

UTILIZATION OF AFRICAN CULTURE IN THE IMPLEMENTATION OF THE
UN CONVENTION ON THE RIGHTS OF THE CHILD: A CASE STUDY OF
KENYA.

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ABSTRACT

The Adoption of the UN Convention on the Rights of the child in 1989 was also heralded as a remarkable achievement in child rights advocacy. Amid renewed optimism, it was seen as the ultimate solution to the challenges facing children. However, 24 Years After its adoption, the situation of Children especially in sub – Saharan Africa is still deplorable. With a Focus on Kenya, this study examines the implication of the current top down approaches to the realization of children rights as enshrined in the CRC. Noting that the current top down legal approach has failed, the study advocates for a bottom up culturally driven approach in handling the challenges facing children in Kenya. As a foundation, the study engages in theoretical discussions on the moral justification of children rights and concludes by noting that children need the rights for their holistic development into adulthood. Similarly, in determining the conception of childhood, the study castigates the current approach that focuses on age and advocates for an approach that considers childhood and adulthood on the basis of mentally capacity and competence.

Focusing on the right to education, health, livelihood and freedom from inhuman and degrading treatment, the study examines how stakeholders are using various local mechanisms to improve the situation of children and how this is has complemented government led initiatives in Kenya .It concludes by urging stakeholders to engage with cultural gatekeepers to develop intergrated approaches that would hasten the full realization of children rights in line with CRC.

LIST OF ABBREVIATIONS

ARP: Alternative Right of Passage

CEDAW: Convention on the Elimination of Discrimination against Women

CRC: Convention on the Rights of the Child

FGM: Female Genital Mutilation

NGOs: Non-Governmental Organizations

NPAF: National Plan of Action Against FGM

OVC: Orphans and Vulnerable Children

UN: United Nation

UNESCO: United Nations Education Scientific and Cultural Organization

UNFPA: United Nations Population Fund

UNICEF: United Nations International Children's Emergency Fund

WFP: World Food Program

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CHAPTER ONE

1.0 INTRODUCTION

1.1 Background

The issue of child vulnerability has been the concern of many African governments for a long time. The deplorable conditions under which orphans and other vulnerable children live is compounded by family poverty in Sub-Saharan Africa. To this end several laws, both at national and international levels, have been developed to improve the situation of children. However as will be demonstrated in this paper, the status of children in Sub-Saharan Africa has continued to deteriorate, thus putting into question the effectiveness of this legislative approach. With a focus on Kenya, this study explores the possibility of a bottom-up integrated approach that is culturally sensitive in tackling the challenges facing children in Kenya

This study consists of Six chapters with chapter one being the introduction. Chapter two initiates the discussion by exploring the conditions of children in Kenya. Using the Convention on the Rights of the Child (CRC) as a benchmark, the chapter focuses on children's social-economic rights and the extent of their attainment in Kenya. Chapter Three engages with theoretical discussions about the nature of human rights in general and examines various human rights approaches. The second part of the chapter explores philosophical and moral justifications for children rights. Using examples from different jurisdictions, the chapter demonstrates the differences and contradictions in the conception of childhood. The nexus between cultures and human rights in general as well as the history and nature of the CRC is discussed in chapter Four. Chapter Five explains various aspects of Kenyan Culture and how they can be used to guarantee children rights with a particular focus on education, and

protection from vulnerabilities and harmful practices like Female Genital Mutilation (FGM). The chapter also explores how culturally sensitive approaches to development such as community led care facilities, *harambee* projects, and kinship foster care could be used to attain a better life for children. The conclusion(Chapter 6) summarises the main thematic areas of discussion and highlights future areas of research.

The overall objective of the study was to examine how African culture can be used to achieve the goals of CRC. The specific research objectives were:

- To investigate whether and to what extent African cultural values are (in) consistent with the CRC.
- To explore how the changing cultural values alter or reinforce any existing patterns of oppression against children.
- To examine how African cultural values, national legislations and CRC can be used to develop an integrated approach in dealing with children's rights in Kenya.

