

**An Analysis on Child Labour Laws in Kenya; A Quest For The Best Interests of The
Child**

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By
Tuwei Chepchirchir Daisy
078160

Prepared under the supervision of
Mr. Harrison Mbori

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Declaration

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

Signed:

Date:

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

Signed:.....

[Supervisor's Name]

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Abstract

Child labour continues to be widespread phenomena across the globe. Worldwide over 215 million children have been reported to be working many of them fulltime. Some of the regions that have recorded the highest numbers of child labourers include Asia and Sub-Saharan Africa.

The ILO has taken initiative to ensure eradication of child labour. There is the ILO Convention 138 on Minimum Age of Employment that seeks to ensure children below a certain age are not engaged in child labour. ILO Convention 182 is on the Worst forms of Child labour its' aim is to ensure that children are not engaged in hazardous activities that may be harmful to their health or may interfere with their education. The African Charter on Rights and Welfare of a Child has also outline the need for protection for children's rights and encourages state parties to ensure that the best interests of a child prevails.

Kenya has ratified all three instruments as an initiative to ensure children rights are protected. Various pieces of legislation such as the Constitution of Kenya 2010, Employment Act, Children's' act have provisions to ensure that child labour is eradicated. Despite all this pieces of legislation there is need for a child-centred policy on the elimination of Child Labour. Such a policy would take into account the nature of work done by the child and consider what is best for the child.

This study will thus analyse the legal provisions on child labour and the steps taken by Kenya to fulfil its obligations. It will also give a recommendation on how to formulate a child-centred policy to eradicate child labour and ensure the best interest of a child prevails.

Table of Legal Instruments

International Instruments

United Nations Convention for the Rights of a Child of 1989 *Entry into force 2nd September 1990*, vol 1577, UNTS No. 147 of 1993,

Minimum Age Convention for Admission to Employment No. 138 *adopted on 26th June 1973, Entry into Force on 19th June 1976*, ILO C138 of 1973 (Fundamental Convention)

Worst Forms of Child Labour Convention No. 182 *adopted on 17th June 1999, Entry into force on 19th November 2000*, ILO C182 of 1999 (Fundamental Convention)

Labour Inspection in Industry and Commerce Convention No 81 *adopted on 11th July 1947, Entry into force on 7th April 1950*, ILO C81 of 1947

Labour Inspection (Agriculture) Convention No 129 *adopted on 25th June 1969, Entry Into force 19th January 1972* ILO C129 of 1969

International Covenant on Civil and Political Rights *adopted on 16th December 1966, Entry into Force 23rd March 1973*

International Convention in Economic, Social and Cultural Rights, *adopted on 16th December 1966, Entry into Force 3rd January 1973*

Universal Declaration of Human Rights, *adopted on 10th December 1948 entered into force March 23, 1976* 999 U.N.T.S. 302

Regional Instruments

African Charter on the Rights and Welfare of the Child , OAU Doc 49,*entry into force 29th N*

Case Law

James Maraka Adoro (minor suing through the uncle) vs Paul Njogu Kihara November 1999

B.A.A vs Republic eklr 2011

M.C Mehta V State Of Tamil Nadu Supreme Court of India 1996

Domestic Legislation

Employment Act (No. 11 of 2007)

Children's Act (Chapter 141 Rev.2010)

Basic Education Act (No.14 of 2013)

Constitution of Kenya (2010)

List of Acronyms

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of a Child
AU	African Union
CRC	Convention on the Rights of the Child
ILO	International Labour Organisation
IPEC	International Programme on Elimination of Child Labour
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Political Rights
OAU	Organisation of African Unity
OVCs	Orphans and Vulnerable Children
NGO	Non- Governmental Organisation
UNICEF	United Nation Children’s Fund
UDHR	Universal Declaration of Human Rights

CHAPTER 1

Research Proposal

Introduction

Child labour is any form of prohibited labour done by a child in exchange for money.¹ This form of labour is most likely to interfere with the child's mental and physical health.² Child labour has been recognised as a social problem across the globe and various organisations have been formed to fight child labour. Child labour deprives children of their childhood due to its exploitative nature. Child labour also deprives them the right to education among other rights.

Worldwide over 215 million children have been reported to be working many of them fulltime.³ Some of the regions that have recorded the highest numbers of child labourers include Asia and Sub-Saharan Africa. In Asia about 77.8 million children between the ages of 5-17 are engaged in child labour.⁴ Most children work in the agriculture sector, fishing and seafood industries. Across Asia children are employed as domestic helps and some are even sexually exploited. Countries in Asia have tried to combat child labour by strengthening their legal framework and having labour inspectors in various sectors.⁵

In Kenya children are engaged in the worst forms of child labour. Most of the children are in the agriculture sector especially tea and coffee plantations.⁶ Reports also indicate that children work in the mining sector, fishing and herding animals.⁷ Children work long hours under hazardous conditions with dangerous tools and are exposed to toxic chemicals. These

¹Mckenna Y, 'Transcript of Child Labour in Kenya'(2015),< [https://prezi.com/ child-labour-in-Kenya](https://prezi.com/child-labour-in-Kenya)> accessed on 26/01/2016

² International Labour Office, A practical guide to ILO Convention No. 182,(ILO AND IPU 2002

³ ILO findings on the Worst Forms of Child Labour < <http://www.un.org>.> accessed on 16th February 2016

⁴ US Department of Labour, Findings on the Worst Forms of Child labour, (2014),3

⁵ US Department of Labour, Findings on the Worst Forms of Child Labour,3

⁶ ILO findings on the Worst Forms of Child Labour < <http://www.un.org>.> accessed on 16th February 2016

⁷US Department of Labour, Findings on the Worst Forms of Child Labour,3

children are exposed to various risks including the possibility of death, injuries, health complications and even disabilities.

There has been a slight advancement in Kenya since 2012 to try and eradicate child labour. This is evident through various social protection programmes and policies that cater for the vulnerable children. However, to be entirely successful in eradication of child labour there is a need to ensure that various gaps of the law have been addressed.

Statement of the Problem

The problem with our legislative framework covering child labour is that there are various legal gaps. There is no provision for the children working under oral contracts especially above sixteen since they have completed compulsory education. There is also no framework for protection of the employee rights of the working child. Working children are not afforded with the rights like other employees who are above the age of eighteen. An example would be the minimum wage for children, working conditions, working hours and their representation in trade unions.

Policies enacted to eradicate child labour are not child-centred. Such policies are ineffective and hence child labour is not successfully eradicated. A child-centred policy will ensure the protection of working children. Current policies have no regard to what would be best for the child. There is no framework on the types of work that would be beneficial for a child and how the rights of the working children would be protected.

Justification of the Study

This research will enable one to understand the need for harmony between our various acts of parliament. The study will be able to address the various legal gaps and their consequences. Addressing the legal gaps will enable legislators to come up with a comprehensive framework that will ensure no group of children will be left vulnerable. The study will assist

policy makers with the requisite knowledge on how government agencies can implement national policies to ensure eradication of child labour.

The research will also enable policy makers to come up with a child-centred policy to ensure effective eradication of child labour. This study will enable one to understand the importance of including the best interest of a child while enacting the law. This study will assist policy makers to judge the appropriateness of work done by children and the effects of the work on children. One will be able to understand the role of work in children's lives and what are the causes of child labour. There is need to understand the root causes of child labour and address them in order to effectively eradicate the problem.

Statement of objectives

The main objective of this study is to try and analyse both the national and international legal framework present to combat child labour. This analysis will enable me to identify the legal gaps in child labour provisions. Other objectives of this research include;

- i. Investigate whether the domestic child labour laws meet international labour standards and international human rights instruments
- ii. The need for an effective child –centred policy to eradicate child labour
- iii. Provide appropriate recommendations that can be adopted to address the challenges.

Research Questions

This research work will seek to answer the following questions;

- i. Do the Kenyan laws as well as the international framework address all the issues in child labour?

- ii. Do the Kenyan laws addressing child labour meet the international standards set out in labour conventions?
- iii. How can a child-centred policy be formulated to ensure that child labour is completely eradicated?

