court expressed similar sentiments in the case of *Mathew Okwanda v Minister of Health and Medical Services & 3 Others*²²⁴ by stating that ‘even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question.’ This are the actual steps that can be measurable.

In *Susan Waithera & 4 Others v the Town Clerk, Nairobi City Council and 2 others*,²²⁵ Musinga (J) was adamant that eviction should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State must take all reasonable measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land.

Remarkably, in *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & Ors*,²²⁶

The High Court of Kenya determined that the government had failed to demonstrate concrete policy measures, guidelines and the progress made towards the realization of economic rights and particularly the right to education. The Court stressed that the government should set out clear policies that are indicative of their appreciation that socio-economic rights are here to stay and that the defense of progressive realization may not be here for too long.

²²⁴*Mathew Okwanda v Minister of Health and Medical Services & 3 Others* Nairobi High Court Petition No. 94 of 2012, Para. 16.

²²⁵*Susan Waithera & 4 Others v the Town Clerk, Nairobi City Council and 2 others* [2011] KLR.

²²⁶*Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & Ors* [2013] eKLR, Petition No. 133 of 2013.

Legislative Measures

With regard to legislation, the Supreme Court has noted that the passage of legislation to redress an injustice, or to deliver public goods, is not the single execution-oriented act that can be discharged immediately upon command. It is, inherently, a process and must run over time, in the context of supportive measures, and responsible exercises of discretion. It involves the conduct of studies, and the development of legislative proposals. The development of legislation is no longer the preserve of Parliament, or the legal draftspersons in the State Law Office. Public participation in the legislative process is a constitutional imperative.²²⁷

Standard setting is also identified as one of these measures, and it highlights the State's responsibility to demonstrate progressive realization of rights.²²⁸

On top of declaring the rights of the litigants, the court has a duty to follow up its decisions in order to ensure that the litigants enjoy the fruits of the court award.

The court in *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 Others*²²⁹ issued post-judgment directives that the respondent files existing or planned State policies and legal framework on forced evictions and demolitions in Kenya generally and whether they are in line with acceptable international standards and the measures the Government has put in place towards the realization of the right to accessible and adequate housing and to reasonable sanitation in Kenya as is the expectation of Article 43(1) (b) of the Constitution. It directed the State to come up with a programme of eviction.

It is this kind of judicial thinking that can ensure expedient but progressive realization of social and economic rights as envisaged in the Constitution.

Standard of Reasonableness

Notably, the South African Constitutional Court in its application of socio-economic rights have rejected the minimum core approach concept as a guide. It said that it understood the minimum core obligation to refer to the needs of the most vulnerable group of people. The Court observed

²²⁷*Supra* n 199, Para. 65.

²²⁸*The Constitution of Kenya*, Art 21(2).

²²⁹*Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 Others*, High Court Petition No. 65 of 2010, Para. 32.

that the needs and opportunities for the enjoyment of social and economic rights vary to a great extent according to income, unemployment, availability of land and poverty. They also depend on the economic and social history and circumstances of a country. Therefore, detailed information is required to determine the needs and opportunities for the enjoyment of a right. This kind of detailed information is not available for determining what the minimum core obligation in the context of the South African Constitution would entail.²³⁰

As a result the Court developed a standard of review for assessing compliance with constitutional obligations in the area of social and economic rights by the South African governmental authorities. This standard of scrutiny, the reasonableness test, allows for an assessment of the reasonableness of the measures taken by the government to realize social and economic rights within its available resources. The Court in the *Grootboom* case laid down the criteria or elements of the reasonableness test as follows: first, a reasonable program must allocate tasks and responsibilities among different spheres of government (national, provincial, local) and provide them with the necessary financial and human resources to carry out their respective legal obligations created by legislation.²³¹

Secondly, although legislation will often be required, it is in itself not enough. Legislation must be complemented by policies and programs that are reasonable in conception and implementation. These should be coordinated, coherent and comprehensive. Such policies and programs must be capable of facilitating the realization of a right.²³²

Thirdly, reasonable measures must take into account the social, economic and historical context and background of the situation which the policy aims to address. In addition, a program must be flexible and cater for the alleviation of needs over the short, medium and long term. A reasonable program must not exclude a significant segment of society.²³³ Furthermore, it is essential that for the measures to be considered reasonable.²³⁴

The Court also interpreted the term ‘within its available resources’ as used in the Constitution of South Africa to mean that the State is not obliged to do more than what its available resources

²³⁰ *Government of the Republic of South Africa v Grootboom*²³⁰2000(11) BCLR 1169 Par, 31-33.