The following research questions guided the study;

- Is there a relationship between African cultural values and CRC?
- Do the changes in African cultural values alter or reinforce any existing patterns of oppression against children?
- Can the African cultural values, national legislation and CRC be used to design an integrated approach in handling children's rights in Kenya?

1.2 Methodology and Theoretical Framework.

The study relied on the secondary research design with both descriptive and analytical approaches. The descriptive approach involved an examination of reports, legislations and policies to determine the situation of Kenyan children while the analytical approach focused on the theoretical and normative positions advanced by scholars on the subject. The qualitative data used in the study was obtained from various sources key among them being UN publications, NGO reports, academic articles, and Kenya government reports.

The interest theory of human rights has been used to give the study a theoretical foundation. The theory, which basically postulates that an individual has a right to something if he has an interest in it explains the underlying theme in the study; that children have rights to livelihood health and education because of the significance of these requirements in facilitating their development.

1.3 Statement of the Problem

Whereas many writers have examined the various strategies of improving the situation of children in Africa, very little has been done to determine how African culture can be utilized to realize these rights. In fact a lot of the literature has tended to portray African culture as part of the problem². This misconception of culture as being retrogressive has resulted into top down programs that are not only ineffective but also culturally and financially unsustainable. A lot of emphasis has thus been put on state controlled systems and legal approaches which focus on the enactment and implementation of domestic and international laws and policies relating to child

² See Child Rights Advisory, Documentation and Legal Centre and Regional African Juvenile Justice Network(2004)Child Trafficking, Juvenile Justice Quarterly ,27(3) pp 1-15 Accessed from http://www.thecradle.or.ke/pdfs/2012/JJQ_Vol_1_Issue_3_%2828-10-04%29.pdf accessed on 07/08/2013

welfare³. However, as will be demonstrated in the following chapter, the legal approach spearheaded by the UN has failed to emancipate children, and though there is an emerging call for an alternative approach to dealing with children in Sub-Saharan Africa, there seems to be total disregard to the role of culture in the process. Even scholars like Minujin et. al., who have advocated for a more comprehensive approach, have failed to highlight the important role of culture towards the achievement of children's rights⁴. Criticizing Poverty Reduction Strategy Paper (PRSP), which is one of the main policy approaches advanced by the UN Committee on the Status of the Child, Minujin et. al argue that PRSP ignores the underlying needs of poor families and their children⁵. However whether expanded to cover poor family or not, PRSP may not offer the ultimate solution because as a national policy paper, it is modelled along global economic principles with no regard to socio-cultural realities. Its use in emancipating children is thus very minimal. Writing about children rights in Kenya, Jarso argues that the deplorable situation of children in Kenya is due to the government's failure to implement national and international legislations and conventions⁶. However, Jarso fails to acknowledge the resource limitation that makes the legislative approach ineffective. Moreover, the overly western orientation of CRC makes it quite difficult to implement without cultural

³These include CRC, African Charter on Child Rights and welfare among others.

⁴Minujin, A. Delamonica, E., Gonzalez, E. and Davidziuk, A. (2005). Children Living in Poverty. A review of child poverty definitions, measurements, and policies. Desk Review paper for UNICEF's Conference on "Children & Poverty: Global Context, Local Solutions" Graduate Program in International Affairs. New School University. April 25-27, 2005. New York Accessed from http://www.unicef.org/policyanalysis/files/child_poverty_final_draft_4_05.pdf

⁵ Ibid

⁶Jarso, J. (2012). implementing the children's rights agenda in kenya: taking stock of the progress, hurdles and prospects. *American University International Law Review*, 27(3), 673-718. P 694

considerations⁷. Other writers have attributed the poor status of Kenyan children to lack of a clear institutional framework noting that proper institutional framework would help in developing practices that would be beneficial to the children⁸. Although this perspective sheds light on some missing gaps with regard to government approaches, it fails to take into account the unique socio-cultural realities in the day to day life of African children. Though very important, Institutionalised means such as state run children facilities lack the necessary infrastructure to handle the increasing number of orphans and vulnerable children (OVCs). Such an approach is only effective in handling children issues at a very small scale thus creating the need to go beyond the institutional and legal approaches into a more bottom up community led and culturally sensitive approach that would respond to the needs of the increasing number of OVCs.

