

**A STUDY OF HEALTH INSURANCE POLICY IN KENYA AS A MEANS OF
ATTAINING THE RIGHT TO HIGHEST ATTAINABLE STANDARD OF
HEALTH**

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Declaration

I, WABWIRE FIONA A. NABATANZI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Anne Kotonya

Abstract

The right to highest attainable standard of health is a universal right that is owed to all people and that is necessary for the achievement of other human rights. The Constitution of Kenya under article 43(1)(a) recognizes this right and as such it guarantees it for the people of Kenya. This right can be actualized through health insurance policies, amongst others, and therefore this research provides an analysis of health insurance policy as a means of attaining the right. Teachers in Kenya are the demography that this research focuses on. This is because they are the only group in formal employment that compulsorily pays for two health insurance policies, contrary to the law, yet they are only covered under one of them. In addition, the insurance policy that is applicable has a lot of challenges that come with it thus becoming a hinderance for teachers to attain their right to highest attainable standard of health.

In order to show that there is need to have efficient enforcement measures with respect to rights, in addition to having the right itself, this paper discusses what the right to highest attainable standard of health is and how insurance is a means of achieving it. The study is based on the human rights theory under both international and national laws which provide the extent to which this right should be enforced.

A comparison is also drawn between Kenya and Canada; and Kenya and Australia, in order to provide a practical outlook on the shortfalls of the implementation of this right. The comparison sheds light on ways in which enforcement may be effected in order to ensure that the right to highest attainable standard of health for teachers, through health insurance policy, is met. It also provides guidelines on how to deal with the problems that arise from health insurance policies. It is from this comparison and the analysis of the human rights theory that it is evident that the right to highest attainable standard of health for teachers in Kenya, through health insurance, has not been achieved.

List of abbreviations

AON- AON Kenya Insurance Brokers Limited

ICESCR- International Covenant on Economic, Social and Cultural Rights

KNUT- Kenya National Union of Teachers

KUPPET- Kenya Union of Post Primary Education Teachers

PBS- Pharmaceuticals Benefits Scheme

TSC- Teachers Service Commission

UDHR- Universal Declaration of Human Rights

UN- United Nations

WHO- World Health Organization

Case

1. Kenya Union of Post Primary Education Teachers (KUPPET) v Teachers Service Commission & another (2015) eKLR.

List of legal instruments

A) International legal instruments

1. Universal Declaration of Human Rights
2. Committee on Economic, Social and Cultural Rights General Comment No 14
3. International Covenant on Economic, Social and Cultural Rights
4. International Convention on the Elimination of All Forms of Racial Discrimination
5. Convention on the Elimination of All Forms of Discrimination Against Women
6. Conventions on the Rights of the Child
7. Convention on the Rights of Persons with Disabilities
8. European Social Charter
9. African Charter on Human and People's Rights

B) National legal instruments

1. Constitution of Kenya
2. National Hospital Insurance Fund Act
3. Marriage Act
4. Canada Health Act

Chapter 1: Introduction

1.1. Background

Since the 1960s, Kenya is one of the few African countries that have had a national medical insurance scheme for her citizens, the National Hospital Insurance Fund (“NHIF”).¹ This fund is mandatory for people in formal employment and optional for people in informal employment.²

Teachers in Kenya, who are part of the citizens in formal employment are part of the demographic that should have NHIF compulsorily. However, in 2015, the Teachers Service Commission (“TSC”), which is the union for all teachers in Kenya, enlisted a private medical insurance scheme cover namely, AON Kenya Insurance Brokers Limited (“AON”), that was to provide medical insurance services to teachers.³ AON covers all teachers, under the TSC, in active service aged eighteen (18) years up to sixty-five (65) years.⁴ The Kenya National Union of Teachers (“KNUT”) consented to having AON as their medical insurance cover, whereas the Kenya Union of Post Primary Education Teachers (“KUPPET”) were against AON as they opted for NHIF.⁵ In spite of them objecting to register for AON compulsorily, KUPPET were forced by TSC to register for and use the insurance.⁶ Therefore, they went to court to have the decision by TSC quashed⁷ and the court granted KUPPET its prayers stating that TSC had violated KUPPET members’ constitutional right by compelling them to join an association.⁸

Notwithstanding the court’s ruling, in 2016, through a circular, TSC informed its employees that it had procured AON for the provision of medical insurance cover for the employees and their dependents.⁹ However, after the medical cover came into force, teachers threatened to boycott work because the insurance policy had since had many challenges. The challenges

¹ Section 3(1), *National Hospital Insurance Fund* (Act No 255 of 2012).

² <https://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-015-0692-8> on 30 January 2019.

³ Oduor A, ‘Teachers to enjoy more medical scheme benefits’ Standard Digital, 19 May 2016 <https://www.standardmedia.co.ke/article/2000202306/teachers-to-enjoy-more-medical-scheme-benefits> on 30 January 2019.

⁴ Teachers Service Commission, *Circular No 3/2020*, 2020.

⁵ <http://www.knut.or.ke/index.php/latest-news/80-nhif-medical-cover-still-expensive-tsc-tells-kuppet> on 6 February 2019.

⁶ *Kenya Union of Post Primary Education Teachers (KUPPET) v Teachers Service Commission & another* (2015) eKLR.

⁷ *Kenya Union of Post Primary Education Teachers (KUPPET) v Teachers Service Commission & another* (2015) eKLR.

⁸ Article 36 (2), *Constitution of Kenya* (2010).

⁹ Teachers Service Commission, *Circular No 21/2016*, 2016.

that were articulated include: substandard hospitals being enlisted to provide medical services for the teachers; most health providers withdrawing from AON therefore hampering efficiency of delivery of medical services;¹⁰ and restriction of outpatient services to a certain amount.¹¹

According to the World Health Organization (“WHO”), the right to highest attainable standard of health is a fundamental right that should be enjoyed by everyone.¹² The Constitution of Kenya¹³ acknowledges this and to ensure its enjoyment, it provides for the accessibility of health services which has four overlapping dimensions, namely: non-discrimination, physical accessibility, affordability and information accessibility.¹⁴

In order to ensure that health care is affordable, most people including governments resort to providing medical insurance to its employees as was the case of TSC providing AON medical insurance cover for its teachers. The medical insurance sought to reduce the teachers’ financial burden at the time of care thus reducing the deprivation of care that would otherwise be caused by their inability to pay.¹⁵ However, if the insurance cover does not meet the various aspects that constitute the right, then the right will not have been upheld.

1.2. Statement of problem

The United Nations (“UN”) and the WHO have provided guidelines on the criteria that, when met, proves that this right to highest attainable standard of health¹⁶ has been upheld. The UN provides that for one to have access to the right, the state needs to provide conditions that assure, to all, medical services and medical attention in the event of sickness.¹⁷ However, teachers’ unions have expressed dissatisfaction with the health cover citing that many

¹⁰Omulo C, ‘Teachers threaten to boycott work over medical cover’ Daily Nation, 3 October 2018 <https://www.nation.co.ke/news/education/Teachers-to-boycott-work-over-medical-cover/2643604-4789890-sxfk21z/index.html> on 30 January 2019.

¹¹<http://universalhealth2030.org/2017/05/26/kenyacrisis-hits-police-teacher-medical-schemes/> on 6 February 2019.

¹² World Health Organization, *Fact Sheet 31*, 1.

¹³ Article 43 (1) (a), *Constitution of Kenya* (2010).

¹⁴ Committee on economic, social and cultural rights, *Supplement No. 2*, 2000, 131-132.

¹⁵ Feldstein M, ‘Balancing the goals of health care provision and financing’ 25 *The Health Affairs* 6, 2006, 1603-1604.

¹⁶ Article 43(1)(a), *Constitution of Kenya* (2010).

¹⁷ Article 12 (d), International covenant on economic, social and cultural rights, 16 December 1966, 2200A (XXI).

hospitals have failed to offer services with authority from AON.¹⁸ Furthermore, the hospitals that provide services, under AON, are not equipped to handle some diseases and therefore patients cannot receive medical services and attention.¹⁹

The WHO provides that the highest attainable standard of health is achieved when medical services are affordable to all individuals.²⁰ However, in many instances, the insurance policy provided to teachers does not cater fully for the medical services. The low cap in the insurance necessitates the teachers to pay for deficit in medical bills by themselves and thus making healthcare not affordable. The scheme also limits the dependants to four children and as such, teachers with more than four children have to pay separately for the medical expenses of the other children not protected under the scheme.²¹

Owing to the above, it is arguable that the right to highest attainable standard of health, for teachers, through medical insurance schemes has been upheld in spite of there being a constitutional provision to that effect. This is because, in as much as there is a law in place, there seems to be a challenge in its implementation.

1.3. Hypothesis

The health insurance policy provided to teachers fails to uphold the teachers' right to the highest attainable standard of health²² as envisioned under article 43(1)(a) of the Constitution of Kenya.

1.4. Statement of objectives

1. Examine what the right to highest attainable standard of health is and the requirements for it to be achieved as envisioned under the Constitution of Kenya.

¹⁸ Waihenya K, 'TSC reaches out to national health insurer for staff cover' Daily Nation, 6 July 2019 <https://www.nation.co.ke/news/education/TSC--national-health-insurer-staff-cover/2643604-5185154-smn8s8/index.html> on 21 August 2019.

¹⁹ Omulo C, 'Teachers threaten to boycott work over medical cover' Daily Nation, 3 October 2018 <https://www.nation.co.ke/news/education/Teachers-to-boycott-work-over-medical-cover/2643604-4789890-sxfk21z/index.html> on 29 July 2019.

²⁰ World Health Organization, *Right to health*, 2008, 4.