²³¹ *Ibid*, Par, 39-40.

²³² *Ibid*, Para 41, 42.

²³³ *Ibid*, Para 43.

²³⁴ *Ibid*, Para 44.

permit. This means “that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources”.²³⁵ Moreover, the Court endorsed the interpretation of the UN Committee that the notion of progressive realization must be understood to impose an obligation to move as expeditiously and effectively as possible towards the full realization of rights.²³⁶

Suffice to say, although the reasonableness test as developed by the South African Constitutional Court has been welcomed by commentators,²³⁷ some critical observations can be made relating to some of its characteristics from the perspective of providing effective protection of social and economic rights. It can be argued that the concept of reasonableness is inherently vague. What is reasonable depends on context. Is it possible to identify the programs that governmental authorities are supposed to set up and implement in order to satisfy the needs of separate vulnerable groups? Reasonableness is an elastic concept that can be given different interpretations according to one’s position. The government may be inclined to ‘sell’ its policy, arguing that it is acting reasonably.²³⁸

It has been said, however, that reasonableness seems to stand in for whatever the Court regards as desirable features of State policy. Similarly there have also been fears that the Court will overstep its legitimate role by prescribing policy decisions to the government.²³⁹ This may raise issues of the separation of powers between the various branches of government.

²³⁵Grootboom, para. 46. The Court added: “There is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.”

²³⁶ Grootboom, para. 45, quoting General Comment no. 3, para. 9 of the UN Committee.

²³⁷Cass Sustein, ‘Social and Economic Rights? Lessons from South Africa,’ (2001) 11:4 *Constitutional Forum*, 123.

²³⁸Fons Coomans, ‘Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court, available at <http://www.zaoerv.de/65_2005/65_2005_1_a_167_196.pdf> accessed 16 November 2016.

²³⁹Bilchitz D, ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence,’ (2003) 19 *South African Journal on Human Rights*.

Another characteristic of the reasonableness test is that this method of review seems to shy away from granting immediate individual relief in the cases brought to the Court.²⁴⁰ Granting immediate relief for individuals is possible under the minimum core obligations approach as developed by the UN Committee.²⁴¹

Moreover, it has been argued that the standard of reasonableness review is difficult to define and apply in practice. Liebenberg, for example, has argued that it is unfortunate that the Court in *Grootboom* did not clarify that the test of reasonableness would apply to all policies and processes that determine the overall availability of resources, the allocation of resources between the local, provincial and national spheres of government, as well as the level of resources allocated to particular spheres of government.²⁴² In addition, who determines the level of resources available and for what purpose in relation to other legitimate governmental goals? Where do resources come from? Do the constitutional provisions on social and economic rights oblige a reallocation of resources from one sector of the domestic budget to another, for instance from military expenditure to social services, or from transport to housing? It is also possible to move resources from one sector within a governmental department to another, for example from higher education to primary education. Another option would be to move resources among social welfare budgets, say more resources for education, less for social assistance.²⁴³

Instructively, most of the Kenyan courts have relied on this standard of reasonableness, in the interpretation of the concept of progressive realization. For instance, in *Consumer Federation of Kenya v AG & 4 Others*²⁴⁴ the court stated that in considering whether a right under Article 43 of the Constitution has been infringed, what the court should consider is whether the measures adopted by the State are reasonable or not in the circumstances. Similar reasoning was followed in *John Kabue's Case*.

²⁴⁰Liebenberg S, 'South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6 *Law, Democracy and Development*.

²⁴¹ *Supra* n. 237.

²⁴²Liebenberg S, 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa,' (2001) 17 *South African Journal on Human Rights*.

²⁴³ *Ibid*.