This study tries to fill this knowledge gap by examining how culture could be useful in realizing children's right. It seeks to explore how various aspects of African culture can complement or inform (but not replace) various government policies and programs in achieving the same.

⁷See Archard, D. (1993). *Children: Rights and childhood*. London: Routledge p 64

⁸P. L., Groza, V. K., Groark, C. J., Greenberg, A., Bunkers, K., & Muhamedrahimov, R. J. (2011). VIII. The Situation for children without parental care and strategies for policy change. *Monographs Of The Society For Research In Child Development*, 76(4), 190-222. doi:10.1111/j.1540-5834.2011.00633.x

CHAPTER TWO

2.0 HIGHLIGHTS OF THE CHALLENGES FACING CHILDREN IN KENYA

This chapter examines the various challenges facing children in Kenya. Key challenges discussed include HIV, child labour and child poverty and lack of access to education.

Poor nutrition and HIV are some of the many challenges facing Kenyan children. According to UNICEF, by 2010 35% of all urban children in Kenyan slums were undernourished with 2.2 million adolescents found living with AIDS⁹. The high level of HIV is mainly caused by deprivation which compels teenage girls to drop out of school and engage in prostitution¹⁰. Other persistent challenges include FGM, which is practiced by 38 of the 42 Kenyan ethnic communities, and child labour¹¹. Estimates from UNICEF indicate that between 1999 and 2003, 25% of Kenyan children were involved in child labour¹². This is despite the country ratifying numerous international conventions and enacting The Children's Act to control the vice¹³. Factors fuelling child labour include child poverty and the increasing demand

⁹ See UNICEF cited in African Child Policy Forum, Supra note 18 pp 20 and 21

¹⁰ Mildred, J., & Plummer, C. A. (2009). Responding to child sexual abuse in the United States and Kenya: Child protection and children's rights. *Children & Youth Services Review*, 31(6), 601-608. doi:10.1016/j.childyouth.2008.11.002

¹¹ Ibid See Kenya National Bureau of Statistics (2010) Kenya Demographic Health Survey accessed from http://www.unfpa.org/sowmy/resources/docs/library/R313_KNBS_2010_Kenya_DHS_2009_final_report.pdf on 15/07/2013 at 9.00 am pp 65-69

¹² See UNICEF 2005 cited in Munene, I. I., & Ruto, S. J. (2010). The Right to Education for Children in Domestic Labour: Empirical Evidence from Kenya. *International Review Of Education / Internationale Zeitschrift Für Erziehungswissenschaft*, 56(1), 127-147. doi:10.1007/s11159-010-9152-1 p 131

¹³ Ibid p 131

for cheap labour offered by children.¹⁴The table below highlights child labour prevalence in Kenya.

Sector	Number of Children	Percentage
Agriculture	717,304	77.4%
Manufacturing	21,903	2.4%
Trade	16,465	1.8%
Hotel	14,097	1.5%
Other Business	55,601	6.0%
Private Household	101,168	10.9%
TOTAL	926,541	100%

Table 2.1 Distribution of child labourers in Kenya by sector

Source: Republic of Kenya, 2003¹⁵

Though the law stipulates harsh penalties for those who employ children, the above table shows that child labour is indeed prevalent in Kenya. The law has been criticised by many scholars as being unable to address the underlying factors that

¹⁴ Ibid

¹⁵ Republic Of Kenya cited in Ruto and Munene Supra note 12 at 131

compel children to drop out of school into the labour market¹⁶. There is thus need for a more integrated approach that captures the push factors such as poverty which force families to allow their children to join the labour market and compels children in child headed families to work for their survival¹⁷.

