

**THREADING THE NEEDLE: ASSESSING THE BALANCE BETWEEN THE
STATE'S LEGAL OBLIGATIONS AND THE PROGRESSIVE REALISATION
OF THE RIGHT TO EDUCATION IN KENYA**

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Declaration

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

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Dedication

To God, whose grace, guidance, and unfailing love have been my anchor throughout this journey. I am grateful for the strength and wisdom that have carried me through every challenge.

To my family, whose unwavering love, sacrifices, and prayers have been the foundation of my achievements. To Aunty Irene, my anchor and constant source of inspiration, your belief in me and steadfast support have been a fount of strength and resilience.

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May this research contribute, in some small way, to a world where education is truly accessible to all.

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List of legal instruments

Basic Education Act, 2013

Basic Education Bill, 2024

Children Act, 2022

Constitution of Kenya, 2010

Constitution of the Republic of South Africa, 1996

Convention on the Rights of the Child, 1989

International Covenant on Economic, Social, and Cultural Rights, 1966

Repealed Education Act, 1968 (Cap 11)

South African Schools Act, Act 84 of 1996

List of abbreviations

CBC	Competence-Based Curriculum
CDF	Constituency Development Fund
CEB	County Education Boards
CESR	Committee on Economic, Social, and Cultural Rights
CRC	Convention on the Rights of the Child
EFA	Education For All
ESC	Economic, Social, and Cultural
ICESCR	International Covenant on Economic, Social, and Cultural Rights
KICD	Kenya Institute of Curriculum Development
KIE	Kenya Institute of Education
SER	Social and Economic Rights
TVET	Technical and Vocational Education and Training

List of cases

Baker v Carr (1962), The Supreme Court of the United States.

Certification of the Constitution of the Republic of South Africa (1996), Constitutional Court of South Africa.

Gabriel Nyabola v Attorney General & 2 others (2014) eKLR.

Juma Musjid Primary School v. Essay NO and Section 27 v Minister of Education (2011), Constitutional Court of South Africa.

Marbury v Madison (1803), The Supreme Court of the United States.

Minister of Health and Others v Treatment Action Campaign and Others (2002) Constitutional Court of South Africa.

Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (2021) eKLR.

MMM v Permanent Secretary, Ministry of Education & 2 others (2013) eKLR

Ndoria Stephen v Minister of Education & 2 others (2015) eKLR.

Section 27 and Others v Minister of Education and Another (2012), The High Court of South Africa, Gauteng Division, Pretoria.

William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others (2021) eKLR.

Abstract

This study explores the realisation of the right to education in Kenya, focusing on the challenges posed by the doctrine of separation of powers and its interaction with the political question doctrine, particularly concerning economic, social, and cultural (ESC) rights. It examines how the inclusion of ESC rights in the Bill of Rights under the Kenyan Constitution does not breach the separation of powers, despite the long-standing belief that such rights are non-justiciable due to their association with resource allocation, which traditionally falls under the purview of political actors. Through an analysis of case law, including landmark rulings like *Ndoria Stephen v Minister of Education*, and international frameworks such as General Comment No. 13 from the Committee on Economic, Social, and Cultural Rights (CESCR), this study scrutinises judicial remedies like structural interdicts in ensuring state accountability.

A comparison of Kenya's approach with South Africa's progressive legal framework highlights best practices for balancing immediate and long-term obligations in the right to education. South Africa's use of minimum core obligations in education serves as a benchmark for Kenya's legal and policy reforms. The study also investigates Kenya's historical and contemporary efforts to fulfill the right to education since independence, analysing the impact of international instruments and the 2010 Constitution.

Additionally, it critiques the Kenyan government's recurrent reliance on resource constraints as justification for inadequate educational provisions, calling for the establishment of a minimum core of immediate obligations that the state must meet regardless of financial limitations. This study underscores the need for stronger judicial oversight to ensure that the Executive is held accountable beyond policy formulation, focusing on tangible and sustainable improvements in access to quality education. Ultimately, this work aims to contribute to a more robust legal framework that promotes justice, equality, long-term sustainability, and transparency in realizing children's right to education in Kenya, while addressing challenges related to mismanagement and corruption.

Chapter 1

1.1 Background

The analysis of this question necessitates an examination of the doctrine of separation of powers, which laid the foundation for the political question doctrine, and its place in today's legal reality of economic, social, and cultural (ESC) rights. It has been settled by the courts that the inclusion of economic and social rights in Bill of Rights chapters within the constitutions is not a violation of the doctrine of separation of powers, as it does not confer on the courts any task so different from that conferred on them in relation to civil and political rights.¹ The Committee on Economic, Social, and Cultural Rights (CESR) has also held the position that the adoption of the rigid classification of economic, social, and political rights that places them beyond the reach of the courts, on the premise that they are mostly concerned with resource allocation which is within the purview of political actors, would be contrary to the principle outlining that the two sets of human rights are indivisible and interdependent.² The doctrine of separation of powers as set out in the case of *Marbury v Madison* has historically been invoked to alienate questions on economic, social, and cultural rights from the adjudication of the courts.³ For a long time, the position was that such claims were not considered justiciable in courts of law using the considerations set out in the case of *Baker v Carr*.⁴

The elements to determine whether a claim constituted a non-justiciable political question were if there exists - "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of the government; or an unusual

¹ *Certification of the Constitution of the Republic of South Africa* (1996), Constitutional Court of South Africa.

² Juniar M, 'The Indivisibility of Civil and Political Rights and Economic, Social and Cultural Rights in CRPD' *X Russian Law Journal* 4, 2022, 4.

³ *Marbury v Madison* (1803), The Supreme Court of the United States.

⁴ *Baker v Carr* (1962), The Supreme Court of the United States.

need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”⁵

The interpretation and application of these elements *stricto sensu* increasingly raised justice concerns amongst the international community, which has consequently shifted the approach taken by the courts over the years. The rigid application of the doctrine of separation of powers and the political question doctrine has since been phased out, which has seen courts pronounce themselves in matters concerned with economic, social, and cultural rights, in a quest to hold the state to fulfill its positive obligations to safeguard the enjoyment of these economic, social, and cultural rights.

Most outstandingly in the Kenyan context, a broad and purposive interpretation of Article 23(3) of the 2010 Constitution, a non-exhaustive list of reliefs that the courts may grant in claims pertaining to violation of fundamental rights and freedoms, has seen the entrance of structural interdicts as an appropriate relief in such claims.⁶ This has meant that courts have the authority to call upon relevant members of the Executive arm of government to formulate remedies for violation of economic, social, or cultural rights.⁷ This has been a more progressive approach as it provides for long-term thinking for policymakers as well.⁸ However, despite the entrance of structural interdicts into the adjudication of economic, social, and cultural rights, the threshold in most instances has been reduced to the Executive simply showing the existence of measures to curb such violations through policy documents, without considering their appropriateness or suitability to safeguard this right. This is observed in the rationale offered in the determination of the legal issues in the case of *Ndoria Stephen v Minister of Education & 2 others (2015) eKLR*, where it was satisfactory to prove that measures were formulated and documented by the Ministry of Education to curb socioeconomic disparities hindering equality in access to quality education.

⁵ *Baker v Carr* (1962), The Supreme Court of the United States.

⁶ Muzungu M, 'Structural Interdicts in Kenyan Constitutional Law' 1 *Kabarak University Press* 1, 2022, 146.

⁷ Muzungu M, 'Structural Interdicts in Kenyan Constitutional Law,' 148.

⁸ Muzungu M, 'Structural Interdicts in Kenyan Constitutional Law,' 148.

Article 13(2) of General Comment No. 13 spells out the essential features of education – the availability of sufficient educational institutions within the State, accessibility of education through the dimensions of physical accessibility, economic accessibility, and non-discrimination, acceptability of curricula and teaching methods, and adaptability to the changing needs of society, and the social and economic settings of the society in question.⁹

In newly independent Kenya, the responsibility for the provision of education was placed on the State through the now Repealed Education Act, of 1968 (Cap 11). This saw the entrance of education into plans for national development, taking up recommendations from the Ominde Commission Report of 1964 as well as the Gachathi Report of 1976 whose main objectives included emancipation from poverty, individual development, and social justice.¹⁰ The State taking on this responsibility soon made education a political affair, which political actors used in their endeavours for political gain.¹¹ The inadvertent risk of this is that the realisation of the right to education would depend on the government of the day, making such reforms short-term and unsustainable. This has also meant that the realisation of the right to education faces the risk of hindrances due to the scarcity of resources. For how long though can this be an excuse for the Executive?

This also begs the question of the role, place, and formalisation of public-private partnerships in the collaborative efforts to counter the resource allocation challenge and see to the provision of quality education through efficient means, without over delegating its judicial functions.

1.2 Statement of the problem

The Executive arm of government perpetually decries the issue of scarcity of resources which limits its ability to fulfill its legal obligations, particularly in realizing the right to education.¹² While resource constraints are a legitimate concern, the continued reliance on this argument begs

⁹ CESR General Comment No. 13, *The Right to Education (Art. 13)*, 8 December 1999.

¹⁰ Kisainge K, 'Reforming Education and Training? Lessons from Development of Vocational Education and Training' 1 *Australian Journal of Adult Learning* 44, 2004, 50.

¹¹ Kisainge K, 'Reforming Education and Training? Lessons from Development of Vocational Education and Training,' 50.

¹² Byrne S, 'Reclaiming Progressive Realisation: A Children Rights Analysis' 28 *The International Journal of Children's Rights* 4, 2020, 754.

the critical question: for how long can the state's failure to adequately provide access to quality education for children be excused? This problem directly affects the realisation of children's right to education and highlights the need for a more accountable and effective approach by the government.

Despite the Executive's efforts in formulating various policy documents and implementing measures aimed at fulfilling the right to education, justice concerns remain. A notable example is seen in the case of *Ndoria Stephen v Minister of Education & 2 others (2015) eKLR*, where structural interdicts were employed as a judicial remedy under Article 23 of the Kenyan Constitution. However, the Executive's compliance with these orders has often been reduced to merely demonstrating that policies and measures have been put in place.¹³ This approach has allowed the Executive to evade deeper scrutiny of whether these measures are not only being properly implemented but are also effective in achieving their intended goals. As a result, questions arise about whether the current legal mechanisms are truly holding the Executive accountable for fulfilling its obligations regarding the right to education.

South Africa provides a best practice example of balancing immediate obligations with the progressive realization of the right to education, as enshrined in Section 29 of its Constitution.¹⁴ South Africa views the realisation of the right to education as a fundamental part of the realisation of equality, human dignity, and freedom, which has impacted the language of legislative documents such as the South African Schools Act to bring about its realisation with expediency.¹⁵ The Act adopts a minimum core content approach to outline strategies for improving educational infrastructure, quality, and access, particularly for disadvantaged populations.¹⁶ Courts play a crucial role in ensuring the state fulfills these obligations, as seen in key cases like *Juma Masjid Primary School v. Essay NO and Section 27 v Minister of Education (2011) Constitutional Court of South Africa*, where judicial intervention upheld the right to education. Furthermore, South Africa emphasizes equality and non-discrimination in education,

¹³ *Ndoria Stephen v Minister of Education & 2 others (2015) eKLR*.