²⁴⁴*Consumer Federation of Kenya v AG & 4 Others*, Nairobi High Court Petition 88 of 2011.

Nevertheless, jurisprudence from the Kenyan courts has failed illustrate that the courts have been able to come up with a common standard of interpretation of the progressive realization principle unlike the South African Courts approach to reasonableness albeit its challenges. Article 21(2) of the Constitution of Kenya is broad in its provision of the progressive realization principle unlike the South African's Constitution which provides that realization of a right will be made through reasonable measures, made progressively available and accessible.

Kenya is also a signatory to the ICESCR; therefore in interpretation of the progressive realization principle, reference should be made to the provisions of the Covenant in regard to the same and the reasonable measures approach.

4.4.7 State – Owned Human Rights Institutions

While corporations are generally considered non-State actors, State-owned institutions are considered to be part of the State. They and their employees are therefore under the same human rights obligations as the State.²⁴⁵ This is alluded by Article 20(1) of the Constitution of Kenya which provides that the Bill of Rights applies to all law and binds all State organs and all persons. These institutions have an essential role to play in protecting human rights and are well placed to monitor, protect and promote economic, social and cultural rights.

Being alive to this fact, the Constitution of Kenya under Article 59 establishes the Kenya National Human Rights and Equality Commission to promote respect for human rights and develop a culture of human rights in the Republic.

Article 59(4) of the Constitution allows parliament to enact legislation to give full effect to the Article and provides that such legislation may restructure the commission into two or more separate commissions.

In this regard, three Commissions have been established under various Acts of Parliament. This include: The Kenya National Commission on Human rights (KNCHR) established under Act No. 14 of 2011; the Commission on Administrative Justice (CAJ) established under the Act No. 23 of 2011 and the National Gender and Equality Commission (NGEC) established under Act No. 15 of 2011.

²⁴⁵ Sigrun Skogly, 'The Human Rights Obligations of the IMF and the World Bank,' (2001) 151.

The KNCHR is an autonomous national human rights institution with the core mandate of furthering the promotion and protection of human rights in Kenya. It acts as a watch-dog over the Government in the area of human rights and provides key leadership in moving the country towards a human rights State.²⁴⁶

CAJ's mandate, inter-alia, is to investigate any conduct in State affairs, or any act or omission in public administration in any sphere of government, that is alleged to be prejudicial or improper, or to result in any impropriety or prejudice.²⁴⁷

The over-arching goal for NGEN is to contribute to the reduction of gender inequalities and the discrimination against all; women, men, persons with disabilities, the youth, children, the elderly, minorities and marginalized communities.²⁴⁸

Instructively, members of the public are allowed under Article 59(3) of the Constitution to complain to the Commissions, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

Notably, the functions of the commissions include monitoring and advising the government on the integration of the human rights principles in all national and county policies, laws and administrative regulations in all public and private institutions; acting as the principal organs of the State in ensuring compliance with obligations under all treaties and conventions ratified by Kenya relating to human rights; investigating human rights violations and making recommendations for necessary action and improvement of the functioning of the institutions concerned and providing advisory opinions on human rights related issues with recommendations on legal, policy or administrative measures to address the specific concerns.

The commissions have been instrumental in providing advisory opinions to the government to initiate education reforms to enhance realization of the right to education. The opinions or proposals center on the improvement of public administration including review of legislation, codes of conduct, processes and procedures. Further, they build capacity of officers from public institutions to respect and promote human rights standards. For instance, in CAJ's Annual Report of 2014, it is reported that 11 officers from MOEST were trained on effective complaints

²⁴⁶The Kenya National Commission on Human Rights website, available at < <http://www.knchr.org/>>

²⁴⁷Commission on Administrative Justice website, available at < <http://www.ombudsman.go.ke/>>

²⁴⁸ National Gender and Equality Commission website, available at < <http://www.ngeckenya.org/>>

handling methods as well as resolution of public complaints indicator in the National Government Performance Contracting system.²⁴⁹ The Commission also reviewed the draft Code of Regulations, and Code of Conduct and Ethics of the Teachers Service Commission to ensure that they complied with the principles of administrative justice.²⁵⁰

To this end, it can be denoted that all these commissions have a role to play in realization of the right to basic education in Kenya. However, their role is limited to the protection, and observance of human rights in public and private institutions. They do not have enforcement powers for the realization of human rights. The State is the last resort as far as the human rights standards are concerned.