Whereas remarkable steps have been taken in the education sector, resulting into an increase in enrolment in primary schools, the challenge of retention still remains¹⁸. Thus although an impressive 83% of all school going age children enrol in schools every year¹⁹, a significant number drop out in the course of the 8 year primary schooling period, with UNICEF putting the figure at 3 out of every 10 children²⁰. This is despite the fact that both Children's Act, the CRC and the African Charter on children's rights guarantee basic education to children. Other than child poverty, teenage pregnancy has also been blamed for this high dropout rate.²¹ The transition rate from primary to secondary school is also very low with the World Bank noting that only 24% of those who finish primary school proceed to secondary school.²² The low level of transition can be attributed to the high fees in secondary school (in contrast to free education in primary schools). Furthermore, even when fees is available, logistical challenges such as long distances to school, and the cost of other education requirements still keep children away.²³

¹⁶Ruto and Munene Supra note 13 at 130

¹⁷ Ibid

¹⁸Ogola F.(2010) Free education in Kenya's Public primary Schools:Addressing the challenges, Addis Ababa:Organization for Social Science Research in Eastern and Southern Africa.p14

¹⁹ See World Bank(n.d)School enrolment, primary (% net)Accessed from <http://data.worldbank.org/indicator/SE.PRM.NENR> on 13/07/2013

²⁰ See UNICEF Cited In Irene I.(2012) Factors that influence the Drop out of Boys in Public Primary Schools in Kenya:Acase of Kakamega Central District. Unpublished thesis,accessed from <http://erepository.uonbi.ac.ke/handle/123456789/7159> p 2

²¹ See Ogola Supra note 18 at p 22-24

²² See World Bank Supra note 19

²³ See Ogola,supra note 34 see also <http://kenya.usaid.gov/programs/education-and-youth>). Accessed on 14/05/2013

According to African Child Policy Forum (ACPF), family poverty, which results into child poverty, currently stands at 45% in Kenya and is manifested through malnutrition and general poor healthcare that results into high infant mortality rate which is estimated to be 92 per 1000 births²⁴. Poverty thus violates a child's right life, dignified treatment and livelihood under CRC and the African charter on children's rights²⁵

From the discussion, it is clear that the situation of children is still deplorable in Kenya even with the enactment of numerous domestic legislations and the signing of the CRC over 22 years ago²⁶. The above challenges are so intertwined and mutually reinforcing that a purely legal approach may not be very successful in handling them. This is demonstrated by the fact that numerous policies and legislation on children rights such as the "return to school policy", targeting the re-integration of pregnant girls back to school, the children's Act and the recently enacted Anti-FGM Act have not done much to radically change the situation of children in Kenya. The CRC, which is the main document that informs child rights, doesn't provide any opportunity for alternative mechanisms of ameliorating these condition thus creating a potential room for conflict with local cultures in Kenya. The legal and policy approach currently being pursued by the donors and the Kenyan government is therefore inadequate and creates the need for a change in perspective.

²⁴See The African Child Policy Forum(2009).Child Poverty in Africa;An Overview.Child Policy Forum,Addis Ababa Accessed from <https://www.africanchildforum.org/site/index.php/resource-centre/child-poverty-in-africa%3a-an-overview.html#.US8nPVeK2Dc> p 9 See also <http://data.worldbank.org/country/kenya> accessed on 15/06/2013 at 7. Pm See also Unicef (2009)Child Survival and Development : Kenya Accessed from on 15/06/2013http://www.unicef.org/kenya/Kenya_-_Child_Survival_and_Development_February_2009.pdf

²⁵ See articles 5 and 16 of the African charter on children's rights,article ,Article,6,19 and 37 of the children's convention.