¹⁴ Section 29, *Constitution of the Republic of South Africa (1996)*.

¹⁵ *Juma Masjid Primary School v. Essay NO and Section 27 v Minister of Education (2011)*, Constitutional Court of South Africa.

¹⁶ Section 35, *South African Schools Act (Act No. 84 of 1996)*

actively addressing disparities through civil society advocacy and judicial oversight, ensuring both immediate and long-term state accountability in education provision.¹⁷

In the context of positive freedom relating to the right to education, the enjoyment of this right is contingent upon proactive state action.¹⁸ The reliance on policies that are not effectively monitored or enforced risks creating a situation where children are deprived of their fundamental right to education due to systemic inadequacies and lack of accountability. Justice must not only be done but also be seen to be done. This principle underscores the need for meaningful judicial interventions and specific benchmarks that go beyond mere policy formulation and require tangible proof of the effectiveness of these measures.

Moreover, there is an urgent need to establish a "minimum core" of immediate state obligations.¹⁹ This would set a baseline level of educational provisions that the government must guarantee, regardless of resource constraints.²⁰ This study seeks to address these critical gaps by exploring the adequacy of existing legal frameworks in ensuring that the Executive is held accountable for fulfilling its obligations toward the right to education. It also aims to assess the potential for stronger judicial oversight to ensure that state actions are not only symbolic but result in meaningful and sustainable improvements in access to quality education.

1.3 Hypothesis

If a minimum core of immediate state obligations in the realization of the right to education is established and effectively enforced, and a balance is reconciled between these minimum core

¹⁷ Section 27 and Others v Minister of Education and Another (2012), The High Court of South Africa, Gauteng Division, Pretoria.

¹⁸ Rapatsa M and Matloga N, 'The Right to Basic Education in South Africa: Lessons from Section 27 and Others v Minister of Education and Another (2012) ZAGPPHC 114' 5 *Mediterranean Journal of Social Sciences* 27, 2014, 1125.

¹⁹ Forman L, Luljeta C, Chapman A and Lamprea E, 'Conceptualizing minimum core obligations under the right to health: How should we define and implement the 'morality of the depths'' *International Journal of Human Rights*, 2016, 1 – <https://www.dlsph.utoronto.ca/wp-content/uploads/2012/02/Conceptualising-minimum-core-obligations-under-the-right-to-health-How-should-we-define-and-implement-the-morality-of-the-depths.pdf> on 19th February 2016.

²⁰ Byrne S, 'Reclaiming Progressive Realisation: A Children Rights Analysis' 28 *The International Journal of Children's Rights* 4, 2020, 753.

obligations and progressive realisation of the right to education, it will bring about sustainable outcomes in education in Kenya, in line with justice concerns.

1.4 Research Objectives

1. To analyze the concept of "progressive realization" in both international and national legal frameworks, with a focus on the state's immediate and long-term obligations to ensure equal access to quality education, and to assess how Kenyan courts have interpreted the balance between progressive realization and state obligations concerning the right to education.
2. To assess Kenya's progress in realising the right to education since gaining independence, while examining the influence of international instruments and the 2010 Constitution in advancing this right
3. To compare the legal framework of South Africa that has effectively balanced progressive realisation and immediate state obligations in the context of education and make recommendations for improving the realisation of the right to education while maintaining a balance between progressive implementation and the state's immediate obligations in light of scarce resources

1.5 Research Questions

1. How does the concept of "progressive realization" in international and national legal frameworks shape the state's immediate and long-term obligations to ensure equal access to quality education, and how have Kenyan courts interpreted the balance between progressive realization and state obligations regarding the right to education?
2. How has Kenya progressed in realising the right to education since gaining independence, and what influence have international instruments and the 2010 Constitution had in advancing this right?
3. What lessons can Kenya learn from South Africa's legal framework to enhance the realisation of the right to education while effectively balancing progressive implementation and the state's immediate obligations in the context of scarce resources?

1.6 Literature Review

1.6.1: Structural Interdicts in Kenyan Constitutional Law

In her article in the *Kabarak Law Review*, Martha Chinyavu Muzungu explores key themes regarding the use of structural interdicts in Kenyan constitutional law, while also identifying gaps for further study. Structural interdicts are presented as judicial remedies that allow courts to maintain oversight of their orders, particularly in cases related to socio-economic rights, marking a shift from the traditional *functus officio* doctrine.²¹ Muzungu emphasizes the judiciary's role in enforcing rights and the need for innovative judicial tools to address violations effectively.²² She reviews influential Kenyan and South African cases, demonstrating how structural interdicts have been employed to tackle socio-economic rights violations. However, the article also highlights the challenges in implementing these remedies, such as executive resistance and complexities in ensuring compliance.²³

Muzungu provides a historical context, noting Kenya's past reluctance to safeguard human rights and the necessity for a more proactive judicial role under the current Constitution.²⁴ The article identifies areas for further research, including the need for empirical studies on the effectiveness of structural interdicts, the role of judicial discretion in crafting remedies, the impact of the political question doctrine, and the importance of public participation in judicial processes.

Martha Chinyavu Muzungu's article on structural interdicts in Kenyan constitutional law provides a comprehensive overview of their importance and challenges but overlooks critical areas. While the potential of structural interdicts to enforce socio-economic rights is well-articulated, the article lacks depth on practical issues like sustained judicial oversight in Kenya, where resource limitations and judicial independence concerns persist. It insufficiently addresses the risks of judicial overreach and the need to balance court intervention with respect for the separation of powers.

²¹ Muzungu M, 'Structural Interdicts in Kenyan Constitutional Law,' 148.

²² Muzungu M, 'Structural Interdicts in Kenyan Constitutional Law,' 145.

²³ Muzungu M, 'Structural Interdicts in Kenyan Constitutional Law,' 160.

²⁴ Muzungu M, 'Structural Interdicts in Kenyan Constitutional Law,' 160.

Though executive resistance is noted as a challenge, Muzungu does not explore effective mechanisms to counteract it, such as sanctions or incentives drawn from comparative models like South Africa. The article's call for empirical studies is valid, but it misses an opportunity to include preliminary examples or data from Kenya to strengthen its arguments. Overall, while insightful, the article would benefit from a deeper exploration of practical solutions, comparative analysis, and empirical evidence.

1.6.2: 'The Political Question Doctrine: Justiciability and the Separation of Powers'

The origin of the Political Question Doctrine, as presented by Cole, can be traced to *Marbury v. Madison* (1803), where Chief Justice John Marshall distinguished between matters subject to judicial review and those involving political discretion, particularly those reserved to the executive branch, such as the President's discretion in appointments.²⁵ This separation was further reinforced in *Luther v. Borden* (1849), where the Court held that certain decisions, particularly those related to the Guarantee Clause,²⁶ were committed to Congress and thus beyond judicial adjudication.²⁷

In *Luther*, prudential concerns also emerged, as the Court recognized that invalidating a state government could lead to chaos, a factor weighing against judicial intervention.²⁸ Cole highlights that the modern application of the doctrine was solidified in *Baker v. Carr* (1962), which outlined six factors that could indicate a political question, including a textually demonstrable commitment of the issue to another branch, the lack of judicially manageable standards, and the risk of conflicting pronouncements by different branches.²⁹

However, *Zivotofsky v. Clinton* (2012) narrowed the doctrine's scope, encouraging courts to resolve statutory claims on their merits, even in politically sensitive cases, thus shifting the boundaries of the doctrine.³⁰ Despite these developments, gaps remain. *Baker* provided guiding

²⁵ *Marbury v. Madison* (1803), The Supreme Court of the United States.

²⁶ The Guarantee Clause requires the United States to guarantee every state a Republican form of government and provide protection from foreign invasion and domestic violence.

²⁷ *Luther v. Borden* (1849), The Supreme Court of the United States.

²⁸ *Luther v. Borden* (1849), The Supreme Court of the United States.

²⁹ *Baker v. Carr* (1962), The Supreme Court of the United States.

³⁰ *Zivotofsky v. Clinton* (2012), The Supreme Court of the United States.

factors, but no consistent standard for applying the doctrine, leading to inconsistent judicial outcomes, particularly in foreign policy cases. Additionally, scholars remain divided on whether the doctrine is constitutionally mandated or driven by prudential concerns, creating ambiguity about its scope and applicability. Recent rulings, such as *Zivotofsky*, suggest a narrowing of the doctrine, especially in statutory interpretation, but raise questions about how far this trend will extend and whether courts will increasingly engage in areas traditionally seen as political.³¹

Cole's analysis of the Political Question Doctrine provides a thorough historical account and highlights key jurisprudential milestones but falls short in addressing its practical implications in modern governance. The article does not sufficiently explore the ambiguity surrounding whether the doctrine is constitutionally mandated or driven by prudential concerns, leaving gaps in understanding its boundaries.

While the discussion of the six Baker factors is informative, it overlooks their inconsistent application in case law, particularly in foreign policy matters, where judicial decisions often oscillate between deference and intervention. The application of *Zivotofsky v. Clinton* illustrates a narrowing of the doctrine but fails to consider whether this trend undermines the separation of powers or risks judicial overreach.

Additionally, the article does not adequately address the societal and political consequences of the doctrine's inconsistent use, particularly for marginalised groups seeking justice. This omission weakens its engagement with the practical realities of judicial decision-making. While well-structured, the analysis would benefit from a deeper exploration of the doctrine's evolving scope, its application, and its broader impact on governance and justice.

³¹ Cole J, 'The Political Question Doctrine: Justiciability and the Separation of Powers' Congressional Research Service, 2014, 22 –<https://sgp.fas.org/crs/misc/R43834.pdf> on 23 December 2014.

1.6.3: Progressive Nature of Social and Economic Rights in Kenya: A Delayed Promise?

The paper emphasizes the concept of progressive realization, which is a fundamental principle in both international and domestic law.³² This principle posits that the enforcement of social and economic rights (SER) should occur gradually, taking into account the available resources of the state.³³ Gitiri explains that this approach recognizes that while immediate fulfillment of all rights may not be feasible, states have an obligation to take deliberate, concrete steps toward achieving these rights over time.³⁴ This gradual approach is essential for understanding the balance between the state's capabilities and its obligations, especially in a resource-constrained environment like Kenya.