²¹ Oduor A, 'TSC gives details, list of hospitals for teachers in new health cover' Standard Digital, 31 May 2015 <https://www.standardmedia.co.ke/article/2000164092/tsc-gives-details-list-of-hospitals-for-teachers-in-new-health-cover> on 21 August 2019.

²² Article 43(1)(a), *Constitution of Kenya* (2010).

2. Examine insurance policy as a means of upholding the right to highest attainable standard of health using teachers in Kenya as the case study.
3. Examine whether the right to highest attainable standard of health, for teachers, has been met.

1.5. Research questions

1. What constitutes upholding the right to highest attainable standard of health as envisioned under the Constitution of Kenya?
2. How is insurance policy a means of upholding this right to highest attainable standard of health?
3. Has the right to highest attainable standard of health for teachers been upheld?

1.6. Justification of the study

The importance of this research is to show that there is need for proper implementation of laws in addition to there being laws in place. The rule of law should be in effect in order to ensure that the policy makers and the enforcers of law ensure that rights are adhered to and upheld to the letter. In addition, the enforcement of the rights should be for the benefit of the citizens who the right protects.

It is clear that the NHIF Act is in place as the policy but the enforcement by the TSC is not for the benefit of the citizens, who in this case, are the teachers. This is evident in the actions by TSC to discard NHIF based on it being too expensive²³ that TSC sought for an alternative medical cover, AON. However, in as much as AON is more affordable according to TSC, the policies put in place such as a limit on the outpatient cover hinders the proper implementation of this right because teachers end up having to cut on some costs in treatment to ensure that they stay within the set limit. If the limit exceeds, the teachers end up paying for the medical expenses separately and as such medical care becomes expensive contrary to the principle of affordability for the attainment of the right to highest achievable standard of health.

²³ <http://www.knut.or.ke/index.php/latest-news/80-nhif-medical-cover-still-expensive-tsc-tells-kuppet> on 6 February 2019.

1.7. Scope of the study

This paper entails the examination of the right to highest attainable standard of health²⁴ as a human right and its implications on other human rights. It defines what constitutes the right based on international and national laws in order to establish the basic requirements of the right. These requirements then provide a basis by which the paper elaborates on insurance as a means of achieving the right and to what extent is the right applicable. Further, the paper examines whether the insurance policies provided for teachers in Kenya have enabled the said right to be upheld.

1.8. Methodology

The research design methodology used in this paper is the case study design which seeks to describe a unit in detail, in context and holistically.²⁵ This method of design is being used in order to have an in-depth analysis of the enforcement of the right to highest achievable standard of health²⁶ through health insurance. It will act as a lens to show the issues in question and the practicability of the enforcement mechanisms as used in other jurisdictions.

Teachers in Kenya is the specific unit that the research focuses on to show whether the implementation of this right, through medical insurance, is effective. The case study of the teachers will provide an in-depth analysis of the issue at hand. This is owing to the fact that the study aimed at finding out if teachers in Kenya's right to the highest achievable standard of health²⁷ has been met through the implementation of AON by the TSC because all other citizens in formal employment in Kenya are compulsorily covered by NHIF. However, teachers are the outliers as they compulsorily pay for both NHIF and AON, yet they are only covered under AON.

²⁴ Article 43(1)(a), *Constitution of Kenya* (2010).

²⁵ Kombo DK and Tromp DLA, *Proposal and thesis writing*, Paulines Publications Africa, Nairobi, 2018, 72.

²⁶ Article 43(1)(a), *Constitution of Kenya* (2010).

²⁷ Article 43(1)(a), *Constitution of Kenya* (2010).

Comparative study has been used in order to discuss the enforcement of the right to highest attainable standard of health. Australia²⁸ and Canada,²⁹ just like Kenya, have national health insurance policies for their citizens. This similarity, amongst others, is used to draw comparison between the national medical insurance system in Kenya and Canada, and Kenya and Australia. The comparison, therefore, seeks to help arrive at conclusions and recommendations that may help to anticipate and structure future events or systems.³⁰

The desk research includes the study of academic literature such as books, journals, thesis, dissertations, statute, case law, statistics from reports and internet resources. This method provides various perspectives of what constitutes the right based on the different works of different scholars. It is used to gain perspective on the right and its requirements. It further shows how this right should be upheld through medical insurance schemes. It also shows the need for effective implementation of laws in addition to the laws being in place and how Canada and Australia have dealt with the same issue.

1.9. Definition of terms

Accessibility is the relationship between the location of health care services and the location of clients, taking account of client transportation resources and travel time, distance and cost.³¹

Availability is a dimension of access.³² It is defined as the sufficient supply and appropriate stock of health workers, with the competencies and skill-mix to match the health needs of the population.³³

Acceptability, on the other hand, is the health workforce's characteristics and ability to treat all patients with dignity, create trust and promote demand for services.³⁴

²⁸ <https://ww2.health.wa.gov.au/Careers/International-applicants/International-medical-graduates/Overview-of-the-Australian-health-system> on 10 April 2020.

²⁹ Sawyer M, Gao Q, Dong Y and Chen Z, 'An overview of the Canadian healthcare system: Public solutions make our public healthcare stronger' University of Columbia, 1.

³⁰ Bukhari SAH, 'What is comparative study?' Social Science Research Network, 2011, 3.

³¹ Pechansky R and Thomas JW, 'The concept of access: Definition and relationship to consumer satisfaction' *19 Medical Care* 2, 1981, 128.

³² Pechansky R and Thomas JW, 'The concept of access: Definition and relationship to consumer satisfaction', 128.

³³ <https://www.who.int/workforcealliance/media/qa/04/en/> on 23 February 2020.

³⁴ <https://www.who.int/workforcealliance/media/qa/04/en/> on 23 February 2020.

1.10. Dissertation outline

The dissertation comprises of five chapters. The first chapter is an introductory chapter that comprises of the background, statement of problem, statement of objectives, hypothesis, research questions, justification of this dissertation, scope of the study and the chapter summary. This introduction acts as a roadmap for the dissertation.

The second chapter discusses the theoretical framework and methodology. This theoretical framework is a means of providing perspective on the research paper through a theory that justifies the problem posed in this dissertation. On the other hand, the methodology discusses the means through which the content for this research paper was acquired.

The third chapter discusses the questions under research as mentioned above and the contribution that this research paper makes. This is done through answering the questions based on a theoretical framework and the literature review that the research posits, and this provides a rationale for the research paper.

The fourth chapter is a comparative case study between Australia and Kenya; and Canada and Kenya. This is because both Australia and Canada are among the countries with the best health systems globally and they also use national insurance as a means of upholding the right to highest attainable standard of health for its citizens. This comparative case study provides a practical outlook on how insurance should be used as a means of attaining this right.

The fifth chapter is the conclusion of the research paper and it also discusses recommendations on how the right may be upheld by the enforcers through health insurance for teachers in Kenya.

Chapter 2: Theoretical framework

2.1. Introduction

This theoretical framework seeks to guide the research and helps to answer the various questions posed in the stated research questions. The interest theory of rights is the theory that is discussed in order to help shed light on what is the appropriate standard that ensures that a human right is met. In this case, the right to highest attainable standard of health.

The chapter also provides the methodology that was used to acquire information that is provided for in this dissertation.

2.2 Theoretical framework

2.2.1. Interest theory of rights

The interest theory is a family of theories that associates rights with the furtherance of interests³⁵ and the human rights theory is one such theory that complements it. The interest theory of rights relies on the four Hohfeldian incidents and on how they make up the logical structure of rights³⁶ and as such the said incidents will be briefly discussed. The Hohfeldian incidents are: the privilege; the claim; the power; and the immunity.³⁷ Hohfeld posits that these incidents are always linked to a correlative such that if someone has a right then another person has a duty. Privilege is linked to no-right, power to liability and immunity to disability.³⁸

Jeremy Bentham initiated the interest theory, also known as the benefit theory of rights which proposes that a person's right is their interest, and another person has a duty to uphold it.³⁹ He states that a law commanding or forbidding an act creates a duty whereas a right results from this duty.⁴⁰ The Constitution of Kenya provides for the right to highest attainable standard of health⁴¹ which, based on Bentham's theory creates a duty. This right to health owed to the teacher thus arises from a duty and as such the government and the citizens in

³⁵ Kurki VAJ, 'Are legal positivism and interest theory of rights compatible?' Academia.edu, 4.

³⁶ Hastings M, 'For an interest theory conception of human rights' Academia.edu, 2.

³⁷ Lazarev N, 'Hohfeld's analysis of rights: An essential approach to a conceptual and practical understanding of the nature of rights' *Murdoch University Electronic Journal of Law*, 2005 - <http://classic.austlii.edu.au/au/journals/MurUEJL/2005/9.html> on 27 March 2020.

³⁸ Nyquist C, 'Teaching Wesley Hohfeld's Theory of Legal Relations' 52 *Journal of Legal Education* 1/2, 2002, 240.

³⁹ <http://core.ecu.edu/phil/mccartyr/1175docs/TheoriesofRights.pdf> on 1 October 2019.

⁴⁰ Bentham J, *Of laws in general*, 1, Continuum International Publishing Group Limited, London, 1970, Appendix C.

⁴¹ Article 43 (1) (a), *Constitution of Kenya* (2010).

general have to uphold it. Various scholars and philosophers have, subsequently, developed on this theory.

Matthew Kramer is one such scholar who has developed the interest theory of rights. He posits that the theory is a right-holding theory that seeks to provide sufficient criteria for when someone holds a legal right.⁴² He asserts that this theory has a jurisprudential character as it constitutes, in part, general accounts of the nature of legal rights⁴³ and it recounts the general considerations that adjudge to whom any legal duty is owed.⁴⁴ He acknowledges that a person does not hold a right based on the mere fact that he benefits from it. There needs to be an existence of some law or an authoritative legal norm that bestows the specified legal right on that person.⁴⁵ In this case, the right has been bestowed by the Constitution of Kenya among other laws.