²⁶These include the Children's Act enacted in 2001 , the Return to School Policy Launched in 2005,the Anti-FGM Act of 2011 and the CRC ratified in 1990

CHAPTER THREE

3.0 RETHINKING CHILDREN'S RIGHTS: A REVIEW OF VARIOUS CONTESTATIONS.

This chapter focuses on the definition of human rights by critically examining the approaches put forth by various scholars. It also delves into the definition of childhood before focusing on whether children actually have (human) rights. Lastly the chapter concludes by theorizing children rights.

3.1 What are Human Rights?

The definition of human rights is highly contested. On one hand there are those who view human rights as basic rights that must be guaranteed by governments in order to meet a minimum standard of moral legitimacy²⁷. Supporters of this view such as Talbott note that rights are requirements for citizens to develop and exercise their autonomy. This conception is however erroneous because it implies that rights are given by the state, yet human rights can neither be given nor taken away because they emanate from a higher moral position and precede both the state and the constitution²⁸. Thus though all constitutional rights are human rights, not all human rights are constitutional rights²⁹. The "statist" conception of rights advanced by Talbott has also attracted feminist critics. Feminist argue that because the dominant

²⁷Talbott, William(2011). The Consequentialist Project for Human Rights.In , *Human Rights and Human Well-Being*. . Retrieved 7 Mar. 2013, from <http://0-www.oxfordscholarship.com.pugwash.lib.warwick.ac.uk/view/10.1093/acprof:oso/9780195173482.001.0001/acprof-9780195173482-chapter-1>

²⁸AmatyaSen,cited in Clair Asuncion(2006).How Can Human Rights Contribute to Poverty Reduction?AphilosophicalAssesment of the Human Development Report,2000 in Williams Lucy(ed)*International Poverty Law:An Emerging Discourse*.London,Zed Books p 25

²⁹ Ibid

human rights language focuses on the relationship between the individual and the state, and perceives the state as the protector and or violator of rights, it ignores the rights violations that take place in the private sphere, especially at the family level³⁰. Child liberationists, concur arguing that children essentially face the same problems as women³¹ with the only difference being that for women, the oppressors are men while for children, it is the parents. This criticism, whereas valid in relation to women's right, is invalid with regard to the children, because it casts aspersion on the institution of the family, which is considered as one of the rights of a child and is the foundation on which the CRC is based. Moreover, children who have escaped from the private sphere into the public sphere such as child labourers, child soldiers, or street children are actually considered as being more oppressed and exploited³². Baxi perceives human rights as human moral claims; he insists that if one proceeds on the premise that something is his right, he immediately creates a notion of there being someone with an obligation to grant it³³. This view is however criticised by Nickel who argues that a call for human rights doesn't necessarily translate into a call for a particular entity to grant them; rather it's a call for the recognition of this right³⁴. Nickel's argument is that individuals may have rights which are not practically realizable and for which a specific duty holder may not be identifiable, but this doesn't make them any less justifiable³⁵. The most problematic conception of rights is perhaps that advanced by Donnelly. According to him, human

³⁰See Archard Supra note 7 at 70

³¹ Ibid

³²See Freeman M.(2011).The Value and Values of Children's rights in Invernizzi, A., & Williams, J. M. (2011). *The human rights of children: From visions to implementation*. Burlington, Vt: Ashgate Pub. P25

³³ See Baxi U.(August,2012) *Re-Thinking Human Rights :Preliminary Reflections Concerning Human Rights thoughts and Folkways*.Unpublished

³⁴ Nickel, J.(2013) "Human Rights", *The Stanford Encyclopedia of Philosophy* Accessed from URL = <<http://plato.stanford.edu/archives/sum2013/entries/rights-human/>>

³⁵ Ibid

rights are rights that individuals have because they are human beings³⁶. However, a look at groups that possess these rights indicate a flaw in Donnelly's conception. For instance, there are rights that adults have, such as the right to marry, that children may not have, yet children are still human beings. Similarly, mentally incapacitated individuals often have their freedom of movement curtailed to protect them from harm yet this is never considered as a rights violation.