4.5 CONCLUSION

It can be concluded that Kenya has a feasible legal, policy and institutional framework that provides for realization of the right to basic education. However, it has been established that this is not adequate to fully realize the right to basic education. In particular, the Constitution has instructive provisions of the right to basic education and its implementation standard thereof. Nevertheless, it has been established that this is not conclusive as glaring gaps have been identified. Similarly, the national statutes are not comprehensive on the steps and the measures to be taken by the State in progressively realizing the right to basic education. They only have general provisions which do not give directions on how realization of the right is to be assessed from. It has also been noted that the measures undertaken by the State to progressively realize the right to basic education have not been sufficient.

It is also evident that the judiciary has a profound role to play in the application and interpretation of the right to basic education which contributes to its effective implementation. The Kenyan courts should therefore develop a comprehensive common progressive realization standard to act a guide in determination and assessment of the measures undertaken by the State in realizing the right to basic education.

²⁴⁹The Commission on Administrative Justice Annual Report 2014, No. 16/2014.

²⁵⁰ Ibid.

CHAPTER FIVE

5.0 SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 SUMMARY

This research has been analyzing the progressive realization of the right to basic education in Kenya whilst assessing the adequacy of the legal framework in place that actualizes the understanding of the right to basic education.

In the first chapter, the paper gave a synopsis of the study, introducing the topic and provided a background to the study. It also gave the statement of the problem, research objectives, research questions and the research hypothesis. Further, it set out the scope & limitation of the study, research methodology and provided a summary of the literature review of the study.

In the second chapter, the paper analyzed various scholarly works in regard to the concept of human rights as a whole including historical development of human rights, classification of human rights, concept of enforcement and limitation of human rights and socio-economic rights for example, the right to education and also basic education as its component.

It went further to examine the human rights standards, the concept of State obligations with regard to human rights and progressive realization of socio-economic rights.

The third chapter of this research examined the current legal, policy and institutional framework in Kenya that are in place to actualize the principle of progressive realization on the rights to basic education. This included an in depth understanding of national laws, international instruments approved by Kenya and all the principles of international law adopted by various international committees. The paper also looked at the various institutions established in Kenya to facilitate the understanding of the right to basic education.

The fourth chapter analyzed the legal framework in Kenya with an aim of establishing whether it has sufficiently facilitated the advanced realization of the right to the basic education. In this part, the paper examined whether the parameters for realization of the right to basic education as

set out in chapter 2 have actually been achieved by the current legal, policy and institutional framework in Kenya.

Further, the chapter evaluated the steps that have been taken by the Kenyan government to progressively recognize the rights to basic education.

Additionally, that chapter examined the role of the judiciary in enforcement of the principle of progressive comprehension of the socio-economic rights particularly, that right to basic education.

Lastly, the chapter looked at the role of State-owned human rights institutions in promotion of the respect for human rights in Kenya. In specific, what the institutions have done to push the government to realize the right to basic education.

5.2 CONCLUSION

In conclusion therefore, it is evident from this thesis that education is important and it is a human right within itself and a necessary means of recognizing other human rights. It ought therefore to be protected and fulfilled by the State. Similarly, basic education is an essential factor of the right to education and gives minimum parameters for the fulfillment of the right to education. The Constitution of Kenya protects this right under Article 43(1) (f) and Article 53 (1) (b). It is also recognized under the Children's Act, Basic Education Act, ICESCR, CRC, CRPD, ACHPR and the ACRWC. The right to education is a socio-economic right belonging to the second generation of rights. Its realization therefore is dependent to the liberal realization standard.