Hypothesis

This study is based on the presumption that the legal framework covering child labour has legal gaps. This study will thus be based on the following presumptions;

- i. Labour laws pertaining to child labour do not address all issues.
- ii. National Policy on Eliminating Child Labour is not child-centred hence ineffective
- iii. Social Programmes and Government Agencies entrusted with the role of eliminating child labour have not been entirely successful

Literature Review

An ILO publication outlines the action by member states to eliminate child labour. It gives the statistics on how many countries have developed a national policy and legislative framework to combat child labour.⁸

The report further indicates the interdependence between ILO and IPEC to combat child labour. The main works by both organisations is creating awareness of the child labour problem and programmes to encourage the ratification of child labour conventions worldwide.⁹ Data obtained from the report will enable one to understand the nature of child labour and which areas are worst affected. Programmes undertaken by ILO and IPEC in other

⁸ ILO, Tackling Child Labour ;From Commitment to Action, *ILO Journal* (2012),10

countries would be useful to know which programmes and policies are effective and which ones are not.

There is need for parliamentarians to take action to ensure that they have set up programmes to combat child labour. Such programmes should aim at; denouncing child labour, preventing engagement of children in child labour, giving special attention to OVCs and sensitizing the public on child labour.¹⁰ Parliamentarians have to ensure that the legislative framework have measures to ensure rehabilitation and reinsertion of children to the education system.¹¹ This information will be able to give useful insight on some the steps that need to be taken by legislators to ensure that child labour is eradicated.

There is need to review child labour laws from a different perspective. Various form of work can develop or harm the child's development.¹² There is need to develop a national child labour policy that encompasses the rights of the working children. Such a policy would be child-centred and hence more effective. In order to effectively eradicate child labour there is need for the government to address the causes of child labour. Access to free education can help to avoid the situation of children working.¹³

Employers have to take measures to ensure the safety of working children and that the rights of such children should not be undermined. The role of children when enacting a child-centred policy should not be under-mined¹⁴. There is no insight on how exactly children can be involved in law making and the forms of work appropriate for children. The study will be able to give recommendation on how children interests can be depicted in a national policy and the need for a framework of what work a child can be allowed to do.

¹⁰ ILO, Handbook for Parliamentarians; Eliminating Worst Forms of Child Labour, *Journal no. 3* (2002) ,81

¹¹ ILO, Handbook for Parliamentarians,81

¹² Boyden M, Child Labour; Promoting the Best Interests of a Working Child, (1998),2

¹³ Boyden M ; Promoting the Best Interests of a Working Child,2

¹⁴ Noguchi Y, ILO standards on Child Labour in relation to CRC,(2005) 13

Noguchi writes about the domestic child labour in modern households. Domestic child labour is defined as the work done by children in someone else's household.¹⁵ This form of work should in principle be regulated like all other forms of child labour.¹⁶ ILO Convention 182 does not regulate domestic child labour the problem that would arise what would constitute domestic child labour. This study will analyse national framework on child labour and be able to address the any gaps regarding domestic child labour.

Various authors have done research on the indivisibility of children's rights in order to eradicate child labour.¹⁷ Various rights of a child have a role in eliminating child labour. The right to information¹⁸ is important to create awareness amongst children about their rights and the risk that arises from engaging in hazardous work.¹⁹ All children have a right to birth registration²⁰ for the purpose of recognising them as a person. This information is important to ensure that all persons employed are of legal age and not minors.²¹

The legislature should consider what is best for the child when enacting laws on child labour. In case of a conflict of interest between parent and children or employers and child the solution to the conflict should consider what is best for the child.²² The law would therefore forbid children from working in hazardous conditions and would set a suitable minimum working age. The government should also set up programmes to give material assistance to poor families to deter child labour.²³

¹⁵ Noguchi Y, ILO standards on Child Labour in relation to CRC, 15

¹⁶ Noguchi Y, ILO standards on Child Labour in relation to CRC, 16

¹⁷ Marta P, 'The Question of Child Labour from a Child Rights Perspective,'(1998),5

¹⁸ Article 17 UN Convention on the Rights of the Child, 2nd September 1990 1577 UNTS 147

¹⁹ Marta P, 'The Question of Child Labour from a Child Rights Perspective' 5

²⁰ Article 7. UN Convention on the Rights of the Child,

²¹ Marta P, 'The Question of Child Labour from a Child Rights Perspective',5

²² Boyden M, 'Promoting the Best Interests of a Working Child',2

²³ Marta P, 'The Question of Child Labour from a Child Rights Perspective',5

Assumptions

This study is guided by the following assumptions that;

- i. Labour laws do not adequately address issues on child labour
- ii. The National Action plan on the Elimination of Child labour is not child-centred
- iii. A child-centred policy would have regard to what would be the best for the child in order to be effective
- iv. Working children are ignorant of their rights as a child and an employee

Limitation to the Research

This research limits itself to the legal framework regarding child labour. The research will only look at the domestic labour laws and the various international frameworks covering child labour that has been ratified by the country. The research will focus on trying to give recommendations develop policies that are child-centred in order to ensure effectiveness during implementation.

Research Methodology

The main research methodology that will be used will majorly be desktop research. The research will focus on international and domestic legislation concerning children's rights to try and eliminate child labour. Academic articles on child labour, international and country reports on the state of child labour will provide the necessary insight on the level of child labour in the country both globally and locally. Surveys and research done by international organizations will also be important in the research. Information gathered will be important in determining if international obligations and pressure has had any impact on the domestic laws.

CHAPTER 2

Theoretical Framework and Conceptual framework

Introduction

The theoretical framework adopted by this study is the naturalist approach, social contract theory and functionalist approach. Each theory makes generalization of the ideas that prevail in this study in order to give a clear understanding. Conceptual framework contains some of the terms that in form this research study. Some of the concepts discussed give a better understanding of child labour and its provision in domestic and international legislations. The first part of the chapter will cover the theoretical framework and the second part will entail the conceptual framework

Theoretical Framework

Natural Law

This study will be primarily centred on the naturalist approach to try and understand why child labour has to be eliminated. Lon Fuller a natural law leaning scholar discusses the inner morality of law. There is no distinction between law and morality; law is a moral commitment. The purpose of law is to achieve social order by subjecting human conduct to the governance of the rules.²⁴ Rules are built on legal procedures that are purposive and contain a procedural inner morality. A valid law has to be; promulgated, cannot be retroactive, the rules have to be clear and concise, rules should not be contradictory and must be capable of fulfilling possible change.²⁵ Any legislative framework that is set out to combat child labour should be able to fulfil the above requirements. The principles would provide order and coherence making the system efficient and effective.

²⁴ Stephanie Paton, 'The Inner-Morality of Law' An Analysis of Lon-Fuller's Theory', [2014], GULS Law Review,< <http://www.gulawreview.org/entries/legal-theory/the-%E2%80%98inner-morality-of-law%E2%80%99-an-analysis-of-lon-l-fuller%E2%80%99s-theory>> accessed on 27th February 2016

²⁵Ibid

John Locke is a natural law leaning scholar who studied the character of liberalism in natural law. A liberal system would enshrine individual rights but people in society have to exercise their rights responsibly.²⁶ People have a duty to respect the rights of other individuals in order to rightfully claim their own rights. With regards to child labour, children's rights have to be respected. An employer engaging a child in hazardous work is overstepping by denying the child other essential rights for his economic gain.

Social Contract Theory

The social contract theory by John Locke emphasises the rights of the individual especially where the sovereign fails to carry his duties. Man became the subject of the social contract making him subject to the law of the society.²⁷ Duty of the ruler was to provide protection; failure to provide protection, trust enjoyed by the ruler would be forfeited hence the ruler ought not to be obeyed.²⁸ In relation to child labour in case legislators do not address child labour issues or provide comprehensive laws to combat child labour man has no obligation to obey the ruler. The will of the people prevails and they have a right to preserve themselves.

Functionalist Theory

This study is also rooted in the functionalist approach based largely on the works of Emile Durkheim. In this approach a typical society was conceived as an organic whole whereby each member of society is required to perform its function in order to maintain others in society.²⁹ This is similar to the functions of the human body however new approaches by other scholars have been developed in context with modern society. Functionalists believe in any society individuals' work together in order to sustain each other.³⁰ This provides balance if any part fails to perform its function society may breakdown. Presence of child labour in a

²⁶ John Locke, Natural Rights, Natural Law and American Constitutionalism, <http://www.nlnrac.org/earlymodern/locke> accessed on 17th February 2016

²⁷ Omony J, *Key Issues in Jurisprudence*, 20

²⁸ Omony J, *Key Issues in Jurisprudence*, 20

²⁹ Mooney K, *Understanding Social Problems*, London, [2007], 12

³⁰ Available at < www.wou.edu/~girodm/foundations/Durkheim.pdf > accessed on 24th January 2017

society is an indication of a breakdown in the society's mechanism. Child labour is a consequence of a malfunctioning society. Failure to provide the needs of a child in society makes the child resort to child labour.