However, to navigate through the complex definitional barrier of human rights, I will take a more philosophical approach by focusing on the key principles that underpin human rights. These are survival, dignity, equality, and freedom³⁷. I will thus define human rights as the necessities that human beings are naturally entitled to so as to live a life of dignity, freedom and equality.

3.2 Who is a Child?

Defining a child is not an easy task. Establishing the point at which childhood begins and ends has been a source of problems to many institutions, not least of all the UN. This study tries to engage with the various contestations in a bid to fully explain what constitutes childhood.

The first area of contestation is the overlap between the definition of a child and that of youth. The CRC considers a child to be anyone below 18 years³⁸. On the other hand, UNESCO defines youth as anyone between the age of 15 and 18³⁹ therefore an individual who fall between 15 -18 years fall in both categories. This overlap

³⁶ Donnelly, J. (2003). *Universal human rights in theory and practice*. Ithaca: Cornell University Press.p10

³⁷ Ignatieff, M., & Gutmann, A. (2001). *Human rights as politics and idolatry*. Princeton, N.J: Princeton University Press. Pp162-165

³⁸ See article 1 of the UN Convention on the rights of the child

³⁹ See UNESCO <http://www.unesco.org/new/en/social-and-human-sciences/themes/youth/youth-definition/> accessed on 24/06/2013

implies that youth empowerment through employment as advocated by various NGO's and governments could potentially be a violation of article 32 of the CRC since it encompasses youth employment. The challenge of defining a child is not only a problem to UNESCO but other bodies as well. Article 77(2), Addition Protocol 1 of the Geneva Convention reads:

*‘‘The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces...’’*⁴⁰

It is unclear whether this convention envisaged childhood to end at 15 years or whether it only has special protection for those under 15. However, age 15 was endorsed by Special Court for Sierra Leone (SCSL) as the age of criminal responsibility so as to effectively handle child soldiers⁴¹, an issue that was highly criticised by NGOs who noted that children were not competent enough to understand the implication of serving as militants and were essentially victims⁴². Though the 15 years remained on its statutes, no child actually appeared before SCSL due to this criticism⁴³. The contention in relation to the age of criminal responsibility is perhaps more clear in domestic jurisdiction where countries have very low ages for criminal responsibility, with England and Wales setting the age at 10 years⁴⁴. Congo is also said to have executed child soldiers who were way below

⁴⁰ See Article 77(2) of the Geneva Convention

⁴¹ See Article 7 of the Special Court of Sierra Leone Statute, accessed from <http://www.scs-l.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176> on 13/07/2013

⁴² See IRIN, (2011). Analysis: Should child soldiers be prosecuted for their crimes? Accessed from <http://www.irinnews.org/report/93900/analysis-should-child-soldiers-be-prosecuted-for-their-crimes> on 13/07/2013

⁴³ Ibid

⁴⁴ See <https://www.gov.uk/age-of-criminal-responsibility> Accessed on 13/07/2013

18 years while Sierra Leone domestic constitution allows for prosecution of 17 years old children in adults' courts⁴⁵.

Another area of contestation is participation in democratic process where Austria, Brazil and Cuba grants the right to vote to 16 year old individuals while Korea and Indonesia grants it to 17 year olds⁴⁶. Interestingly, Britain, which denies those under 18 the right to vote allows children over 13 years to work with the age of recruitment as a soldier standing at 16 years of age⁴⁷. One thing that comes out in the discourse on childhood is the level of contradiction. For instance, it's absurd to assume that individuals who are below 18 years old are developed enough for military service but not competent to participate in the voting process. Furthermore those who dismiss 18 years as the age of majority argue that the conception of who a child is should be based on mental competence and not age. Archard, one of the key proponents of this view, note that childhood can be perceived from