Gitiri identifies several challenges that hinder the effective enforcement of SER in Kenya. One of the primary obstacles is the limitation of resources, which affects the government's ability to allocate sufficient funding and support to realize these rights fully.³⁵ Additionally, the separation of powers creates a complicated dynamic between the executive, legislative, and judicial branches due to inconsistent understanding of their duty to provide checks and balances, often resulting in a lack of coherent policy implementation.³⁶ The absence of clear judicial standards for measuring what constitutes "progressive realization" further complicates enforcement, as it leaves significant discretion to the courts, which may lead to inconsistent rulings and outcomes.³⁷

The paper also highlights the influence of South African jurisprudence on Kenya's interpretation

³² Gitiri J, 'Progressive Nature of Social and Economic Rights in Kenya: A Delayed Promise?' 6 *Constitutional Review* 1, 2020, 134.

³³ Gitiri J, 'Progressive Nature of Social and Economic Rights in Kenya: A Delayed Promise?' 6 *Constitutional Review* 1, 2020, 135.

³⁴ Gitiri J, 'Progressive Nature of Social and Economic Rights in Kenya: A Delayed Promise?' 6 *Constitutional Review* 1, 2020, 140.

³⁵ Gitiri J, 'Progressive Nature of Social and Economic Rights in Kenya: A Delayed Promise?' 6 *Constitutional Review* 1, 2020, 135.

³⁶ *Minister of Health and Others v Treatment Action Campaign and Others* (2002) Constitutional Court of South Africa.

³⁷ Gitiri J, 'Progressive Nature of Social and Economic Rights in Kenya: A Delayed Promise?' 6 *Constitutional Review* 1, 2020, 160.

and enforcement of SER.³⁸ Gitiri discusses how South Africa's constitutional framework, which robustly addresses social and economic rights, serves as a model for Kenya. The comparative analysis reveals that while South Africa has made strides in judicial enforcement of SER, Kenya has been slower to adopt similar principles in its legal system.³⁹ By examining South African case law, Gitiri illustrates how judicial interpretations can shape the realization of these rights and emphasizes the potential lessons that Kenya can learn from its neighbour's experiences.

Gitiri highlights significant gaps in the enforcement of social and economic rights (SER) in Kenya, including inconsistent implementation and judicial reluctance to intervene in politically sensitive matters. The absence of a defined minimum core content for SER creates a void in legal standards, hindering courts and the government from effectively assessing compliance and enforcing obligations. While the analysis effectively outlines challenges tied to the principle of progressive realisation, it falls short in addressing governance inefficiencies, resource allocation priorities, and public accountability mechanisms that undermine SER enforcement.

The comparative insights from South Africa are valuable but lack actionable strategies for overcoming Kenya's specific barriers. Additionally, the paper overlooks the critical role of public participation and civic engagement in advancing SER, focusing predominantly on state actions. Gitiri's work provides a solid foundation but requires deeper exploration of systemic issues, practical solutions, and collaborative approaches to drive meaningful progress.

1.7 Theoretical Framework

In examining the right to access quality education, modern liberalism serves as a critical theoretical framework, as it emphasises the state's responsibility to ensure both social and economic equality. This theory is particularly relevant to a study on education, given the increasing demand for governments to address disparities in access to quality education and the role that public policy plays in overcoming those barriers. Modern liberalism highlights the

³⁸ Gitiri J, 'Progressive Nature of Social and Economic Rights in Kenya: A Delayed Promise?' 6 *Constitutional Review* 1, 2020, 150.

³⁹ Gitiri J, 'Progressive Nature of Social and Economic Rights in Kenya: A Delayed Promise?' 6 *Constitutional Review* 1, 2020, 160.

importance of positive state intervention to guarantee that education, a fundamental human right, is accessible to all, especially the marginalized.⁴⁰ It provides a foundation for understanding how states can balance individual freedoms with broader societal obligations to ensure equitable educational opportunities.⁴¹

Modern liberalism moves beyond the minimal state approach of classical liberalism by advocating for state involvement in redistributing resources to reduce inequality in education.⁴² This theory underscores the idea that access to education is not just a personal responsibility but a social good that must be provided for through public systems.⁴³ It supports state action in leveling the playing field, ensuring that all individuals, regardless of their socio-economic background, can benefit from quality education.⁴⁴ This framework is crucial to understanding how governments, through legislative and policy measures, can address the structural inequalities that hinder the realization of the right to education for all citizens.

Critics of the modern liberalism theory contend that heavy reliance on state intervention runs the risk of economic inefficiencies and overregulation.⁴⁵ They also contend that too much state involvement in education may stifle innovation and lead to a one-size-fits-all approach that doesn't account for diverse needs and local contexts.⁴⁶ They argue that by placing too much emphasis on state solutions, modern liberalism risks undermining the role of private institutions,

⁴⁰ Ball T and Givertz H, 'The modern liberal program' Britannica, <https://www.britannica.com/topic/liberalism/The-modern-liberal-program> on 5 September 2024.

⁴¹ Ball T and Givertz H, 'The modern liberal program' Britannica, <https://www.britannica.com/topic/liberalism/The-modern-liberal-program> on 5 September 2024.

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<https://bazhum.muzhp.pl/media/files/Diametros/Diametros-r2005-t-n5/Diametros-r2005-t-n5-s1-20/Diametros-r2005-t-n5-s1-20.pdf> in 2005.

⁴³ Ball T and Givertz H, 'The modern liberal program' Britannica, <https://www.britannica.com/topic/liberalism/The-modern-liberal-program> on 5 September 2024.

⁴⁴ Ball T and Givertz H, 'The modern liberal program' Britannica, <https://www.britannica.com/topic/liberalism/The-modern-liberal-program> on 5 September 2024.

⁴⁵ Epstein R, 'The Wrong Rights, or: The Inescapable Weaknesses of Modern Liberal Constitutionalism' The University of Chicago Law Review, <https://lawreview.uchicago.edu/print-archive/wrong-rights-or-inescapable-weaknesses-modern-liberal-constitutionalism>.

⁴⁶ Epstein R, 'The Wrong Rights, or: The Inescapable Weaknesses of Modern Liberal Constitutionalism' The University of Chicago Law Review, <https://lawreview.uchicago.edu/print-archive/wrong-rights-or-inescapable-weaknesses-modern-liberal-constitutionalism>.

non-state actors, and market-driven approaches that could provide more competitive and effective education alternatives.⁴⁷

1.8 Significance of the study

This study addresses a critical gap in the legal and policy frameworks governing the right to education, particularly in the context of state accountability and the limitations posed by resource constraints. By exploring the issue of state compliance with judicial orders, such as structural interdicts, and analyzing the effectiveness of policies implemented by the Executive arm of government, this research sheds light on the persistent challenges in realizing children's right to quality education. The significance of this study lies in its potential to influence both policy and judicial approaches to safeguarding educational rights.

First, it contributes to a deeper understanding of how the state's reliance on resource constraints can be critically examined to ensure that such justifications do not perpetuate systemic failures in education provision. By drawing comparisons with South Africa's legal framework, which balances immediate and progressive obligations, this study provides a valuable benchmark for evaluating Kenya's approach to education rights and offers insights into best practices that may be adapted for more effective governance.

Second, this research highlights the role of judicial oversight in enforcing state accountability. By assessing whether legal mechanisms truly compel the Executive to go beyond policy formulation and demonstrate tangible outcomes, the study opens pathways for stronger judicial intervention in education rights cases. This is particularly important in developing benchmarks and minimum core obligations, ensuring that resource limitations do not hinder the fulfillment of non-derogable rights, such as basic education.

Ultimately, this study has the potential to impact the formulation of more robust legal standards, promoting justice and equality in the realization of children's right to education. It aims to contribute to a more accountable and transparent governance system, where the state's

⁴⁷ Epstein R, 'The Wrong Rights, or: The Inescapable Weaknesses of Modern Liberal Constitutionalism' The University of Chicago Law Review, <https://lawreview.uchicago.edu/print-archive/wrong-rights-or-inescapable-weaknesses-modern-liberal-constitutionalism>.

obligations are rigorously monitored and enforced, benefiting not only policymakers and legal practitioners but also civil society advocates and children whose educational futures are at stake.

1.9 Research Methodology

This study is going to take the form of prescriptive doctrinal legal research aimed at prescribing the balance between the state's legal obligations and the progressive realisation of the right to education in Kenya.

Prescriptive doctrinal legal research is an appropriate method for this study as it allows for a thorough analysis of existing legal frameworks, principles, and judicial decisions regarding the state's obligations in providing access to education.⁴⁸ This method is particularly suitable because it focuses on assessing the adequacy of legal mechanisms that hold the Executive accountable for fulfilling its educational obligations. By interpreting and applying legal doctrines, principles, and statutes, prescriptive doctrinal research helps explore how laws should be enforced to ensure children's educational rights are upheld. It also facilitates a critical evaluation of constitutional provisions, along with statutory laws and judicial precedents to determine whether these legal frameworks are effective and properly implemented.

Additionally, this method allows for comparative analysis, drawing from other jurisdictions like South Africa, to identify best practices and inform recommendations for strengthening Kenya's legal framework on education rights. The prescriptive doctrinal approach not only describes the law but also proposes solutions, such as enhancing state accountability through more rigorous judicial oversight and establishing a "minimum core" of educational obligations. Furthermore, this structured legal inquiry enables a systematic analysis of how laws are applied and can be improved to meet societal needs, focusing on issues like accountability, resource constraints, and enforcement.

⁴⁸ Jain S, 'Doctrinal and Non-doctrinal Legal Research' 17 *Journal of the Indian Law Institute* 4, 1975, 516-536.

1.10 Limitations of the Study

The absence of primary data collection and empirical analysis inherent in doctrinal research may restrict the depth of insight into the practical implications of this study.

1.11 Chapter Breakdown

Chapter 1 (Proposal):

This chapter lays out the introduction to the research topic, presenting an overview of the study's objectives, research questions, significance, and methodology. Additionally, it highlights a brief overview of the subsequent chapters.

Chapter 2 (Tracking Progress: Evaluating Kenya's Efforts in Realising the Right to Education):

This chapter will assess how far Kenya has come in the realisation of the right to education since it gained independence and the role of international instruments and the 2010 Constitution in the same. This chapter will also analyse the plight of the right to education as a derogable right and the limitations imposed on the enjoyment of this right.

Chapter 3 (Legal Framework & Jurisprudential Landscape):

This chapter will interrogate the legal context of the research topic. It will examine the relevant statutes, regulations, and case law that shape the legal landscape related to the research topic. This chapter will also assess how Kenyan courts have interpreted the balance between progressive realisation and state obligations regarding the right to education.

Chapter 4 (Comparative Lessons From South Africa: The Successful Progressive Realisation of the Right to Education):

This chapter will compare the legal framework of South Africa that has effectively balanced progressive realisation and immediate state obligations in the context of education

Chapter 5 (Summary of Findings and Conclusion):

The final chapter will offer conclusions drawn from the research findings and provide practical recommendations for the future of sustainable education.

