

Strathmore University

Law School

COMPETENCY-BASED CURRICULUM IN KENYA: IS IT AN ENABLER OR A HINDRANCE TO THE RIGHT TO EDUCATION IN KENYA FOR MARGINALIZED CHILDREN IN THE NOTHERN REGION IN KENYA?

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DECLARATION

I, **MWANGI PHOEBE WANGECHI**, 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 part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed

Date: 8th May 2025.



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



Signed:

Dr. Lynette Osiemo

Date: 8 May 2025



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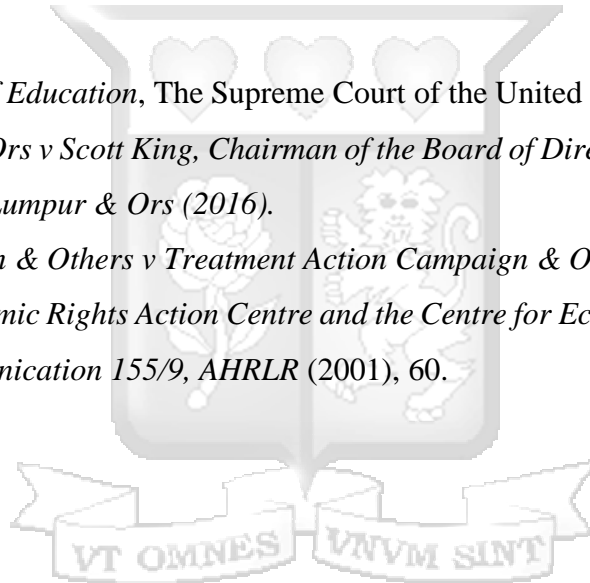
A. LIST OF CASES

Kenyan cases

1. *Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others* (2013), eKLR.
2. *Government of the Republic of South Africa and Others v Grootboom and Others* (2000)
3. *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.
4. *MMM v Permanent Secretary, Ministry of Education & Others* (2013) eKLR.
5. *Ndoria Stephen v Minister for Education, Kenya National Examinations Council & Attorney General* (2015) eKLR.
6. *Okiya Omtatah Okoiti & Another v. Attorney General & 2 Others* (2022) eKLR.

International cases

1. *Brown v Board of Education*, The Supreme Court of the United States, 1954.
2. *Jakob Renner & Ors v Scott King, Chairman of the Board of Directors of the International School of Kuala Lumpur & Ors* (2016).
3. *Minister of Health & Others v Treatment Action Campaign & Others* (2002), ZACC.
4. *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication 155/9, AHRLR* (2001), 60.



B. LIST OF LEGAL INSTRUMENTS

Kenyan

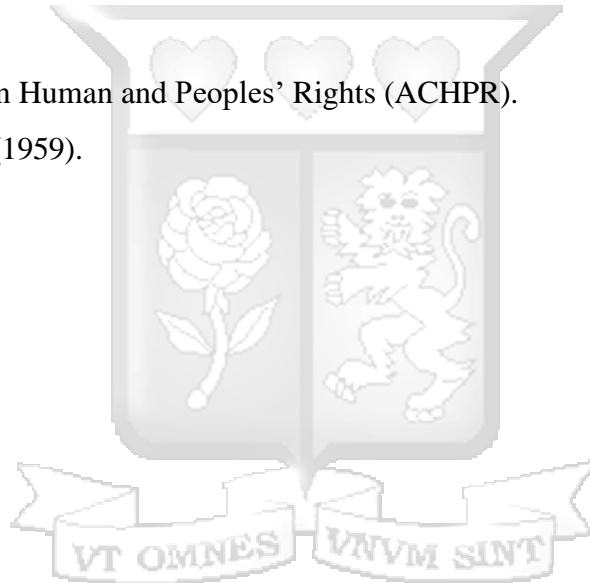
1. Basic Education Act (2013).
2. Constitution of Kenya (2010).

UN Official documents

1. International Covenant on Economic, Social and Cultural Rights (ICESCR).
2. United Nations Convention on the Rights of the Child Universal Declaration of Human Rights (UDHRC).
3. United Nations Educational, Scientific and Cultural Organization: International Bureau of Education (IBE).

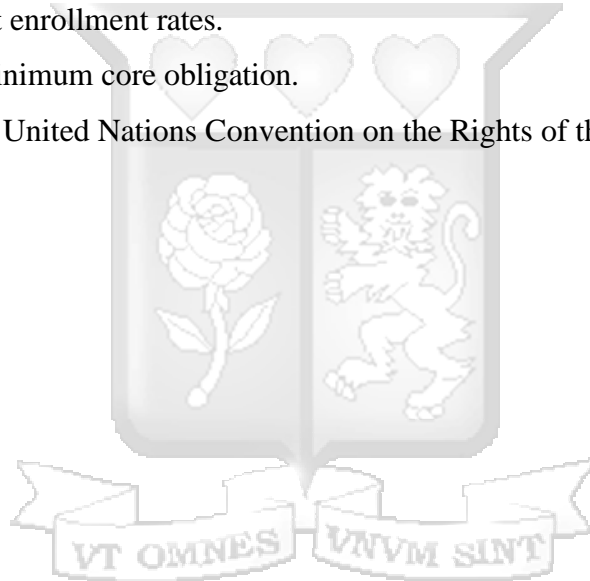
Regional documents

1. African Charter on Human and Peoples' Rights (ACHPR).
2. Immigration Act (1959).



C. LIST OF ABBREVIATIONS

1. ASAL - Arid and Semi-Arid Lands.
2. CBC - Competency Based Curriculum.
3. CESCR - Committee on Economic, Social, and Cultural Rights.
4. CoK - Constitution of Kenya.
5. IBE UNESCO - UNESCO International Bureau of Education.
6. ICESCR - International Covenant on Economic, Social and Cultural Rights.
7. IHRL - International Human Rights Law.
8. KCPE - Kenya Certificate for Primary School Education.
9. KCSE - Kenya Certificate of Secondary Education.
10. NER - Net enrollment rates.
11. MCO - Minimum core obligation.
12. UNCRC - United Nations Convention on the Rights of the Child.



ABSTRACT

The universal right to education is a fundamental human right that demands equality and accessibility for all. The recent implementation of the Competency-Based Curriculum in Kenya raises questions regarding its impact on marginalized communities, particularly in Arid and Semi-Arid Lands. While the CBC aims to provide a competency-driven educational approach, its effectiveness in addressing the challenges faced by these communities remains uncertain. Parents in these regions face escalating financial pressures, exacerbating socio-economic disparities that hinder access to quality education. This research examines the CBC's implications for educational equity and inclusivity, focusing on its ability to meet the needs of marginalized groups. Using a socio-economic framework and doctrinal methodology, the dissertation identifies curriculum implementation gaps and recommends targeted interventions. These findings aim to guide policymakers in ensuring that the universal right to education is realized, regardless of geographical or socio-economic barriers.

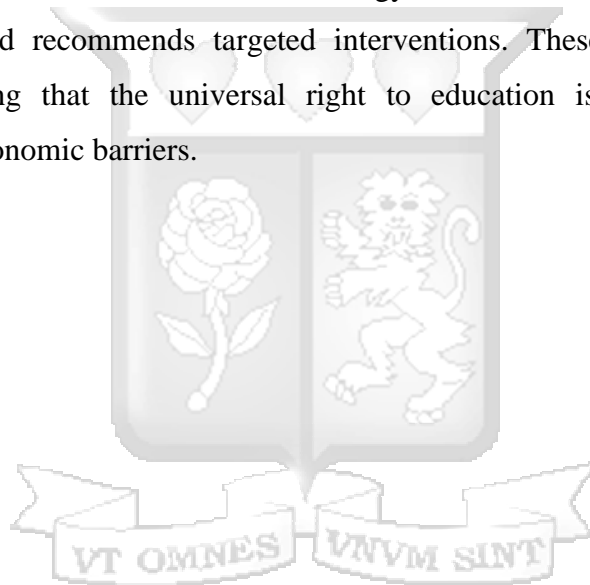


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CHAPTER ONE: INTRODUCTION

1.1 Historical Background of the Problem

Education drives economic and social change. Regularly reviewing the curriculum is imperative to align with the globalization of the labor market and meet the demand for twenty-first-century skills.¹ In 2003, Kenya introduced the free primary education program, abolishing tuition fees for primary education and significantly increasing school enrollment. It is currently anchored in Articles 43(1)(f) and 53(b) of the 2010 Constitution, hereinafter referred to as the (COK) and Sections 4 and 41 of the Basic Education Act No. 4 of 2013. Before the inception of free education for all children in public schools, many children from low-income backgrounds often faced barriers to schooling due to financial constraints.² After the introduction of free and basic education, the total intake to Grade 1 rose from 0.969 million in 2002 to 1.312 million in 2003, an increase of 35 percent.³ Statistics show that abolishing school fees in the 8-4-4 curriculum resulted in a notable surge in enrollment rates, offering more opportunities, especially to marginalized groups. That curriculum replaced the former 7-6-3 model, which was from 1964-1985.⁴ The 8-4-4 system has served Kenya for 32 years. Consequently, in December 2017, the Kenyan Ministry of Education rolled out the new education system, Competency Based Curriculum, hereinafter referred to as (CBC) which is the subject matter of discussion in this dissertation paper.

The UNESCO International Bureau of Education (IBE-UNESCO) Report of 2016 recommends implementing a quality curriculum, including assessment, planning and content. Three events led to the implementation of the 8-4-4 system which were not seen in the CBC: the 1966 conference on education at Kericho in Kenya, which stressed the need for integrating rural development; the International Labor Organization mission report and the recommendation of the National Committee on Educational Objectives and Policies of 1975.⁵ This event shows a well-revised

¹ Gibbons M, Higher education relevance in the 21st century, World Bank, Washington DC, 1998,8.

² Oketch, Moses O, Somerset H, *Free primary education and after in Kenya: Enrolment impact, quality effects, and the transition to secondary school*, Consortium for Research on Educational Access, Transitions and Equity, Nairobi,2010,17.

³ Somerset A, 'Universalizing primary education in Kenya: the elusive goal', *Comparative Education*, 45(2), 2009,244.

⁴ Ogola F, 'Free Education in Kenya's Public Primary Schools Addressing the Challenges,2010,8.

⁵ Sifuna D, Development of education in Africa, 'The Kenyan experience,1990,14.

process of unveiling a curriculum to the education sector. The rolling out of the 8-4-4 received less or little resistance. The main contention of the 8-4-4 system was how it was heavily focused on academic performance and examinations, prioritizing rote learning over critical thinking and creativity.⁶ Critics argue that it emphasized theoretical knowledge at the expense of practical skills, leaving graduates ill-prepared for the job market.⁷ Studies have revealed that CBC was hastily crafted and rushed through a shallow piloting phase in 2017 that lasted an average of ten weeks and was influenced by Western experts.⁸ It was introduced only through the Basic Education Curriculum Framework, 2017 and Sessional Paper No.1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development.⁹ There was a lack of proper training for the teachers, which hampers new curriculum adoption.¹⁰

1.1.1. Challenges of the Competency Based Curriculum

The UNESCO reports indicate that teachers have received minimal preparation for CBC compared to previous systems and that parents unfairly bear the burden of sourcing materials instead of the government.¹¹ Moreover, parents have raised concerns that CBC requires significantly more resources than the 8-4-4 system, leading to higher education costs, especially for marginalized children.¹² According to the Transforming Education in Africa report of 2023, 727,200 pupils in Kenya have been forced to drop out of school because of the high cost of education.¹³ This challenge is due to the budget squeezing that has adversely affected the education system.¹⁴ These problems get more profound when we specifically focus on Kenya's Arid and Semi-Arid Lands

⁶ Ogola F, 'Free Education in Kenya's Public Primary Schools Addressing the Challenges,10.

⁷ Ogola F, 'Free Education in Kenya's Public Primary Schools Addressing the Challenges, 10.

⁸ Kaviti L, The New Curriculum of Education in Kenya: a Linguistic and Education Paradigm Shift, University of Nairobi, 2018.

⁹ People's Action for Learning Network; Education Policy Scan in response to the Basic Education Curriculum Framework Principles,2020,4.