Positive and Negative Liberties

The idea of positive and negative liberties has been examined and defended by Isaiah Berlin.³¹ Positive liberty is the possibility of acting in such a way to control someone's life and realize one's fundamental purposes.³² Negative liberties on the other hand are the absence of barriers and constraints.³³ The difference between positive and negative liberties is that negative rights prevents the state from violating individual autonomy while positive rights impose a duty on the state to provide certain amenities.³⁴ The concept of negative liberty attempts to answer the question, "Within what area should a person be left to do what he is able to do without any interference?"³⁵ Whereas positive liberty seeks to answer "who are the sources of interference and what determines such interference?"³⁶

Attaining entirely negative liberties is not possible.³⁷ Societies constantly place restrictions to the personal lives of individuals in order to prevent the liberty of other people from being infringed. ³⁸Child protection is an example of the difficulty the government may face when setting boundaries between private and public life. One would argue for full negative liberty should apply in the protection of children. However, this should not be the case the state

³¹ Isaiah B, Two Concepts of Liberty,OUP,(1959),4

³² Available at<https://plato.stanford.edu/entries/liberty-positive-negative/> accessed on 02/02/2017

³³ Available at<https://plato.stanford.edu/entries/liberty-positive-negative/>accessed on 02/02/2017

³⁴ Tamar E, A Positive Right for the Protection of Children, Yale Law School,Vol 7,Issue1,11

³⁵ Isaiah B, Two Concepts of Liberty,OUP,(1959),7

³⁶ Isaiah B, Two Concepts of Liberty,OUP,(1959),8

³⁷ Isaiah B, Two Concepts of Liberty,OUP,(1959),7

³⁸ Sally H, Liberty and Respect in Child Protection,BJSW,22

should be able to intervene and guide caregivers on making decisions that would be best for the child.³⁹

Children defy the conventional view of rights; this is because they lack rational capabilities. John Stuart Mill excludes children from his conception of liberty.⁴⁰ He states that liberty rights only apply to human beings who have attained full maturity of their faculties.⁴¹ Children must be protected from their own actions. Therefore do not have negative liberty to do as they please but have a positive claim for protection by the state.⁴² Children do not have the negative right to do as they please by engaging in any form of child labour in order to fend for themselves. The state steps in to ensure they are protected through legislative mechanisms.

Conceptual Framework

The UNCRC defines a child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.⁴³⁴⁴ Child Labour is any form of labour that is most likely to be mentally, socially and physically harmful to the child or interferes with their schooling.⁴⁵ Child labour affects four basic rights of the child; survival, protection, participation and development⁴⁶ Child participation in work has to be distinguished from child labour. Child participation in work is the ordinary assistance given by child to a parent or guardian. Such form of work does not interfere with the child's health and education.

³⁹ Sally H, Liberty and Respect in Child Protection, BJSW, 22

⁴⁰ John Stuart Mill, On Liberty, Legal Classics Library, (1869)

⁴¹ John Stuart Mill, On Liberty, Legal Classics Library, (1869)

⁴² Tamar E, A Positive Right for the Protection of Children, Yale Law School, Vol 7, Issue 1, 11

⁴³ Article 1, *UN Convention on the Rights of a Child*, 30 July 1990, 1577 UNTS 147

⁴⁴ Article 1, *UN Convention on the Rights of a Child*, 30 July 1990, 1577 UNTS 147

⁴⁵ International Labour Office, A practical guide to ILO Convention No. 182, (ILO AND 1PU 2002)

⁴⁶ Mckenna Y, Transcript of Child Labour in Kenya, 2015, < <https://prezi.com/> child-labour-in-Kenya> accessed on 26/01/2016

This analysis on child labour laws will encompass the worst forms of child labour and the minimum age for admission to employment. The two main conventions dealing with these issues specifically are Convention 138 on the Minimum Age for Admission to Employment⁴⁷ and ILO Convention 182 on the Worst Forms of Child Labour.⁴⁸ Convention 138 applies to all the working children despite the economic sector they are working in. The basic minimum age for employment is 16 years the child may do light work provided it is not hazardous to their health or safety.⁴⁹ These children must have completed all forms of compulsory school work. On the other hand worst forms of child labour include slavery, child prostitution and pornography, illicit activities and hazardous work.⁵⁰ Hazardous work can be defined as work in which by its nature can cause harm to the health, safety or the morals of a child.⁵¹ Hazardous work also includes work done by children in households subjecting them to long hours, unhealthy environment and unsafe equipment. Long hours of work can be defined as the time worked above the specified threshold by national regulations.⁵²

This research will also analyse the concept of on vulnerability of orphans and other vulnerable children (OVCs) and protection of the invisible children workers. Invisible children workers are mainly in the domestic industry for example households; current legislation does not cover their protection. ⁵³

In order to understand OVCs one has to understand who exactly are orphans and a vulnerable children. An orphan is a child who has lost one or both parents while a vulnerable child is a child living in a high risk setting.⁵⁴ Children are considered to be vulnerable if they or their parents are living with HIV/AIDS, children living on the street or living in an unsupportive

⁴⁷ Co 138 Minimum Age Convention [1973] available at <http://www.ilo.org> accessed on 16th February 2016

⁴⁸ Co 182 Worst Forms of Child Labour [1999] available at <http://www.ilo.org> accessed on 16th February 2016

⁴⁹ Article 7, *C138 Minimum Age Convention*, 26 June 1973 1015 UNTS 297

⁵⁰ Article 3.1, *ILO Convention No. 182 on the Worst Forms of Child Labour*, 17 June 1999, 2133 UNTS 161

⁵¹ Article 3.2, *ILO Convention No. 182 on the Worst Forms of Child Labour*, 17 June 1999, 2133 UNTS 161

⁵² Diallo C, 'Challenges and Strategies in Improving Labour Statistics in Africa', [2010]

⁵³ Collete A, 'The Invisible child Worker in Kenya, *Nordic Journal of African Studies*', [2001] vol 2,4

⁵⁴ Dipankar D, 'Addressing the Needs of Orphans and Vulnerable Children', [2009], vol 2,2

environment with inadequate medical care.⁵⁵ Such children are exploited and are forced to work in hardship areas in order to provide for their families.

Poverty is one of the main reasons why OVCs resort to manual labour. OVCs experience a wide array of shortages especially food and clothing. In such conditions children who are fortunate to go to school cannot concentrate and end up dropping out of school. A case study done in Nyanza shows that labour is usually divided into two forms; domestic chores and manual labour.⁵⁶ Exploitative child labour is outside the household and mainly divided according to gender roles. Boys usually take up fishing, working in mines and cattle rearing while girls participate in domestic activities..⁵⁷ This indicates clear that OVCs are not protected and hence the most vulnerable to child labour due to their backgrounds.

Domestic child labour is a form of child labour that has not been addressed by our domestic legislation. The girl child is an invisible domestic worker who works under difficult and deprived circumstances.⁵⁸ Male children also work in such dehumanizing conditions as houseboys. Such children are usually taken from poor households in rural areas and have no option but to work. These children suffer economically since they are poorly paid, mentally and even socially due to their young age.⁵⁹

The challenge in protecting domestic children is the private nature of the domestic sector.⁶⁰ The domestic sector is out of reach for labour inspectors and other authorities since they live in their employer's house In most if not all cases there is no written contract between the employer and the child hence making such investigations very difficult.⁶¹ The children are

⁵⁵ Dipankar D, 'Addressing the Needs of Orphans and Vulnerable Children', [2009], vol 2,4

⁵⁶ Dipankar Datta, 'Addressing the Needs of Orphans and Vulnerable Children', [2009], vol 2,8

⁵⁷ Dipankar D, 'Addressing the Needs of Orphans and Vulnerable Children', [2009], vol 2,6

⁵⁸ Collete A, 'The Invisible child Worker in Kenya, Nordic Journal of African Studies', [2001] vol 2,4

⁵⁹ Collete A, 'The Invisible child Worker in Kenya, ', [2001] vol 2,4

⁶⁰ Walakira J, 'Interpretation of Child Labour in Uganda, Wien Law Journal', [2009], 33

⁶¹ Dipankar D, 'Addressing the Needs of Orphans and Vulnerable Children', [2009], vol 2,6

usually presented as relatives or family members and not child workers hence difficult to know their working situations.

Child labour laws are also ineffective since they mainly regulate the formal sector. Domestic labour laws mainly regulate employment of children in specific sectors such as mining, manufacturing, fisheries plantations and manufacturing industries.⁶² The laws do not have a legal minimum age for those working in the informal sector hence allowing an arena for child abuse.