Rowan Cruft, in defining the interest theory provides that these interests arising from a right should serve either: the holder's interests; or what policy makers take to be people's interests; or interests of the typical person.⁴⁶ This will ensure that the loopholes in Joseph Raz's idea of this theory, as subsequently discussed, are dealt with. Raz's proposition of this theory is that every right must serve the holder's interest⁴⁷ but this idea is flawed as proven by many scholars including Cruft. Owing to this fact, Cruft provides the preceding ideas of the various interests that the theory acknowledges. The Kenyan legal provision in question takes account the holder's right to highest attainable standard of health,⁴⁸ the lawmakers' recognition of the citizen's right and the typical person's right to health.

Further, John Finnis posits a good representative approach to this interest theory of rights when he argues that human rights can be justified as they secure necessary conditions for human well-being.⁴⁹ He also provides what he describes as the seven basic forms of human good, which form the foundation for human rights. Life is one of the basic forms and it is an essential prerequisite for human well-being⁵⁰ as it serves to justify the claims to the

⁴² Kramer MH, 'In Defence of the Interest Theory of Rights: Rejoinders to Leif Wenar on Rights' in McBride M (ed), *New essays on the nature of rights*, 1ed, Hart Publishing, Oxford, 2017, 49.

⁴³ Kramer MH, 'Some doubts about alternatives to the interest theory of rights' 123 *Symposium on Rights and the Direction of Duties* 2, 2013, 245-246.

⁴⁴ Kramer MH, 'Some doubts about alternatives to the interest theory of rights' 123 *Symposium on Rights and the Direction of Duties* 2, 2013, 245-246.

⁴⁵ Kramer MH, 'Some doubts about alternatives to the interest theory of rights,' 247.

⁴⁶ Cruft R, 'Rights: Beyond interest theory and will theory' 23 *Law and Philosophy* 4, 2004, 375-376.

⁴⁷ Cruft R, 'Rights: Beyond interest theory and will theory,' 372.

⁴⁸ Article 43(1)(a), *Constitution of Kenya* (2010).

⁴⁹ Finnis J, 'Grounding human rights in natural law' 60 *American Journal of Jurisprudence* 2, 2015, 213.

⁵⁰ Meena R, 'The idea 'basic goods' in philosophy of John Finnis' Academia.edu, 3.

corresponding rights and the duty that is owed to the right.⁵¹ Good health is a right that is necessary for one to have life and as such, based on Finnis, this right ought to be upheld as it is owed to the citizens.

Every specified interest theory right seeks to protect a specified universal and fundamental interest of the right holder such as the right to health care.⁵² As such, a sufficient criterion by which we ought to determine what interests should be preserved by human rights is the universality of those interests.⁵³ The right to highest attainable standard of health⁵⁴ is a universal principle as stipulated in the Universal Declaration of Human Rights⁵⁵ (“UDHR”) as well as in the Committee on Economic, Social and Cultural Rights General Comment Number 14 (General Comment No 14). Therefore, the right to highest attainable standard of health, through medical insurance, for teachers in Kenya should be upheld because the right is a universal right.

2.2.2. Human rights theory as a complement to the interest theory of rights

Human rights theory as part of the interest theory provides what constitutes a right that a person ought to benefit from. The human right in question in this paper is the right to highest attainable standard of health and the teachers are the people that ought to benefit from this right. The human rights theory on health proposes the application of general human rights principles to healthcare, particularly interactions between patients and providers.⁵⁶ This proposition seeks to establish whether the right to highest attainable standard of health⁵⁷ is being achieved. This theory further provides availability, accessibility, acceptability and quality as elements necessary for assessing health policies and service delivery.⁵⁸

Availability as an aspect of the right posits that there is need for quality and functioning health and health care programmes for all.⁵⁹ Insurance policies are part of health and

⁵¹ <https://www.iep.utm.edu/hum-rts/> on 4 September 2019.

⁵² Hastings M, ‘For an interest theory conception of human rights’ Academia.edu, 4.

⁵³ Hastings M, ‘For an interest theory conception of human rights’ Academia.edu, 4.

⁵⁴ Article 43(1)(a), *Constitution of Kenya* (2010).

⁵⁵ Article 25, *Universal Declaration of Human Rights*, 10 December 1948.

⁵⁶ Cohen J and Ezer T, ‘Human rights in patient care: A theoretical and practical framework’ *Health and Human Rights Journal*, 2013 - <https://www.hhrjournal.org/2013/12/human-rights-in-patient-care-a-theoretical-and-practical-framework/> on 26 March 2020.

⁵⁷ Article 43(1)(a), *Constitution of Kenya* (2010).

⁵⁸ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 4 September 2019.

⁵⁹ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 4 September 2019.

healthcare programmes and as such they should ensure that they meet the needs of the citizens it seeks to serve.

The human rights theory on health also provides for accessibility as a component which has four overlapping dimensions.⁶⁰ The dimensions are non-discrimination, physical accessibility, affordability, and information accessibility.⁶¹ The state has an obligation to ensure that it provides insurance to its citizens and prevent any discrimination with regards to its implementation.⁶² Kenya has taken such measure by providing for NHIF by putting a legal framework in place. The state has a further obligation to ensure that health insurance is affordable to its citizens.⁶³ Insurance policies achieve affordability by providing different payment levels for the citizens and effectively covering all the cost for treatment that the insured receives. Additionally, access to information related to health insurance policies is necessary to allow for the state to keep a track on these policies, such as insurance, and the efficacious social participation, in the process, by the citizens.⁶⁴

Acceptability of health services ensures that it improves the health status of those concerned⁶⁵ and it also ensures that it is people-centred and it caters for specific needs of diverse population groups.⁶⁶ Health insurance policies should ensure that the element of acceptability is met in order to ensure that the highest achievable standard of health⁶⁷ is attained and upheld.

Moreover, health facilities ought to be of good quality in order to ensure that quality, as an element, is met.⁶⁸ To ensure this, health services should be safe, effective, timely, people-centred, equitable, integrated and efficient.⁶⁹ Once health insurance policies meet these requirements, then the highest attainable standard of health⁷⁰ will have been attained.

⁶⁰ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 4 September 2019.

⁶¹ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 4 September 2019.

⁶² *CESCR General Comment No 14, The right to highest attainable standard of health*, 11 August 2000, 19.

⁶³ *CESCR General Comment No 14*, 36.

⁶⁴ <http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module14.htm> on 4 September 2019.

⁶⁵ *CESCR General Comment No 14*, 12.

⁶⁶ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 4 September 2019.

⁶⁷ Article 43(1)(a), *Constitution of Kenya* (2010).

⁶⁸ *CESCR General Comment No 14*, 12.

⁶⁹ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 4 September 2019.

⁷⁰ Article 43(1)(a), *Constitution of Kenya* (2010).

2.2.3. Justification for the use of the interest theory of rights

This interest theory of rights is a tool of philosophical analysis to be applied to any legal system.⁷¹ It is important for one to identify the rights before one can identify the duties, which in the circumstances, are correlative to the rights⁷² and as illustrated above, the interest theory has provides a proper lens through which this right to highest attainable standard of health⁷³ for teachers in Kenya can be tackled. This is because the right is a human right and a universal principle that is provided in law as stated by Kramer. These laws provide for the teachers' human right to highest achievable standard of health which serves them positively and as such, they should benefit from the right. Additionally, the right imposes a duty on the state, in particular the enforcers, to see to it that the said right for teachers is upheld. In essence, not only should the right be upheld but also it should be upheld for the benefit of the teachers, who are the right holders.

⁷¹ Kurki VAJ, 'Are legal positivism and interest theory of rights compatible?' Academia.edu, 7.

⁷² Mack E, 'In defence of the jurisdiction theory of rights' 4 *Rights, Equality, and Liberty Universidad Torcuato Di Tella Law and Philosophy Lectures* 1,2, 2000, 76.

⁷³ Article 43(1)(a), *Constitution of Kenya* (2010).

Chapter 3: Conceptualizing insurance as a means of achieving the right to highest attainable standard of health

3.1 Introduction

The right to highest attainable standard of health⁷⁴ is an important human right without which, the application of other rights is indispensable⁷⁵ and without which, other rights have little meaning.⁷⁶ The right to food, health,⁷⁷ education, to be free from torture,⁷⁸ inhumane or degrading treatment⁷⁹ are universal and inalienable and they are also interrelated.⁸⁰ Therefore, the advancement of the right to highest attainable standard of health⁸¹ facilitates the others and similarly, the deprivation of the right adversely affects the other rights.⁸²

This right has been provided for through extensive legislation internationally, regionally and domestically. The legal instruments, that have been enacted and passed as a result of legislation in these different levels, have provided for various criteria of establishing whether this right has been upheld. The international and regional legal provisions on the right are binding on Kenyans because Kenya acknowledges the general rules of international law as forming part of its laws.⁸³ Kenya also affirms that treaties and conventions ratified by it form part of its laws⁸⁴ and as such they become binding on Kenyans. Therefore, this chapter, based on these various legal instruments, answers the question of what the right is and how insurance is a means of upholding this right.

⁷⁴ Article 43(1)(a), *Constitution of Kenya* (2010).

⁷⁵ Kenya National Commission on Human Rights, *The right to health: A case study of Kisumu County*, 2017, 14.

⁷⁶ Jamar S, 'The international human right to health' Southern University Law Centre, 1994, 1.

⁷⁷ Article 25, *Universal Declaration of Human Rights*, 10 December 1948.