¹⁰ Ngwacho A, 'Competence and competency based learning curriculum for greening sustainable development in Kenya: Challenges and panaceas. *Journal of Research Innovation and Applications in Education*. 2019,53-62 on- <CBC challenges and panaceas >on 30 June 2019.

¹¹ Kenya's journey towards the implementation of the Competency Based Curriculum; strategies, opportunities and challenges <<https://unesdoc.unesco.org/ark:/48223/pf0000374067> >August 2020.

¹² Muthoni K, Legal bigwigs to defend State in case challenging new curriculum, The Standard Newspaper ,5th February,2022-<[legal bigwigs to defend state in CBC challenges](#)> on 5th February,2022.

¹³ Transforming education financing in Africa ; A strategic agenda for the African union year of education- <[Transforming Education Financing in Africa report.pdf](#), on February 2024,3.

¹⁴ Transforming education financing in Africa ; A strategic agenda for the African union year of education- <[Transforming Education Financing in Africa report.pdf](#),2023,3.

regions (ASAL), which have had perpetual challenges on their socio-economic rights. Access to free basic education under the new curriculum faces significant challenges in the larger North Eastern region, including poor internet connectivity, insecurity, and a shortage of teachers, all of which hinder its effective implementation.¹⁵ The counties in this region include Garissa, Isiolo, Lamu, Mandera, Marsabit, Samburu, Tana River, Turkana, Wajir, and West Pokot.

According to recent figures, the net enrollment rates (NER) of ASAL regions and the national average differ significantly. For example, the national average for primary education is 96.8%, but the NER for ASAL areas is roughly 42%.¹⁶ This problem is made worse by high dropout rates; in Mandera County, for instance, 27.2% of children are not enrolled in school, which adds to the rising national dropout rate, which grew from 7.5% in 2021 to 8.5% in 2023.¹⁷

Government initiatives such as the devolution of education and the introduction of mobile schools for nomadic communities have made some progress. However, these efforts remain insufficient and lack the scale needed to reach all children in these underserved regions.¹⁸ The United Nations International Children's Emergency Fund (UNICEF) 2023 report emphasizes that consistent investment and creative solutions are required to bridge these educational inequalities. Kenya's CBC aims to modernize education by promoting skills-based learning.¹⁹ Nevertheless, its one-size-fits-all approach risks overlooking the particular difficulties underprivileged groups in ASAL regions experience.²⁰ The expenditures of CBC, including educational materials, digital tools, and specialized resources, put excessive additional weight on families already struggling financially.²¹ This extra burden calls into question CBC's capacity to carry out Articles 53(1)(b), 43(1)(f) of the

¹⁵ Ogola F, 'Free Education in Kenya's Public Primary Schools Addressing the Challenges,15.

¹⁶ UNICEF Kenya Country Office Annual Report, 2023. <<https://www.unicef.org/media/152251/file/Kenya-2023-COAR.pdf>> on March 2023.

¹⁷ UNICEF Kenya Country Office Annual Report, 2023. <<https://www.unicef.org/media/152251/file/Kenya-2023-COAR.pdf>> on March 2023.

¹⁸ Ngwacho A , Competence and competency based learning curriculum for greening sustainable development in Kenya: Challenges and panaceas, *Journal of Research Innovation and Implications in Education*, 3(2), 2019,53-62.

¹⁹ Ngwacho A, Competence and competency based learning curriculum for greening sustainable development in Kenya,60.

²⁰ Ngwacho A, Competence and competency based learning curriculum for greening sustainable development in Kenya,58

²¹ Ngwacho A, Competence and competency based learning curriculum for greening sustainable development in Kenya, 58.

Kenyan Constitution and Sections 4 and 41 of the Basic Education Act No 4 of 2013, which mandate that all people have access to an equal and accessible education.

Petitioners have challenged CBC in court, particularly in the *Havi v Cabinet Secretary for Education & Others*²² case. The central argument in this case focused on the lack of adequate public participation and the alleged procedural irregularities in the formulation and rollout of CBC. The petitioners, led by Nelson Havi, argued that the curriculum was introduced without comprehensive consultation with stakeholders, including teachers, parents, and education experts. They also raised concerns regarding teachers' preparedness, infrastructural limitations, and the financial burden on parents.²³ The High Court, while acknowledging these challenges, upheld CBC on the grounds of public interest and the investment already made in the curriculum.²⁴ This paper will make the case that the state has a minimum core obligation to guarantee that every child has access to their right to an education.

Nevertheless, children in Kenya's Northern region have an equal right to benefit from the curriculum, and the state is responsible for addressing geographical disparities and financial constraints to ensure their access. Furthermore, the dissertation will emphasize that to fulfill this duty and eliminate the inequalities that prevent equitable access to education, initiatives from all arms of government, particularly the judiciary, are required. It will conclude with a comparative analysis of Finland, a country with notable educational progress that employs a competency-based approach. The dissertation seeks recommendations from Finland's experience to help Kenya overcome its educational challenges.

1.2 Problem Statement

The right to access free and basic education under the 8-4-4 system presented significant challenges to the marginalized communities. The curriculum left several issues unresolved and inadequately addressed. With the introduction of the Competency-Based Curriculum, which is more technical and considerably more resource intensive than the 8-4-4 system, the problem of

²² *Havi v Cabinet Secretary for Education & Others* 2024 eKLR.

²³ *Okiya Omtatah Okiiti & Another v. Attorney General & 2 Others* (2022) eKLR.

²⁴ *Havi v Cabinet Secretary, Responsible for Matters Relating to Basic Education & 7 others; Kenya Private Schools Association & 4 others (Interested Parties)* (2021) eKLR.

education accessibility to children in the Northern Region of Kenya has worsened rather than improved.

This study undertakes a legal analysis of the implementation of the Competency-Based Curriculum (CBC), particularly at the primary education level, through the lens of constitutional obligations under Article 43(1)(f) of the 2010 Constitution of Kenya. Anchored in the minimum core obligation theory, as opposed to the principle of progressive realization, the study examines whether the State has fulfilled its immediate and non-derogable duties to guarantee free and basic education. The focus is on marginalized populations in the Northern Region of Kenya, where access to education remains severely constrained. By interrogating the legal adequacy of the CBC's rollout in these regions, the study seeks to establish the extent of the executive compliance with its constitutional mandate and to propose actionable legal and policy reforms to address existing systemic disparities.

1.3 Research Objectives

1. To analyze the minimum core obligation and the principle of progressive realization in enforcing the right to free and basic education under socio-economic rights frameworks.
2. To examine judicial reasoning in landmark precedents on the right to education, particularly regarding access to free and compulsory education and the judiciary's enforcement obligations.
3. To conduct a comparative legal analysis between Finland's national curriculum and Kenya's Competency-Based Curriculum (CBC), evaluating their effectiveness in fulfilling the right to education.
4. To propose legal and policy reforms for the effective implementation of CBC in Kenya, with a particular focus on ASAL (Arid and Semi-Arid Lands) counties.

1.4 Research Questions

This study aims to answer the following questions.

1. How does the minimum core obligation framework shape the immediate enforcement of the right to free and basic education, particularly in marginalized regions?

2. How have courts interpreted and applied the right to free and compulsory basic education, and what legal standards have emerged from these rulings?
3. What key legal, policy, and pedagogical factors contribute to Finland's success in education, and what lessons can be drawn for Kenya's CBC?
4. What specific legal and policy reforms are required to enhance the effectiveness of CBC in Kenya, particularly in ASAL counties?

1.5 Literature Review

Pierre Gouedard, an education policy analyst at the OECD, explains that the vision behind curriculum reform reflects the intended purpose of altering the curriculum, he emphasizes that the vision addresses questions regarding the rationale for the reform (why), the preferred nature of the curriculum (what), and the methods to achieve desired changes (how).²⁵ He argues that responses to these inquiries are crucial in shaping the implementation outcomes because without a clear justification for the reform, the curriculum policy risks lacking public and political support.²⁶ Furthermore, in the absence of a clear roadmap or theory of change outlining how proposed policies align with reform objectives, confusion among key stakeholders may arise, likely leading to diminished policy credibility and inefficient resource utilization.²⁷ However, as much as Pierre's work discusses general frameworks for curriculum reform across different educational systems, it does not focus on one curriculum but on broader strategies for effectively implementing curriculum changes. My work will narrow down his lessons to the jurisdiction of Kenya and involve the socio-economic disparities that affect the implementation of the new curriculum.

Aaron Benavot, a professor of education and former director of UNESCO's Global Education Monitoring Report, acknowledges that the lack of consensus on fundamental educational values

²⁵ Gouedard P, Pont B, Hyttinen S and Huang P, 'Curriculum reform: A literature review to support effective implementation,2020,10.

²⁶ Gouedard P, Pont B, Hyttinen S and Huang P, 'Curriculum reform,11.

²⁷ Gouedard P, Pont B, Hyttinen S and Huang P, 'Curriculum reform,11.

presents a significant challenge to systematic curriculum improvement.²⁸ Additionally, without consensus on the type of support required, divergent and conflicting opinions may impede progress in curriculum change.²⁹ He highlights that a key challenge for systematic curriculum improvement is that countries struggle to improve their educational systems because they do not have a clear, shared understanding of what education should aim to achieve. Without agreement on the core values of education or the types of support needed, it is difficult to make meaningful changes to the curriculum, as this lack of consensus likely slows down or even blocks progress in reforming education. In his work, he overemphasizes consensus while overlooking the practical implementation of the curriculum, which can significantly hinder its progress. The more significant challenge is transforming the analogy of systematic curriculum improvement into actionable policies and strategies that accommodate diverse educational needs, societal expectations, and evolving global standards. This paper will argue that while consensus to a new curriculum is important, there is need to think about the socio-economic situation of the country as it may impede the progress of a new curriculum.

Herme Mosha, an education scholar specializing in curriculum development, highlights the distinctive characteristics of a competency-based curriculum, emphasizing its focus on clearly defined outcome statements that outline learners' expected competencies, behaviors, tasks, and acceptable standards.³⁰ Competency-based curricula aim to assist learners in achieving predetermined abilities, with an emphasis on individual behavior and criterion-referenced assessment.³¹ The primary objective of a competency-based curriculum is to facilitate learners reaching predetermined skills, with a focal point on each learner's behavior throughout the learning process with evaluation geared toward criterion-referenced assessment.³² In contrast, content-based curricula prioritize rote memorization of factual knowledge, which is rigid.³³ While Mosha

²⁸ Kamens D, Benavot A, 'National, regional and international learning assessments: Trends among developing countries, 1960–2009, *Globalization, societies and education*, 2011, 285.

²⁹ Kamens D, Benavot A, 'National, regional and international learning assessments, 11.

³⁰ Mosha J, 'A case study of learning materials used to deliver knowledge and skills or competency-based curricula in Tanzania, *Association for Development of Education in Africa*, 2012, 2.

³¹ Mosha J, 'A case study of learning materials used to deliver knowledge and skills or competency-based curricula in Tanzania, 3.

³² Kouwenhoven W, 'Competence-based curriculum development in higher education: A globalized concept, *Technology education and development*, 8(2), 2009, 1-22.

³³ Mosha J, 'A case study of learning materials used to deliver knowledge and skills or competency-based curricula in Tanzania', 5.

illuminates the differing approaches of competency-based and content-based curricula, he overlooks that the right to education is a socio-economic good and there has been ongoing debate on whether competency-based curricula adequately address broader educational equity and access concerns. This paper will argue that education is not solely about delivering curriculum but also about ensuring equitable access for all students, regardless of their socio-economic background. Thus, achieving socio-economic justice in education requires not only the adoption of a flexible, outcome-based curriculum but also the elimination of the inequalities that hinder the fair distribution of educational opportunities.