Kenya has ratified ILO Convention No.81⁶³ and ILO convention 129.⁶⁴ According to these conventions labour inspection should include inspection of premises, working conditions and employee's register among other things.⁶⁵ In the case of the informal sector it is difficult to inspect due to the nature of work done by the children. Such children move from place to place, there is no register and the government agencies lack resources to investigate child labour in the informal sector.⁶⁶ Despite the difficulty to inspect there is need for community programmes to help prevent child labour in the domestic sector.

This research will also be guided by the cardinal principle on the Best Interests of a Child. This principle is embodied in the UN Convention on the Rights of a Child. It states that the best interests of a child shall be a primary consideration and must be applied in a systemic manner in any matters concerning a child.⁶⁷ The Constitution of Kenya 2010 also provides for the best interest of a child in any matter concerning the child.⁶⁸ For any action that affects

⁶² Collete A, 'The Invisible child Worker in Kenya,[2001] vol 2,4

⁶³ Co 81, Labour Inspection Convention of 1947

⁶⁴ Co 129, Labour Inspection (Agriculture) of 1969

⁶⁵ Collete A Suda, The Invisible child Worker in Kenya, [2001] vol 2,4

⁶⁶ Collete A Suda, The Invisible child Worker in Kenya, Nordic Journal of African Studies,[2001] vol 2,4

⁶⁷ Article 40(30),, UN Convention on the Rights of a Child, 30 July 1990, 1577 UNTS 147

⁶⁸ Article 53(2), Constitution of Kenya (2010)

a child or a group of children due attention must be given to the child. This can be done through systematic participatory mechanisms taking in to account age and gender.⁶⁹

This research will rely on a rights based approach in trying to combat child labour. This approach puts premium on the best interests of a child as provided under Article 3 of the UNCRC. Article 32(1) compels states to protect children from hazardous work which may interfere with the child's health, physical, mental or moral development. The aim of this approach is to give children a voice in any matter concerning their wellbeing. On one hand children can be considered to be vulnerable and hence need protection and on the other hand they have a say to any matter that may affect their lives. Children are not only passive recipients of any action affecting their lives but can be treated as an active agent who influences their own lives.⁷⁰

Conclusion

Invisible children and OVCs continue to suffer and have a higher a degree of vulnerability as compared to any other group of children. Due to poverty and the urgency to provide for their families such children resort to child labour. As stated above it is quite difficult for the labour inspector to gauge the working conditions of these children due to the private nature of the sector. The working area is usually private homes. There is need for analysing the regulatory mechanism and provide recommendations on how to address this issue.

⁶⁹ UNHCR, Guidelines in Determining the Best Interest of a Child

⁷⁰Walakira J, Interpretation of Child Labour in Uganda, Wien Law Journal,[2009],33

CHAPTER 3

Legal Framework on Child Labour

Introduction

In Kenya child labour has been regulated through various instruments namely Constitution of Kenya 2010, Employment Act and the Children's Act. The International Labour Organisation has also regulated child labour through ILO convention 182 and 138 which shall be discussed in depth all through this chapter. The main concern of the chapter is whether the issues in child labour have been well addressed by both domestic and international framework. Thus this chapter will give a brief history on child labour globally, analyse the legal provisions on child labour both national and international and the government policies to eradicate child labour.

Global Development on the Fight against Child Labour

Child labour can be traced to the rise of industrial production in agricultural societies in the UK.⁷¹ The practice became conspicuous in the 18th Century. People began to become opposed to child labour when young boys at the age of ten were employed in factories whose activities were deemed to be dangerous to children's health.⁷² By 1880 there was the enactment of the English Education Act which stated that children between age 5 to 10 must attend school this was in a bid to exclude children from the work place.⁷³

During the industrial revolution children as young as 4 years old were employed in production factories.⁷⁴ Children crawled in landmines too narrow for adults, some worked as domestic servants others assistants or apprentices.⁷⁵ The industry preferred children to adults

⁷¹ Available at <<http://www.earlham.edu/~pols/globalprobs/children/Laila.html>>, accessed on: 24/01/2017).

⁷² Kelland A, *Children at Work; Child Labour Practices in Great Britain*, Lynne Publishers, London (2004),12

⁷³ Pakhare J, *Domestic Child Labour*, OUP,2007,97

⁷⁴ Pakhare J, *Domestic Child Labour*, OUP,2007,22

⁷⁵ Tuttle C, History Repeats itself; Child Labour in Latin America, *Children Rights Journal*, Vol 18, 143

because they provided cheap labour, they were submissive and the most vulnerable.⁷⁶ Industrialization in Great Britain and other parts of Europe saw children shift from working at home to working in mines and factories, children worked for long hours with little or no pay.⁷⁷

The fight against child labour started in the late 19th Century with the passing of the Robert Peel's Factory Act as a reform to the working conditions.⁷⁸ There was aggressive activism and economic progress in the early 20th Century that led to reductions of child labour in industrialised nations.⁷⁹ A commission was set up in Britain to investigate into the issues of child labour; the findings of the report showed that children as young as the age of 8 worked about 16 hours daily.⁸⁰ The findings led to the enactment of the Factory Act in 1833 that banned the work for persons under the age of 9 and restricted working hours to 8 for children over the age of 14.

Currently child labour is considered inappropriate for children below a certain age; the definition of child labour excludes household activities that are not harmful to the child's health. Steps have been undertaken to reduce child labour in the country through the enforcement of legal framework and governmental institutions.

National Provisions on Child Labour

Provisions of the Constitution of Kenya

The Constitution of Kenya is regarded as the supreme law of the land and any law enacted should abide by the principles set out in the constitution.⁸¹ Chapter 4 of the Constitution outlines the Bill of Rights this has been seen as one of the most progressive bills globally.

⁷⁶ Dottridge M, '*Types of forced labour and slavery like abuse occurring in Africa Today*', Cahiers d'Etudes 179-180

⁷⁷ Dottridge M, '*Types of forced labour and slavery like abuse occurring in Africa Today*', 179-180

⁷⁸ Factory Act 1937

⁷⁹ Basu, K, "Child Labour: Cause, Consequence, and Cure," *Journal of Economic Literature*, (1999) 10

⁸⁰ Pakhare J, *Domestic Child Labour*, OUP, 2007, 97

⁸¹ Article 2(1) Constitution of Kenya (2010)

Article 30(1) state that every person shall not be held in slavery, (2) no person shall be required to perform forced labour. Article 41 provides for fair labour rights for each worker, some of the rights include; fair remuneration, reasonable working conditions, join a trade union or go on strike. Article 53 provides for the rights of a child; every child has a right to be protected from abuse, neglect harmful cultural practices and hazardous or exploitative labour. Article 53(2) provides that the child's best interest is of paramount importance in any matter concerning children.

Provisions of the Children's Act (Cap 141)

The Children's Act was enacted as law on 31st December 2001 to provide for the rights of the child and to try to enhance the welfare of children in the country. The act was enacted to consolidate all the laws relating to the needs of a child and to give effect to the provisions of the Convention on the Rights of a Child⁸² and the African Charter on the Rights and Welfare of the child.⁸³

Section 4 of the act provides for the best interests of the child. Section 4(2) states that all actions concerning children whether taken by public or private welfare institution the best interests of child shall be a primary consideration. Section 4(3) states that in any procedural matter the child shall be accorded an opportunity to express his opinion and it shall be taken into account depending on the child's age or maturity level of the child.

Section 10 of the act provides that every child is protected from economic exploitation that is harmful to the child's development. It further provides that child labour refers to a situation whereby a child provides labour to another person for payment, situation where child labour

⁸² UN Convention on the Rights of a Child, 30 July 1990, 1577 UNTS 147

⁸³ African Charter on the Rights and Welfare of a Child Nov 29 1999

is used for gain whether or not the child benefits and a situation of contract for services with a child.⁸⁴

Employment Act Cap226

This act outlines the minimum terms and conditions in any employment contract. The act provides for prohibition against forced labour, discrimination in employment, payment of wages and other terms required in any employment contract.

Section 2 of the act defines the worst forms of child labour; it is any form of slavery for example trafficking of children, use and procuring any child for prostitution, procuring a child for any illicit activities for example trafficking drugs or any work if carried out by the child is likely to harm health and safety of the child.