⁷⁸ Article 5, *Universal Declaration of Human Rights*, 10 December 1948.

⁷⁹ Article 5, *Universal Declaration of Human Rights*, 10 December 1948.

⁸⁰ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 3 October 2019.

⁸¹ Article 43(1)(a), *Constitution of Kenya* (2010).

⁸² <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 3 October 2019.

⁸³ Article 2 (5), *Constitution of Kenya* (2010).

⁸⁴ Article 2 (6), *Constitution of Kenya* (2010).

3.2 Legal framework

3.2.1 International instruments

The first notion of the right to health⁸⁵ is found in the UDHR⁸⁶ which provides for the right which, among others, provides for the right to medical care.⁸⁷ The UDHR is not legally binding but it has become a global roadmap for safeguarding the rights of every person and as a result it has been incorporated into many national constitutions and domestic legal framework.⁸⁸ Furthermore, it has become a clear benchmark for the universal human rights standards that must be protected in all countries.⁸⁹ Kenya having acknowledged that the general rules of international law forms part of its laws,⁹⁰ then, the provisions of the UDHR are applicable in Kenya.

This right is also elaborated under article 55 of General Comment No 14 which provides for the promotion of the right to highest attainable standard of health and development as a means of ensuring stability and well-being among members.⁹¹ In as much as general comments are not binding to state parties, they provide authoritative guidance on how the state parties that are signatories to a treaty are expected to implement their treaty obligations⁹² and as such state parties should uphold the right to highest attainable standard of health based on binding treaties. Kenya having ratified various treaties that acknowledge this right, as discussed below, is guided by general comments.

Further, article 12 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) provides that state parties to the convention acknowledge the right of everyone to enjoy the highest standard of physical and mental health.⁹³ This instrument is legally binding with state parties accepting the responsibility to implement and maintain the rights guaranteed therein and its provisions are binding on federal governments, their provinces

⁸⁵ Article 25, *Universal Declaration of Human Rights*, 10 December 1948.

⁸⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449334/> on 13 November 2019.

⁸⁷ Article 25, *Universal Declaration of Human Rights*, 10 December 1948.

⁸⁸ <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/#:~:targetText=The%20UDHR%20is%2C%20as%20its, constitutions%20and%20domestic%20legal%20frameworks.> on 13 November 2019.

⁸⁹ <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/#:~:targetText=The%20UDHR%20is%2C%20as%20its, constitutions%20and%20domestic%20legal%20frameworks.> on 13 November 2019.

⁹⁰ Article 2 (5), *Constitution of Kenya* (2010).

⁹¹ *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

⁹² *FXB Center for Health and Human Rights, Health and Human Rights Resource Guide: Fifth Edition, 2020.*

⁹³ UNGA, *International Covenant on Economic, Social and Cultural Rights*, UN A/Res/2200A(XXI) 16 December 1966.

and territories.⁹⁴ Kenya has ratified the ICESCR and as such its provisions are binding on its people.

Other international legal instruments that provide for the right are: the International Convention on the Elimination of All Forms of Racial Discrimination;⁹⁵ the Convention on the Elimination of All Forms of Discrimination Against Women;⁹⁶ the Conventions on the Rights of the Child;⁹⁷ and the Convention on the Rights of Persons with Disabilities.⁹⁸ All these instruments are legally binding on Kenya because it has ratified them.⁹⁹

3.2.2 Regional instruments

The European Social Charter is a regional instruments that was enacted in order to give binding legal force to the rights in the UDHR.¹⁰⁰ It provides for the right of everyone to benefit from any measures that enable them to enjoy the highest possible attainable standard of health.¹⁰¹ It is binding on countries that are signatories and that have ratified it.¹⁰²

The African Charter on Human and People's Rights is another regional legal instrument which provides for the right to highest attainable state of physical and mental health for every person.¹⁰³ It is legally binding on countries, such as Kenya, that have that have made it form part of the country's laws.¹⁰⁴

3.2.3 National instrument

The Constitution of Kenya provides for the right of every person to the highest attainable standard of health, which includes the right to access health care services that also includes reproductive healthcare.¹⁰⁵ The Constitution is legally binding on all the citizens of Kenya

⁹⁴<http://www.ohrc.on.ca/en/book/export/html/2903#:~:targetText=State%20Obligations%20under%20the%20ICESCR&targetText=The%20ICESCR%20is%20a%20legally,without%20any%20limitations%20or%20exceptions.%E2%80%9D> on 13 November 2019.

⁹⁵ Article 5 (e) (iv), *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, UNGA 2106 (XX).

⁹⁶ Article 11 (f) and Article 12, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNGA 34/180.

⁹⁷ Article 24, *Conventions on the Rights of the Child*, 20 November 1989, UNGA 44/25.

⁹⁸ Article 25, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106.

⁹⁹ <https://indicators.ohchr.org/> on 21 November 2019.

¹⁰⁰ https://www.coe.int/en/web/european-social-charter/-european-social-charter-and-european-convention-on-human-rights#p_101_INSTANCE_fnStu2dTzSYC on 13 November 2019.

¹⁰¹ Article 11, *European Social Charter (Revised)* (1996).

¹⁰² <https://www.amnesty.org/download/Documents/76000/ior630052006en.pdf> on 13 November 2019.

¹⁰³ Article 16, *African Charter on Human and People's Rights*, 27 June 1981.

¹⁰⁴ <https://www.achpr.org/statepartiestotheafricancharter#:~:targetText=The%20African%20Charter%20on%20Human,Charter%20on%2023%20October%202013.> on 21 November 2019.

¹⁰⁵ Article 43 (1) (a), *Constitution of Kenya* (2010).

and both the state and the citizens have the responsibility to ensure that this right is upheld. Additionally, because the Constitution is the supreme law in Kenya,¹⁰⁶ any law that is inconsistent with this provision is void to the extent in which it is inconsistent.¹⁰⁷

3.3 Analysis of the right to highest attainable standard of health and insurance as a means of achieving it

This term, “highest attainable standard of health”,¹⁰⁸ builds a reasonableness standard in that a country has a role to play in making even the social playing field concerning health.¹⁰⁹ The achievement of this right is pegged on the rule of law, an implementation mechanism for human rights, that converts the rights from a concept to reality.¹¹⁰ It is therefore imperative that there is legal processes and institutions that are consistent with this right for the rule of law to be upheld.¹¹¹

The right to highest achievable standard of health may be defined based on different perspectives. One of the perspectives is that the right constitutes four interrelated entitlements which are: availability; accessibility; acceptability; and quality.¹¹² These entitlements, when met, are a reflection that this right has been upheld.

Another perspective, based on the provisions of General Comment No 14¹¹³ is that this right also comprises of the following entitlements, which when met constitutes the upholding of the right. These entitlements are: the right to a health system protection that provides equal opportunity for all the citizens to enjoy this right; the right to prevention, control and treatment of diseases; access to essential medicines; maternal, child and reproductive health; equal and timely access to health services; provision of health-related education; and participation in health-related decisions in the national and community levels.¹¹⁴

¹⁰⁶ Article 2 (1) (a), *Constitution of Kenya* (2010).

¹⁰⁷ Article 2 (4) (a), *Constitution of Kenya* (2010).

¹⁰⁸ Article 43 (1) (a), *Constitution of Kenya* (2010).

¹⁰⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449334/> on 3 October 2019.

¹¹⁰ <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/#targetText=There%20is%20no%20rule%20of,a%20principle%20into%20a%20reality.> on 3 October 2019.

¹¹¹ <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/#targetText=There%20is%20no%20rule%20of,a%20principle%20into%20a%20reality.> on 3 October

¹¹² Article 12, *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

¹¹³ Article 12, *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

¹¹⁴ World Health Organization, *Fact Sheet No 31: The right to health*, 3-4.

3.3.1. Availability of resources

Availability in the health system speaks to the presence of resources which enable the health system to run effectively.¹¹⁵ It also refers to the physical presence or delivery of services that meet a minimum standard.¹¹⁶ The services need to be available in the first place¹¹⁷ in order for physical presence or delivery of services to be met through the sufficient supply of healthcare providers with the proficiencies to meet the needs of the people that they serve.¹¹⁸ In addition, health and healthcare goods must be available in quantity that is sufficient and they include underlying antecedents of health such as availability of enough number of hospitals and clinics, trained medical personnel and essential drugs.¹¹⁹ Health insurance policies ensure that all the above are met through the covers that they offer to the beneficiaries.

Since it began insuring the teachers in health, AON did not ensure availability because teachers' unions had expressed displeasure in the fact that many hospitals had failed to offer services with authority from AON¹²⁰ and that the hospitals that provide services, under AON, were not equipped to handle some diseases and therefore patients could not receive medical services and attention.¹²¹ The government, in response, raised the insurance cover limits for teachers but this did not resolve the aforementioned concern because the teachers still seek to participate in choosing their health service providers¹²² as this will ensure that they pick well equipped hospitals to cater for their medical needs.

¹¹⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3082387/> on 14 November 2019.

¹¹⁶ World Health Organization, *Health service delivery*, 2010, 2.

¹¹⁷ https://www.eupatientaccess.eu/page.php?i_id=19 on 14 November 2019.

¹¹⁸ <https://www.who.int/workforcealliance/media/qa/04/en/#:~:targetText=Availability%20E2%80%93%20the%20sufficient%20supply%20and,health%20needs%20of%20the%20population%3B&targetText=Quality%20E2%80%93%20health%20workforce%20competencies%2C%20skills,and%20as%20perceived%20by%20users>. on 14 November 2019.