Daniel Sifuna and Mark Obonyo are scholars who have extensively studied curriculum reforms in Africa, through their examination of existing literature, highlight the widespread adoption of curriculum reform initiatives across Africa.³⁴ They cite examples from countries such as Tanzania, Zambia, Rwanda, Botswana, Senegal, and South Africa, indicating common challenges in implementation. These challenges include insufficient training and a limited understanding among education stakeholders regarding the Competence Based Curriculum.³⁵ The authors express skepticism about the potential success of this system, noting the absence of evidence supporting its effectiveness since its inception in the United States in the 1970s.³⁶ From their research, it appears that Sifuna and Obonyo primarily focus on the difficulties teachers and parents face rather than centering their attention on the core objectives and intended outcomes of any curriculum. of any curriculum. This oversight prompts a shift in perspective, particularly toward marginalized children with a right to education. My dissertation aims to address this gap by focusing on the educational rights of marginalized children, with a particular interest in Northern Kenya.

In conclusion, at present, much of the academic discussion surrounding the CBC focuses on its benefits and challenges, often emphasizing its practical aspects. These include the need for well-trained teachers, better infrastructure, digital resources, and increased government funding for schools. However, there is a noticeable gap in the literature regarding the right to free and basic education, particularly within the context of CBC implementation in marginalized ASAL areas.

³⁴ Sifuna D, Obonyo M, Competency Based Curriculum in Primary Schools in Kenya; Prospects and Challenges of Implementation, *Journal of Popular Education in Africa*, 2019, 40.

³⁵ Sifuna D, Obonyo M, Competency Based Curriculum in Primary Schools in Kenya, 40.

³⁶ Sifuna D, Obonyo M, Competency Based Curriculum in Primary Schools in Kenya, 43.

My work seeks to focus on the contextual gap. My study examines the state's minimum core obligation to ensure that the new curriculum does not deepen existing inequalities in these communities due to socioeconomic factors. First, it upholds that access to free and compulsory education is the minimum core of the right to education. This analysis requires a thoughtful, context-sensitive approach to judicial interpretation and enforcement of the constitutional right to education.

1.6 Hypothesis

Judicial enforcement of the right to free and basic education, as enshrined in constitutional and international human rights frameworks, ensures that socio-economic disparities do not hinder equitable access to quality education and that CBC implementation aligns with state obligations under the minimum core doctrine.

1.7 Significance of the Study

The significance of this study transcends academia, holding profound implications for Kenya's educational landscape and the well-being of its future generations, particularly in Northern Kenya. By examining the CBC and its intersection with legal frameworks, this research provides actionable insights to address pressing challenges and fortify the educational system's foundation. This study aims to chart a path toward a more inclusive and equitable educational paradigm through a nuanced analysis of the CBC's compliance with international standards, constitutional provisions, and domestic laws. By shedding light on the CBC's impact on marginalized communities' access to quality education, it aspires to champion educational justice and empower every child with the tools for success. Moreover, the identification of legal and policy obstacles in CBC implementation and the proposal of targeted reforms signify a commitment to fostering a transformative educational environment grounded in principles of fairness and opportunity. The findings of this study promise to resonate far beyond academic circles, informing legal policy-making decisions, guiding educational practices, and ultimately shaping the trajectory of Kenya's educational journey. As such, this research embodies a hope for a brighter, more equitable future where every Kenyan child is empowered to realize their full potential through education.

1.8 Theoretical Framework

The Theory of Justice by John Rawls offers a perfect foundation for evaluating Kenya's Competency-Based Curriculum, especially regarding social justice, equality, and fairness. The paper will adopt his two central tenets to advance a more inclusive and equitable approach to education, ensuring that all children, regardless of their background, have equal opportunities to succeed. Firstly, the principle of equal opportunity³⁷ ensures that all students, regardless of background, have a fair chance to succeed, aligning with the CBC's goal of personalized learning and skill development. Secondly, the difference principle³⁸ advocates for policies prioritizing the least advantaged, ensuring that the CBC addresses deep-rooted inequalities within Kenya's education system, especially for marginalized communities. Furthermore, Rawls' framework sets it apart from other theories such as merit-based theories, which emphasize individual success without addressing structural disadvantages, and utilitarianism, which emphasizes the most significant benefit for the most significant number of people but frequently ignores the demands of minorities. Rawls supports a society that places justice at its core and distributes resources more equally.³⁹

Under the Constitution, a marginalized group is a group of people who, because of laws or practices before, on, or after the promulgation of the constitution, were or are disadvantaged by discrimination on one or more of the grounds as stated in the constitution.⁴⁰ The judiciary must protect their rights, ensure equal access to education, and promote inclusive policies to address these inequalities. This aligns with the constitutional commitment to non-discrimination and human rights. In the context of Rawl's difference principle, he provides a critical lens through which to evaluate how educational policies can address disparities.⁴¹ Rawls argues that inequalities can be justified if they benefit the least advantaged members of society so long as the conditions promote fairness for all.⁴² This principle allows for a form of permissible discrimination, where

³⁷ Rawls J, *A Theory of Justice*, Cambridge, 1971.

³⁸ Rawls J, *A Theory of Justice*, 29.

³⁹ Stein Z, *Social justice and educational measurement: John Rawls, the history of testing, and the future of education*, Routledge, 2016.

⁴⁰ Article 260, *Constitution of Kenya* (2010).

⁴¹ Rawls J, *A Theory of Justice*, 29.

⁴² Stein Z, *Social justice and educational measurement*, 45.

resources may be allocated in a way that directly benefits marginalized groups, helping to level the playing field.⁴³ His approach contrasts with the more rigid prohibitions against discrimination in the Constitution. Yet, it emphasizes an inclusive system where inequality is only accepted when it leads to more significant equity. When applied to Kenya's CBC, Rawls' theory supports targeted interventions, such as increased funding for disadvantaged schools, to promote social justice. This approach ensures education policies actively uplift marginalized communities while preventing discrimination.

While Rawls' difference principle emphasizes elevating the conditions of the least advantaged, it presumes a baseline of institutional neutrality and functional equality that may not exist in historically unequal societies.⁴⁴ Kenya's CBC, for instance, operates within a deeply stratified socio-economic framework where disparities in resource allocation, infrastructure, and teacher preparedness are not merely incidental but systemic. Rawls' framework inadequately addresses these structural inequities, leaving policymakers to grapple with gaps between theoretical ideals and operational realities.

Moreover, Rawls' abstract focus on distributive justice is often criticized for its institutional idealism, as it overlooks the deep-rooted mechanisms of historical disadvantage and power asymmetries.⁴⁵ In Kenya's CBC, interventions such as increased funding for under-resourced schools may align with Rawlsian principles but lack the transformative depth required to dismantle systemic barriers perpetuating educational inequities. By prioritizing equitable redistribution without interrogating marginalization's cultural and political dimensions, Rawls' framework risks reinforcing superficial remedies that sustain, rather than subvert, existing hierarchies. Consequently, achieving meaningful educational justice demands a recalibration of Rawlsian principles to integrate structural critiques and context-sensitive reforms that transcend mere redistribution and tackle the root causes of educational inequality.

⁴³ Farrelly C, Justice in ideal theory: A refutation, *Political studies*, 2007, 55(4),844-64.

⁴⁴ Daniels N, Democratic equality: Rawls's complex egalitarianism, 2003, 241-276.

⁴⁵ J Lamot, Distributive justice, *Stanford Encyclopedia of Philosophy*, 2017.

1.9 Limitations of the Study

While this study aims to examine CBC implementation thoroughly, it is essential to recognize certain limitations that could affect the research outcomes. Notably, the research may be constrained by a scarcity of empirical data on CBC implementation, relying primarily on doctrinal research. This lack of data may hinder the ability to draw definitive conclusions about CBC's effectiveness or deficiencies. Furthermore, existing literature on CBC implementation may exhibit bias, with varying perspectives among proponents and critics. The dynamic nature of education policy and implementation poses another challenge, as changes during the research period could impact the relevance of findings. Moreover, limited access to diverse stakeholder viewpoints, including students, teachers, parents, and policymakers, may impede a comprehensive understanding of CBC implementation complexities.

1.10 Assumptions of the Study

This study assumes that the right to education is meant to be universally accessible and integral to the constitutional right to free and basic education. It further assumes that socioeconomic and geographic inequalities can undermine this right, necessitating judicial enforcement to ensure equitable implementation.

1.11 Research Methodology

The research employs doctrinal methodology by using secondary data collected through a desk review of government documents and policies, particularly those of the Ministry of Education and other line ministries at national and subnational levels and the National Council for Nomadic Education in Kenya. In addition to official government documents, the researcher reviews official international documents, especially those from UNICEF and UNESCO. This work uses two systematic approaches to review education marginalization in Kenya comprehensively. Firstly, there is the identification of potential documents for review through discussions with supervisors and online searches using platforms such as JSTOR and Google Scholar.

The paper undoubtedly extensively uses data from the Kenya National Bureau of Statistics and the Ministries of Education and Health. It also examines the relevance and credibility of the data and documents by cross-verifying information across multiple sources and carefully reviewing the

reference materials. Additionally, grey literature, particularly from newspapers and local studies by UNICEF, is crucial to the paper as it encapsulates recent developments and provides valuable insights.

1.12 Chapter Breakdown

Chapter one identifies the background of the competency-based curriculum in Kenya and narrows it down to focus on the accessibility of the new curriculum and the right to education for ASAL communities in Northern Kenya. It then paints a general picture of the shortcomings of the curriculum and how they affect these marginalized communities. After identifying the problem on which this study is centered, the dissertation presents a hypothesis that the curriculum should be revised to address the underlying inequalities in access to education perpetuated in ASAL regions. I detail the lens through which I arrive at this conclusion and how I arrive at it.

Chapter two explores the theoretical foundations of the doctrine of minimum core obligations and progressive realization, focusing on the right to education for marginalized children. Through the lens of international law, this chapter argues that the right to education is a fundamental, non-negotiable guarantee essential for all individuals, regardless of their socio-economic background. The dissertation will demonstrate that states have an obligation to ensure that marginalized children, particularly those from disadvantaged communities, have access to education as a fundamental human right.

Chapter three examines the legislative frameworks in Kenya that guarantee the right to free and primary education for all citizens. It also analyzes Kenya's jurisprudence on socio-economic rights, focusing on the right to education. The discussion of the carefully selected case laws, add up or justify the use of structural remedies as a supervisory mechanism for the enforcement of notable improvement in the access to education for those marginalized children.

Chapter four presents a comparative analysis between Finland and Kenya, highlighting the strides made by the Finland government in advancing the right to education. It examines Finland's strategic investments in education infrastructure, teacher training, and digital learning resources, which have significantly improved accessibility and quality of education. The chapter delves into

the lessons Kenya can draw from Finland’s experience, particularly in policy design, execution, and overcoming logistical and financial challenges to achieve equitable educational access for all children.

Chapter Five synthesizes the insights derived from the study of the identified problem, assessing the validity of the hypothesis and providing recommendations based on the comprehensive analysis presented in each preceding chapter. This chapter draws from the discussions and findings throughout the work, acknowledging each chapter's integral role in shaping the way forward. The conclusions are informed by a critical evaluation of the challenges and proposed solutions to offer well-founded, actionable recommendations for addressing the disparities in the right to education. The intent is to provide a cohesive and thoughtful approach that guides future efforts and policy considerations.



CHAPTER TWO: THE DOCTRINE OF MINIMUM CORE OBLIGATIONS: FOUNDATIONS FOR REALIZING THE RIGHT TO EDUCATION

2.1 Introduction

This chapter examines the legal doctrine of Minimum Core Obligations (MCO) and its interaction with the principle of progressive realization. It contends that the right to education entails a set of core, non-derogable obligations that states must fulfil immediately to guarantee essential entitlements for all individuals, regardless of socio-economic status. These obligations serve as a legal floor to uphold the fundamental values of human dignity and equality. The chapter further analyzes how progressive realization allows for the gradual fulfillment of other aspects of the right to education, based on a state's available resources. However, such progression must be guided by principles of equity, accountability, and non-discrimination. By critically engaging with the doctrinal interplay between MCO and progressive realization, the chapter argues that states are under a binding duty to ensure no child is excluded from accessing basic education due to economic or social barriers. Moreover, steps taken toward full realization must be deliberate, measurable, and designed to achieve meaningful outcomes.