Chapter 2

Tracking Progress: Evaluating Kenya's Efforts in Realising the Right to Education in Kenya

In traditional African societies, the education of children was a community affair, which involved the transmission of important values and skills from one generation to the next.⁴⁹ This serves to debunk the idea that education is a Western phenomenon.⁵⁰ With the coming of the missionaries, Kenya societies witnessed a gradual separation from traditional ideals, embracing more Western ideals, which set a steady foundation for the alienation from cultural heritage that came about with the colonial administration under British rule.⁵¹ Missionaries initially embraced local dialect and values in their delivery of education, to the extent of introducing agriculture into the curricula, following the recommendations of the Phelps-Stokes Mission made in 1924, in a bid to promote practical subjects and improve rural communities.⁵² This slowly came undone as more and more recommendations were made to embrace English as the *lingua franca*, and to abandon practical approaches to education due to their unsubstantial outcomes as reported in the Beecher Report of 1949.⁵³ The British colonial rulers claimed that its education system aimed to make individuals more efficient within their communities and to see to the advancement of the welfare of communities through training on how to manage their affairs, improvement of health facilities, and education on ideas they deemed as important such as citizenship.⁵⁴

Kenyans generally repulsed the formulation of Western curricula, preferring curricula with a more technical-practical orientation due to the oppressive outcomes of their education system. Locals remained at the bottom of the chain, only receiving opportunities for menial jobs that maintained this status quo.⁵⁵ The efforts of African educationalists and politicians to integrate traditional ideals and Western ideals were also unsuccessful.⁵⁶ However, this struggle made education a key tenet of Kenya's national plan and strategy for development at independence.

⁴⁹ Meck M, 'Social Objectives of Education in Kenya and Tanzania' 16 *Internationales Jahrbuch für Geschichts- und Geographie-Unterricht*, 1975, 56.

⁵⁰ Meck M, 'Social Objectives of Education in Kenya and Tanzania', 56.

⁵¹ Meck M, 'Social Objectives of Education in Kenya and Tanzania', 57.

⁵² Meck M, 'Social Objectives of Education in Kenya and Tanzania', 57.

⁵³ Meck M, 'Social Objectives of Education in Kenya and Tanzania', 58.

⁵⁴ Meck M, 'Social Objectives of Education in Kenya and Tanzania', 57.

⁵⁵ Meck M, 'Social Objectives of Education in Kenya and Tanzania', 57.

⁵⁶ Meck M, 'Social Objectives of Education in Kenya and Tanzania', 58.

Education became a tool to break down social discrimination as introduced by colonial rule, and to provoke new attitudes among Kenyans.⁵⁷ This philosophy was further developed in the Ndegwa Commission Report of 1971 which emphasised the need to foster and develop national unity, social equity, individual talents, as well as our rich and varied cultures through education.⁵⁸

The following subsections highlight the marked major milestones in the education sector in Kenya since independence.

2.1 Ministry of Education (1963)

Established to formulate and implement education policies, the Ministry of Education aims to ensure equity, access, quality, and relevance across all education levels in Kenya. It promotes educational research and curriculum development while monitoring and evaluating education programs to assess their effectiveness. The ministry fosters stakeholder partnerships to create a collaborative environment for educational improvement. By addressing the diverse needs of learners, the Ministry of Education plays a crucial role in shaping a robust educational framework that supports national development and empowers individuals through quality education.

2.2 Ominde Commission (1964)

The Ominde Commission was the first post-independence education commission in Kenya, tasked with reforming the colonial education system. Its primary focus was on decolonising education, ensuring that it reflected the national identity and addressed the specific needs of Kenyans.⁵⁹ The commission aimed to eliminate racial and ethnic segregation within the education system, promoting inclusivity and unity.⁶⁰ By advocating for a curriculum relevant to Kenya's socio-cultural context, the Ominde Commission laid the groundwork for a more

⁵⁷ Meck M, 'Social Objectives of Education in Kenya and Tanzania', 79.

⁵⁸ Meck M, 'Social Objectives of Education in Kenya and Tanzania', 80.

⁵⁹ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 48.

⁶⁰ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 48.

equitable and representative education system that aligns with the aspirations of a newly independent nation.

2.3 Gachathi Commission (1976)

Constituted to review Kenya's education system, the Gachathi Commission aimed to align education with the nation's development goals, particularly in rural areas.⁶¹ It introduced an economic perspective on education, emphasising the importance of technical education to promote self-reliance among citizens.⁶² The commission recognised the need for education to contribute to national development and address the skills gap in the workforce.⁶³ By advocating for a curriculum that supports economic growth and rural development, the Gachathi Commission played a pivotal role in reshaping Kenya's educational landscape to meet its developmental aspirations.

2.4 Kenya Institute of Education (KIE) (1976)

The institute was established to develop, review, and approve curricula and all curricula support material for all education levels below university.⁶⁴ The Kenya Institute of Education (KIE) was later rebranded as the Kenya Institute of Curriculum Development (KICD) in 2013.⁶⁵ The institute promotes the implementation of the Competency-Based Curriculum (CBC) and advocates for stakeholder engagement in the curriculum development process.⁶⁶ It emphasises the need to update curricula to align with emerging needs, such as technology and inclusive education.⁶⁷ By ensuring that educational materials are relevant and accessible, KIE, now KICD plays a vital role in enhancing the quality of education in Kenya.⁶⁸

⁶¹ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya' 44 *Australian Journal of Adult Learning* 1, 2004, 50.

⁶² Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 50.

⁶³ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 50.

⁶⁴ Section 23, Education Act (Cap 211).

⁶⁵ Section 3, Kenya Institute of Curriculum Development Act (2013).

⁶⁶ Section 4, Kenya Institute of Curriculum Development Act (2013).

⁶⁷ Section 4, Kenya Institute of Curriculum Development Act (2013).

⁶⁸ Section 4, Kenya Institute of Curriculum Development Act, (2013).

2.5 Mackay Commission (1981)

The Mackay Commission focused on the need for technical education and the expansion of universities in Kenya.⁶⁹ It advocated for the introduction of the 8-4-4 education system, aimed at providing a well-rounded education that prepares students for various life challenges.⁷⁰ This led to the establishment of Moi University, contributing to higher education accessibility.⁷¹ By cementing the economic view of education, the Mackay Commission highlighted the importance of equipping learners with practical skills necessary for national development and economic growth, ensuring that education aligns with the country's labor market needs.

2.6 Kamunge Commission (1988)

The Kamunge Commission addressed key elements of the education system, focusing on financing and management to enhance the quality of education in Kenya.⁷² It introduced the concept of cost-sharing between the government and parents, aiming to reduce the financial burden on the government while ensuring sustainable funding for education.⁷³ By emphasising the importance of effective management and resource allocation, the Kamunge Commission sought to create a more efficient education system that meets the needs of learners and promotes equitable access to quality education across the country.

2.7 The Koech Commission (1999)

The Koech Commission evaluated the effectiveness of the 8-4-4 education system and prepared a report which faced challenges in its implementation due to high costs.⁷⁴ The commission recommended reducing the rigors of the 8-4-4 system to make education more accessible and

⁶⁹ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 51.

⁷⁰ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 51.

⁷¹ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 51.

⁷² Mbii M, Magoma C and Waweru C, 'Composition and Practices of Secondary School Boards of Management: Lessons from Kenya' 8 *American Journal of Educational Research* 5, 2020, 300.

⁷³ Mbii M, Magoma C and Waweru C, 'Composition and Practices of Secondary School Boards of Management: Lessons from Kenya', 300.

⁷⁴ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 52.

relevant to learners' needs.⁷⁵ By addressing the shortcomings of the existing framework, the Koech Commission aimed to create a more flexible and inclusive education system that fosters student engagement and success, ultimately contributing to the overall improvement of educational outcomes in Kenya.

2.8 The Odhiambo Task Force (2010)

Constituted to align Kenya's education system with the Constitution of Kenya, 2010, the Odhiambo Task Force aimed to ensure that education meets the nation's socio-economic needs and ambitions for global competitiveness.⁷⁶ It introduced a competence-based curriculum, enhanced teacher training, and strengthened governance and management of educational institutions.⁷⁷ The task force emphasised inclusive education to cater to diverse learner needs, although the adopted interpretation of inclusion as the seclusion of special needs learners continues to face criticism. By addressing these critical areas, the Odhiambo Task Force sought to create a more equitable and effective education system in Kenya.

2.9 Basic Education Act, 2013

The Basic Education Act of 2013 established a legal framework for promoting and regulating free and compulsory basic education in Kenya. It enshrined the right to education and aimed to ensure quality assurance in educational institutions.⁷⁸ The Act sought to enhance governance and management within the education sector, although some promises regarding implementation remain unfulfilled. By providing a structured approach to education, the Basic Education Act aimed to improve access and quality, ensuring that all children receive the education they deserve and need.

⁷⁵ Kisainge K, 'Reforming education and training? Lessons from development of vocational education and training in Kenya', 52.

⁷⁶ Ministry of Education, *Task Force On The Re-Alignment Of The Education Sector To The Constitution Of Kenya 2010 Towards A Globally Competitive Quality Education For Sustainable Development*, 2012.

⁷⁷ Ministry of Education, *Task Force On The Re-Alignment Of The Education Sector To The Constitution Of Kenya 2010 Towards A Globally Competitive Quality Education For Sustainable Development*, 2012.

⁷⁸ Section 5, Basic Education Act (2013).

2.10 County Education Boards (CEB) (2013)

Introduced under the Basic Education Act of 2013, County Education Boards (CEB) oversee the management of education at the county level.⁷⁹ Their role includes ensuring the implementation of national education policies and programs while promoting access to quality basic education.⁸⁰ The boards monitor and evaluate school performance and response to education programs, facilitate the establishment of educational institutions, and ensure compliance with regulations.⁸¹ Additionally, these boards advocate for community involvement in education, collaboration between national and county governments, sustainable responses to county-specific educational challenges, and enhanced resource allocation for effective education management.⁸²

2.11 Sessional Paper No. 1 of 2019

Sessional Paper No. 1 of 2019 aims to reform Kenya's education and training sector in alignment with sustainable development goals, the Constitution, and Vision 2030.⁸³ It advocates for the promotion of Technical and Vocational Education and Training (TVET) to address critical skill gaps in the workforce.⁸⁴ The paper emphasises the need for the implementation of the Competency-Based Curriculum (CBC) and accountability within the education sector.⁸⁵ By focusing on access, equity, quality, and relevance, Sessional Paper No. 1 seeks out the creation of an education system that meets the evolving needs of Kenyan society.

2.12 Basic Education Bill, 2024

The Basic Education Bill of 2024 was introduced to repeal the Basic Education Act of 2013, providing an updated legal framework for basic education in Kenya. It aims to address emerging challenges and gaps in the education system while introducing new guidelines for governance and management.. By focusing on contemporary issues and ensuring that the education system

⁷⁹ Section 28, Basic Education Act (2013).

⁸⁰ Section 28, Basic Education Act (2013).

⁸¹ Section 28, Basic Education Act (2013).

⁸² Section 28, Basic Education Act (2013).

⁸³ Ministry of Education, *Sessional Paper No. 1 of 2019 on A Policy Framework for Reforming Education and Training for Sustainable Development in Kenya*, 2019.