Progressive realization for the right to basic education in Kenya is reliant on the roles played by the State, its organs, the court and other non-judicial institutions. Nonetheless, the State is the last resort tasked to implement and fulfill that awareness of the right to basic education in Kenya. In specific, Article 21 (1) of Kenyan constitution gives the major duty to the State and all the State organs to observe, protect, respect, promote and accomplish the right to basic education. As such, the State has the duty to fulfill the standards recognized by the right to education. However, the State is required to escape all the actions that may prevent the satisfaction of the right to education; also, the State is required to provide measures which can stop third parties from meddling with that pleasure of the right to education and lastly, the State is required to take

positive methods that can allow and help all the individuals and groups to appreciate the right to education by means at their disposal.

To realize the mentioned obligations, the Constitution of Kenya has provided under Article 21(2) which states that the State should take judicial, policy and other actions, which include the standards setting, to attain the enlightened realization of the rights to basic education.

Under the Article 2 (1) of the ICESCR it gives the international responsibilities in regard to progressive realization of some rights such as, economic, social and cultural rights. State parties including Kenya are required to take actions, mainly on the economic and technical to the full of their accessible resources with a view of accomplishing progressively the maximum realization of the rights including particularly the implementation of legislative measures. Therefore the ICESCR enforces an obligation to change as expeditiously and efficiently as possible to the realization of the goals in it.

This principle of progressive realization of the rights to basic education has been articulated profoundly in different national and international legal mechanisms which Kenya has ratified. However, effective implementation of these articulations is a challenge in Kenya. For instance, the Basic Education Act provides for the formation of the National and County Education Boards and the Education Principles and Quality Affirmation Council to spearhead policy reforms and putting in measures and standards for progressive realization of the right to education. However, this research has revealed that what has been done by these institutions in this regard is very limited and maybe can be subject of future research.

From the thesis, it is evident that the Kenyan State has taken considerable steps to fulfill its obligations under the national and international legal framework in regard to realization of education right. These steps include the establishment of education institutions such as the Ministry of Education, the Science and technology, the Education Boards & Councils, KICD, KNEC and TSC; setting aside considerable amount of resources for the education sector and implementation of the free education program.

The free primary education program actualizes the minimum main obligations of the most essential features of the right to education which is providing universal free primary education for all.

As indicated in the preceding chapters, the program has not been very successful. It has been engraved by a number of challenges which have inhibited the progressive realization of the right to basic education.

The thesis has similarly established that the judiciary has a serious part to play in realization of rights. It is also the mandate of the courts to provide constitutional interpretation that will help in understanding and promotion of all the advanced understanding of socio-economic rights.

However, the jurisprudence which has emanated from the courts is unsettled, confused, and have no common line of thinking towards the concept of progressive realization of socio-economic rights. There is no commonly shared ideologies and philosophy that can provide information and guidance on what progressive realization entails and which can help the State and the citizens better understand progressive realization of these rights.

Some courts have adopted a conservative approach while others have embraced a purposive and liberal method to the clarification of the concept of progressive realization. Moreover, the courts have not fixed a particular definition on what is progressive realization. They have simply described what it should entail and how to approach progressive realization.

Some Kenyan courts, albeit few, have recognized that they have a role to come up with new and innovative remedies, develop the law and help the State better understand its obligations.

Notably, most Kenyan courts have relied on South African jurisprudence in their determination, particularly on the reasonableness standard that has been set by South African courts. Courts have sought to determine the reasonableness, appropriateness and proportionality of the actions of State agencies. There is recognition of the doctrine of separation of powers and adoption of judicial review approach on governmental action or inaction. However, separation of powers is not a bar for the courts' assertion of their interpretive authority. South African courts have emphasized on the reasonableness of the government's plans and policies and their reasonable implementation.

Moreover, some Non-judicial institutions play a significant role in defending the human rights as they are well placed to monitor, protect, promote, and the economic, social and cultural rights. The Constitution of Kenya under the Article 59 forms the Kenya National Human Rights and the Equality Commission from which three constitutional commissions have been established to act as watchdogs of the government on the realization of all the human rights which also include socio-economic rights.

The maximum recognition of the right to education is the end goal of constitutional protection of this right. This has not been achieved in many countries, but taking concrete, effective considerable steps, measures and standards helps progressive improvement in policy shift, development and improvements in the application of the right to basic education.