2.2 The evolving role of Minimum Core Obligations in realizing socio-economic rights

The idea of a minimum core obligation suggests that there are degrees of fulfillment of a right and that a certain minimum level of fulfillment takes priority over a more extensive realisation of the right.⁴⁶ The concept of minimum core obligations was first introduced in General Comment No. 3 by the CESCR, which elaborated on Article 2(1) of the ICESCR. It establishes a baseline standard for human dignity and survival, defining the essential levels of rights that states must fulfill immediately, irrespective of resource constraints. It serves as a tool to clarify state obligations under resource scarcity conditions and limit indefinite delays in compliance by enforcing non-derogable duties that require immediate implementation. General Comments issued by treaty-monitoring bodies like the CESCR are not legally binding. However, they carry significant

⁴⁶ Kalantry S, Getgen J and Koh S, Enhancing enforcement of economic, social, and cultural rights using indicators: A focus on the right to education in the ICESCR, *Human Rights Quarterly*, 2010, 32.

interpretative authority and are widely used by courts, policymakers, and scholars to guide the implementation and enforcement of the ICESCR's provisions.

John Tasioulas defines the minimum core as a sub-set of obligations associated with an economic, social, and cultural right, such as the right to housing or the right to education.⁴⁷ For Tasioulas, he argues that the minimum core in obligations must be complied immediately and they must be feasible.⁴⁸ It is important to note that International Human Rights Law seeks to realize universal moral rights by assigning enforceable legal rights to all individuals.⁴⁹ Socio-economic rights are often realized gradually, considering states' different capacities. Minimum core obligations are particularly valuable for prioritizing obligations amid resource scarcity. By defining a baseline standard, they mitigate risks of arbitrary trade-offs, ensuring that essential rights are not sacrificed for less critical goals.⁵⁰ This prioritization also curtails the misuse of progressive realization as a pretext for indefinite delays in compliance. However, the minimum core obligation framework departs from this gradualist approach by imposing non-derogable duties that require immediate and complete compliance.⁵¹ Tasioulas conceptualizing MCOs emphasize obligations grounded in feasibility and necessity, ensuring that fundamental rights are universally upheld.

Drawing from Kirsteen Shields', an academic specializing in human rights law, he argues that two distinct categories of minimum core obligations exist. The first pertains to the state's responsibility to uphold certain fundamental principles, hence ensuring that its actions do not undermine rights.⁵² The second category of minimum core obligations is referred to as obligations of result.⁵³ These obligations guarantee access to each socio-economic right's basic, essential components. He classifies this type of obligation as an obligation of conduct.⁵⁴ These principles include non-discrimination and refraining from retrogressive actions, such as unjustly restricting access to

⁴⁷ Tasioulas J, Minimum core obligations: Human rights in the here and now, Washington, World Bank, 2017.

⁴⁸ Tasioulas J, Minimum core obligations, 2.

⁴⁹ Tasioulas J, Saving human rights from human rights law, Vanderbilt Journal of Transnational Law, 2019, 1169.

⁵⁰ Tasioulas J, Minimum core obligations, 23.

⁵¹ Tasioulas J, Minimum core obligations, 15.

⁵² Shields K, The Minimum Core Obligations of Economic, Social, and Cultural Rights: The Rights to Health and Education, 2017, 2.

⁵³ Tasioulas J, Minimum core obligations, 8.

⁵⁴ Shields K, The Minimum Core Obligations of Economic, Social, and Cultural Rights, 2.

existing socio-economic rights.⁵⁵ The African Commission reinforced this interpretation in its decision in *SERAC v Nigeria*⁵⁶, where it stated that the minimum core of the right to food mandates that the state must not destroy or contaminate food sources, must not prevent access to food, and must take positive measures to ensure that vulnerable populations do not starve.⁵⁷ The government's actions towards the Ogoni people, which involved destroying food sources and obstructing their efforts, were seen as violations of these core duties.⁵⁸

This normative foundation responds to criticism that human rights law imposes unachievable standards that are disconnected from practical limitations by attempting to strike a careful balance between moral imperatives and practical constraints.⁵⁹ MCOs operationalize human dignity and fairness by ensuring that nations give priority to these fundamental requirements while also acknowledging the limitations imposed by resource scarcity.⁶⁰ However, this balance calls into question the coherence of a framework that simultaneously demands for immediate action and recognizes the gradual nature of rights fulfillment in some situations, raising philosophical concerns about the compatibility of immediate obligations with the more general principle of indivisibility among human rights.⁶¹

2.2.1. Minimum Core Obligations and the Right to Education: Between normative priority and practical limits

Minimum core obligations are a subset of the obligations associated with any given right: they are those obligations that are to be given immediate effect by all states.⁶² These obligations align with the principles of indivisibility and interdependence emphasized in international human rights law. Indivisibility ensures that rights cannot be ranked or fulfilled in isolation, which means that

⁵⁵ CESCR General Comment No.3, 1.

⁵⁶ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication 155/9, AHRLR 2001, 60.*

⁵⁷ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication 155/9, AHRLR 2001, 60.*

⁵⁸ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication 155/9, AHRLR, 2001, 60.*

⁵⁹ Tasioulas J, Minimum core obligations, 8.

⁶⁰ Harris M, 'Downsizing Rights: Why the Minimum Core Concept in International Human Rights Law Should be Abandoned, 2014, 1.

⁶¹ Cruft R, Liao M, and Renzo M, *Philosophical foundations of human rights*, Oxford University Press, Oxford, 43.

⁶² Tasioulas J, Minimum core obligations, 21.

economic, social, and cultural rights are as essential as civil and political rights.⁶³ Interdependence highlights that the fulfillment of one right often supports the realization of others. For example, access to free primary education fulfills the right to education and supports rights related to health, equality, and freedom from poverty. Hence, MCOs must satisfy general constraints that apply to all human rights obligations while ensuring they complement broader frameworks of interconnected rights and responsibilities.⁶⁴ They are those obligations that are to be given immediate effect by all states. Hence, they must satisfy the general constraints that apply to all human rights obligations and meet the specific restrictions that apply to that sub-set of obligations that should be given immediate effect. One general constraint is that the obligation must adequately fall within the scope of the human right in question rather than some other right.⁶⁵

General Comment 13 requires states to ensure that educational systems are accessible, acceptable, available, and flexible enough to meet the requirements of every person.⁶⁶ Moreover, it highlights the necessity for access to free primary education and prohibits states from postponing this responsibility due to economic challenges. Governments must actively eliminate barriers such as poverty, distance, and gender inequality to ensure that educational facilities are accessible to all without discrimination as per clause in Article 2(2) of the Covenant.

Presumably, on the basis that non-discrimination is a civil and political right and that rights of the latter sort are of 'immediate effect,' it would seem to follow that there is a minimum core obligation on states not to discriminate on any grounds when seeking to secure Covenant rights.⁶⁷ However, Tasioulas contends that we must embrace a more modern reading of the dissertation, which holds that the two types of human rights are indivisible, interdependent, and interrelated. One could specifically argue that partial but not complete adherence to at least some economic, social, and cultural rights is necessary for full compliance with civil and political rights responsibilities, even if they are all immediately effective.⁶⁸ Both perspectives may be used simultaneously, which is

⁶³ Tasioulas J, Minimum core obligations, 12.

⁶⁴ Tasioulas J, Minimum core obligations, 22.

⁶⁵ Tasioulas J, Minimum core obligations, 21.

⁶⁶ CESCR General Comment No. 13, The Right to Education (Article 13 of the Covenant), 8 December 1999, E/C.12/1999/10, 57.

⁶⁷ Tasioulas J, Minimum core obligations, 24.

⁶⁸ Tasioulas J, Minimum core obligations, 25.

possibly the most realistic option stating that the complete protection of economic, social, and cultural rights is a prerequisite for the protection of civil and political rights, and vice versa.⁶⁹

However, Eric Posner critiques the minimum core obligation framework by arguing that it might inadvertently legitimize partial compliance, shifting focus away from the broader fulfillment of socio-economic rights.⁷⁰ As Posner puts it:

*“The dilemma for human rights enforcers is that they cannot demand that states comply with all rights perfectly, but if they do not, then they have no basis for criticizing a country’s decision to allocate more resources to satisfy one rather than another.”*⁷¹

Posner highlights the existence of resource constraints allows states to exploit the flexibility offered by minimum core obligations, leading to strategic neglect of non-core obligations.⁷² He critiques the doctrine as being counterproductive by enabling states to comply with the bare minimum while failing to progress towards the broader realization of socio-economic rights.⁷³ Furthermore, Posner warns that the rigidity of minimum obligations can exacerbate inequality, as wealthier states may achieve compliance more readily, leaving poorer states in perpetual non-compliance.⁷⁴ In the context of economic, social, and cultural rights, the possibility of self-serving invocations of the theory of progressive realization exacerbates this issue, serving as a defense for current non-compliance.⁷⁵

The minimum core obligation theory is one way that International Human Rights Law (IHRL) limits acceptable trade-offs and delays in compliance in cases involving economic, social, and cultural rights. However, it is by no means a complete solution to the issues that Posner outlined. Tasioulas responds to these concerns by asserting that the MCO framework is not intended as a ceiling but as a moral floor that establishes an essential baseline for dignity and survival.⁷⁶ He

⁶⁹ Tasioulas J, Minimum core obligations, 25.

⁷⁰ Posner E, *The Twilight of Human Rights Law*, Oxford, Oxford University Press, 2014, 92.

⁷¹ Posner E, *The Twilight of Human Rights Law*, Oxford, Oxford University Press, 2014, 92.

⁷² Tasioulas J, Minimum core obligations, 25.

⁷³ Harris M, *Downsizing Rights*, 3.

⁷⁴ Tasioulas J, Minimum core obligations, 27.

⁷⁵ Harris M, *Downsizing Rights*, 5.

⁷⁶ Tasioulas J, Minimum core obligations, 28.

argues that properly implemented benchmarks and indicators can prevent misuse and foster accountability, ensuring that MCOs operate as steppingstones rather than endpoints in human rights fulfillment. Human rights duties that are part of the core must take precedence over others as they must be fulfilled immediately. Therefore, a state cannot delay the provision of the most basic forms of education by citing the necessity to fulfill the human right to education through the establishment of prestigious research centers.⁷⁷ The fact that primary education is provided under the core mandate precludes such prioritization.

2.3 Free and compulsory basic education as the minimum core of the right to education

According to Coomans, free compulsory primary education under the ICESCR is the minimum core of the right to education. He argues that primary education is so foundational for the development of a person's abilities that it can be rightfully defined as a minimum claim.⁷⁸ The ICESCR further substantiates his argument as it regards basic education as an immediate obligation of states, highlighting its centrality in human rights frameworks.⁷⁹ Furthermore, the Maastricht Guidelines state that the corresponding core obligations of the right to basic education apply irrespective of the availability of resources and should thus be fulfilled by all countries, including developing countries.⁸⁰ It is important to note that the CESCR considers the resource limitations within a given country when evaluating whether a state has fulfilled its minimum core obligations.⁸¹ If a state argues that insufficient resources are preventing it from implementing the core aspects of the right, it must demonstrate that the constraint is due to factors beyond its control and that it was unable to obtain support from the international community.⁸²

Although the minimum core obligations of the right to basic education may not be subject to progressive realization, this does not mean that states will have to enforce them immediately in all

⁷⁷ Bilchitz D, Giving socio-economic rights teeth: The minimum core and its importance, *South African Law Journal*, 2002, 119.

⁷⁸ Coomans F, Identifying violations of the Right to Education Evaluation, 1994, 391-415.

⁷⁹ CESCR General Comment No 13, 51.

⁸⁰ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, reprinted in *Human Rights Quarterly* 691-704, 1998, 9-10.

⁸¹ CESCR General Comment No 13, 10.

⁸² Eide A, Krause C and Rosas A, *Economic, social and cultural rights*, Brill, 2001.

circumstances.⁸³ According to Roux, nations must distribute resources gradually, by their capabilities, in recognition of the non-immediacy of these responsibilities.⁸⁴ Even if a state argues that it lacks the resources to fulfill these duties, Roux emphasizes that the state is still closely watched for prioritizing the realization of the right to basic education over other rights that are also subject to progressive realization.⁸⁵ This suggests that even under circumstances where complete compliance might be postponed, ensuring the most underprivileged populations receive basic education remains a paramount concern.