Part VII of the act provides for the protection of the child. Section 56 prohibits any child below the age of 13 to perform any work however; children between the age of 13 and 16 can perform light work. Children between the ages of 16 and 18 are employable under the act. Section 58 and 59 provides that the minimum age for employment in an industrial undertaking is 16 years as an apprentice. The employer cannot engage the apprentice in any form of work between the hours of 6.30 p.m. and 6.30 a.m.⁸⁵

Case Law

***Joseph Maraka Adoro (minor suing through the uncle) vs Paul Njogo Kihara*⁸⁶**

In this case the applicant brought a claim against the employer on behalf of the minor. The minor was working at the defendant's farm operating a grass shredding machine when his left arm was caught and shredded by the machine. The court stated that this was a tortious case and awarded the plaintiff damages. It also stated that it is not wrong for a child to engage in a

⁸⁴ Section 10(5) *Children's Act* (Cap 141) Laws of Kenya

⁸⁵ Section 60, *Employment Act* (Chapter 226) Laws of Kenya

⁸⁶ *Adrew Maraka v Paul Njogo Kihara* [2004] eKLR

vocation in order to become responsible citizens in future. However, when the work when the work exceeds the child's right to education and safety it becomes child labour. Whoever was found guilty must stop and should be punished.

B.A.A vs Republic⁸⁷

The appellant was charged with the offence of wilful and knowingly causing a child to be in need of care and protection contrary to section 127(1)(b) of the Children Act. The appellant wilfully and knowingly caused O.A.K., a school pupil aged 14 years to be a child in need of care and protection by luring her out of school for child labour. The appellant was sufficiently punished for sentence of three years. The appellant court stated that in the period that she has been in prison, she must have reflected on her conduct and taken note of where she went wrong.

M.C Mehta V State Of Tamil Nadu⁸⁸

An activist lawyer filed a petition with the court claiming that the fundamental rights of children were being grossly violated in contravention of Article 24 of the Constitution of India, which provides that “[n]o child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”

The court ordered that employers illegally employing children must pay Rs. 20,000 into a fund known as the “Child Labour Rehabilitation-cum-Welfare Fund” to be used only for the benefit of that child. The court also ordered the government to either (a) provide employment for an adult member of every family with a child who is employed in a factory or mine or other hazardous work or, if not possible to provide an adult family member with a job, (b)

⁸⁷ *B.A.A vs Republic* ekr [2011]

⁸⁸ *M.C Mehta V State Of Tamil Nadu* Supreme Court of India [1996]

contribute Rs. 5,000 to the Child Labour Rehabilitation-cum-Welfare Fund for each child employed in a factory or mine or other hazardous employment.

The Court's reasoning was that there is need for the government to ensure children do not engage in child labour. Fines imposed on employers would not be enough to prevent a poor parent from having to put their child to work, the government owes these parents a duty of assistance to help remove their children from hazardous employment.

Government Policies on the Elimination of Child Labour

National Plan of Action for the Protection for Children in Kenya (2015-2022)

This action plan provides for the child's right to be protected. Child protection can be defined as preventing and responding to violence, exploitation, neglect and abuse.⁸⁹ The action plan outlines the statistical estimates of child labour in the country; it is estimated that 1.01 million children are engaged in child labour and 700,000 of them are engaged in hazardous child labour.⁹⁰ Child labour mostly occurs in the rural areas especially in the informal sector for example agricultural sector and domestic work.⁹¹ The action plan also covers orphans and vulnerable children affected by HIV/AIDS. OVCs lack monitored adult care making them most vulnerable to harmful labour and sexual exploitation.⁹² In order to achieve the child's right to protection some of planned actions include; strengthening legal frameworks, enforcement of child protection systems, improve financial and technical capacities of duty bearers and promoting community based empowerment programs.⁹³

International framework

It is important and substantial for states to ratify international human rights instruments as well as the framework governing eradication of child labour in order to curb the level of child

⁸⁹ Available at https://www.unicef.org/protection/57929_57990.html accessed on 10th October 2016

⁹⁰ Kenya Integrated Household Budget Survey, 'Child Labour Analytical Report' (2009),22-29

⁹¹ KIHBS, 'Child Labour Analytical Report' (2009),22-29

⁹² Chapter 3, *National Plan of Action for Children in Kenya (2015-2022)*

⁹³ Chapter 3, *National Plan of Action for Children in Kenya (2015-2022)*

labour worldwide. Ratification of international instruments binds states to international obligations which it has to comply with since it has duty to the international community and the society that the state will comply with the changes fully in order to comply with a specific convention. States have a duty to set up supervisory bodies which have the authority to supervise and monitor the implementation process as well as provide guidance on how to make the necessary changes in the existing law. States usually have a duty to report back to the specific body under the convention that has been ratified. Below is a detailed explanation on the provisions on child labour in different international instruments.

Convention on the Rights of a Child (CRC)⁹⁴

It is the first legal instrument that recognizes the fundamental rights of a child and provides a broader legal approach on how to curb child labour as compared to the International Labour Conventions. The convention defines a child as an individual under the age of 18 unless under the law applicable to the child, majority is attained earlier.⁹⁵ The convention further provides that children shall be safeguarded from any work that is likely to be hazardous or interfere with the child's education, physical, mental, spiritual, moral or social development.⁹⁶ States have an obligation to legislate the minimum age for employment, working conditions as well as penalties for violation of these provisions.

Convention 138 Minimum age for the Admission to Employment⁹⁷

The convention provides a guideline on the minimum age which is a basic standard to be applied globally. The table below is summary of the internationally recognized ages for employment for children under the age of 18.

⁹⁴ UN Convention on the Rights of a Child, 30 July 1990, 1577 UNTS 147

⁹⁵ Article 1, *UN Convention on the Rights of a Child*, 30 July 1990, 1577 UNTS 147

⁹⁶ Article 32 *UN Convention on the Rights of a Child*, 30 July 1990, 1577 UNTS 147

⁹⁷ C138 Minimum Age Convention, 26 June 1973 1015 UNTS 297

TABLE 1; MINIMUM AGE⁹⁸

Categorization of Work	The minimum age children can start to work
Hazardous work(work likely to jeopardise child’s health, morals or safety) should not be done by anyone under the age of 18	18(16 under strict conditions)
Light work-provided it does not jeopardise child’s health, safety and morals	13-15

The basic minimum age for work should generally not be below the age of 15 after compulsory basic education has been acquired by the child.⁹⁹ The determination of age limit differs between States that have ratified the instrument. For example the basic minimum age for developed states is 15 while 14 for developing states; hazardous work has an age limit of 18 for developed states and exceptions can be made up to 16. Finally, light work can be carried out children between ages of 13-15 in developed states and 12-14 in developing states.¹⁰⁰ The rules set up provide a guideline for States to legislate according to these standards.

⁹⁸ Available at <http://www.ilo.org/ipecc/facts/ILOconventionsonchildlabour/lang--en/index.htm> accessed on 15/10/2016

⁹⁹ Article 2.3, *C138 Minimum Age Convention*, 26 June 1973 1015 UNTS 297

¹⁰⁰ Available at <http://www.ilo.org/ipecc/facts/ILOconventionsonchildlabour/lang--en/index.htm> accessed on 15/10/2016

Convention 182 Worst Forms of Child Labour Convention¹⁰¹

In 1999, the International Labour Conference held in Geneva, Switzerland governments, employer organisations and trade unions adopted ILO Convention 182. The convention defines worst forms of child labour to include;¹⁰²

- “(a) all forms of slavery or practices similar to slavery, debt bondage and serfdom
- (b) the use of a child for prostitution or for the production of pornography
- (c) the use, procuring or offering of a child for illicit activities such as trafficking of drugs
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

African Charter on the Rights and Welfare of the Child¹⁰³

This instrument was adopted by the Organisation of African Union (OAU) in 1990 and entered into force in 1999. The aim of this instrument is to promote and protect the rights set out in the African Charter on the rights and Welfare of a Child ACRWC and requires state parties to interpret and apply these rights.

The charter provides for the promotion of the best interest of the child in any action concerning children as a primary consideration.¹⁰⁴ It also provides for the essential survival, protection and development of children.¹⁰⁵ The charter also prohibits all forms of economic exploitation of children and requires state parties to have appropriate legislative and administrative measures to eradication of child labour.¹⁰⁶

¹⁰¹ ILO Convention No. 182 on the Worst Forms of Child Labour, 17 June 1999, 2133 UNTS 161

¹⁰² Article 3, *ILO Convention No. 182 on the Worst Forms of Child Labour*, 17 June 1999, 2133 UNTS 161

¹⁰³ African Charter on the Rights and Welfare of the Child, Nov 29,1999

¹⁰⁴ Article 4, *African Charter on the Rights and Welfare of the Child*, Nov 29,1999

¹⁰⁵ Article 5, *African Charter on the Rights and Welfare of the Child*, Nov 29,1999

¹⁰⁶ Article 15, *African Charter on the Rights and Welfare of the Child*, Nov 29,1999

Steps taken by Kenya after Ratification of Child Labour Instruments

ILO Convention No. 138

Kenya ratified this instrument on 9th April 1979 and set the minimum age for employment to be sixteen years.¹⁰⁷ An overview of the convention depicts that state parties to the convention have a mandate to declare the minimum age which should not be below 15.¹⁰⁸ It also instructs state parties to permit light work for children between 13 to 15 years¹⁰⁹ and any hazardous work that may affect the child's health or morals should be done by a person above 18.¹¹⁰

ILO Convention No.182

Kenya ratified this convention on 7th May 2001. The main aim of this convention is the elimination of the worst forms of child labour. Parties have an obligation to come up with national regulations and mechanisms to ensure implementation.