Granted, there is neither mandatory / immediate obligation nor particular time and measures that should be adopted by the State. It requires protracted measures, legislative actions, policy-making, administrative, planning and programmes initiatives. These should benefit the citizens in equal measures. There is emphasis on the need to give priority to the weaker and vulnerable sections of the society. Needless to say, achievement of the right to basic education might be comprehended in a wide range of political backgrounds and there is no single road to its full realization.

5.3 RECOMMENDATIONS

5.3.1 Progressive Realization Standard

The term progressive realization of the economic, social and the cultural rights as envisaged in Article 20, 21 and 43 of the Constitution of Kenya needs to be unpackaged and given a firm and enforceable meaning. The State should not use this principle as an excuse to abdicate its national and international duties in regard to all socio-economic rights which includes the right to basic education.

Progressive realization entails accessibility which would be progressively helped; the legal, governmental, operational and financial difficulties which should be observed and, where possible, dropped over time. It requires careful planning and fair procedures.

The Kenyan courts must endeavour to develop a valuable and reliable framework for interpretation of the concept of progressive realization and adopt a common “progressive realization standard” that can inform the development of a consistent jurisprudence. This will ensure harmonization of future jurisprudence on socio-economic rights and will serve as a common point of reference. They should give practical meaning to the constitutional obligations and help the State define and understand its current and future oriented constitutional obligations in a clearer manner. Like the South African Constitution Court, the Kenyan courts should develop a Kenyan-specific test and formula that should be used in interpretation of Article 20, 21 and 43 of the Constitution of Kenya whilst identifying the weaknesses and strengths of the wordings in the Articles. This should take into account Kenya’s unique political, social, economic and historical circumstances. In a nutshell, socio-economic rights should be accorded a measure of determinacy.

5.3.2 Legislative Reforms

However, in order to observe with its responsibilities, it will be mandatory for Kenya as a State not simply to enact but also to act in a way that it is aimed at achieving the proposed result. Legislative procedures only are not enough to fulfill the State responsibilities. The right to basic education ought to be made practical and enforceable; it should not be a mere aspiration put on paper but attainable practicable claim that can be enforced by a legal system. The judiciary should include guidelines directed to the legislature in their judgements.

The State and its organs should identify the loopholes, lacuna and inconsistencies in the existing laws to ensure that all relevant statutory laws reach the set constitutional standards. For instance, the inconsistencies in Article 20(5) of the Constitution; the open-ended nature of Article 21(2) and lack of implementation of Article 21(4) of the Constitution.

Further they should evaluate the laws to see if there is need for repeal, amendment and enactment of the other laws required for effective implementation of the right to the basic education. For instance, the Act of Basic Education need to be reviewed to set clear guidelines for the enlightened realization of that right to basic education through violations and available remedies for non-implementation indicated.

Moreover, there should be compliance with the international obligations from the instruments ratified by Kenya on the progressive realization of the right to basic education since this forms part of the laws of Kenya.

5.3.3 Policy Management

Effective implementation of policy measures invites a concentrated national effort to appeal the maximum contribution in all sectors of the society to achieve the progress in apprehending the right to basic education. General involvement is important in all stages, which also includes the formulation, the application and reviewing of the national rules.

Rational actions also contain the formation and application by the State of coherent, it is well coordinated and a complete programme is focused towards the enlightened realization of the right to education.

In this regard, the Kenyan State should consider reviewing the free primary education program to negate the numerous challenges it encounters. It should also consider reviewing and revising the policies adopted by the Ministry of Education, the Science and Technology and the institutions under it to guarantee that the realization of basic education right is progressively achieved.

The court should come in to identify and declare instances of inadequate and inappropriate policy changes by the State.

5.3.4 Resource Management

It is evident that availability of resources is a key determinant factor in advanced realization of the rights to basic education. However, the duties of progressive accomplishment are individually to the growth in resources; it needs active use of resources available.

Since the implementation of the Constitution, it is apparent that the Kenyan State has set aside considerable resources for the education sector. The challenge is on effective use of the allocated resources. Therefore, there is need to put in measures to ensure that the resources are properly utilized. Adequate use of resources include proper procurement procedures and practices to enhance efficiency in the supply of materials used in schools like textbooks; avoidance of theft of school resources and good storage management.