Furthermore, although the minimum core rights are vested in everyone, a minimum core approach to the realization of socio-economic rights, particularly in education, prioritizes specific needs over others.⁸⁶ This approach is justified by the argument that these core needs are most urgent. This method requires states to use all their resources to fulfill the fundamental requirements for underprivileged students before attending to the demands of more affluent groups.⁸⁷ A more just and equal basis for the enjoyment of the right to education is created by states concentrating on their resources where the need is greatest attributable to this practice of temporal priority.⁸⁸

The Convention on the Rights of the Child (CRC) promotes the right to education through Article 28, which mandates that states provide free and compulsory primary education for all children.⁸⁹ It stresses the significance of guaranteeing equal opportunities and eradicating disparities. Verheyde argues that Article 28 must be interpreted in light of Article 41, which declares that higher norms established by national or international law take precedence over domestic laws.⁹⁰ I agree with her argument that, based on Article 41, the CRC Committee's emphasis on the minimum core concept and its strong support in legal doctrine, her claim that the obligation to make primary education free and compulsory is a minimum core obligation is justified.

⁸³ CESCR General Comment No 13, 51.

⁸⁴ Roux T, *The politics of principle: The first South African constitutional court*, Cambridge University Press, 2013, 31.

⁸⁵ Roux T, *The politics of principle*, 46.

⁸⁶ CESCR General Comment No 13, 44 (c).

⁸⁷ Roux T, *The politics of principle*, 47.

⁸⁸ Roux T, *The politics of principle*.

⁸⁹ Convention on the Rights of the Child, 20 November 1989, 1577, UNTS 3.

⁹⁰ Arendse L, *The obligation to provide free basic education in South Africa: an international law perspective*. Potchefstroom Electronic Law Journal, 2011, 97.

The CRC Committee emphasizes the importance of the minimum core, making it clear that the obligations tied to free and compulsory primary education must be put into action right away.⁹¹ This includes taking necessary steps like providing school uniforms, textbooks, and transportation for disadvantaged children.⁹² At the heart of these responsibilities is the principle of non-discrimination, meaning that no child should face barriers to education due to their gender, disability, or economic background.⁹³ If uniforms are required, the state must ensure they are provided, especially for children from poorer families.⁹⁴ This aligns with the CESCR's General Comment No. 11, which prohibits charging parents for essential educational services.⁹⁵ The CRC Committee also highlights that providing essential resources is a fundamental obligation the state must fulfill without delay.⁹⁶ Above all, it calls for the removal of any discriminatory practices within schools, ensuring that no child is excluded due to costs or other obstacles and that every child has the right to an education that truly reflects their needs.⁹⁷

2.4 Chapter Summary

In conclusion, this chapter has shown that the doctrine of minimum core obligations underscores the fundamental guarantees of socio-economic rights, emphasizing both immediate duties of conduct and result-oriented responsibilities. States can meaningfully uphold these rights by safeguarding against retrogressive actions and prioritizing access to essential elements for the most vulnerable. This dual approach ensures that socio-economic rights are not mere aspirations but tangible realities for those who need them most. Ultimately, the effective implementation of these obligations bridges the gap between legal frameworks and the practical experiences of marginalized communities

⁹¹ CESCR General Comment No 11, 7.

⁹² CESCR General Comment No 13, 6 (a).

⁹³ CRC Committee General Comment No 5, 12.

⁹⁴ Arendse L, The obligation to provide free basic education in South Africa, 113.

⁹⁵ CESCR General Comment No 11, 7.

⁹⁶ Tasioulas J, Minimum core obligations, 26.

⁹⁷ Tasioulas J, Minimum core obligations, 27.

CHAPTER THREE: THE LEGAL FRAMEWORK OF THE RIGHT TO EDUCATION IN KENYA

3.1 Introduction

The Constitution of Kenya, 2010, stands as one of the country's most transformative achievements, particularly for its progressive and inclusive Bill of Rights. Departing from its predecessor, the current framework firmly enshrines socio-economic rights, aligning domestic law with international obligations. As explored in the first chapter, these rights, articulated under Article 43, are now judicially enforceable, binding the State to take deliberate measures for their realization. This chapter delves into the jurisprudence surrounding the right to education, analyzing how Kenyan courts have interpreted and advanced socio-economic justice through key decisions. The discussed cases were carefully chosen to highlight this area's most significant legal developments.

This transformative constitutional approach provides recourse through adjudication when socio-economic rights are violated. Article 21(1) affirms the State's obligation to respect, protect, and fulfill fundamental freedoms, imposing both negative and positive duties.⁹⁸ The State must refrain from interfering with rights, regulate private actions to prevent infringements and implement legislative and judicial measures to realize these rights. Sub-article 2 further emphasizes the State's duty to take progressive measures to actualize socio-economic rights.⁹⁹ Article 22 empowers individuals to seek judicial redress for denied or threatened rights, while Article 23 authorizes courts to determine such claims and grant appropriate remedies. Article 165 extends the High Court's jurisdiction to review actions and omissions of the State, providing judicial remedy.¹⁰⁰

This constitutional guarantee of free and compulsory basic education under Article 43(1)(f) is buttressed by Kenya's international obligations through ratification of the discussed conventions. The right to free and basic education is enshrined in Article 28 of the United Nations Convention

⁹⁸ *Constitution of Kenya* (2010).

⁹⁹ Article 21(2), *Constitution of Kenya* (2010).

¹⁰⁰ *Constitution of Kenya* (2010).

on the Rights of the Child (UNCRC).¹⁰¹ Also, the Universal Declaration of Human Rights (UDHR)¹⁰² acknowledges that everyone has the right to education and it is free and compulsory, at least in the elementary and fundamental stages.¹⁰³ Human beings inherent dignity is recognized in the preamble of the declaration. This has led to the declaration, although not a treaty, gaining the status of customary international law and no state party can derogate from it.¹⁰⁴ The UNESCO Convention against Discrimination in Education was the first instrument dealing with education to receive international binding force. It deals with systemic issues that hinder realizing the right to education. Moreso, it is mandated to ensure advancement among nations and equality of educational opportunity. State parties must formulate, develop, and apply a national policy promoting equal opportunity and treatment. It should mainly aim at making primary education free and compulsory. The convention, hence, has safeguarded the principle of non-discrimination and thus ensures accessibility, availability, acceptability and adaptability, which are key to realizing the right to education.

Despite this progress, enforcing socio-economic rights remains challenging due to their novelty in Kenya, unlike the more established civil and political rights.¹⁰⁵ Socio-economic rights necessitate State responsiveness, thus compelling courts to urge executive actions. While such judicial enforcement strengthens rights protection, excessive intervention risks disrupting the balance of power among government branches.¹⁰⁶ Judicial enforcement often necessitates innovative remedies, such as structural interdicts, to ensure democratic attention to neglected interests without compromising judicial boundaries. The Supreme Court of Kenya in the *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others case*, defined a structural interdict as a supervisory order enabling courts to monitor compliance with their rulings, compelling the government to prioritize socio-economic rights and address unreasonable neglect.¹⁰⁷ Consequently, it is essential to

¹⁰¹ *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

¹⁰² UNGA, *Resolution 217A (III), Universal Declaration of Human Rights, A/RES/217(III)*, 10 December 1948.

¹⁰³ Article 26, *The Universal Declaration of Human Rights*.

¹⁰⁴ *Meeting the Basic Learning Needs: A Vision for the 1990s*, UNICEF Publishing House, New York, 1990.

¹⁰⁵ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

¹⁰⁶ Sunstein C, 'Social and Economic Rights? Lessons from South Africa' Coase- Sandor Institute for Law and Economics, John M. Olin Law and Economics Working Paper No. 124, 2001, 3.

¹⁰⁷ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

examine how courts have addressed violations of the right to education, which, as established through doctrinal analysis in Chapter 2, encompasses free and compulsory education.

3.2 Analysis of the court's position

***3.2.1 Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others*¹⁰⁸**

The case of *Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others* revolved around the payment of fees by parents around a time post-2003 when the government had put in place a policy of free primary education.¹⁰⁹ The Chief's Magistrates court was asked to interpret Article 53 of the Constitution and clarify the legal implications of sections 29(1) and (2)(b) of the Basic Education Act of 2013. These sections prohibit public schools from imposing the payment of tuition fees for any pupils while allowing for other monetary levies and charges, but only with the approval of the Cabinet Secretary in consultation with the local County Education Board. Section 29(2) states that no child shall be refused to attend school because of failure to pay such charges.¹¹⁰ In this case, the court determined that the school system had incorrectly and illegally imposed several financial fees, taxes, and levies, including "activity fees," which some parents and students could not pay. Consequently, several students were prohibited from attending classes.

In the High Court ruling it ruled, citing international law obligations, including International Children's Rights Convention and the International Covenant on Economic, Social and Cultural Rights (ICESCR), that the imposition of monetary fees, levies and costs was unlawful. According to Justice Lenaola, free means 'free' and not subject to attendant costs in the name of activity funds such as building costs.¹¹¹ The court declared that such unauthorized levies were unlawful and violated the constitutional and international obligations. Consequently, the court ordered the cessation of these illegal charges and mandated that no child should be denied access to education due to the inability to pay such fees. The Court further stated that the right to basic education is not to be gradually realized, as appears to be the hope of school management bodies, given the

¹⁰⁸ *Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others* (2013), eKLR.

¹⁰⁹ (2013) eKLR.

¹¹⁰ Basic Education Act of (2013).

¹¹¹ *Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others* (2013), eKLR.

immediate nature of the legal obligation to supply it.¹¹² It would diminish the Constitution to suggest that that right should not be enjoyed immediately. The High Court had the opportunity to interpret the state's duty to gradually realize the universal right to education, in contrast, it viewed it as immediate pursuant to the Constitution.

3.2.2 *MMM v Permanent Secretary, Ministry of Education & Others*¹¹³

Similarly, in *MMM v Permanent Secretary, Ministry of Education & Others*, the court addressed the issue of a parent's inability to pay the school fees required for post-primary or secondary education.¹¹⁴ It ruled that the state must provide bursaries to support qualifying children and needy families. The court emphasized that the government must show its commitment by taking concrete steps to ensure progressively more significant access to education. While the case was not intended to delve into the full scope of the right to education under Article 43(f) of the Constitution, the Court highlighted several key points. Firstly, it stressed that the realization of this right should not be solely dependent on increased resources. Instead, policies should be developed, and resources should be allocated in a practical, results-oriented manner, not driven by political or other external factors.¹¹⁵ Secondly, the court underscored that achieving the right to education in Kenya will require a gradual approach framed within a clear and publicly accessible structure.¹¹⁶

3.2.3 *Ndoria Stephen v Minister for Education & 2 others (2015) eKLR*¹¹⁷

In this third case, the petitioner, Reverend Ndoria Stephen, brought the case on behalf of marginalized communities in Kenya and challenged the Minister for Education, the Kenya National Examination Council and the Attorney General of Kenya before the Kenyan High Court in October 2012.¹¹⁸ The Petitioner argued that the government had failed in its obligation to provide equitable education to children in marginalized and minority communities. He contended that since independence, the government's educational policies have excluded and discriminated

¹¹² *Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others (2013), eKLR.*

¹¹³ *MMM v Permanent Secretary, Ministry of Education & Others (2013) eKLR.*

¹¹⁴ (2013) eKLR.

¹¹⁵ *MMM v Permanent Secretary, Ministry of Education & Others (2013) eKLR.*

¹¹⁶ *MMM v Permanent Secretary, Ministry of Education & Others (2013) eKLR.*

¹¹⁷ *Ndoria Stephen v Minister for Education & 2 others (2015) eKLR.*

¹¹⁸ *Ndoria Stephen v Minister for Education & 2 others (2015) eKLR.*

against children in ASAL regions, making it impossible for them to fairly compete with children from more affluent areas for admission to public universities and secondary schools. Also, the children's right to education was being violated by the widespread neglect of schools in ASAL zones and the insufficient supply of infrastructure and instructional materials. The petitioner submitted that making these students take the same test as the other students in the nation was discriminatory. To demonstrate this discrimination, the petitioner claimed that while a nationwide teacher strike led to a three-week postponement of a national exam, tribal conflicts in Tana River County and other regions did not, although schools remained closed during the conflict.¹¹⁹

The petitioner sought judicial intervention to compel the government to prioritize and implement policies addressing these disparities. The petitioner prayed that the Court should stop the Respondent from conducting the Kenya Certificate for Primary School Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) examinations in 2012. The petitioner contended that this violated Article 27, 53(1)(b) and Article 56(b) of the 2010 Constitution, which obligates the state to put in place affirmative action programs designed to ensure that minorities and marginalized groups are provided exceptional opportunities in the educational and economic fields.