⁸⁴ Ministry of Education, *Sessional Paper No. 1 of 2019 on A Policy Framework for Reforming Education and Training for Sustainable Development in Kenya*, 2019.

⁸⁵ Ministry of Education, *Sessional Paper No. 1 of 2019 on A Policy Framework for Reforming Education and Training for Sustainable Development in Kenya*, 2019.

remains responsive to the needs of learners, the Basic Education Bill seeks to enhance the quality and accessibility of education in Kenya.

Having evaluated Kenya's efforts in realizing the right to education, it is evident that while progress has been made, significant challenges persist in translating legal provisions into effective outcomes. To better understand these challenges, it is essential to explore the underlying legal framework and the jurisprudential landscape that shapes the implementation of this right. The next chapter will provide a deeper examination of Kenya's legal structures, judicial interpretations, and key rulings that influence the realisation of the right to education.

Chapter 3

Legal Framework and Jurisprudential Landscape on the Realisation of the Right to Education in Kenya

The realization of the right to education in Kenya is supported by both international and national legal frameworks. Internationally, Kenya is a party to treaties like the ICESCR and CRC, which obligate the state to ensure access to quality education. These instruments promote progressive realization, imposing immediate and long-term obligations. Domestically, the 2010 Constitution of Kenya embeds the right to education in the Bill of Rights, particularly through Articles 43 and 53, which mandate free and compulsory basic education. The Basic Education Act of 2013 operationalizes these provisions. Kenyan courts play a key role in interpreting and enforcing these rights, balancing progressive realization with state obligations despite challenges like resource constraints. This chapter examines the intersections of international law, national legislation, and judicial interpretation, offering a comprehensive understanding of Kenya's legal framework and its effectiveness in overcoming barriers to quality, accessible education.

3.1 Legal Framework on the Right to Education in Kenya

3.1.1 Convention on the Rights of the Child, 1989

The United Nations Convention on the Rights of the Child (CRC) focuses on the right of every child to education and the broader goals of education in nurturing the child's development.⁸⁶

Article 28 of the CRC stipulates that every child has the right to education, which should be directed towards the full development of the child's personality, talents, and mental and physical abilities. It emphasises the importance of making primary education free and compulsory, and the promotion of access to secondary and higher education, while also calling for measures to encourage school attendance and reduce dropout rates. Importantly, it also calls for the improvement of school discipline and a focus on a child-friendly and inclusive education system.

⁸⁶ Byrne S, 'Reclaiming Progressive Realisation: A Children Rights Analysis' 28 *The International Journal of Children's Rights* 4, 2020, 751.

Article 29 further elaborates on the aims of education, which should foster respect for human rights, promote understanding, tolerance, and friendship among all nations, and prepare the child for responsible life in a free society. Education should also prepare children for active participation in their community, developing respect for the environment and diversity.

Kenya, as a state party to the CRC, has demonstrated commitment to these principles through various legislative, policy, and institutional frameworks. The Constitution of Kenya, 2010, in particular, mirrors the ideals of Articles 28 and 29 of the CRC by guaranteeing the right to free and compulsory education for all children.⁸⁷

In terms of aligning with Article 29, Kenya has made strides in ensuring that education is not only about access but also about quality and relevance. The Kenya National Curriculum is continually reviewed to ensure it promotes holistic child development, including critical life skills, values, and respect for diversity. Furthermore, Kenya's focus on promoting the rights of the child extends beyond formal education. The country has integrated initiatives that promote child welfare, encourage participation in decision-making processes, and emphasize the importance of child protection in the school environment, which aligns with the broader educational aims of Article 29.

However, to fully meet the aspirations of the CRC, continued efforts are needed to address gaps in infrastructure, inclusion, and education quality, and to ensure that every child receives an education that prepares them for a responsible, active, and fulfilling life in society.

3.1.2 International Covenant on Economic, Social, and Cultural Rights, 1966

Article 13 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) plays a crucial role in establishing the right to education as an essential human right. It outlines several key principles that must guide the provision of education, ensuring that it is available, accessible, acceptable, and adaptable to meet the needs of all individuals. One of the core principles is that everyone has the right to education, which should be free, compulsory, and progressively made available at all levels.

⁸⁷ Article 53(1)(b), Constitution of Kenya (2010).

Another important aspect of Article 13 is the progressive introduction of free secondary and higher education, as described in Article 13(2)(c). While primary education should be universally free, governments are tasked with progressively ensuring that secondary education becomes free and that higher education is equally accessible to all, regardless of their background or socioeconomic status. Additionally, Article 13(1) emphasizes that education should promote the full development of the human personality, foster respect for human rights, and prepare individuals for active participation in society. Lastly, education should be inclusive and culturally sensitive, adapting to the needs of diverse social, cultural, and religious groups, ensuring that all individuals, irrespective of their background, can fully benefit from education.

As a party to the ICESCR, Kenya has made significant efforts to demonstrate its commitment to the principles outlined in Article 13 through various constitutional, legislative, and policy measures. In 2008, the Kenyan government introduced free secondary education, which made secondary education more accessible to a larger proportion of children. Furthermore, the government has progressively expanded access to higher education through scholarships and funding programs, though the increasing demand for university places has led to challenges such as overcrowding and resource constraints.

Kenya's Education for All (EFA) Policy and the Special Needs Education Policy aim to ensure that marginalized groups, including children with disabilities, are integrated into the mainstream education system. This approach aligns with the ICESCR's requirement for inclusive education that respects cultural diversity and adapts to the needs of all learners. The Persons with Disabilities Act, 2003, and the Inclusive Education Policy provide a framework for the integration of children with disabilities, though challenges in accessibility, affordability, and teacher training remain.

Kenya's education system incorporates human rights education as part of the national curriculum, promoting understanding of the rights and freedoms outlined in the Constitution and international human rights instruments, including the ICESCR. The curriculum also promotes cultural sensitivity by fostering tolerance, respect for diversity, and understanding of different communities, in line with Article 13(1) of the ICESCR.

However, challenges including resource constraints, regional disparities, and accessibility issues for marginalized groups remain. More concerted efforts are needed to overcome these barriers and ensure that Kenya's education system fully aligns with the ICESCR's vision of education as a fundamental human right.

3.1.3 Constitution of Kenya, 2010

The Constitution of Kenya, 2010 provides strong constitutional guarantees for the right to education through Articles 43 and 53, each playing a significant role in securing access to education for all children in Kenya.

Article 43 of the Kenyan Constitution enshrines a wide range of economic and social rights, including the right to education.⁸⁸ By embedding education as a basic human right within the Constitution, the Kenyan state acknowledges its responsibility to provide and facilitate education for all citizens, irrespective of their background or socio-economic status, to ensure that education is not a privilege but a guaranteed right for every citizen.

Article 53 of the Kenyan Constitution provides a direct and robust guarantee of the right to education for children. It states— every child has the right to free and compulsory basic education.⁸⁹ This is a landmark provision as it explicitly makes primary education mandatory and free, thereby removing financial barriers to education that might otherwise prevent children from attending school.

The compulsory nature of basic education is intended to ensure that all children are provided with the opportunity to attend school, with the government responsible for making primary education universally accessible. Article 53(1)(b) seeks to eliminate disparities that might arise due to regional, cultural, or economic factors that could affect a child's ability to attend school. This has a particularly strong impact on vulnerable children, including those from low-income families, marginalized groups, and those living in rural or hard-to-reach areas.

The combined impact of Articles 43 and 53 ensures that the Kenyan state is not only constitutionally obligated to offer education but is also required to make provisions for its

⁸⁸ Article 43(1)(f), Constitution of Kenya (2010).

⁸⁹ Article 53(1)(b), Constitution of Kenya (2010).

accessibility, affordability, and quality. However, while these provisions offer a strong legal foundation, challenges persist in their full realisation. Issues such as insufficient infrastructure, overcrowded classrooms, and a shortage of qualified teachers remain barriers that hinder the effectiveness of these constitutional guarantees. Additionally, while Article 53(1)(b) mandates free education at the primary level, there are still indirect costs (such as school uniforms, transport, and supplies) that families may face, which can limit access for some children. Similarly, while Article 43 guarantees the right to education, it does not fully address the quality of education, which is a critical element in ensuring that children are not only enrolled in schools but also receiving an education that equips them with the necessary skills for their futures.

It is worth noting that the Fourth Schedule of the Kenyan Constitution plays a significant role in the devolution of education-related functions, with both the national and county governments sharing responsibility for education. While primary and secondary education remain under the national government, counties are tasked with managing early childhood education, which allows for a more localized approach to addressing the educational needs of young children. This decentralization aims to bring educational services closer to communities, ensuring that local governments can tailor their approaches based on regional needs and challenges.

However, the implementation of these devolved functions has faced challenges, particularly in terms of capacity and resource allocation. Many counties lack the financial and technical resources necessary to effectively manage early childhood education, resulting in disparities in service delivery across different regions. While wealthier counties may have the infrastructure to provide quality education, poorer counties struggle with inadequate facilities, teacher shortages, and low enrollment rates. This has led to uneven access to education, with some areas benefiting from improved services while others remain underserved.

Additionally, coordination between the national and county governments has sometimes led to inefficiencies and overlap in responsibilities, complicating the delivery of education services. Financial constraints further hinder the ability of county governments to fully implement education policies, particularly in marginalized regions. Despite these challenges, the devolution of education functions through the Fourth Schedule has the potential to enhance local

governance and improve access to education if resource allocation, capacity building, and coordination mechanisms are strengthened.

3.1.4 Basic Education Act, 2013

The Basic Education Act outlines key principles aimed at ensuring the realisation of the right to education in Kenya. These include the right of every child to free and compulsory basic education, the protection of every child's right to equal standards of education in public schools, including uniformity in the medium of instruction for children at the same educational level, and the promotion of good governance, participation, and inclusiveness of parents, communities, the private sector, and other stakeholders in the development and management of basic education.⁹⁰ Additionally, the Act emphasizes transparency, the cost-effective use of educational resources, and the sustainable implementation of educational services, as well as upholding human dignity and integrity among those managing basic education.⁹¹

However, the Act lacks explicit incorporation of the best interest of the child as a foundational principle, a critical oversight in child-focused legislation. It also insufficiently emphasises children's participation in educational decisions, undermining its alignment with international best practices and the holistic addressing of children's needs and rights.

The provision for the structure of education in Kenya as outlined in the Basic Education Act aims to create an inclusive and flexible system that accommodates learners' diverse abilities and needs.⁹² Additionally, the Cabinet Secretary, in collaboration with the National Education Board and stakeholders, is tasked with developing regulations and advising on financing for sustainable education.⁹³

However, the current structure has inefficiencies that impede effective implementation, particularly due to its vague emphasis on individual learner abilities and resource availability. It lacks clear mechanisms to assess disparities, resulting in continued inequality in access to quality education for marginalised areas.