¹¹⁹ Article 12 (a), *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

¹²⁰ Waihenya K, 'TSC reaches out to national health insurer for staff cover' Daily Nation, 6 July 2019 <https://www.nation.co.ke/news/education/TSC--national-health-insurer-staff-cover/2643604-5185154-smn8s8/index.html> on 21 August 2019.

¹²¹ Omulo C, 'Teachers threaten to boycott work over medical cover' Daily Nation, 3 October 2018 <https://www.nation.co.ke/news/education/Teachers-to-boycott-work-over-medical-cover/2643604-4789890-sxfk21z/index.html> on 29 July 2019.

¹²² Wanzala O, 'TSC enhances teachers' medical insurance' Daily Nation, 22 August 2019 <https://www.nation.co.ke/news/education/Medical-scheme-a-boon-for-teachers/2643604-5244248-dl6ojhz/index.html> on 1 November 2019.

3.3.2. Accessibility

Accessibility as an entitlement provides that health facilities should be available to everyone without discrimination based on the four interrelated dimensions of non-discrimination, physical accessibility, affordability and information accessibility.¹²³ Health insurance policies ensure accessibility by protecting every insured person from unexpected high medical costs.¹²⁴

In order for all the citizens to have equal opportunities to enjoy the right to highest attainable standard of health, the state needs to take steps to redress any discriminatory law, practice and policy.¹²⁵ In addition to the state, the local governments should address the inequalities and also remove discrimination within health systems.¹²⁶ These steps by both the state and the local governments ensures the implementation of the rule of law and thus the upholding of this right.

Equality is a key measure required to address the social determinants affecting the enjoyment of the right to health¹²⁷ by ensuring that there are no discriminatory practices. Negative equality, which is the system that Kenya practices, follows that equality should allow differential treatment unless they are based upon grounds that are prohibited.¹²⁸ The fact that teachers in Kenya are the only group in formal employment that compulsorily pay for two health insurance policies and are covered under one policy only,¹²⁹ is differences in treatment based on a prohibited ground as this is not within the NHIF Act that provides for NHIF as the only compulsory insurance policy for citizens in formal employment.¹³⁰ Therefore, this inequality has led to a discriminatory practice that is hindering teachers in Kenya from enjoying their right to highest achievable standard of health.

¹²³ Article 12 (b), *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

¹²⁴ <https://www.healthcare.gov/why-coverage-is-important/coverage-protects-you/> on 13 November 2019.

¹²⁵ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 3 October 2019.

¹²⁶ World Health Organization, *Report of the high-level working group on the health and human rights of women, children and adolescents*, 2017, 7.

¹²⁷ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> on 3 October 2019.

¹²⁸ MacNaughton G, 'Untangling equality and non-discrimination to promote the right to health care for all' *Health and Human Rights Journal*, 2013- <https://www.hhrjournal.org/2013/08/untangling-equality-and-non-discrimination-to-promote-the-right-to-health-care-for-all/> on 3 October 2019.

¹²⁹ Oduor A, 'Teachers to enjoy more medical scheme benefits' *Standard Digital*, 19 May 2016 <https://www.standardmedia.co.ke/article/2000202306/teachers-to-enjoy-more-medical-scheme-benefits> on 30 January 2019.

¹³⁰ <https://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-015-0692-8> on 30 January 2019.

Additionally, the Constitution of Kenya, in ensuring equality of treatment of its citizens, provides that there shall not be discrimination by the state, either directly or indirectly, among other things, based on marital status.¹³¹ However, AON provides that only one spouse can be listed as a beneficiary for a teacher's insurance policy.¹³² This policy disregards the fact that the laws of Kenya recognize polygamy under customary and Islamic laws¹³³ and as such an individual may have more than one spouse. The consequence of this discrimination by AON, on a teacher, based on marital status is that the other spouses in customary and Islamic marriages have their right to highest attainable standard of health infringed on as they cannot benefit under the scheme.

Physical accessibility of health facilities¹³⁴ ensures that the right to highest attainable standard of health is met. However, for teachers, this has been far from their reach. In their previous cover under AON, medical facilities that teachers could visit had failed to offer services with authority from AON.¹³⁵ As a result, the teachers were stranded as they did not have a hospital within reach owing to the financial burden that would come along if they decided to get treated at a facility that is not covered under AON. The government in response to the teachers' plight increased their covers but the teachers expressed the need to be able to choose the hospitals that would treat them in order to ensure accessibility.¹³⁶

Health services must also be economically accessible to all.¹³⁷ Economic accessibility speaks to the affordability of medical services¹³⁸ and health insurance is a means of making health services affordable as it provides for lower deductibles, as premiums, for a larger financial medical cover under the insurance scheme.¹³⁹ However, for teachers in Kenya, health

¹³¹ Article 27 (4), *Constitution of Kenya* (2010).

¹³² Oduor A, 'Sh3 billion additional medical cover benefits for 318,000 teachers' Standard Digital, 22 August 2019, <https://www.standardmedia.co.ke/article/2001339011/sh3b-additional-benefits-for-teachers-in-new-medical-plan> on 3 October 2019.

¹³³ Section 6 (3), *Marriage Act* (Act No 4 of 2014).

¹³⁴ Article 12 (b), *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

¹³⁵ Waihenya K, 'TSC reaches out to national health insurer for staff cover' Daily Nation, 6 July 2019 <https://www.nation.co.ke/news/education/TSC--national-health-insurer-staff-cover/2643604-5185154-smn8s8/index.html> on 21 August 2019.

¹³⁶ Wanzala O, 'TSC enhances teachers' medical insurance' Daily Nation, 22 August 2019 <https://www.nation.co.ke/news/education/Medical-scheme-a-boon-for-teachers/2643604-5244248-dl6ojhz/index.html> on 13 November 2019.

¹³⁷ Article 12 (b), *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

¹³⁸ Asher J, Hamm D and Sheather J, 'The right to health: A toolkit for health professionals' BMA and the Commonwealth Medical Trust, 2007,10.

¹³⁹ Qingyue M, Liying J and Beibei Y, 'Cost-sharing mechanisms in health insurance schemes: a systematic review' The Alliance for Health Policy and Systems Research, WHO, 2011,4.

insurance has proved to be a financial burden and as such making medical care economically inaccessible. This is because teachers are compulsorily required to pay premiums for both NHIF and AON¹⁴⁰ yet they are only covered under AON and the cover by the latter is subject to limits¹⁴¹ that necessitate the teachers to pay an additional fee. Moreover, for teachers with more than one spouse and more than four children, they will have to pay for the additional dependents separately¹⁴² and this is another financial burden.

Access to employment that provides wages is linked directly to health as it provides access to, among other things, preventive health care.¹⁴³ Teachers in Kenya have access to medical insurance covers as a result of employment that provide for this right. However, the implementation has seen treatment become elusive because of the extra expenses for treatment that accrue for the teachers¹⁴⁴ in addition to them paying for two insurance policies: NHIF; and AON.

In order to ensure information accessibility as a way to uphold their right to highest attainable standard of health, teachers in Kenya have expressed their need to participate in the identification of health service providers that will cover their medical treatment under AON insurance.¹⁴⁵ In the context of the right, individuals and groups are entitled to participate in identifying overall strategy for health, set agenda, make decisions, prioritization of health needs, implementation of health policies and accountability¹⁴⁶ on healthcare and health policies. Participation may also be understood by dividing them into two types. Participation under article 11 of General Comment No 14¹⁴⁷ is under the direction that health providers

¹⁴⁰ <http://www.knut.or.ke/index.php/latest-news/80-nhif-medical-cover-still-expensive-tsc-tells-kuppet> on 5 October 2019.

¹⁴¹ <http://universalhealth2030.org/2017/05/26/kenyacrisis-hits-police-teacher-medical-schemes/> on 5 October 2019.

¹⁴² Oduor A, 'Sh3 billion additional medical cover benefits for 318,000 teachers' Standard Digital, 22 August 2019, <https://www.standardmedia.co.ke/article/2001339011/sh3b-additional-benefits-for-teachers-in-new-medical-plan> on 3 October 2019.

¹⁴³ McGowan A, Lee M, Meneses C, Perkins J and Youdelman M, 'Civil rights laws as tools to advance health in the twenty-first century' *Annual Review of Public Health*, 2016, <https://www.annualreviews.org/doi/full/10.1146/annurev-publhealth-032315-021926> on 3 October 2019.

¹⁴⁴ <http://universalhealth2030.org/2017/05/26/kenyacrisis-hits-police-teacher-medical-schemes/> on 6 February 2019 on 3 October 2029.

¹⁴⁵ Wanzala O, 'TSC enhances teachers' medical insurance' Daily Nation, 22 August 2019, <https://www.nation.co.ke/news/education/Medical-scheme-a-boon-for-teachers/2643604-5244248-dl6ojhz/index.html> on 3 October 2019.

¹⁴⁶ Dr Potts H, 'Participation and the right to highest attainable standard of health' University of Essex Human Rights Centre, 2008, 16.

¹⁴⁷ *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

should reduce illness suffered by an individual or improve the individual's environment¹⁴⁸ whereas participation under article 8 of the 1993 Vienna Declaration and Programme of Action,¹⁴⁹ the citizens are the stakeholders, during decision making, who have a say at every level. Owing to the above definitions of participation, the request by teachers is valid because they are entitled to participate in decisions that pertain to their health.¹⁵⁰

3.3.3. Acceptability and quality

Acceptability ensures that all health facilities must have regard for medical ethics, should be culturally appropriate, should be designed to maintain confidentiality and should improve the health status of the citizens.¹⁵¹ Under the previous regime of AON insurance, the hospitals that were listed were not acceptable to the teachers based on the above standards because they did not ameliorate the status of health for those concerned as they were not equipped to handle some of the teachers' medical needs.¹⁵²

In addition to having regard for culture, health facilities must also be appropriate both scientifically and medically and should also be of good quality.¹⁵³ The knowledge, skills, competencies and behaviour of healthcare providers should be assessed according to professional ethics and from the feedback by the recipients of the health services.¹⁵⁴ In this regard, the feedback from teachers is that they are discontented with the health insurance scheme under both the old and the new medical cover as stated above citing incompetency of the staff in the hospitals that the insurance limits them to.