In Kenya the Employment Act provides that no person can employ a child in any activity that constitutes worst forms of child labour.¹¹¹ One can launch a complaint to the labour or police officer if he suspects a child may be involved in an activity that may constitute worst forms of child labour.¹¹²

¹⁰⁷ Available at http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283 accessed on 20/10/2016

¹⁰⁸ Article 2, *C138 Minimum Age Convention*, 26 June 1973 1015 UNTS 297

¹⁰⁹ Article 4, *C138 Minimum Age Convention*, 26 June 1973 1015 UNTS 297

¹¹⁰ Article 3, *C138 Minimum Age Convention*, 26 June 1973 1015 UNTS 297

¹¹¹ Section 53, *Employment Act*, [Rev 2012]

¹¹² Section 54, *Employment Act*, [Rev 2012]

Conclusion

From the analysis of the laws it is encouraging the steps undertaken by Kenya and the international community to address the rights of a child. There are similarities between the conventions despite addressing different aspects of child labour. The ILO convention both seek to progressively eradicate child labour among children of all ages. The next chapter will have an in depth analysis on some of the articles on each legislation.

CHAPTER 4

Assessment of Legal Framework

Introduction

The ILO has regulated child labour through the Minimum Age Convention and Worst Forms of Child Labour Convention. Both Conventions aim to reduce and eventually eliminate child labour globally. After the ratification of these instruments, many countries have adopted domestic laws prohibiting harmful labour. However, statistics prove that children still participate in harmful work. The main purpose of this chapter is to assess the ILO child labour conventions. The main aim of the Minimum Age Convention was the progressive eradication of child labour while the Worst Forms of Child Labour Convention recognises the existence of worst forms of child labour, and it seeks to eliminate. Domestic legislation will also be assessed and any gaps in the law shall be pin-pointed.

Assessment of National Legislation

There have been various amendments to the domestic framework governing child labour. This has led to a slight advancement to curb child labour and hence a drop in numbers of children working in various sectors.¹¹³ However, there continues to be certain issues that have not been addressed and some gaps in various pieces of legislation. The Minimum Age convention states that the minimum age shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.¹¹⁴ However, one can employ a child in the ages between 13 and 16 who may engage in light work.¹¹⁵ The Employment Act prohibits worst forms of child labour¹¹⁶ and continues to state that the Cabinet Secretary shall come up with a list of hazardous work. There is need for policy guidelines on what constitutes hazardous work; this also applies to light work for children

¹¹³ Kenya Intergrated Household Budget Survey,2012,34

¹¹⁴ Article 2.3, *C138 Minimum Age Convention*, 26 June 1973 1015 UNTS 297

¹¹⁵ Section 56, *Employment Act* (Chapter 226) Laws of Kenya

¹¹⁶ Section 53, *Employment Act* (Chapter 226) Laws of Kenya

between ages 13 to 16. This policy on what constitutes light work and hazardous work will shed light on what the types of work this will avoid any ambiguity.

Children are engaged in domestic work and are not provided formal recognition under the Employment act. There is also no provision for children who work with no written contract between the age of 16-18. Formal recognition of domestic work as a profession and formal extension of the provisions to non-contractual forms of work, would as well guarantee an extension of the rights and guarantees for workers provided in the Employment Act and in the other work-related laws to this specific category.¹¹⁷ Even though Kenyan legislation already provides different instruments of protection for workers, there is no clear recognition of domestic workers.¹¹⁸ There is need for recognition of domestic workers especially children working in this sector.

Assessment of International Framework

Convention 138 Minimum Age Convention

Some of the provisions in the convention are vague and give room for misinterpretation. Article 1 encourages member states to draft legislation that abolishes child labour and raises the minimum age consistent with the development of young persons.¹¹⁹ This article does not state what child labour is. The definition is also not present throughout the convention. The article further does not indicate the need for special mechanisms to ensure implementation of the article.¹²⁰ This gives an impression that it would be sufficient to establish a minimum age without putting up institutional mechanisms to ensure compliance.

¹¹⁷ CEFA, Policy Assessment in the Framework Domestic Workers in Kenya, (2016),9

¹¹⁸ CEFA, Policy Assessment in the Framework Domestic Workers in Kenya, (2016),9

¹¹⁹ Article 1, Convention 138 Minimum Age Convention, 26 June 1973 1015 UNTS 297

¹²⁰ Mavunga RA, *Critical Assessment Of The Minimum Age Convention 132 And The Worst Forms Of Child Labour Convention 182* [2013]

Article 2(1) states that each member to the convention shall specify and ratify the minimum age for employment in any occupation.¹²¹ This provision seeks to protect children in any form of work or employment. The content of this provision seeks to ensure that every child working in whichever sector is protected. This is important especially for children working on domestic households who are rarely recognised. However, it may cause a problem in many African set ups where children are required to engage in some form of work.¹²²

Convention 182 Worst Forms of Child Labour Convention

Article 1 provides that the elimination of the worst forms of child labour must be treated as a matter of urgency.¹²³ This provision indicates the immediate necessity to have effective measures to ensure the eradication of child labour. This indicates that there is a categorization of the forms of child labour from the worst forms to the tolerable kind.¹²⁴ This categorization neglects other forms of work such as light work that is prevalent in most parts of the world.¹²⁵ Worst forms of child labour must be addressed urgently but other forms of light work that are prevalent needs to be revisited.¹²⁶

Article 6 of the convention stipulates that each member state has an obligation to implement programmes to ensure the eradication of worst forms of child labour. It further provides that such programmes should be designed and implemented with the relevant government institutions.¹²⁷ This convention can thus be described as action oriented. It protects children beyond the legislative provisions.¹²⁸ Unlike Convention 138 this convention requires the

¹²¹ Article 2(1), Convention 138 Minimum Age Convention, 26 June 1973 1015 UNTS 297

¹²² Mavunga RA, *Critical Assessment Of The Minimum Age Convention 132 And The Worst Forms Of Child Labour Convention 182* [2013]

¹²³ Article 1, ILO Convention No. 182 on the Worst Forms of Child Labour, 17 June 1999, 2133 UNTS 161

¹²⁴ Noguchi Y, *International Journal on Children Rights*, [2010] 522.

¹²⁵ White 1999 *Childhood* 133-134.

¹²⁶ Mavunga RA, *Critical Assessment of The Worst Forms Of Child Labour Convention 182* [2013]

¹²⁷ Article 6.2 ,ILO Convention No. 182 on the Worst Forms of Child Labour, 17 June 1999, 2133 UNTS 161

¹²⁸ Mavunga RA, *Critical Assessment Of The Worst Forms Of Child Labour Convention 182* [2013]8

government to collaborate not only with worker organisations but also with the concerned groups.¹²⁹

International Convention on Civil and Political Rights (ICCPR)

The ICCPR has a provision on child labour that states should ensure that children and young persons should be protected from economic and social exploitation.¹³⁰ Any form of employment in work that is harmful to their morals or health should be punishable by law.¹³¹

The International Convention on Economic and Social and Cultural Rights (ICESCR) is more comprehensive in the provisions of child labour as compared to the Universal Declaration of Human Rights (UDHR) and The International Convention on Civil and Political Rights (ICCPR). UDHR provides that no one shall be held in slavery and servitude and shall be prohibited in all forms.¹³² On the other hand the ICCPR provides that states have an obligation to ensure that no one is held under conditions of slavery and servitude this is an absolute right.¹³³ As can be noticed there is no outright prohibition of the term ‘child labour’, however, certain forms of child labour can be interpreted to include under this provision.