In response to the petitioner's submissions, the Ministry of Education argued that it had made substantial efforts to address educational disparities in marginalized regions. They highlighted initiatives such as school feeding programs, the provision of mobile schools for nomadic communities, and increased financial allocations for infrastructure development in marginalized communities in Kenya. The government argued that it had implemented initiatives to guarantee that children from marginalized communities take national exams in a more conducive environment.

In this case, the Court acknowledged that it was limited to the arguments and evidence presented before it. Regrettably, the petitioner did not raise the issue of evaluating the reasonableness or effectiveness of the government's policies to tackle the challenges of providing basic education in marginalized areas.¹²⁰ Moreover, the government failed to present evidence demonstrating the

¹¹⁹ *Ndoria Stephen v Minister for Education & 2 others*, (2015) eKLR.

¹²⁰ Mahadew A, Case Review on *Ndoria Stephen v Minister for Education & 2 others*, (2015).

efficacy of its strategies in addressing these challenges. Mahadew points out that although the petitioner did not specifically ask the Court to assess the reasonableness or efficacy of the government's measures, the Court had the discretion to request such evidence.¹²¹ This would have been a more effective and appropriate course of action. There should be clear evidence showing that the government's measures are improving access to quality education in marginalized areas. This includes visible improvements in infrastructure like classrooms, sanitation, and educational resources. It is not enough for the Court to accept the government's claims without evaluating the effectiveness of its policies and programs in addressing educational disparities.

In this case, the Kenyan judiciary had a great chance to reinforce one of the most essential socio-economic rights, the right to education. However, the court did not fully consider the progressive nature of this right, as stated in Article 2 of the ICESCR.¹²² The Court acknowledged that it could only consider the arguments and supporting documentation that were brought to its attention. The government failed to produce proof of the policy's success, and the petitioner did not contest the policies' efficacy or reasonableness. Judicial activism may have addressed this lost chance by using the Court's discretion to ask for further information to evaluate the effectiveness and reasonableness of the government's actions, as used in the *Grootboom case* in South Africa where the reasonableness of the low-cost housing program was assessed given the progressive realization of the right to housing.¹²³ To avoid adopting a more bureaucratic approach and infringing on the Executive's duties, the Constitutional Court refrained from making decisions regarding the specifics of such programs and instead left them up to the executive's discretion.

3.3 The appropriateness of structural interdicts to be a relief for the violation of the right to free and compulsory education.

Courts play a vital role in safeguarding socio-economic rights by interpreting constitutional provisions, resolving disputes, and holding the government accountable. When a right is violated, individuals have the legal avenue to seek redress in court. The judiciary serves as the guardian of the Constitution and the Bill of Rights, ensuring that state actions align with constitutional

¹²¹ Mahadew A, Case Review on *Ndoria Stephen v Minister for Education & 2 others*, 3.

¹²² Skeleton A, Mutu P, Realising the right to basic education through strategic litigation in Kenya, *African Human Rights Law Journal*, 2024, 292.

¹²³ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

mandates. Apart from hearing cases on rights violations, courts also grant appropriate remedies to rectify such breaches. The judiciary has the power to enforce the Bill of Rights by providing redress for denied, violated, or threatened rights. Article 23 of the Constitution outlines a range of possible remedies but does not limit the courts to those listed, allowing for the development of new and suitable forms of redress as needed.

One significant judicial remedy is the structural interdict, a measure used to ensure compliance with court rulings, particularly in cases of systemic violations of socio-economic rights. Structural interdicts require the party responsible often to the government to implement corrective measures under judicial supervision.¹²⁴ This approach acknowledges that some rights can only be effectively realized by addressing deep-rooted structural issues within public institutions.¹²⁵ Structural interdicts help create sustainable solutions that ensure broader access to fundamental rights by focusing on long-term reforms rather than isolated infractions.

The Constitution, through its extensive Bill of Rights, guarantees various economic and social rights.¹²⁶ These include the right to the highest possible standard of health, access to adequate and affordable housing, proper sanitation, social security and education. These rights are meant to be progressively realized, depending on the availability of resources.¹²⁷ However, as emphasized by Justice Mumbi Ngugi in the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*, the government has a duty to take reasonable steps to facilitate their fulfillment.

The Mitu-Bell case arose from the forced eviction and demolition of homes in the informal settlement of Mitumba Village, located near Wilson Airport in Nairobi. The residents, represented by Mitu-Bell Welfare Society, challenged the eviction, arguing that it violated their constitutional rights, including the right to housing, dignity, and fair administrative action. The High Court ruled in their favor, emphasizing the government's obligation to provide alternative shelter to those who

¹²⁴ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

¹²⁵ Mbazira C, 'From ambivalence to certainty: Norms and principles for the structural interdicts in socio-economic-economic rights litigation in South Africa', 24 *South African Journal on Human Rights*, 2008, 4.

¹²⁶ Ambani JO and Mbondenyi K, *A new era in human rights promotion and protection in Kenya? An analysis of the salient features of the 2010 Constitution's Bill of Rights*, (eds) Pretoria University.

¹²⁷ Article 21, Constitution of Kenya (2010).

were rendered homeless. The Kenya Airports Authority appealed, and the Court of Appeal overturned the High Court's decision. Subsequently, the case was taken to the Supreme Court.

The Supreme Court upheld the residents' rights, declaring the evictions unlawful and a violation of the right to housing under Article 43(1) of the Constitution. The Court affirmed that evictees are entitled to seek redress, including compensation, adequate notice, dignified treatment, and even the provision of alternative land for resettlement. Consequently, the Supreme Court recognized the use of structural interdicts as appropriate reliefs in human rights litigation under the Constitution. This decision underscored the judiciary's role in holding the state accountable for fulfilling socio-economic rights and provided a framework for enforcing such rights in Kenya.

The judiciary must hold the state accountable for its minimum core obligation to ensure that basic education is accessible, available, and non-discriminatory. The right to education is not just a right to “attend school” but a guarantee that children in ASAL regions can access quality education without financial barriers. Just as the state was required to provide immediate alternatives to forced evictions in the Mitu-bell case, it similarly has an immediate obligation to ensure that children in these regions have access to at least basic education.

From the Mitu-bell case, we get to borrow the idea of structural interdicts as it has been evidenced that the government is reluctant to work towards the realization of the rights and the word progressive realization is used to shield or justify their inactions. They claim the nature of these rights does not create a mandatory obligation on the state to take measures toward their realization. Structural interdicts offer a way to force the government’s hand into action regarding these often-neglected rights. The Supreme Court pointed out that socio-economic rights, like all other rights, require the state to formulate the needed policy and legislation to ensure their enjoyment. Additionally, it is well within the court's powers to apply an interpretation of the law that favors the enforcement of the Bill of Rights. It went on to state that the Court can use structural interdicts to require the government to furnish the Court with evidence that, indeed it is incapable, owing to limited resources, of realizing the right.¹²⁸

¹²⁸ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

However, there is a challenge in ensuring compliance with supervisory court orders, as many directives on socio-economic rights remain unenforced due to inadequate follow-up mechanisms. In certain cases, courts must exercise supervisory jurisdiction to guarantee that their rulings are implemented effectively. For example, in *Michael Mutinda Mutemi*, the court directed the State to submit affidavits within 30 days detailing the actions taken regarding the petitioner's bursary application for his son's school fees. Yet, nearly a year later, the State had not complied, raising concerns about the enforceability of socio-economic rights in Kenya. A similar situation arose in *Mitu-Bell Welfare Society v. Attorney General & 2 Others*, where the court instructed the State to submit an affidavit within 60 days outlining its policies on shelter and housing for marginalized groups and to engage with the petitioners to address their grievances after their eviction. However, to date, the State has not adhered to the court's orders. These instances highlight the broader issue of state reluctance in fulfilling its constitutional obligations regarding socio-economic rights, emphasizing the need for stricter judicial intervention to ensure compliance.

***3.2.5 Havi v Cabinet Secretary, Responsible for Matters Relating to Basic Education & 7 others; Kenya Private Schools Association & 4 others*¹²⁹**

Lastly, the infamous case of *Havi v Cabinet Secretary, Responsible for Matters Relating to Basic Education & 7 others; Kenya Private Schools Association & 4 others* cannot miss to be discussed in this context. The case was initially filed by Esther Ang'awa in Constitutional Petition E371 of 2021,¹³⁰ It revolved around the legality and constitutionality of the CBC in Kenya. Ang'awa, an advocate of the High Court and parent, argued that the CBC was implemented without sufficient research or meaningful public participation, as required under constitutional and statutory law, particularly the Basic Education Act of 2013. She contended that the CBC is in breach of Section 41 of the Basic Education Act No 4 of 2013 and in contravention of Articles 1(3)(a), 2(1) and (2), 3(1), 10, 21(1), (2) and (3), 24, 27(1), (2), (4) and (5), 33(1), 43(1)(0), 47(1) and (2), 53(b) and (d) and (2), 55(c), 56, 73 and 232 of The Constitution of Kenya.¹³¹

¹²⁹ *Esther Awuor Adero Ang'awa v Cabinet Secretary Responsible for Matters Relating to Basic Education & 7 others; Kenya Private Schools Association (KPSA) & 4 others (Interested Parties)* (2021) eKLR.

¹³⁰ *Esther Awuor Adero Ang'awa v Cabinet Secretary Responsible for Matters Relating to Basic Education & 7 others; Kenya Private Schools Association (KPSA) & 4 others (Interested Parties)* (2021) eKLR.

¹³¹ (2021) eKLR.

The Ministry of Education defended the new curricula by emphasizing its goals to address the deficiencies of the 8-4-4 system, which had been criticized for promoting rote learning rather than practical skills. The respondents referred to the numerous task force and committee reports, starting with the Mackay Report, which acknowledged that the 8-4-4 system was an unintended result of the necessity to expand university education by one year and as such the Petitioner's plea for a return to the 8-4-4 educational system is essentially asking the Court to accept a curriculum and organizational framework that emerged as an unexpected consequence. They further presented that Vision 2030's Social, Economic, and Political Pillars aim to improve the quality of life through targeted social programs, including education reforms, and to achieve a 100% transition from primary to secondary school.

Furthermore, the Ministry of Education argued that halting the CBC would lead to substantial financial losses and cause massive disruption, including derailing ongoing assessments for Grade 6, preparations for Junior Secondary Schools, and teacher training programs. Moreover, it argued that forcing Grade 5 learners back into the old curriculum for national examinations would be unfair and result in widespread failures. The government concluded that any interruption to CBC implementation would jeopardize the education sector's progress and destabilize ongoing reforms critical for national development.

The High Court's three-judge bench ruled to maintain the CBC. Firstly, the court found sufficient public participation, including consultations with faith-based organizations, educators, and other stakeholders, had occurred. The court ruled that the respondents had serious engagements with major stakeholders including, the public, learners, Kenya National Union of Teachers and Kenya Union of Post Primary Teachers in the various steps towards implementing CBC. Secondly, the court emphasized that scrapping CBC mid-implementation would disrupt the education system and harm learners, violating their constitutional right to education under Article 53(1)(b). Lastly, the court acknowledged the systemic investments already made in CBC, ruling that the sunk costs and progress achieved outweighed the procedural flaws raised by the petitioners. The court did not grant the petitioners their prayer for an injunction and conservatory order because they found no supporting evidence. They emphasized that the judgments are based on the tremendous public interest and likely prejudice that will be visited on the children of this country and the general disruption and disorder that would occur should the implementation of CBC be stopped at this

stage. On the flip side of the coin, the petitioners did not demonstrate any prejudice that would occur should the implementation continue.