⁹⁰ Section 4, Basic Education Act (2013).

⁹¹ Section 4, Basic Education Act (2013).

⁹² Section 42, Basic Education Act (2013).

⁹³ Section 42, Basic Education Act (2013).

Second, the Act assigns the Cabinet Secretary the responsibility of creating regulations and providing advice but lacks a strong monitoring and accountability framework to assess the effectiveness of these measures in relation to national educational goals. This centralised approach without independent oversight may result in delays and inconsistencies in policy implementation. While Section 2 mentions a statutory structural adjustment mechanism for assessing learners' needs, it does not specify how or how often this process will be applied, indicating a need for further expansion and clarity.

Additionally, the provision's vague reliance on consultation with the National Education Board and "other relevant stakeholders" creates ambiguity regarding the roles of various actors, potentially excluding key participants like local communities, educators, and learners from meaningful involvement in education. Additionally, it fails to address how the education system will adapt to emerging challenges, such as technology integration and evolving labor market demands.

The Basic Education Act of 2013 delineates the roles of various stakeholders to ensure the effective realisation of the right to education in Kenya. At the national level, the National Education Board is tasked with advising the Cabinet Secretary and relevant departments on policy matters, collaborating with the Quality Assurance and Standards Council, and removing barriers to accessing quality education.⁹⁴ The Board also formulates guidelines for the establishment of basic education institutions, ensures children remain in school, and promotes transitions to higher levels of education, particularly for marginalized groups.⁹⁵

At the county level, County Education Boards are responsible for overseeing and managing youth polytechnics, early childhood education, and related programs in consultation with county governments.⁹⁶ They also coordinate education and training on behalf of the national and county governments, interpret national policies based on county-specific needs, and collaborate with schools and national bodies on curriculum implementation, teacher management, and

⁹⁴ Section 5, Basic Education Act (2013).

⁹⁵ Section 5, Basic Education Act (2013).

⁹⁶ Section 18, Basic Education Act (2013).

examinations.⁹⁷ Additionally, these Boards are charged with monitoring education standards, maintaining institutional data, and ensuring all children complete basic education.⁹⁸

The Basic Education Act of 2013 faces weak monitoring and evaluation due to overlapping mandates among multiple oversight bodies, such as the Ministry of Education, county governments, and school boards. This fragmentation causes inefficiencies, confusion, and neglect of critical issues like infrastructure and teacher deployment. The lack of a unified framework obstructs progress, hindering equitable access to quality education.

Section 69 of the Basic Education Act requires the Cabinet Secretary to review, evaluate, and monitor educational policies but lacks mechanisms for transparency and public participation. Although it calls for continuous review in consultation with relevant stakeholders, it does not establish a formal reporting system to inform the public about findings, progress, and challenges. For the review process to be effective and resonate with affected communities, a clear framework for public reporting is essential. Access to this information would empower citizens to engage in meaningful discussions and hold the government accountable, enhancing public trust in educational governance, and facilitating more effective policy development to improve the education system.

The penalties in Section 92 of the Basic Education Act are insufficient to instill a strong sense of responsibility among the state and its agents regarding education delivery. The fines and imprisonment terms—up to Ksh. 200,000 or 12 months for first offenses, and Ksh. 300,000 or 12 months for repeat offenses—do not effectively deter violations or ensure compliance. These penalties do not reflect the gravity of neglecting educational rights, especially in cases of systemic issues like mismanagement of funds or inadequate infrastructure. To enhance enforcement and accountability, the penalties should be strengthened with higher fines, longer imprisonment terms, or alternative measures.

⁹⁷ Section 18, Basic Education Act (2013).

⁹⁸ Section 18, Basic Education Act (2013).

3.1.5 Children Act, 2022

Section 5 of the Children Act, 2022 which grants the state the responsibility to progressively realise the rights of the child raises important questions about accountability and checks on the power of the state. While the state is tasked with taking measures to fully realise children's rights, the provision lacks a clearly defined mechanism for holding the state accountable if these measures are not met. The Cabinet Secretary is given broad authority to develop, review, and implement policies and programs, but without robust oversight, there is a risk that the implementation of children's rights could be delayed or compromised, particularly in the absence of clear timelines or accountability structures.

Moreover, while the provision emphasises the importance of children's participation in matters affecting them, and the requirement to consider their opinions, there is a gap in ensuring that these rights are not only symbolic but actionable. The actual capacity of the state and relevant authorities to genuinely involve children in decision-making processes, especially those from vulnerable or marginalised groups, remains uncertain. The law provides that the child's opinion should be taken into account "having regard to the child's age and degree of maturity," but this can be subjective, potentially limiting children's agency based on arbitrary assessments.

There is also no mention of oversight mechanisms that would effectively monitor whether the state is fulfilling its obligations in a manner that respects the rights of children. As such, while the provision sets out important ideals, its effectiveness in realising these rights depends on the strength of implementation measures, accountability mechanisms, and the active involvement of independent bodies to safeguard children's rights and ensure their full participation in matters that affect them.

Section 13 of the Children Act, 2022, while reaffirming the constitutional right to free and compulsory basic education, employs overly generic phrasing that undermines its practical utility, particularly given the existence of the Basic Education Act. Subsection (1) restates the principle enshrined in Article 53(1)(b) of the Constitution of Kenya, 2010 but offers no additional specificity or actionable measures to enhance implementation or address barriers to education. Its broad language does little to clarify the scope or extent of the right beyond what is constitutionally mandated.

Subsection (2) shifts responsibility onto parents and guardians, mandating them to ensure their children's enrollment in educational institutions. However, this obligation is articulated without considering the systemic challenges that often hinder compliance, such as poverty, lack of infrastructure, or cultural barriers. While emphasising parental responsibility is important, this provision does not account for how the state will support parents who face these challenges, creating a gap in the law's effectiveness.

Subsection (3) requires the Cabinet Secretary, in consultation with relevant stakeholders, to develop and implement policies for realising the right to basic education. However, it does not outline clear benchmarks, timelines, or accountability mechanisms for the implementation of these policies. This vagueness risks diluting the state's responsibility and creates ambiguity regarding the obligations of various actors, particularly when juxtaposed with the more detailed provisions in the Basic Education Act.

Instead of reiterating broad principles, the Children Act could have leveraged its provisions to address gaps in the Basic Education Act or provide enhanced protections for vulnerable children, such as those with disabilities, those living in marginalised areas, or those facing systemic exclusion from education.

3.2 Kenyan Case Law Analysis

3.2.1 Ndoria Stephen v Minister of Education & 2 others (2015) eKLR.

The petitioner argued that children from marginalized areas are systematically denied equal access to education due to government policies, leading to poor performance and limited opportunities for secondary school and university placements. He cited Articles 53 and 56 of the Constitution of Kenya, 2010, which guarantee the right to free and compulsory education and mandate special educational opportunities for marginalized groups. The petitioner contended that the right to education under Article 53 must be implemented immediately, unlike broader rights under Article 43, which allow for progressive realization. He also called for the abolishment of national examinations, claiming they do not consider the unique challenges faced by marginalized children.

In response, the respondents highlighted government efforts, such as establishing national schools in every county and implementing programs to support girls from marginalised regions. They acknowledged historical factors contributing to marginalisation but maintained that the government is addressing these issues through policy frameworks and denied any evidence of discrimination.

The court emphasized that while the right to education under Article 43 is progressive, the right to free and compulsory education under Article 53 is immediate. It referenced principles from previous cases, underscoring the state's obligation to provide equal access to education. Ultimately, the court dismissed the petition, stating that abolishing the national examination system would not effectively address the inequalities faced by marginalized children. While recognizing the importance of educational access, the judgment called for continued advocacy and government monitoring to improve education in marginalized communities.

3.2.2 Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (2021) eKLR

The appellants claimed that their socio-economic rights, particularly the right to housing, were violated due to the eviction and demolition of their homes, arguing that the state has a duty to protect these rights. They urged the court to recognize the progressive realisation of socio-economic rights and the state's obligation to take deliberate steps toward fulfilling them. In contrast, the respondents, especially the Kenya Airports Authority, contended that enforcing socio-economic rights does not grant proprietary rights over land owned by others and argued that the trial court wrongly held them responsible for the eviction without a direct link to security agents.

The court acknowledged the concept of structural interdicts as a novel remedy in human rights litigation, emphasising their cautious application and the need for government policy flexibility. It affirmed the relevance of international law, particularly Articles 2(5) and 2(6) of the Constitution of Kenya, 2010, in interpreting socio-economic rights. The court highlighted that the right to housing must be understood within the context of available resources and the state's

obligations under progressive realisation, which requires deliberate and incremental steps toward fulfillment.

While the ruling advances socio-economic rights enforcement, it raises concerns about immediate relief for individuals whose rights are violated. The effectiveness of structural interdicts will depend on the state's commitment to implementing necessary changes, underscoring the need for continued advocacy and systemic improvements to fully realise and protect socio-economic rights in practice.

3.2.3 MMM v Permanent Secretary, Ministry of Education & 2 others (2013) **eKLR**

The petitioner claimed that his son's right to education was violated due to insufficient financial support from the government, specifically citing the inadequate bursary of Kshs 4,000 per year provided through the Constituency Development Fund (CDF). He argued that the State has a constitutional duty under Article 43 to progressively realise the right to education and sought a full bursary to enable his son to attend school. In response, the Ministry of Education contended that they had established bursary funds to assist needy students and were making efforts within their resource constraints. They argued that the petitioner failed to demonstrate a significant infringement of his son's right to education.

The court recognised the right to education as justiciable and affirmed the State's obligation to progressively realize this right. It found that the petitioner partially demonstrated the infringement by highlighting the inadequacy of the bursary support. The court ordered the respondents to submit a report within 30 days detailing actions taken regarding the bursary application and directed the petitioner to report on responses from the local CDF.

However, the effectiveness of the court's reporting mechanism raises concerns. The lack of a structured framework for reporting and follow-up actions may hinder accountability and urgency. Additionally, public awareness and transparency were not addressed, which could enhance community engagement. While the court's orders are a positive step, they do not provide a

long-term solution for systemic issues in realizing the right to education, suggesting a need for comprehensive policy reforms to support needy students effectively.

3.2.4 Gabriel Nyabola v Attorney General & 2 others (2014) eKLR

The petitioner argued that the government's policy of providing free secondary education only to students in public schools discriminated against those in private schools. They asserted that the right to basic education should include secondary education for all children, regardless of their school type, emphasising that every child has the right to choose their educational institution without discrimination. The petitioner highlighted the Ministry of Education's acknowledgment of the shortage of public secondary schools and its encouragement of private sector involvement in education, advocating for equitable treatment of private school students.

In contrast, the respondents maintained that the right to education is to be achieved progressively, prioritizing vulnerable children who cannot afford tuition and rely on public schools. They argued that funding public schools was a legitimate policy aimed at serving those most in need, asserting that private institutions operate for profit, making state funding inappropriate. The Attorney General noted that the right to basic education is not absolute and depends on the state's capacity to provide it.