International Labour Organisation

The International Labour Organisation was created in 1919 to reflect the belief that universal peace can be achieved by social justice.¹³⁴ The main aim of ILO’s creation was the need for security, humanitarian, economic and political considerations.¹³⁵ ILO’s legal standards were agreed upon by governments, workers and employer’s organisations.¹³⁶ After a relatively

¹²⁹ Hanson and Vandaele, *International Child Rights*, [2003]115

¹³⁰ Article 10.3, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 1057 UNTS 993

¹³¹ Article 27, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 1057 UNTS 993

¹³² Article 4, *Universal Declaration on Human Rights*, 10 December 1948, 999 UNTS 302

¹³³ Article 8, *International Covenant on Civil and Political Rights (1976)* 23 March 1976 999 UNTS 171.

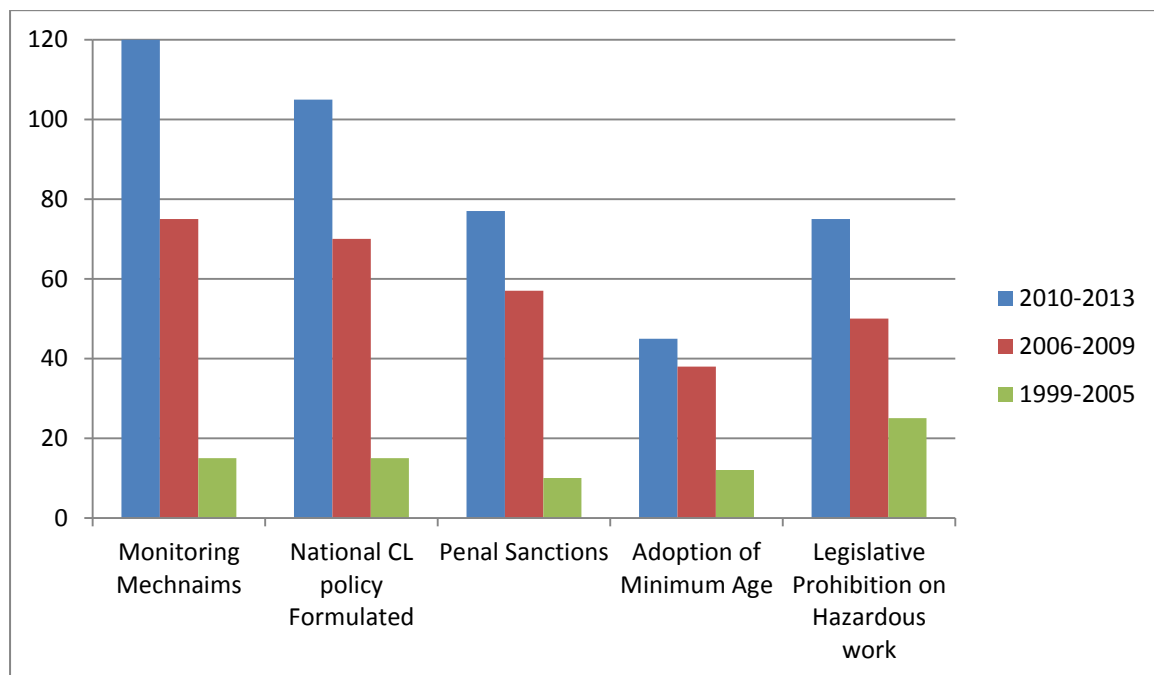
¹³⁴ Available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> accessed on 26/01/2016

¹³⁵ Available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> accessed on 26/01/2016

¹³⁶ ILO and IPEC, “Eliminating the worst forms of child labour,”. [2002]Geneva, pp.16-17

long period ILO established Convention 138 Minimum Age Convention and Convention 182 Worst Forms of Child Labour Convention. Ratification of these two conventions is progressive and majority of the states have adopted the legislation.

Implementation of these two conventions indicates that states are formally acknowledging that child labour is unacceptable and taking initiative to end it. The table below is a global estimate of actions reported under both conventions.¹³⁷



The chart above is an indication of the positive impact the ratification of the ILO conventions has had on trying to eliminate child labour. The impact of good national legislation cannot be underestimated. Legislation sets forth specific rights and responsibilities for both individuals and the state. Over the recent years more states have taken up the initiative to curb child labour that has led to a drop of child labourers from 246 million to 186 million.¹³⁸ The drop

¹³⁷ ILO, Making Progress Against Child Labour, 2000-2012, 9

¹³⁸ Available at < [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_221568/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_221568/lang-en/index.htm)> accessed on 26/01/2016

cannot entirely be attributed to the legislative framework in place but it has played a significant role.¹³⁹

African Charter on the Rights and Welfare of a Child

The ACRWC was entered into force in November 29, 1999 under the Organisation of African Unity (OAU) which is currently the African Union (AU). ACRWC was aimed to serve as a blueprint for the observance of child rights across African countries. The African Children's charter similar to the Convention on the Rights of a Child defines a child to be any human being below the age of 18.¹⁴⁰

The African Children's Charter embodies the cardinal principle of the best interests of a child. It provides that all action concerning the rights of a child has to consider the best interests of a child.¹⁴¹ In any judicial proceeding affecting a child who is able of communicating an opportunity shall be provided for the child to air his or her views.¹⁴² Article 4.1 vaguely defines the term 'best interests of a child' which give lee way to varied state interpretation. This can lead to states interpreting the charter in a manner detrimental to the child. Article 4.2 on the other hand does not cater for a child who cannot communicate this is discriminatory for children who have physical impairments or those who cannot communicate due to age.

Implementation of ACRWC

The ACRWC has been in force for 26 years now with 47 countries ratifying the charter out of 54 countries in Africa. State parties have an obligation to recognize the rights under the charter and take constitutional steps to ensure measures have been taken to implement the

¹³⁹ ILO, Making Progress Against Child Labour, 2000-2012, 10

¹⁴⁰ Article 2, *African Charter on the Rights and Welfare of the Child*, Nov 29, 1999

¹⁴¹ Article 4.1, *African Charter on the Rights and Welfare of the Child*, Nov 29, 1999

¹⁴² Article 4.2, *African Charter on the Rights and Welfare of the Child*, Nov 29, 1999

provisions of the charter.¹⁴³ The Charter sets up the African Committee of Experts on the Rights and Welfare of the Child hereinafter known as the Committee.¹⁴⁴ It has a mandate to promote and protect the rights enshrined in the charter, monitor the implementation of the charter and interpret provisions of charter at the request of the state party.¹⁴⁵

The ACERWC tracks the implementation of the charter by the state reports from state parties. The ACERWC is empowered to receive and examine the reports submitted by State parties on the measures they have adopted to give effect to the provisions of the Charter as well as the progress achieved in the exercise of the rights recognised.¹⁴⁶ State parties are required to submit reports two years after the committee starts its work and every three years thereafter.

Kenya has submitted an initial and subsequent report on the measures it has taken to ensure the implementation of the charter. The report entails the general measures undertaken by various state ministries, non-state organisations and children institution to ensure measures have been put in place to protect the rights of the child. Some of the measures listed include the legislative framework put in place that is the Children's Act and setting up policies like the National Action Plan for Children .It has also increased the budget allocated to the children policy by approximately 39 million in the financial year 2011/2012.¹⁴⁷

¹⁴³ Article 1.1, *African Charter on the Rights and Welfare of the Child*, Nov 29,1999

¹⁴⁴ Article 32, *African Charter on the Rights and Welfare of the Child*, Nov 29,1999

¹⁴⁵ Article 42, *African Charter on the Rights and Welfare of the Child*, Nov 29,1999

¹⁴⁶ Available at < <http://www.ihrda.org/515-2/>> accessed on 13/12/2016

¹⁴⁷ State Party Report Kenya, Report to the African Union on the Implementation of ACRWC,2013

Conclusion

On assessment of both National and International legislation it is evident the impact that legislative mechanism have to curb child labour. There has been positive progress from the drop of the number of child labourers globally. Our domestic legislation has shown efforts to implement both ILO provisions and ACRWC. Labour Law enforcement mechanisms and criminal law mechanisms have not been effective as it should be. Effective enforcement mechanisms would lead to more progress.

CHAPTER 5

Recommendations and Conclusion to the study

Introduction

As highlighted so far the legal framework governing child labour has been progressive and has been able to curb child labour. However, child labour continues to be a problem in Kenya and other parts of Africa. There is need to analyse what more can be done to ensure that the number of children engaged in child labour progressively declines.

This chapter will thus entails the recommendations and conclusion to this study. As already discussed in the previous chapter Kenya has taken various compliance steps to ensure that the domestic laws accommodate international labour laws. This chapter will give further remarks on what can be done to fill in gaps in the legal framework and recommendations on the formulation of a child –centred policy on the eradication of child labour.