In conclusion, these entitlements under the right to highest attainable standard of health are dependent on each other and the right can only be said to have been achieved if all of them

¹⁴⁸ Halabi SF, 'Participation and the right to health: Lessons from Indonesia' *Health and Human Rights Journal*, 2009- <https://www.hhrjournal.org/2013/09/participation-and-the-right-to-health-lessons-from-indonesia/> on 3 October 2019.

¹⁴⁹ Article 8, *Vienna Declaration and Programme of Action*, 25 June 1993, GA Res/48/121.

¹⁵⁰ World Health Organization, *Fact Sheet No. 31: The right to health*, 3-4.

¹⁵¹ *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

¹⁵² Omulo C, 'Teachers threaten to boycott work over medical cover' *Daily Nation*, 3 October 2018 <https://www.nation.co.ke/news/education/Teachers-to-boycott-work-over-medical-cover/2643604-4789890-sxfk21z/index.html> on 29 July 2019.

¹⁵³ *CESCR General Comment No 14, The right to highest attainable standard of health (Art 12)*, 11 August 2000.

¹⁵⁴ <https://www.who.int/workforcealliance/media/qa/04/en/#:~:targetText=Availability%20E2%80%93%20the%20sufficient%20supply%20and.health%20needs%20of%20the%20population%3B&targetText=Quality%20E2%80%93%20health%20workforce%20competencies%2C%20skills,and%20as%20perceived%20by%20users.> on 13 November 2019.

have been met. However, as illustrated above, the right has not been upheld through AON insurance cover because it has not ensured availability, accessibility, acceptability and quality of medical services.

Chapter 4: Comparative case study of other healthcare systems

4.1. Introduction

Human rights, under international law, affirms that everyone has the right to highest attainable standard of physical and mental health¹⁵⁵ and that countries that are party to human rights treaties have the obligation to observe these rights.¹⁵⁶ Australia is one country that is party to all international human rights law instruments, that provide for the right to health.¹⁵⁷ Thus, it is obliged to ensure that its laws, in dealing with other nations, contributes towards the realization of the right to health.¹⁵⁸ Owing to this, Australia has streamlined its healthcare system through various means, including health insurance, which has resulted in it becoming one of the countries with the best health systems in the world.¹⁵⁹

Canada is one other country that has also signed and ratified every international treaty that is pertains to the right to health.¹⁶⁰ Its healthcare system is based on the principle that every citizen of Canada will receive all hospital physician services that are medically necessary and this has been achieved through Canada's ten provinces and three territories financing and running a state-wide medical care insurance program.¹⁶¹ This system has seen Canada emerge as one of the states with the best healthcare system in the world as of the year, 2019.¹⁶²

The WHO provides that, for a healthcare system to be well-functioning, it requires a steady financing structure, a well-trained and adequately paid workforce, facilities that are well maintained and access to reliable information that enables the beneficiaries to make decisions.¹⁶³ Australia and Canada have ensured that their health system conforms with the

¹⁵⁵ UNGA, *International Covenant on Economic, Social and Cultural Rights*, UN A/Res/2200A(XXI) 16 December 1966.

¹⁵⁶ Reid EA, 'Health, human rights and Australia's foreign law policy' 180 *The Medical Journal of Australia* 4, 2004, 163.

¹⁵⁷ Reid EA, 'Health, human rights and Australia's foreign law policy' 180 *The Medical Journal of Australia* 4, 2004, 163.

¹⁵⁸ Reid EA, 'Health, human rights and Australia's foreign law policy' 180 *The Medical Journal of Australia* 4, 2004, 163.

¹⁵⁹ <http://www.health.gov.au/about-us/the-australian-health-system> on 10 November 2019.

¹⁶⁰ Abban V, 'Getting it right: What does the right to health mean for Canadians?', Wellesley Institute, 2015,4.

¹⁶¹ Kliff S, 'Everything you ever wanted to know about Canadian health care in one post' Washington Post, 1 July 2012 <https://www.washingtonpost.com/news/wonk/wp/2012/07/01/everything-you-ever-wanted-to-know-about-canadian-health-care-in-one-post/> on 15 November 2019.

¹⁶² <http://worldpopulationreview.com/countries/best-healthcare-in-the-world/> on 15 November 2019.

¹⁶³ <http://worldpopulationreview.com/countries/best-healthcare-in-the-world/> on 10 November 2019.

above requirements, as will be discussed below, and this has enabled them to have efficient healthcare systems.

Owing to the fact that Australia and Canada have national health insurance policies that are compulsorily applicable to their citizens as is in Kenya, a comparative study is discussed in this chapter. This, comparative study, is also necessary because both Australia and Canada have mastered the art of implementation of the laws that govern the right to highest attainable standard of health. It shows the criteria that their health systems have met in order to ensure the upholding of this human right, through insurance, and it also draws a comparison on how the said criteria are enforced. Furthermore, it shows the significance of human rights being implemented in the interest and for the benefit of the rights holders.

Moreover, Australia has faced challenges that Kenya has faced including the fact that the private insurance cover is expensive and there is minimal information on both the private and national health insurance, to the insured.¹⁶⁴ They have resolved these issues as discussed below and therefore Kenya can use the measures as a baseline for the resolution of the challenges facing its system of a national health insurance policy. Similarly, Canada, just like Kenya, faces the issues of the rising cost of healthcare through national insurance and the challenges in the access of health services.¹⁶⁵ In an effort to correct these problems, Canada has put in effective legal measures. Therefore, the case study of the two countries will provide guidelines on how to remedy the issues arising from the implementation of health insurance policy for its teachers.

4.2. Case study of Australia

The health system of Australia may be described as interconnected health systems as opposed to a unified system, with its federal government, territory governments, and local governments sharing responsibility for its funding, management and operation.¹⁶⁶ Funding of healthcare is also done by non-government organizations, private insurers and individuals who pay for their own medical expenses,¹⁶⁷ for various reasons. Due to the fact that its health

¹⁶⁴https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook4Sp/MedicareChallenges on 21 November 2019.

¹⁶⁵ Micieli A, 'The challenges facing Ontario's health care system moving forward: A health policy perspective' 4 *University of Ottawa Journal of Medicine* 1, 2014, 38.

¹⁶⁶ Australian Institute of Health and Welfare, *Australia's health 2018*, 2018,3.

¹⁶⁷ Australian Institute of Health and Welfare, *Australia's health 2018*, 2018,3.

system is jointly run by all levels of its government: federal; state; and territory,¹⁶⁸ Australia has been able to ensure that the right to highest attainable standard of health has been achieved.

As discussed, the Australian government is guided by international laws on the right to highest attainable standard of health.¹⁶⁹ In addition to international laws, in order to ensure that the right to highest attainable standard of health, for its citizens, is upheld, Australia has enacted the Australian Charter of Healthcare Rights¹⁷⁰ (“the Charter”) that provides for the rights of its citizens when accessing healthcare. These rights are in line with the previously mentioned requirements by the WHO,¹⁷¹ and it has guiding principles that act as a roadmap for its enforceability. These principles are that every person is guaranteed the right to access medical care and that the Australian government commits to international agreement that recognize that every person has the right to the highest attainable standard of physical and mental health.¹⁷² The Charter provides for the right to: access healthcare; receive safe and high quality healthcare that meets the national standards; be treated with dignity and respect; receive information; have personal privacy respected; and provide feedback and make a complaint without it affecting the treatment that the individual receives.¹⁷³

The Australian government, in a bid to ensure accessibility and affordability of health facilities, contributes financial resources via two national health subsidy schemes: Medicare Benefits Scheme (“Medicare”); and Pharmaceuticals Benefits Scheme (“PBS”).¹⁷⁴ Medicare is a universal public health insurance scheme that underpins the health system by guaranteeing free treatment for card-holders, as public patients in public hospitals.¹⁷⁵ In addition, PBS ensures the accessibility of the aforementioned card holders to a range of prescription pharmaceuticals that are subsidised under it.

¹⁶⁸ <https://www.health.gov.au/about-us/the-australian-health-system> on 10 November 2019.

¹⁶⁹ Reid EA, ‘Health, human rights and Australia’s foreign law policy’ 180 *The Medical Journal of Australia* 4, 2004, 163.

¹⁷⁰ <https://www.safetyandquality.gov.au/sites/default/files/2019-06/Charter%20of%20Healthcare%20Rights%20A4%20poster%20ACCESSIBLE%20pdf.pdf> on 16 November 2019.

¹⁷¹ <http://worldpopulationreview.com/countries/best-healthcare-in-the-world/> on 16 November 2019.

¹⁷² <https://www2.health.vic.gov.au/about/participation-and-communication/australian-charter-healthcare-rights/about-the-charter#> on 16 November 2019.

¹⁷³ <https://www.safetyandquality.gov.au/sites/default/files/2019-06/Charter%20of%20Healthcare%20Rights%20A4%20poster%20ACCESSIBLE%20pdf.pdf> on 10 November 2019.

¹⁷⁴ <https://www2.health.wa.gov.au/Careers/International-applicants/International-medical-graduates/Overview-of-the-Australian-health-system> on 16 November 2019.

¹⁷⁵ Australian Institute of Health and Welfare, *Australia’s health 2018*, 2018,5.