The Court acknowledged its reliance on the arguments and evidence presented but missed an opportunity to scrutinize the reasonableness and effectiveness of government measures in ensuring equitable access to education. Also, the respondents failed to provide a case for the inequalities that the CBC burdens the marginalized communities and neither did the court exercise its discretion and request such evidence. The petitioner requested that the Court declare the CBC curriculum in violation of the constitutional right to education, it was thus incumbent on the Court to direct the respondents to show how effective and reasonable the measures cited were for it not to grant an order making such a declaration.

However, the court's approach in *Havi* missed a critical opportunity to reconcile the tension between administrative efficiency and the realization of constitutional rights. For children in ASAL regions, the financial demands and infrastructural deficiencies associated with CBC render meaningful participation nearly impossible.¹³² This perpetuates systemic inequities that Article 56(b) of the Constitution explicitly seeks to remedy through affirmative action measures for marginalized groups. Consequently, in failing to interrogate whether the state had meaningfully prioritized marginalized populations, the court diluted the transformative aspirations of Kenya's constitutional framework. Administrative efficiency cannot be an end in itself; it must align with the overarching constitutional directive to uphold human dignity, equality, and non-discrimination. A more rigorous judicial approach would demand that the state justify its resource allocation strategies against the yardstick of minimum core obligations, ensuring that fundamental rights are not sidelined for the sake of procedural expedience.

3.3 Chapter Summary

This chapter analyzes the court's approach to socio-economic rights, with a focus on the right to education. It highlights the judiciary's role in affirming the justiciability of this right while also revealing inconsistencies in its enforcement. The discussion underscores the challenges of

¹³² Richard Kipngeno Ronoh and Serem D: *Challenges faced in implementing free primary education for pastoralists in Kenya*, Scientific Methodical Center, Lithuania, 2012, 102.

balancing judicial intervention with government policy and the need for stronger mechanisms to ensure effective implementation. Ultimately, the chapter emphasizes the importance of a more consistent and proactive judicial approach in safeguarding the right to education.

CHAPTER FOUR: COMPARATIVE ANALYSIS BETWEEN FINLAND AND KENYA

4.1 Introduction

The curriculum of Finland is known as the Finnish National Core Curriculum, which serves as the guiding framework for education in the country.¹³³ It is the same as Kenya's new curriculum only that Finland's approach is more decentralized, allowing municipalities and schools significant autonomy in curriculum adaptation. Finland express their education reform as been gradual , strategic and not abrupt.¹³⁴ Stakeholders recognized early on that short cuts rarely lead to lasting progress and that building a strong, equitable education system requires consistent, research-driven adjustments over time.¹³⁵ Similar to Kenya, Finland has adopted a competency-based approach, shifting from traditional exam-focused education to a more holistic system that fosters lifelong learning.¹³⁶ Finland's approach underscores the importance of sustained investment, well-structured policy frameworks, and active stakeholder engagement in education reforms.¹³⁷ These factors make Finland's competency-based curriculum an insightful case study for Kenya's ongoing educational transformation, particularly in addressing regional disparities and ensuring equitable learning opportunities for all students.

One of its significant reforms, the 2014 National Curriculum Framework, emphasizes student-centered and phenomenon-based learning to enhance critical thinking, creativity, and problem-solving skills.¹³⁸ Furthermore, Finland's implementation has been highly systematic, supported by

¹³³ Vitikka E, Krokfors L and Hurmerinta E, The Finnish National Core Curriculum: Structure and development, University of Helsinki,2012

¹³⁴ Ouakrim N,Kupianen S, Beyond PISA: Building a World-Class Learning System in Finland, National Center on Education and the Economy, Washington, 28,2023.

¹³⁵ Ouakrim N,Kupianen S, Beyond PISA: Building a World-Class Learning System in Finland, 90.

¹³⁶ [Kenya-Finland strategizes on CBC implementation](#) on February 14, 2025.

¹³⁷ Ouakrim N,Kupianen S, Beyond PISA: Building a World-Class Learning System in Finland, 53.

¹³⁸ Finnish National Board of Education, New national core curriculum for basic education: focus on school culture and integrative approach, 2016.

long-term policy planning, substantial investment in teacher education, and a decentralized governance structure that allows schools and municipalities significant autonomy in curriculum adaptation.¹³⁹ Its' current educational model was a strategic response to the need for a more equitable and effective system. It's not surprisingly that Finland ranks among the most successful education systems globally, demonstrating consistently high student performance.¹⁴⁰ Their success is attributed to their well-planned government implementation strategies, including substantial investment in teacher training and curriculum development.¹⁴¹ The Finnish government ensures that education reforms are guided by research-based methodologies rather than political agendas, fostering a stable and sustainable system.¹⁴²

4.2 Finland's legal framework

Historically, compulsory education in Finland was first introduced in 1921 through the Compulsory Education Act, which mandated that all children attend school for at least six years.¹⁴³ This was later extended to nine years in 1968, when Finland adopted the comprehensive school system, ensuring that all children receive free and equal education from ages seven to thirteen.¹⁴⁴ The legal framework mandates publicly funded education with minimal variation in school quality. In 2021, Finland further expanded compulsory education to 12 years, requiring students to continue education until they complete upper secondary school or turn 18 years old.¹⁴⁵ This reform aimed to improve youth employment rates and ensure that all students acquire essential skills for further education and the labor market. Under the Basic Education Act, municipalities are required

¹³⁹ OECD Education Policy Perspective, Finland's Right to Learn Programme: Achieving equity and quality in education,2022,2.

¹⁴⁰ Ouakrim N,Kupianen S, Beyond PISA: Building a World-Class Learning System in Finland,30.

¹⁴¹ Maiyuria M, Mackatani C, Gakunga D, Competency Based Curriculum in Kenya: Impact of Resources on Implementation of the Programme, International journal of research and innovation in social science,2024, 3659.

¹⁴² Sahlberg P, Finnish lessons 3.0, What can the world learn from educational change in Finland? Teachers College Press, 2021,34.

¹⁴³ Vitikka E, Krokfors L and Hurmerinta E, The Finnish National Core Curriculum, 21.

¹⁴⁴ Eurydice, Finland: Compulsory education extended until the age of 18<[Finland: Compulsory Education](#), on July 23,2021.

¹⁴⁵Welcome to Eurydice, Finland: Compulsory education extended until the age of 18<[Finland: Compulsory Education](#), on July 23,2021.

to ensure that all children within their jurisdiction receive compulsory education, including a year of pre-primary schooling before formal education begins.¹⁴⁶

In addition, Finland's implementation has been extremely methodical, strengthened by long-term policy planning, substantial investment in teacher preparation, and a decentralized governance structure that grants municipalities and schools considerable latitude in modifying the curriculum.¹⁴⁷ This legal decentralization ensures that educational governance remains flexible and responsive to local needs, a stark contrast to systems that rely on rigid centralized control.¹⁴⁸ By embedding local autonomy within a legally binding national framework, Finland strikes a balance between uniform educational standards and contextual adaptability, fostering an innovative and inclusive learning environment.

Moreover, Finnish law elevates the teaching profession through rigorous academic requirements, mandating that primary and secondary educators hold master's degrees.¹⁴⁹ This legislative emphasis on expertise ensures that teachers are not merely implementers of policy but active architects of the curriculum and student assessment.¹⁵⁰ Unlike Kenya that impose standardized, high-stakes testing, Finland's legal framework entrusts teachers with classroom-based assessments, reinforcing the principle that evaluation should support learning rather than serve as a punitive ranking mechanism.¹⁵¹ Finland's strategy emphasizes how crucial it is to implement education changes with consistent funding, well-designed policy frameworks, and strong stakeholder participation.

At the heart of Finland's legal education policy is an unwavering commitment to equity. Municipalities are legally required to prepare education equality plans, ensuring that schools have the resources to support students with disabilities, immigrants, and those from lower socioeconomic backgrounds.¹⁵² The law mandates that education remains tuition-free,

¹⁴⁶ Aho E, Pitkanen K and Sahlberg P, Policy Development and Reform Principles of Basic and Secondary Education in Finland since 1968 , The World Bank, Washington,2006,20.

¹⁴⁷ Lavonen J, Governance decentralisation in education: Finnish innovation in education,2017,4.

¹⁴⁸ Lavonen J, Governance decentralisation in education: Finnish innovation in education,2017,12.

¹⁴⁹ Sahlberg P, The Secret to Finland's Success: Educating Teachers, Stanford Center for Opportunity Policy in Education, 2, 2010

¹⁵⁰ Sahlberg P, The Secret to Finland's Success, 2.

¹⁵¹ [Kenya-Finland strategizes on CBC implementation](#) on February 14, 2025.

¹⁵² Sahlberg, P, Finnish lessons 3.0, Teachers College Press, New York, 2011,6.

encompassing not just instruction but also meals, learning materials, and transportation where necessary, thus dismantling economic barriers to access.¹⁵³ These legal provisions align education with Finland's broader welfare policies, positioning learning as a fundamental right rather than a commodity. Finland's education system is founded on principles that prioritize quality, equity, efficiency, student well-being, and global engagement.¹⁵⁴ It aligns closely with the country's broader welfare policies and promotes lifelong learning as an essential aspect of personal and societal development.

Finland's recent reforms have emphasized transforming schools into collaborative learning spaces, nurturing a supportive educational environment, and fostering independent learning among students.¹⁵⁵ Consequently, Finland's legal framework integrates digital education strategies into national policies, ensuring that technological advancements enhance learning rather than widen inequalities.¹⁵⁶ While Kenya struggles with a digital divide, Finnish law mandates equal access to digital tools, promoting inclusive digital literacy. This legal foresight reflects Finland's long-term strategic planning, embedding adaptability within the legal structure of its education system.¹⁵⁷

4.3 Education investments in Finland

As of 2025, Finland has reflected a sustained commitment to educational investment over the years. Its average public spending on education being approximately 5.88% of Gross Domestic Product (GDP), its peak being a GDP of 7.49% in 1993 and its lowest being a GDP of 5.1% in 2022 which was caused by the effects of the covid 19 pandemic.¹⁵⁸

In Finland, the provision of education is a decentralized responsibility shared between the state and its 308 municipalities.¹⁵⁹ Municipalities are legally obligated to offer basic services, including early childhood education and basic education, to all residents.¹⁶⁰ The funding model is designed

¹⁵³ OECD Education Policy Perspective, Finland's Right to Learn Programme,4.

¹⁵⁴ Benito R, Alegre M and Balletbo G, School Segregation and Its Effects on Educational Equality and Efficiency in 16 OECD Comprehensive School Systems", Comparative Education Review, 104-134,2014.

¹⁵⁵ Sahlberg P, Finnish lessons, What can the world learn from educational change in Finland? 97.

¹⁵⁶ Sahlberg P, Finnish lessons, What can the world learn from educational change in Finland? 97.

¹⁵⁷ Lavonen J, Governance decentralisation in education: Finnish innovation in education,2017,4.

¹⁵⁸ https://www.theglobaleconomy.com/Finland/Education_spending/ 2025

¹⁵⁹ Lavonen J, Governance decentralisation in education: Finnish innovation in education,2017,17.

¹⁶⁰ Sahlberg P, The Secret to Finland's Success,4.

to ensure equity across regions, with the executive providing financial support to municipalities to balance disparities in local revenue generation.¹⁶¹ This system ensures that even municipalities with limited resources can maintain high educational standards.¹⁶² Consequently, rural schools receive funding that enables them to offer quality education comparable to urban institutions. The Finnish education system's emphasis on uniformity and equal opportunity ensures that students in rural areas have access to the same educational resources and qualified teachers as their urban counterparts.¹⁶³

Kenya faces significant challenges in providing adequate educational funding to rural and marginalized communities.¹⁶⁴ Despite constitutional mandates ensuring the right to free and compulsory basic education, disparities persist in arid and semi-arid regions.¹⁶⁵ Factors such as poverty, nomadic lifestyles, and inadequate infrastructure contribute to lower enrollment and retention rates in these areas.¹⁶⁶ To address these challenges, initiatives like the Education for Marginalized Children of Kenya II (EMACK II), supported by USAID and the Aga Khan Foundation, have been implemented.¹⁶⁷ EMACK II focuses on increasing access to education in marginalized counties. Kenya's educational funding for marginalized communities is more reliant on targeted interventions and external support to bridge existing gaps. While the government has made strides in policy reforms and partnerships to enhance educational access, challenges remain in achieving uniform quality and resource distribution across all regions.