The court ruled that every person under eighteen in Kenya is entitled to free and compulsory primary and secondary education, as mandated by the Constitution. However, it found that the government's policy of limiting funding to public schools did not constitute discrimination against private school students, as it aligned with the principle of progressive realisation. The ruling clarified that the right to education must translate into genuine accessibility for all children, potentially prompting the government to consider more equitable funding for both public and private institutions, thereby setting a legal precedent for educational rights in Kenya.

3.2.5 William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others (2021) eKLR

The petitioners argued that the State has a constitutional obligation under Article 43 of the Constitution of Kenya, 2010, to provide accessible and adequate housing, which they claimed is non-delegable. They contended that the State must take active measures to fulfill these rights, ensuring individuals are not left vulnerable due to inaction or insufficient oversight. The petitioners asserted that the State failed in its obligations by allowing a private entity, the 1st Respondent, to conduct evictions without safeguarding the petitioners' rights, thereby abdicating its duty to protect them. They emphasized the importance of progressive realization under Article 21(2), arguing that the State must implement legislative and policy measures to gradually fulfill socio-economic rights like housing.

In response, the respondents maintained that the responsibility for providing housing lies solely with the State, not private entities. They argued that while private parties have a negative duty not to infringe on rights, they are not required to actively realize those rights. The court upheld the principle that the responsibility for ensuring socioeconomic rights, including adequate housing, lies with the State and cannot be delegated to private entities, even in public-private partnerships. The court clarified that while private entities must avoid infringing on rights, the positive obligation to progressively realize such rights remains with the State. This ruling emphasises the necessity for the State to maintain accountability in fulfilling its constitutional obligations, safeguarding individuals against potential violations, and ensuring the progressive realization of fundamental rights.

Having explored the legal framework and jurisprudential landscape surrounding the right to education in Kenya, it becomes evident that while significant strides have been made, challenges remain in the effective implementation and enforcement of these rights. In examining the foundational legal principles and judicial approaches, it is essential to consider the experiences of other jurisdictions that have navigated similar obstacles. South Africa, with its robust legal framework and progressive judicial rulings on socio-economic rights, offers valuable insights and best practices that could inform Kenya's approach. The next chapter will delve into a comparative analysis, drawing lessons from South Africa's successes and challenges in realising

the right to education, in a bid to enhance Kenya's own efforts in advancing the realisation of this fundamental right.

Chapter 4

Comparative Lessons From South Africa: The Successful Progressive Realisation of the Right To Education

This chapter provides a comparative analysis of the realisation of the right to education in Kenya and South Africa, focusing on their constitutional frameworks, judicial enforcement, and implementation mechanisms. Both countries recognize education as a fundamental socio-economic right and have enshrined its protection within their constitutions. However, their approaches to actualising this right differ due to their unique legal, political, and socio-economic contexts.

South Africa has developed a robust jurisprudence on socio-economic rights, with courts playing a proactive role in ensuring compliance through remedies such as structural interdicts and the establishment of minimum core obligations. Landmark cases like *Grootboom* and *Juma Masjid* illustrate the judiciary's efforts to balance progressive realisation with immediate obligations,

The Constitution of Kenya, 2010 elevated the right to education to a justiciable status, offering a framework for progressive realisation. While the judiciary has shown a willingness to enforce this right, challenges such as resource constraints, overlapping duties, and executive resistance have hindered effective implementation. Kenyan courts have yet to fully explore remedies like structural interdicts, which could provide a framework for monitoring and enforcing compliance.

South Africa's view of the realisation of the right to education has impacted the language of legislative documents such as the South African Schools Act to bring about its realisation with expediency.⁹⁹ The Act adopts a minimum core content approach to outline strategies for improving educational infrastructure, quality, and access, particularly for disadvantaged populations.¹⁰⁰ Courts play a crucial role in ensuring the state fulfills these obligations, as seen in key cases like *Juma Masjid Primary School v. Essay NO and Section 27 v Minister of Education (2011) Constitutional Court of South Africa*, where judicial intervention upheld the right to education. Furthermore, South Africa emphasises equality and non-discrimination in education,

⁹⁹ *Juma Masjid Primary School v. Essay NO and Section 27 v Minister of Education* (2011), Constitutional Court of South Africa.

¹⁰⁰ Section 35, *South African Schools Act* (Act No. 84 of 1996)

actively addressing disparities through civil society advocacy and judicial oversight, ensuring both immediate and long-term state accountability in education provision.¹⁰¹

The South African Constitution mandates that every child, particularly those in disadvantaged communities, should have access to quality education.¹⁰² However, despite these constitutional guarantees, significant challenges persist in the realisation of this right. Issues such as widespread poverty, inequality, and inadequate resources hinder the effective delivery of education.¹⁰³ The *Section 27* case serves as a landmark example of these challenges, illustrating the failure of the Limpopo Department of Basic Education to deliver textbooks, which are essential for providing quality education.¹⁰⁴ This failure not only led to public outcry but also highlighted systemic issues within the education system that need to be addressed.¹⁰⁵

The historical context of South Africa's education system, shaped by the legacy of apartheid, has created enduring disparities that continue to affect access to quality education. Rapatsa and Matloga in their article argue that addressing these historical injustices is crucial for achieving educational equity. The *Section 27* case emphasises the immediate realisation of the right to basic education, with the court ruling that the state has a non-derogable duty to provide educational resources, such as textbooks, which are vital for effective education delivery.¹⁰⁶ This case illustrates the importance of accountability in the education system, as the failure to deliver educational resources not only violates constitutional rights but also necessitates mechanisms to ensure that government departments are held accountable for their obligations.¹⁰⁷

¹⁰¹ *Section 27 and Others v Minister of Education and Another* (2012), The High Court of South Africa, Gauteng Division, Pretoria.

¹⁰² Section 29, *Constitution of the Republic of South Africa* (1996).

¹⁰³ Rapatsa M and Matloga N, 'The Right to Basic Education in South Africa: Lessons from Section 27 and Others v Minister of Education and Another (2012) ZAGPPHC 114' 5 *Mediterranean Journal of Social Sciences* 27, 2014, 1124.

¹⁰⁴ *Section 27 and Others v Minister of Education and Another* (2012), The High Court of South Africa, Gauteng Division, Pretoria.

¹⁰⁵ Rapatsa M and Matloga N, 'The Right to Basic Education in South Africa: Lessons from Section 27 and Others v Minister of Education and Another (2012) ZAGPPHC 114' 5 *Mediterranean Journal of Social Sciences* 27, 2014, 1124.

¹⁰⁶ *Section 27 and Others v Minister of Education and Another* (2012), The High Court of South Africa, Gauteng Division, Pretoria.

¹⁰⁷ *Section 27 and Others v Minister of Education and Another* (2012), The High Court of South Africa, Gauteng Division, Pretoria.

Furthermore, the *Juma Masjid* case reinforces the notion that educational policies should prioritise the needs of disadvantaged learners.¹⁰⁸ The Constitutional Court emphasized that a transformative model of education must first address the needs of those who have been historically marginalized before extending benefits to more privileged groups.¹⁰⁹ This focus on equity is essential for creating a more just and inclusive education system.

This analysis highlights key issues, including judicial oversight, executive accountability, and the role of community involvement in advancing the right to education. By examining these aspects, the study recommends best practices and lessons that can enhance the realisation of this critical right in both jurisdictions, ensuring it becomes a lived reality for marginalised populations.

4.1 Minimum Core Content

To strengthen the realisation of the right to education, Kenya can adopt South Africa's concept of minimum core obligations by establishing clear baselines for essential aspects like curriculum, infrastructure, and teacher training. South Africa's approach ensures every learner receives a standard level of education, providing Kenya with a roadmap for defining and implementing critical minimum standards.

Key areas for these standards include an inclusive and culturally relevant curriculum that reflects local knowledge and languages, promoting a sense of identity. Learning materials should be accessible, with an ideal student-to-textbook ratio of 1:1. Infrastructure must meet safety and accessibility standards, with adequate amenities like clean water, electricity, and functional libraries.

Teacher training programs should focus on continuous professional development, ensuring educators are equipped for diverse student needs. Regular workshops could support this. Additionally, meaningful engagement with parents and communities is crucial, with regular forums and workshops to enable active participation in children's education.

¹⁰⁸ *Juma Masjid Primary School v. Essay NO and Section 27 v Minister of Education* (2011), Constitutional Court of South Africa.

¹⁰⁹ *Juma Masjid Primary School v. Essay NO and Section 27 v Minister of Education* (2011), Constitutional Court of South Africa.

By implementing these standards, Kenya can improve accountability and ensure equitable access to quality education, ultimately enhancing educational outcomes for all students.

4.2 Statutory Structural Adjustment Mechanism

Kenya's Basic Education Act of 2013 includes a statutory structural adjustment mechanism aimed at monitoring and improving education outcomes, yet its potential remains underutilised. South Africa's advanced monitoring and evaluation frameworks, supported by robust data collection and community engagement, offer a model for operationalizing this mechanism in Kenya.

To enhance its effectiveness, Kenya should implement several strategies. First, establish robust data collection systems using technology for real-time tracking of student enrollment, attendance, retention rates, and academic performance. Digital platforms and mobile apps can streamline data entry and analysis. Regular monitoring and evaluation should be scheduled, with periodic assessments to identify areas requiring intervention.

Collaboration among stakeholders such as government, educators, parents, and community organizations is key. Regular forums can facilitate discussions on data findings, feedback, and solutions. Training for education officials and administrators on data interpretation will enable informed decision-making. Clear feedback mechanisms can enhance accountability and involve communities in the process.

Flexibility in policy adjustments, based on insights from monitoring, will allow the education sector to respond swiftly to challenges. By implementing these strategies, Kenya can transform the statutory structural adjustment mechanism into an effective tool for improving educational outcomes.

4.3 Structural Interdicts

South Africa's use of structural interdicts to enforce socio-economic rights, including education, offers a valuable lesson for Kenya. These remedies ensure ongoing oversight and compliance with court orders. To strengthen the use of structural interdicts, Kenyan courts should receive training on their application, establish clear guidelines, and introduce monitoring mechanisms to

ensure consistent implementation. Public participation, through NGOs and civil society, can improve oversight, while specialized units in courts can track compliance.

Collaboration with independent bodies, like constitutional commissions, would enhance impartial monitoring. Consequences for non-compliance, including contempt proceedings, must be articulated, and orders should be specific, actionable, and time-bound. Promoting public awareness and encouraging strategic litigation will further enhance their effectiveness.

Cooperation between the judiciary, executive, and legislature is essential for successful implementation. Documenting success stories can also build confidence in structural interdicts. Recognizing and rewarding exemplary performance can foster a culture of accountability, motivating officials to meet their obligations. Involving state officials in problem-solving sessions can empower them to take ownership of their roles and ensure urgency in implementing change. Addressing resource constraints and offering technical support will further strengthen enforcement, ensuring that structural interdicts contribute to realizing constitutional rights in Kenya's education sector.