Medicare, being only limited to Australian citizens, New Zealand citizens, permanent residents in Australia and people from countries with reciprocal agreements¹⁷⁶ limits the accessibility as a means of achieving the right to highest attainable standard of health. Therefore, in order to remedy this, all other people that are not part of the demographic covered under Medicare have the option of getting private insurance that works in tandem with the publicly funded system.¹⁷⁷

It is also evident that the Australian government takes into account acceptability and quality as a means of achieving the right to highest attainable standard of health when providing health insurance policies for its people. This is done through the government providing tax advantages or tax rebates to people who take out private insurance policies as this will incentivize people to go to private health facilities and thereby reducing the strain on the public hospital system.¹⁷⁸ Private insurance is also encouraged by the government because it upholds the provision of the Charter that stipulates that the people should receive safe and high quality healthcare that meets the national standards.¹⁷⁹

Provision of information, on health, to the people of Australia as one of the stipulations by the Charter has been achieved through various websites that provide for information on Medicare and private insurance as an alternative.¹⁸⁰ Furthermore personal privacy in the health system is guaranteed by the Privacy Act of Australia of 1988 which regulates how the government and other organizations handle personal information of the people.¹⁸¹ In the event that one provides feedback or makes a complaint on the health system, such as issues of corruption, the treatment of the individual is not interfered with as the feedback is treated securely, sensitively and confidentially.¹⁸²

The above steps taken by the Australian government to ensure the achievement of the right to highest attainable standard of health for its citizens, through insurance, is evidence that in

¹⁷⁶ Australian Institute of Health and Welfare, *Australia's health 2018*, 2018,6.

¹⁷⁷ <https://www.healthdirect.gov.au/australias-healthcare-system> on 16 November 2019.

¹⁷⁸ <https://www.betterhealth.vic.gov.au/health/ServicesAndSupport/understanding-health-insurance> on 16 November 2019.

¹⁷⁹ <https://www.safetyandquality.gov.au/sites/default/files/2019-06/Charter%20of%20Healthcare%20Rights%20A4%20poster%20ACCESSIBLE%20pdf.pdf> on 16 November 2019.

¹⁸⁰ <https://www.betterhealth.vic.gov.au/health/ServicesAndSupport/understanding-health-insurance> on 16 November 2019.

¹⁸¹ [https://www.oaic.gov.au/privacy/the-privacy-act/#:~:targetText=The%20Privacy%20Act%201988%20\(Privacy,other%20organisations%2C%20handle%20personal%20information](https://www.oaic.gov.au/privacy/the-privacy-act/#:~:targetText=The%20Privacy%20Act%201988%20(Privacy,other%20organisations%2C%20handle%20personal%20information) on 16 November 2019.

¹⁸² <https://www.health.gov.au/about-us/corporate-reporting/report-suspected-fraud> on 16 November 2019.

addition to there being a policy in place, implementation is key for the interest of the citizens to be met. The laws enacted by a state should be for the benefit of the right holder.

4.3 Case study of Canada

The organization of Canada's healthcare structure is largely determined by the Canadian Constitution, in which the duties and responsibilities of healthcare are divided between the federal, provincial and territorial governments.¹⁸³ The healthcare system, which comprises of a national health insurance, is government sponsored with its services being provided by private entities.¹⁸⁴ Each of Canada's ten provinces and three territories finance and run a state-wide medical insurance program and under the federal law, healthcare services are provided at no cost to the citizens.¹⁸⁵ In addition to the federal government, the ten provinces and the three territories, the healthcare system also receives contributions from charitable organizations, and private insurance companies also chip in.¹⁸⁶

In spite of each province and each territory having its own insurance plan, all these plans must meet five requirements to see to it that they observe the standards provided for in the Canada Health Act.¹⁸⁷ These standards are: public administration; comprehensiveness; universality; portability; and accessibility.¹⁸⁸ They ensure that health insurance policies provides for the people of Canada are effective and as a result, the right to highest attainable standard of health for its people will be achieved.

Accessibility of healthcare is ensured through the Canada Health Act providing for significant financial penalties when provinces permit private payments for publicly insured medical services particularly when extra billing is involved.¹⁸⁹ This provision serves as a deterrence for the private healthcare sector against the exploitation of the people. Additionally, the government is ensuring accessibility to its indigenous communities by closing the gap that stems from the fact that they are unable to easily access healthcare

¹⁸³<https://www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html#:~:targetText=The%20federal%20government%20is%20also,payroll%20levies%20and%20other%20revenue>. on 17 November 2019.

¹⁸⁴ Sawyer M, Gao Q, Dong Y and Chen Z, 'An overview of the Canadian healthcare system: Public solutions make our public healthcare stronger' University of Columbia, 1.

¹⁸⁵ Kliff S, 'Everything you ever wanted to know about Canadian health care in one post' Washington Post, 1 July 2012 <https://www.washingtonpost.com/news/wonk/wp/2012/07/01/everything-you-ever-wanted-to-know-about-canadian-health-care-in-one-post/> on 15 November 2019.

¹⁸⁶ <https://www.ehphp.ca/> on 24 November 2019.

¹⁸⁷ <https://www.ehphp.ca/> on 24 November 2019.

¹⁸⁸ Section 7, *Canada Health Act* (Canada).

¹⁸⁹ <https://sencanada.ca/content/sen/committee/372/soci/rep/repoct02vol6part2-e.htm> on 16 November 2019.

services because of lack of infrastructure for them.¹⁹⁰ This initiative by the government ensures that the right to highest attainable standard of health for all its citizens is achieved.

Additionally, the Canadian government is applying a human rights perspective in order to meet the rights of the First Nations children through the implementation of Jordan's Principle.¹⁹¹ The First Nations Children are a group of children from an indigenous community in Canada and the Jordan's Principle ensures that these children have access to health products, services and support when they need them.¹⁹² These efforts to ensure that the marginalized are also catered for speaks to the government's efforts to make healthcare accessible as per the provisions of the Canada Health Act¹⁹³ and the requirements, for the achievement of the right to highest attainable standard of health, under international law.

Canadian citizens apply for the public health insurance in order for them to not pay for most health services and this application is done to the province or territory in which a person lives in.¹⁹⁴ This decentralization of national health insurance services ensures that public administration as required by the Canada Health Act is effected. The government, however, advises its citizens to have a private health insurance as they wait for the government insurance to be processed or if they intend to travel to another province or territory because some things may not be covered in the other jurisdiction.¹⁹⁵

In the event of healthcare needs, Canadians turn to primary healthcare services as that is what their national insurance covers.¹⁹⁶ However, there may be need for the individual get private healthcare services, and these services are charged at a minimal fee because the provincial and territorial governments negotiate with private practitioners.¹⁹⁷ This effort by the government ensures that patients have access to healthcare and that the quality of the

¹⁹⁰<https://www.canada.ca/en/public-health/news/2018/11/statement-from-the-minister-of-health-on-the-preliminary-findings-from-the-united-nations-special-rapporteur-on-the-right-to-health.html> on 16 November 2019.

¹⁹¹<https://www.canada.ca/en/public-health/news/2018/11/statement-from-the-minister-of-health-on-the-preliminary-findings-from-the-united-nations-special-rapporteur-on-the-right-to-health.html> on 16 November 2019.

¹⁹² <https://www.canada.ca/en/indigenous-services-canada/services/jordans-principle.html> on 22 November 2019.

¹⁹³ Section 7, *Canada Health Act* (Canada).

¹⁹⁴<https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/new-life-canada/health-care-card.html> on 17 November 2019.

¹⁹⁵ <https://canadianvisa.org/life-in-canada/insurance/health-insurance> on 17 November 2019.

¹⁹⁶ <https://canadianvisa.org/life-in-canada/insurance/health-insurance> on 17 November 2019.

¹⁹⁷ <https://canadianvisa.org/life-in-canada/insurance/health-insurance> on 17 November 2019.

hospital and services are acceptable to them. This practice ensures that the right to highest attainable standard of health for the people of Canada is upheld.

The above discussion shows the efforts that the government of Canada, through national medical insurance, has put in in order to ensure that the rights of their citizens are upheld. Just as Australia ensured that the rights were implemented in the interest and for the benefit of the rights holder, so does Canada.

4.4 Comparative analysis between Kenya and Canada; and Kenya and Australia

The Constitution of Kenya provides for the right to highest attainable standard of health for its citizens.¹⁹⁸ Kenya also recognizes the general rules of international law¹⁹⁹ and has also ratified international treaties that provide for the right to highest attainable standard of health and as a result, the laws become binding and applicable in Kenya.²⁰⁰ The NHIF Act also provides that any person in formal employment is liable, as a contributor, to pay the NHIF Board a standard contribution through monthly deductions of his salary or remuneration.²⁰¹ Moreover, the employer of such person is legally mandated to deduct and pay the NHIF Board, these said deductions, on behalf and to the exclusion of said person.²⁰² It is therefore evident that Kenya, just like Australia and Canada, has a legal framework for the enforcement and application of the right to highest attainable standard of health for its citizens- in this case, the teachers.

AON insurance policy compulsorily covers teachers, through its procurement by the TSC,²⁰³ in spite of the teachers from KUPPET expressing their displeasure on the same in the past and them going to court and receiving judgement in their favour.²⁰⁴ This forceful imposition of a duty on the teachers from KUPPET is a violation of their constitutional right of them having the freedom of association.²⁰⁵ The imposition also disregards the nature of human

¹⁹⁸ Article 43 (1), *Constitution of Kenya* (2010).

¹⁹⁹ Article 2 (5), *Constitution of Kenya* (2010).

²⁰⁰ Article 2 (6), *Constitution of Kenya* (2010).