On the other hand, Finland has established a strong education system distinguished by substantial resource allocation, transparency, and effective governance. According to the 2023 Corruption Perceptions Index by Transparency International, Finland ranks second with a score of 87, reflecting a strong commitment to integrity and accountability in public administration.¹⁶⁸ This high level of transparency ensures that educational resources are efficiently utilized, contributing

¹⁶¹ Sahlberg P, Finnish lessons 3.0: What can the world learn from educational change in Finland? ,128.

¹⁶² Sahlberg P, Finnish lessons 3.0: What can the world learn from educational change in Finland? ,128.

¹⁶³ Sahlberg P, Finnish lessons 3.0: What can the world learn from educational change in Finland? ,129.

¹⁶⁴ Ogola F, 'Free Education in Kenya's Public Primary Schools Addressing the Challenges,2010,8.

¹⁶⁵ Kinyanjui J, Kenya: ^[L]_[SEP]Education in Marginalized Communities, Open Book Publishers, 2022.

¹⁶⁶ Kinyanjui J, Kenya: ^[L]_[SEP]Education in Marginalized Communities, Open Book Publishers, 2022.

¹⁶⁷ U.S Agency for International Development, Education for marginalized children in Kenya fact sheet,2017-2020.

¹⁶⁸ Transparency International, the global coalition against corruption, 2023 Corruption Perceptions Index, [2023 Corruption Perceptions Index](#) 2023.

to the country's exemplary educational outcomes. In contrast, Kenya faces challenges related to underfunding and governance in its education sector, as reflected in its lower Corruption Perceptions Index score of 31, placing it 126th out of 180 countries.¹⁶⁹ By adopting Finland's practices of fiscal discipline and accountability, Kenya could enhance its educational infrastructure and resource management, thereby improving access to quality education, particularly in marginalized regions.

However, Finland's education system faces significant challenges due to its rapidly aging population and urban migration trends.¹⁷⁰ The country is experiencing one of the fastest aging populations among OECD nations, with the proportion of citizens aged 65 and over increasing from 14.8% in 2000 to 21.8% in 2019.¹⁷¹ This demographic shift leads to declining school-age populations, particularly in rural areas, resulting in decreased enrollment and the consolidation or closure of rural schools.¹⁷² Consequently, educational resources become increasingly concentrated in urban centers, potentially exacerbating regional disparities in educational access and quality.¹⁷³ Urbanization introduces additional challenges, as schools in suburban areas report rising social and behavioral issues among students.¹⁷⁴ Educators note an increase in loneliness, depression, and anxiety among young people, necessitating adaptations within the education system to address these mental health concerns.¹⁷⁵ Furthermore, the pervasive influence of digital media presents a significant obstacle for educators striving to maintain student engagement.¹⁷⁶ In response, some Finnish schools have reverted to traditional learning tools, such as books, to mitigate distractions associated with digital devices and refocus students' attention on learning.¹⁷⁷

¹⁶⁹ Transparency International, the global coalition against corruption, 2023 Corruption Perceptions Index, [2023 Corruption Perceptions Index](#) 2023.

¹⁷⁰ Valkama P, Oulasvirta L, How Finland copes with an ageing population: adjusting structures and equalising the financial capabilities of local governments, 1, 2021.

¹⁷¹ Valkama P, How Finland copes with an ageing population, 1.

¹⁷² Sahlberg P, Finnish lessons 2.0: What can the world learn from educational change in Finland?. Teachers College Press, 35, 2014.

¹⁷³ Bartl W, Economisation of the education system in shrinking regions? The demographic responsiveness of education demand and supply at different levels of the education system. Comparative Population Studies, 2014, 39.

¹⁷⁴ Sahlberg P, Finnish lessons 2.0, 37.

¹⁷⁵ Bartl W, Economisation of the education system in shrinking regions? 42.

¹⁷⁶ Kupiainen R, Making the "digital leap" in Finnish schools, Tampere University, Finland, 290.

¹⁷⁷ Kupiainen R, Making the "digital leap" in Finnish schools, 294.

4.3 Chapter Summary

This chapter undertakes a comparative analysis of Finland and Kenya's education systems, exploring differences in curriculum design, legal frameworks, and funding strategies. In conclusion, Finland's decentralized, equity-centered model anchored in sustained, research-informed reforms and robust legal support exemplifies how strategic local autonomy and consistent investment can yield outstanding educational outcomes. Kenya's emerging shift toward a competency-based, locally driven approach highlights the transformative potential of embracing similar principles to address systemic challenges. Ultimately, aligning policy with practice is essential for achieving lasting educational excellence.



CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Findings

The legal analysis in this research shows the systemic weaknesses in the judicial enforcement of the right to education in Kenya. While the courts have recognized education as a fundamental socio-economic right, they have failed to establish a clear, enforceable legal framework for compelling the government to uphold this right especially in the Northern region of Kenya. The study critically evaluates judicial precedents, highlighting inconsistencies, judicial difference to executive discretion, and a lack of structural remedies to address systemic violations.

Firstly, a key finding is that Kenyan courts have taken conflicting positions regarding the justiciability of the right to education. In cases such as *Githunguri Residents Association v. Cabinet Secretary, Ministry of Education* and *MMM v. Permanent Secretary, Ministry of Education*, the courts affirmed that free and compulsory education is an immediately enforceable right, not subject to progressive realization. However, in cases like *Ndoria Stephen v. Minister for Education*, the courts adopted a deferential approach, refraining from compelling the government to take concrete steps to redress systemic educational inequalities. This inconsistency weakens the legal framework necessary for holding the state accountable. By failing to adopt a coherent interpretive approach, the courts have allowed the government to evade its obligations under both the Kenyan Constitution and international law. The judiciary's reluctance to demand clear evidence of policy effectiveness means that the government can justify educational disparities without meaningful scrutiny.

Secondly there is a limited use of structural interdicts as a remedy that could enforce compliance with court decisions. Courts have missed opportunities to compel the executive to take immediate corrective action. As analyzed in the *Havi v. Cabinet Secretary for Education*, the court failed to demand a clear, legally binding commitment from the government to address disparities in the implementation of the Competency-Based Curriculum (CBC). Instead, the court upheld CBC's legality based on government assurances, without compelling an audit of its accessibility for marginalized communities. A more rigorous judicial approach would require the Kenyan government to justify its resource allocation strategies in light of the principle of non-discrimination enshrined in the Constitution. The study argues that judicial reluctance to

interrogate budgetary priorities has enabled the government to perpetuate inequitable educational access.

Thirdly, While the Kenyan Constitution guarantees free and compulsory basic education, there remains a legislative gap in defining the minimum core content of this right. Without a clear legal standard, the executive continues to evade its obligation by invoking resource constraints.

Also, Kenya has ratified key international treaties, including the ICESCR which obligate states to provide at least a minimum core level of education to all children. However, the study finds that Kenya has failed to meet this obligation, particularly in the Arid and Semi-Arid lands, where schools lack teachers, adequate learning materials, and basic infrastructure.

5.2 Recommendations

A critical step toward ensuring the full realization of the right to education in Kenya is the establishment of a consistent and proactive judicial framework. The judiciary must adopt a uniform interpretive approach that aligns with international legal obligations, ensuring that the right to education is not left to government discretion. Courts must move beyond passive acknowledgment of rights violations and instead prioritize structural interdicts that mandate compliance rather than merely recognizing constitutional breaches. Such an approach would prevent policy failures from being dismissed as administrative oversights and, instead, place a legal obligation on the government to take immediate corrective action.

Beyond judicial intervention, budgetary transparency and accountability are essential to realizing the right to education. Courts should play a more active role in scrutinizing public education spending to ensure compliance with constitutional obligations under Article 43(1)(f). Drawing from the *Government of the Republic of South Africa v Grootboom* decision, the reasonableness standard requires the State to justify its education policies and budgetary decisions based on their impact and adequacy, especially for the most vulnerable. This approach prevents the government from using resource limitations as a blanket excuse for systemic neglect and instead calls for targeted, equitable investment in underserved areas.

To ensure equitable access to education, the government should adopt positive discrimination in education financing by prioritizing historically marginalized regions, especially in Northern

Kenya. This means directing resources not just broadly, but specifically toward communities that have suffered long-standing exclusion under both the 8-4-4 and CBC systems. While county governments play a role in implementing local infrastructure, the responsibility for funding free and basic education must remain with the national government, as provided under the Fourth Schedule of the Constitution.

Furthermore, the Basic Education Act (2013) must be amended to explicitly incorporate the minimum core obligation which is a non-negotiable legal standard that guarantees universal access to fundamental educational resources. This amendment should establish a binding statutory framework that compels the government to ensure equitable teacher distribution, adequate learning materials, and infrastructural improvements, particularly in Arid and Semi-Arid Lands (ASALs). Without this legal certainty, the right to education remains an abstract constitutional promise rather than an enforceable reality.

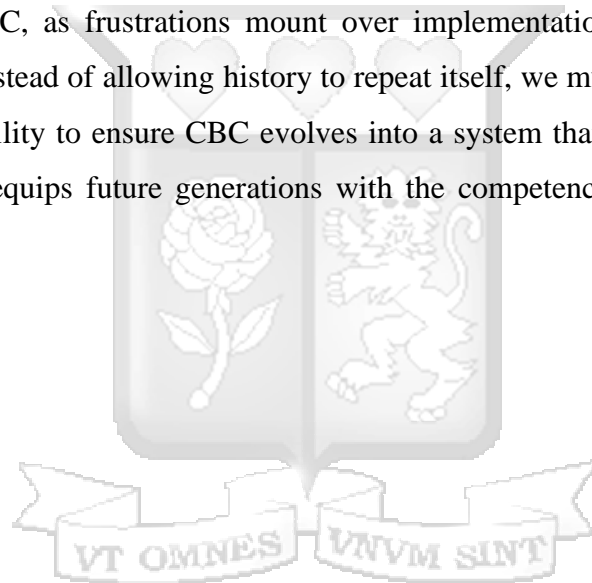
Kenya's education reform can also benefit significantly from lessons drawn from Finland's globally acclaimed model. Finland's success is anchored in sustained investment, decentralized governance, and research-driven policymaking principles that remain conspicuously absent in Kenya's highly centralized and politically volatile education system. Kenya can emulate Finland by devolution being left in the ambit of the county governments. A key recommendation from this comparison is the institutionalization of decentralized education governance, granting greater autonomy to schools and local governments. Unlike Kenya, where curriculum decisions are dictated at the national level, Finland's approach ensures that municipalities and schools have the flexibility to adapt curricula to local needs, creating a responsive and context-specific education system.

Finally, public participation in education policymaking must be institutionalized. A major flaw in Kenya's Competency-Based Curriculum (CBC) rollout was the lack of inclusive stakeholder engagement, leading to widespread resistance and implementation challenges. To ensure that future reforms are both practical and sustainable, Kenya must establish a legally mandated public participation framework that requires periodic consultations with parents, teachers, civil society, and education experts. Moreover, the creation of a National Education Ombudsman an

independent body tasked with oversight and accountability in education policymaking would serve as a critical safeguard against arbitrary or politically motivated curriculum changes.

Conclusion

In conclusion, CBC is no longer a fleeting experiment but a permanent feature of Kenya's education system, making it imperative to shift discussions from resistance to refinement and sustainability. Eight years into its implementation, we have witnessed both its strengths and its shortcomings. Looking back, Kenya's approach to education reform has often been reactionary rather than strategic. First, we weakened the 8-4-4 system by rationalizing learning areas, and when that failed, we demonized it, paving the way for its abrupt replacement. A similar pattern is now unfolding with CBC, as frustrations mount over implementation challenges rather than focusing on solutions. Instead of allowing history to repeat itself, we must move beyond political debates and policy volatility to ensure CBC evolves into a system that truly enhances learning, fosters inclusivity, and equips future generations with the competencies needed in a dynamic world.



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