Eliminating Child Labour in Kenya

The complete eradication of child labour needs a critical evaluation of some of the steps currently being taken by the institutions and the enforcement of new mechanisms to ensure effective eradication. One of the steps already taken is the ratification of ILO Convention 182 on the Worst forms of Child Labour and ILO convention 138 the Minimum Age Convention. The domestic laws that have ensured implementation of the ILO convention 182 under the Employment Act that outlines the worst forms of child labour.¹⁴⁸ Implementation of ILO Convention 138 is evident in the Employment Act that outlines the minimum age for admission to employment is sixteen (16) years.¹⁴⁹ Below are some of the recommendations that can be implemented;

¹⁴⁸ Section 53, *Employment Act*, [Rev 2012]

¹⁴⁹ Section 57, *Employment Act*, [Rev 2012]

- i. Fulling obligations under the CRC. The CRC Committee has stated that there is a need to improve data collection to get a full view of the child labour situation in the country. This will allow a country to assess what measures still need to be taken to eliminate child labour in all its forms. The CRC is concerned about the enforcement mechanism, and has pinpointed the lacking of “coordination and collaboration among government agencies in data collection and the inadequate technical capabilities for data collection, analysis, and reporting which are significant in order to obtain a sufficient enforcement of the legislation.¹⁵⁰ The ILO has communicated that the enforcement procedure is on the right track, but one of the major concerns is that penalties should be imposed in practice, to be able to effectively enforce the legislation.¹⁵¹
- ii. Labour inspection is a tool that can be used in the eradication of child labour in the country. The labour inspection system is under the Occupational Safety and Health Act¹⁵² which provides for the Occupational Safety, Health and Injury Benefits Authority (OSHIBA).¹⁵³ The authority has a mandate to implement the act, improve and ensure health and safety and good working conditions for the employers.¹⁵⁴ Labour inspectors have the power to inspect and enter into premises at any time without any notice to the employer.¹⁵⁵ Such inspections would check on the working conditions of the employees and if any safety precautions have been taken up to ensure that no harm is being inflicted on the employee. Labour inspection would confirm that employees are not under the age of 16 and those

¹⁵⁰ UN Committee on the Rights of the Child (CRC), “Consideration of reports submitted by States parties under article 44 of the Convention, 2006

¹⁵¹ UN (CRC), “Consideration of reports submitted by States parties under article 44 of the Convention, 2006

¹⁵² Occupational Safety and Health Act, No.15 of 2007

¹⁵³ Available at < <http://www.mywage.org/kenya/home/labour-laws/health-and-safety-at-work>.> accessed 7th January 2017

¹⁵⁴ Available at <http://www.labour.go.ke/> accessed on 7th January 2017

¹⁵⁵ Section 32, *Occupational Health and Safety Act*, [Act No.15 of 2007]

employed between ages 16 and 18 do not perform worst forms of child labour.

Labour inspections should aim to target every sector

- iii. Trade unions are an important tool that can be used for the eradication of child labour in the country. Trade unions are very influential and active in various issues affecting employees throughout the state and have interconnected goals to ensure the eradication of child labour. Child labour is a trade union issue because it is a violation of human rights and a cheap source of labour for employers among other reasons. Trade unions can support the cause by coming up with a trade union policy against child labour.¹⁵⁶ The policy should cut across all sectors in the economy. The policy should oppose all forms of child labour and uphold children's right such right to education and the minimum age of work to comply with ILO provisions.¹⁵⁷ The government should ensure that this initiative is well funded in order to achieve its mandate.
- iv. Legal awareness and literacy would be important to ensure the elimination of child labour. There is need to reach out to areas most prone to child labour and areas with a high number of OVCs. Education on the effects both physical and psychological would deter parents from engaging children in any hazardous activity.
- v. There is also need for safe-reporting mechanisms to ensure that citizens are able to inform the authorities on any suspicious activity if an employer engages a child in any of the worst forms of child labour.
- vi. OVCs also need protection due to their vulnerability they are prone to perform any kind of work to ensure that their families can have basic needs. This can be regulated by taking up measures to eradicate poverty and prevalence of HIV

¹⁵⁶ ILO, 'Trade Unions and Child Labour, A Tool for Action' ILO Journal,[2016],24

¹⁵⁷ILO, 'Trade Unions and Child Labour, A Tool for Action' ILO Journal,[2016],28

which leaves children as orphans. Eradication of poverty would reduce the number of OVCs throughout the country and allow them a chance to education.

- vii. Vocational training can be used as a means to deter children from child labour. Vocational training is an educational service aimed at equipping a person with skills to make him more sufficient. Vocational training can deter child labour by enabling children to access basic needs, rehabilitation of children who have need support after being exposed to hazardous work.¹⁵⁸ It can also introduce children to income-generating activities that can help them assist their families.¹⁵⁹
- viii. There is also need for policy guidelines on what constitutes light work, This policy will provide a list of work for children between the age of 13 and 16. Light work can constitute non-hazardous work which can allow children to learn the roles they are expected to do in adulthood.

Development of a Child-Centred Policy

This section of the chapter entails the need of developing a policy that promotes the best interests of working children. Working children in this context would mean children who have attained the age of 16 and are not performing work that does not entail worst forms of child labour. A child-centred policy will take into account the opinions of a child before making any laws that may affect them.

Various factors have to be taken into consideration before coming up with the policy. This approach will entail how the child experiences the work, appropriateness of the work and the interventions in work taking into account the effects the work may have on the child.¹⁶⁰

There is need to respect children and evaluate their potential and individuality this will allow them to effectively communicate their opinions on the basis of what is best for them.

¹⁵⁸ Pius M, 'Addressing Child labour Through Vocational Training', Issue No.6 [2007],4

¹⁵⁹ Pius M, 'Addressing Child labour Through Vocational Training', Issue No.6 [2007],4

¹⁶⁰ B Myers, 'Promoting the best Interest of working children'2, US Education Research Center,[1998],5

A child-centred policy would entail understanding the impact of work in children's lives and assessing the impact of this work on both a physical and psychological basis.¹⁶¹ Understanding work in children's lives would allow one to be aware of how work relates to their personal lives. Children may view work as a learning experience and a chance to help out in the family probably due to poverty affecting them. Assessing impact of work on children must be done both positive and negative effects. Correct data must be analysed and negative assumptions of work should not be blindly drawn. One of the positive impacts is the increased levels of responsibility a child acquires through work this is essential for the child's development and survival.¹⁶²

A child centred policy can be guided by various principles. Any action done by the government should be based on accurate data on children's work and the impact on their lives. The data should include life situation of children, effects of work on children and how the work they do affects their personal lives.¹⁶³ Policies put in place should ensure that they leave the child better off. Interventions put in place would ensure that they work they engage in is safe. Children must be involved in the policy-making procedure, under the CRC opinions of children should be considered in matters affecting them.¹⁶⁴ The policy implemented should be regularly monitored to ensure that it has achieved its objectives.

¹⁶¹ B Myers, 'Promoting the best Interest of working children'1998],8

¹⁶² Noguchi Y, ILO standards on Child Labour in relation to CRC,(2005) 13

¹⁶³ Noguchi Y, ILO standards on Child Labour in relation to CRC,(2005) 14

¹⁶⁴ Article 12, *UN Convention on the Rights of a Child*, 30 July 1990, 1577 UNTS 147

Conclusion

This thesis has sought to evaluate the main areas the assessment of national and international framework governing child labour and the development of a child-centred policy to ensure the best-interests of a child is safeguarded. The National framework has indicated that it has complied with its obligations under the ratified instruments. The state has taken up the initiative to enforce the Children's act to cater for the welfare of the child and the Employment Act to cater for the welfare of employers and employees. In conclusion the National framework is not conclusively comprehensive on all factors affecting children and it needs to be addressed.

Most countries have ratified the ILO convention 138 and ILO convention 182. This is very progressive and data indicates that there has been a significant drop in the number of child labourers. However, some of the provisions are ambiguous and allow room for misinterpretation. Some of the provisions give a wide discretion to state parties when it comes to the definition of some terms. The ACERWC has also taken positive measures to ensure the implementation of the ACRWC. State parties have been able to adhere to their requirements under the charter by submitting state reports on the steps undertaken to implement the charter

The development of a child-centred policy will take into account the voice of the child. It will be able to factor in conclusively the type of work done by the child and how it affects the child. Effects of work on children both physical and psychological must be assessed conclusively and empirical data collected paying to both the positive and negative impact of work on children's lives. Child-centred policy upon monitoring will be able to indicate effectiveness due to the fact that children affected by the policy would be able to air their opinion.

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