The Kenyan State should effectively utilize the resources which are within it and those that are available from the international co-operations and aid. The Constitution of Kenya envisages accountability as one of the national morals and principles of governance under the Article 10. The Government should thus endeavour to be accountable while using the resources allocated to the education sector so that they can yield the intended results and help ameliorate the standards of basic education in Kenya.

Notably, the resources are inadequate to financial or human resources; the information and technology are as well the resources important in achieving the right to basic education. Further, the growth of social resources is needed for the realization by each person of the right to basic education.

The courts should adopt the culture of pointing out misallocation and misuse of the available resources and also make assessment if the State has made appropriate financial allocations to realize the right to basic education.

Further, the State should employ economic experts to offer broad policy guidelines in resource allocation and use. Resource management should be put in the context of principles such as equity, sustainability and social justice.

5.3.5 Profound Role of the Court in Interpretation and Application of the Principle of Progressive Realization

Courts provide a grievance mechanism on infringement of fundamental freedom and human rights. Article 22 of the Kenyan Constitution opened a very important avenue of seeking redress where a right or necessary freedom are denied, invaded, dishonored or is threatened. This has seen many litigants move to court since the promulgation of the Constitution to seek redress on the socio-economic rights which include right to education. Various other cases have been based on the right to housing and health.

Granted, jurisprudence from the courts should transform the Kenyan society and in particular ameliorate the plight of the weaker and vulnerable sections of the society. All courts should thus

assert their constitutional authority and play a more active role in assisting the progressive realization of socio-economic rights

In this case, the judicial pronouncements have to be principled, substantive, expansive and innovative. A court should be bold enough to issue reasonable directives and guidelines to the Executive and the Legislature. It should generate new ideas and perspectives that outline broad goals and procedures that can guide the political process.

It is the courts' role to encourage and develop the growth and sustenance of progressive realization of socio-economic rights. They should highlight shortcomings in strategies, programmes, policies and legislation adopted by the State. They should steer reform measures. They have a supervisory role to play.

To determine if suitable actions have been taken in realizing the right to basic education, the courts should pay attention to reasonable and effective use and the access to the resources available. Further, the courts should adopt the reasonable approach standard and the standards used in the international instruments as a form of measure in determining adequate measures.

By determining the constitutionality of laws, conduct and policies, they should come up with compelling and authoritative pronouncements that contain innovative remedies, guidelines and directives to the various State and non-State actors. This has been of great help in South Africa and India. Immediate, effective and systematic remedies from the courts can translate laws into practice. It can also contribute immensely to the political and democratic debate in the country.

It is noteworthy that the Constitution of India is structurally different from the Kenyan Constitution in that whereas the Kenyan Constitution contains explicit provisions on socio-economic rights, the Indian Constitution contains directive principles. This notwithstanding, the Indian Supreme Court has developed directive principles from being clearly non-justiciable to their providing the basis of a right of action through adoption of a more balanced and integrated approach in the interpretation of the concept of the progressive realization of socio-economic rights. Contributory factors to the development of their jurisprudence include inter alia: public interest litigation; use of *amicus curiae*, experts, monitoring committees, fact-finding commissions; detailed interim orders; and collective problem solving mechanism.

Notably, courts do not stop at declaration of the law and issuance of directives but there is judicial follow up on implementation. Judicial guidelines and follow-up in the implementation of the judgements will ensure compliance and address the plight of the litigants. Kenyan courts should aim at establishing procedures for implementation and monitoring and issuance of regular directions in the course of implementation. The courts should be able to provide evidence of successful enforcement of the judicial declarations.

Therefore, the courts can rely on experts and fact-finding committees that will help lighten the burden of proof on individual litigants especially those who are acting in person. The courts should encourage public interest litigation which should include the idea of collective problem solving. Deeper study on the issue at hand would avail in court more information that would help the court to effectively and factually determine the issue. This has the potential of encouraging litigation by improving the litigant's chances of success. This should entail context-specific inquiry on the issue at hand taking into account the State of resources at issue, technical complexity of the specific policy requirements and social, political, economic and other elements. Such and more judicial activism can fasten the pace of progressive realization of socio-economic rights.