4.4 Accountability Measures

South Africa's emphasis on transparency and accountability, supported by effective oversight bodies, makes a good attempt to address government inefficiencies. Kenya can borrow such strategies by introducing performance reviews, hefty financial penalties, and public accountability measures. Collaboration with civil society and community-driven monitoring can further enhance transparency and ensure the effective use of educational resources.

To address government inefficiencies and ensure accountability in the education sector, several appropriate sanctions can be considered. First, implementing financial penalties for government officials or departments that fail to meet established educational performance targets can create a direct incentive for accountability. These penalties could involve withholding budget allocations or imposing fines that would be redirected to support educational initiatives.

Second, establishing a system of performance reviews and evaluations for education officials can help identify inefficiencies. Those who consistently underperform could face disciplinary

actions, including demotion or removal from their positions. This would encourage a culture of accountability and high performance within the education sector.

Third, public accountability measures, such as mandatory reporting on educational outcomes and the use of public forums to discuss performance, can enhance transparency. Officials who fail to provide accurate and timely reports could face reputational sanctions, which may impact their future career prospects.

Additionally, creating independent oversight bodies with the authority to investigate and address inefficiencies in the education system can be effective. These bodies could recommend sanctions against officials or departments that do not comply with educational standards or fail to implement necessary reforms.

Finally, engaging civil society and community organizations in monitoring government performance can provide an additional layer of accountability. If communities are empowered to report inefficiencies and advocate for change, government officials may be more motivated to act responsibly.

4.5 Tensions Over Separation of Powers and Overreach

South Africa's balanced use of structural interdicts, interpretation of the political question doctrine, and inter-branch dialogue highlight ways to resolve tensions between the executive and judiciary. Kenyan courts can adopt these practices, issuing practical orders while fostering cooperation and mutual respect between government branches to improve compliance with constitutional mandates on education.

Overcoming tensions between the executive and judiciary regarding the right to education requires fostering cooperation, accountability, and respect for constitutional mandates. Dialogue and communication between the two branches can clarify roles and build mutual understanding. Regular inter-branch meetings can address misunderstandings and encourage collaboration on policies and implementation.

Courts must balance judicial activism and restraint, intervening in policy matters only when there is clear evidence of constitutional violations. Remedies like structural interdicts allow the

judiciary to guide the executive's actions while respecting the separation of powers. Judicial orders should be clear, practical, and time-bound to ensure feasibility and compliance without overstepping mandates.

Building the capacity of both branches is crucial. The judiciary should deepen its understanding of education policy complexities, while the executive must strengthen mechanisms to comply with court orders. Civil society and the public should be engaged to promote accountability and transparency, focusing both branches on shared goals of upholding rights.

Independent institutions, such as human rights commissions, can mediate disputes and monitor progress, reducing tensions. Mutual respect for constitutional supremacy and the rule of law is essential, emphasising the complementary roles of the executive and judiciary in advancing socio-economic rights.

4.6 Executive Resistance

Kenya can address executive resistance by adopting South Africa's strategies of fostering commitment through collaborative problem-solving, recognising exemplary performance, and engaging stakeholders in educational planning. Such measures create a sense of ownership over outcomes and urgency among officials, encouraging compliance with obligations to fulfill the right to education.

To inspire a sense of urgency and commitment among state officials in fulfilling their obligations, particularly in the education sector, several approaches can be adopted. First, establishing clear and measurable goals with specific timelines can create a framework that emphasizes accountability. When officials understand that their performance will be evaluated against these targets, it fosters a sense of urgency to act.

Second, sharing compelling narratives and data that highlight the impact of educational shortcomings on communities can evoke emotional responses and motivate officials to prioritize their responsibilities. Organizing workshops and forums where stakeholders, including students and parents, share their experiences can humanize the issues and reinforce the need for immediate action.

Third, recognizing and rewarding exemplary performance can cultivate a culture of commitment. Public acknowledgment of officials who successfully meet their obligations can inspire others to follow suit, creating a competitive spirit focused on achieving educational goals.

Additionally, involving state officials in collaborative problem-solving sessions can empower them to take ownership of their roles. When they actively participate in developing solutions, it instills a sense of responsibility and urgency to implement changes. By combining these strategies, a strong commitment to fulfilling state obligations can be fostered, driving meaningful progress in the education sector.

4.7 Administrative Remedies

South Africa's Council for Educators provides Kenya with a model for effective complaint resolution and policy advocacy in education, particularly through the Office of the Ombudsman. Strengthening the ombudsman's independence, investigative powers, and stakeholder collaboration could help Kenya address systemic educational challenges and promote accountability.

Kenya could enhance the protection of the right to education by establishing a robust ombudsman framework in educational institutions. This framework should ensure impartiality, allowing the ombudsman to investigate complaints on issues like resource inadequacy and discrimination. Accessible complaint mechanisms should be developed, and the ombudsman should advocate for policy reforms based on complaints.

Public awareness campaigns and mediation services would help resolve disputes and protect students' experiences. Collaboration with other oversight bodies, such as human rights commissions, would ensure a comprehensive approach to addressing educational injustices.

Drawing from South Africa's experience, Kenya can build on its legal recognition of the right to education by addressing gaps in implementation. Judicial activism, community engagement, and monitoring systems are key to overcoming challenges, and offering valuable insights into

Kenya's progress. The concluding chapter will present recommendations for strengthening the right to education in Kenya.

Chapter 5

5.1 Summary of Findings

This study reveals that while Kenya has made commendable progress in realising the right to education, significant gaps remain in its implementation. Despite the constitutional entrenchment of this right and the existence of supportive legal frameworks, enforcement and practical realization often fall short. One critical issue is the inadequacy of state accountability, particularly in enforcing judicial orders related to education. Resource constraints are frequently cited as justifications for non-compliance, creating a barrier to fulfilling the state's obligations. This underscores the need for a more robust accountability framework that prioritizes transparency, efficiency, and urgency in addressing educational disparities.

The analysis of Kenya's legal framework further highlights its limitations in translating laws and policies into tangible educational outcomes. Marginalised groups, including children from low-income families, rural communities, and those with disabilities, remain disproportionately excluded from quality education. Although the Basic Education Act of 2013 provides a foundation for reform, its potential remains underutilised due to weak implementation and insufficient monitoring mechanisms.

By evaluating Kenya's approach in comparison to international best practices, the study identifies actionable insights to bridge these gaps. Lessons from more effective models like that of South Africa demonstrate the importance of well-defined minimum standards, proactive judicial interventions, and collaborative stakeholder engagement in driving educational reforms. The comparative analysis not only reveals areas where Kenya can improve but also underscores the need to adapt these strategies to local contexts, ensuring they address specific challenges and priorities.

In achieving its research objectives, the study provides a comprehensive assessment of Kenya's historical and current efforts to realise the right to education. It maps out legislative and policy developments over time, shedding light on both progress and persistent challenges. By critically examining legal mechanisms and judicial interpretations, the research evaluates the balance

between state obligations and the principle of progressive realisation, offering an in-depth understanding of how this balance impacts educational access and quality.

Most importantly, the study moves beyond critique to propose practical solutions. By identifying existing gaps and systemic challenges, it presents recommendations aimed at strengthening state accountability, enhancing legal enforcement, and fostering inclusive educational policies. These recommendations prioritise equity and inclusivity, ensuring that the promise of quality education becomes a reality for all Kenyan children. This synthesis of findings and proposals positions the study as a valuable resource for policymakers, educators, and advocates striving to advance the right to education in Kenya.

5.2 Recommendations For Kenya and Future Research

5.2.1 Applying South African Approaches to Progressively Realising the Right to Education in Kenya and Creating an Environment Enabling Their Adoption

This study underscores the need for Kenya to adopt targeted strategies to advance the realisation of the right to education, as modelled in South Africa. Establishing minimum core obligations is essential to ensure that key aspects such as curriculum, infrastructure, teacher training, and community engagement meet defined standards. By setting and implementing these benchmarks, equitable access to quality education can be guaranteed, laying a strong foundation for improved learning outcomes.

To enhance the effectiveness of the Basic Education Act of 2013, Kenya should prioritise the further development of existing monitoring and evaluation mechanisms. This includes leveraging technology for real-time data collection on critical indicators such as enrollment, retention, and performance. Regular assessments, stakeholder engagement, and flexible policy adjustments informed by data insights will enable a more responsive and efficient education system.

Judicial oversight must play a proactive role in ensuring government accountability. Courts should be empowered to issue specific, actionable, and time-bound orders with clear monitoring provisions. Building the judiciary's capacity to address education rights and fostering inter-branch collaboration will strengthen compliance and enhance the realization of constitutional mandates.

Transparency and accountability are vital to addressing inefficiencies in the education sector. Introducing performance reviews, financial penalties for non-compliance, and public accountability measures will encourage responsible governance. Independent oversight bodies and community-driven monitoring can complement these efforts, ensuring the effective use of resources and fostering trust among stakeholders.

Addressing executive resistance requires creating a sense of ownership of educational outcomes and a sense of urgency among officials. Establishing clear, measurable, and time bound targets, recognizing exemplary performance, and involving officials in collaborative problem-solving will encourage a culture of accountability. Additionally, engaging stakeholders in educational planning and decision-making will promote a shared commitment to fulfilling obligations.

A strengthened administrative framework is critical for effective enforcement of education rights. Enhancing the independence and capacity of the ombudsman to investigate and resolve complaints will provide a reliable avenue for addressing systemic issues. Accessible complaint mechanisms, public awareness campaigns, and mediation services can empower individuals and communities to advocate for their rights. Regular reporting and collaboration with oversight bodies will ensure transparency and continuous improvement in the education system.

This study also highlights the critical importance of tailoring educational strategies to the diverse needs of Kenya's counties, given the country's socio-economic and cultural diversity. To address this, Kenya would benefit significantly from the constitution of a dedicated task force to investigate county-specific contexts and challenges in the education sector. Such a task force could conduct comprehensive assessments of factors such as infrastructure, teacher distribution, curriculum implementation, and access to learning materials at the county level. By providing localised insights, the task force would enable the development of targeted interventions that address unique barriers to education in each region. This approach would not only promote equity but also ensure that national education policies are implemented effectively across diverse contexts, leading to better educational outcomes nationwide.

5.3 Conclusion

In conclusion, this study emphasises the urgency of aligning state obligations with the progressive realisation of the right to education in Kenya. It calls for a governance system that is both accountable and action-oriented, prioritising the educational needs of vulnerable populations. The recommendations aim to galvanise policymakers, legal experts, and civil society into collaborative action to ensure that every Kenyan child has access to quality education.

Beyond legal compliance, the study asserts that education is a transformative human right, shaping individual potential and the nation's future. By addressing current gaps and proposing sustainable reforms, this work sets the stage for a more equitable and impactful education system in Kenya.

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