²⁰¹ Section 15, *National Hospital Insurance Fund Act* (Act No 255 of 2012).

²⁰² Section 16, *National Hospital Insurance Fund Act* (Act No 255 of 2012).

²⁰³ Oduor A, 'Sh3 billion additional medical cover benefits for 318,000 teachers' Standard Digital, 22 August 2019, <https://www.standardmedia.co.ke/article/2001339011/sh3b-additional-benefits-for-teachers-in-new-medical-plan> on 17 November 2019.

²⁰⁴ *Kenya Union of Post Primary Education Teachers (KUPPET) v Teachers Service Commission & another* (2015) eKLR.

²⁰⁵ *Kenya Union of Post Primary Education Teachers (KUPPET) v Teachers Service Commission & another* (2015) eKLR.

rights of being interdependent and interrelated²⁰⁶ and as such, the freedom of association should not be violated in order for the right to health to be achieved. Canada ensures that all rights are upheld by giving the people the freedom to choose their health providers and then the health services are either paid for through the public insurance or the government reimburses in the case of private health services.²⁰⁷ Australia, through international law also recognizes the right to health as a human right and ensures that all the rights related to the right to health are enjoyed and respected.²⁰⁸

As discussed extensively, accessibility is a key determinant for the actualization of the right to highest attainable standard of health. In Australia, the Charter provides for access to healthcare as the guiding principle of Australia's healthcare system.²⁰⁹ There is the provision of Medicare and private insurance that is subsidized which enables all people living in Australia to have access to various health facilities and to also receive treatment easily.²¹⁰ In Canada, accessibility is provided for under the Canada Health Act.²¹¹ The provision has been enforced through there being a national insurance policy from the government and an additional private health insurance policy that the government regulates which give the people access to various health facilities and medical treatment.²¹² For Kenya, in as much as AON gives teachers medical access, the hospitals are limited²¹³ and as such accessibility becomes a challenge when a specific hospital is not able to offer services that the patient may need. Additionally, the scheme is limited to five dependants²¹⁴ and as such, teachers with more dependants will have limited accessibility restricted to only five members.

The healthcare system in Australia and Canada is affordable and this has resulted in the right to highest attainable standard of health for its citizens being met. In Australia, Medicare

²⁰⁶ <https://www.unfpa.org/resources/human-rights-principles> on 18 November 2019.

²⁰⁷ <https://www.ephpp.ca/> on 24 November 2019.

²⁰⁸ <https://www.mja.com.au/journal/2004/180/4/health-human-rights-and-australias-foreign-policies> on 18 November 2019.

²⁰⁹ <https://www.safetyandquality.gov.au/sites/default/files/migrated/Charter-PDF.pdf> on 18 November 2019.

²¹⁰ <https://www.betterhealth.vic.gov.au/health/ServicesAndSupport/understanding-health-insurance> on 18 November 2019.

²¹¹ Section 7 (e), *Canada Health Act* (Canada).

²¹² <https://www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html#:~:targetText=The%20federal%20government%20is%20also,payroll%20levies%20and%20other%20revenue.> on 18 November 2019.

²¹³ Oduor A, 'Sh3 billion additional medical cover benefits for 318,000 teachers' Standard Digital, 22 August 2019, <https://www.standardmedia.co.ke/article/2001339011/sh3b-additional-benefits-for-teachers-in-new-medical-plan> on 18 November 2019.

²¹⁴ Oduor A, 'Sh3 billion additional medical cover benefits for 318,000 teachers' Standard Digital, 22 August 2019, <https://www.standardmedia.co.ke/article/2001339011/sh3b-additional-benefits-for-teachers-in-new-medical-plan> on 18 November 2019.

covers most of the health-related needs and citizens are also encouraged to get private insurance that is subsidized which sees to it that all their health needs are taken care of at a minimal cost to the insured.²¹⁵ Similarly, Canada offers a national health insurance cover through its provinces and territories and they also recommend private insurance policy that is regulated by the respective government administrations to ensure affordability.²¹⁶ However, in Kenya, the teachers pay for NHIF and yet they are not covered under it. Additionally, they pay premiums to AON which they are covered under though there are financial caps²¹⁷ and limitation of dependants which may necessitate the insured to take out private medical cover if they have more than five dependants.²¹⁸ The need to pay for all these insurance policies even though the teacher does not benefit under all of them makes the healthcare system expensive.

Finally, health insurance policy in Kenya for teachers does not ensure acceptability and quality of hospitals and medical services for teachers. This is because, in as much as the government has increased the medical cover for teachers, the teachers have expressed the need to choose the hospitals that will cover them.²¹⁹ This is because one of their major concerns was that they had been receiving poor quality healthcare from the healthcare providers that the previous AON insurance covered.²²⁰ On the other hand, Canada has ensured quality of services by providing an avenue for the citizens to visit private health service providers under minimal cost.²²¹ Additionally, Australia offers tax rebates as an incentive for people to take out private insurance policies that allows them to visit private

²¹⁵ <https://www.betterhealth.vic.gov.au/health/ServicesAndSupport/understanding-health-insurance> on 18 November 2019.

²¹⁶ <https://www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html#:~:targetText=The%20federal%20government%20is%20also,payroll%20levies%20and%20other%20revenue.> on 18 November 2019.

²¹⁷ <http://universalhealth2030.org/2017/05/26/kenyacrisis-hits-police-teacher-medical-schemes/> on 18 November 2019.

²¹⁸ Oduor A, 'Sh3 billion additional medical cover benefits for 318,000 teachers' Standard Digital, 22 August 2019, <https://www.standardmedia.co.ke/article/2001339011/sh3b-additional-benefits-for-teachers-in-new-medical-plan> on 18 November 2019.

²¹⁹ Wanzala O, 'TSC enhances teachers' medical insurance' Daily Nation, 22 August 2019 <https://www.nation.co.ke/news/education/Medical-scheme-a-boon-for-teachers/2643604-5244248-dl6ojhz/index.html> on 18 November 2019.

²²⁰ Omulo C, 'Teachers threaten to boycott work over medical cover' Daily Nation, 3 October 2018 <https://www.nation.co.ke/news/education/Teachers-to-boycott-work-over-medical-cover/2643604-4789890-sxfk21z/index.html> on 18 November 2019.

²²¹ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)30181-8/fulltext#:~:targetText=Canada's%20universal%2C%20publicly%20funded%20health,tax%2Dfunded%20public%20insurance%20plans.](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)30181-8/fulltext#:~:targetText=Canada's%20universal%2C%20publicly%20funded%20health,tax%2Dfunded%20public%20insurance%20plans.) on 18 November 2019.

health facilities thus decongesting government facilities and thereby improving quality of healthcare.²²²

In conclusion, it is clear that in as much as there is a law in place, it is necessary for the government to take steps to ensure its enforceability just as the Canadian and Australian governments have done. Furthermore, if a right is enforced in the interest and for the benefit of the citizens as evidenced from the case study of Canada and Australia, then, the right to highest attainable standard of health will be achieved.

²²² <https://www.betterhealth.vic.gov.au/health/ServicesAndSupport/understanding-health-insurance> on 18 November 2019.

Chapter 5: Conclusion and recommendations

5.1. Conclusion

This research has defined, comprehensively, what the right to highest attainable standard of health is and it has also described insurance as a means of achieving this right. Based on this, the finding of this research is that the right to highest attainable standard of health, for teachers in Kenya, through insurance has not been upheld. Kenya has not upheld the right because, based on the interest theory of rights, the right has not been enforced for the benefit of the right holder-²²³ the teachers. Furthermore, the enforcement of AON has led to the infringement of some of the other human rights owed to the teachers. For instance: freedom from discrimination and freedom of association. This infringement goes against the human rights theory of the benefit interest which proposes that other human rights principles should be upheld when enforcing the right to highest attainable standard of health.²²⁴

Moreover, international law provides for accessibility, affordability, acceptability and quality as the standards that need to be met for the right to highest attainable standard of health to be achieved.²²⁵ However, as illustrated in the research, these standards have not been met by AON insurance and as such, the insurance has not ensured the upholding of the right. The case study of Australia and Canada has also provided a lens through which one may use insurance as an effective enforcement mechanism for the attainment of this right. However, the comparison between these health systems and the Kenyan health system has shown the loopholes in the latter's quest to provide this right.

5.2. Recommendations

One of the recommendations of this research is that the government should ensure that there are effective measures that ensure proper enforcement of the rights guaranteed to its citizens. They can borrow the Canadian health system of decentralizing health insurance policies in order to ensure that all groups benefit without restriction. This decentralization will see teachers from different backgrounds benefiting from a health insurance scheme in a way that is beneficial to them based on their livelihoods. The government should also regulate private health insurance policy providers so that in the event that the government is not able to

²²³ Cruft R, 'Rights: Beyond interest theory and will theory' 23 *Law and Philosophy* 4, 2004, 375-376.

²²⁴ <https://www.hhrjournal.org/2013/12/human-rights-in-patient-care-a-theoretical-and-practical-framework/> on 20 November 2019.

²²⁵ *CESCR General Comment No 14*, 12.

provide sufficient health insurance cover for its citizens, the citizens have an affordable alternative.

Furthermore, the government should have a well-structured health system which will in turn ensure that the proper channels are followed, and beneficial services are offered to the people. This clarity will see to it that no group is forced to compulsorily pay for another health insurance policy other than the health insurance policy that is prescribed by law. This clarity will also see to it that the international health standards of accessibility, affordability, acceptability and quality are met, and the citizens benefit from it.

The ultimate goal is to ensure that the right to highest attainable standard of health for teachers in Kenya is enforced and upheld in the interest of the teachers. However, in a quest to attain the aforementioned right, other human rights should not be violated.

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