5.3.6 Institutional Dialogue

Progressive realization of socio-economic rights calls for productive dialogue between the three arms of government i.e. the legislature, executive and the judiciary and other State and non- State organs. Each institution should be able to apply its own institutional competencies for the common goal of realizing the socio-economic rights. Progressive realization entails engagement, communication and dialogue. There is need to promote the involvement of different participants in making the law, developing policy and in the application or the implementation process. The State should be open to change in governmental leadership and also understand the application of textual provisions in appropriate circumstances. This calls for a systematic approach to the realization of the socio-economic rights.

Additionally, there is need for a coordinated approach by the institutions in the education sector to help steer ahead realization of the right to basic education by avoiding conflicts for instance,

between the Ministry of Education, the Teachers Service Commission, teacher unions and the County Governments.²⁵¹

5.3.7 The State-Owned Human Rights Organizations

These institutions need to play a more active role in monitoring the understanding of economic, social and cultural rights. They need to develop criteria and indicators for assessing the acquiescence of the state and its international obligations with regard to the right to basic education.

Further, they should collect and disseminate information about government performance hence give meaningful contribution to monitoring a State's progress in implementing its obligations under the national and international instruments, both in terms of noting general trends and in identifying specific problem areas.

The KNCHR, CAJ and NGEK should work in collaboration in ensuring that the State complies with its international obligations with regard to the right to basic education.

5.3.8 The Kenyan State to Focus More on Fulfilling the Obligations of Behavior and the Obligations of Result that arise from the Generic Obligations

The State and its organs should come up with substantive actions reasonably calculated to realize the right to basic education. For instance, to conduct an impact assessment of the free primary education program and come up with concrete strategies, key activities and target output targets which will be used to assess the program's implementation in various schools. This should be within a specified plan and time frame. However, the plan must specially set out a series of directed operation dates for every stage of the enlightened implementation of that plan. This will assist in evaluating the realization of the right to basic education in Kenya especially after the declaration of the Constitution.

Further, the State and its organs should aspire to achieve specific targets to satisfy the basic education standards which include enhancement of access of all to education and the freedom to choose the kind of education one wishes to pursue. These standards also encompass right to education the availability, the accessibility, the acceptability and the adaptability. In this regard,

²⁵¹ Supra n. 178.

the State should strive to ensure that the international basic education standards are achieved which include having not only primary education available and free to all but also secondary, higher education, fundamental education and the overall education system continuously improved.

5.3.9 Violations for Non-Implementation of Economic, Social and Cultural Rights

The Bill of Rights as a whole is an important part of democratic State of Kenya and it is the outline for cultural, social and economic policies. They thus ought to be given equal prominence and status like any other requirements in the Constitution. The wording of Article 21 (2) of the Constitution doesn't give ultimate responsibility for implementation of socio-economic rights.

The Maastricht guidelines also provide the failure by the State towards observing the generic requirements to respect, protect and fulfill socio-economic rights constitutes a violation of such rights. This also includes violations of the important structures of the right to education. A violations approach is more feasible and an effective alternative to hold a State accountable for non-implementation of socio-economic rights.

For an act to be a violation: focus should be on destructions resulting from activities and the policies on the part of the government. Violations that are related to forms of discrimination and the violations take place due to the failure of a State to accomplish the main minimum duties.

This approach should be applied in Kenya and the State be held accountable for not implementing the right to basic education as a result of the above mentioned violations when they occur.

5.4 LIMITATIONS OF THE STUDY & DIRECTIONS FOR FUTURE RESEARCH

The study intended to look at what measures other jurisdiction have taken in fulfilling the State's commitment and obligations to realize the right to basic education. However, the research was not able to do an in-depth analysis of what measures have been taken in other jurisdictions in this regard. The study only looked at how the courts in other jurisdictions have applied the progressive realization concept in their determinations.

Future researchers should focus on analyzing the effectiveness of the progressive realization principle in realization of the right to basic education whilst undertaking a comparative study of measures undertaken in other jurisdictions that have successfully implemented the principle.

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