‘...the moral or juridical perspective from which a person may be judged incapable of being responsible for their deeds, an epistemological viewpoint from which a person, due to immaturity is seen as lacking in adult reason or knowledge, and a political angle from which young humans are thought unable to contribute towards and participate in the running of the community’⁴⁸

This conception whereas not giving a fixed age, offers an insight into who a child really is though due to its subjectivity, it is impossible to arrive at a universal limit for

⁴⁵ See Happold M.(n.d)The Age of Criminal Responsibility In International Criminal Law http://www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345 Accessed on 13/07/2013

⁴⁶ See White I.(2013) Voting Age accessed from <http://www.parliament.uk/briefing-papers/SN01747> on 13/07/2013

⁴⁷ See the UK army website <http://www.army.mod.uk/join/20145.aspx> accessed on 12/07/2013

⁴⁸See Archard Supra note 7 at 32

all individuals. Moreover ‘adult knowledge’ is so relative that it would be impossible to use it as a determining factor for adulthood.

In traditional non-western societies, childhood is considered to end at puberty, and upon attaining this age, children are considered adults and are therefore given adult responsibilities, including property ownership⁴⁹. Since puberty is attained at different ages and of has no correlation with mental capability, this classification is equally problematic. Among the pastoralist communities in Kenya, girls are married off upon attaining puberty and though officially banned the practice still continues unabated. The boys, upon attaining puberty, are given the roles of protecting pastoralist communities against cattle rustlers and other forms of insecurity⁵⁰.

The key challenge in defining who a child is lies in the dichotomy between childhood and adulthood. Generally adulthood is associated with competence while childhood is associated with ‘childishness’ and mental incompetence⁵¹. Freeman, a sharp critic of this dichotomy, proposes progressive realization of children rights, arguing that children have rights because they are both ‘beings’ and are ‘becoming’⁵². He lists ‘becoming rights’ as, right to survival development, protection, health and education. On the other hand he considers ‘being rights’ as freedom of expression, association and assembly, and the children’s right to express themselves fully in matters concerning them⁵³. Whereas his conception of the ‘becoming rights’ is generally acceptable, the ‘being rights, are quite contestable.

⁴⁹Huho M.J.(2012) Conflict Resolution Among Pastoral Communities in West Pokot county, Kenya: A missing link ,Academic Research International, **3, No. 3, pp 458-468**
Accessed from
http://www.researchgate.net/publication/238191173_CONFLICT_RESOLUTION_AMONG_PASTORAL_COMMUNITIES_IN_WEST_POKOT_COUNTY_KENYA_A_MISSING_LINK, on 24/08/2013 at 9.30

⁵⁰ Ibid

⁵¹ See Archard Supra note 7 at 70-73

⁵² See Freeman Supra note 28 supra note 31

⁵³ Ibid at 28

The enjoyment of these 'being right' should be subject to the supervision and approval of the guardian. For instance if left completely free, a child would easily choose to get married and justify it on the basis of freedom of choice. The 'being rights' are only justifiable if considered within the limits of the child's interaction. For instance, the right to participate in democratic processes may be conceived as the right to elect a class prefect and to vie for election as one, but not to elect a member of parliament. However an obvious problem that arises here is that highlighted by Cantwell. According to him, a particular category of children possess the same level of thinking as adults and should get some "adult rights"⁵⁴. He proposes a structure which would differentiate between infants, children, and young people. Though he doesn't state where each category starts or stops, he falls short of resenting that young people who are 16 or 17 years of age are still referred to as children, against their will and despite their increased mental capacities.⁵⁵

It is clear from the discussions that the question of childhood is quite contested. Though some scholars see the dichotomy between adulthood and childhood as being of benefit to children, others see it as a form of oppression that should be discontinued. However there seems to be agreement that children at a particular age, based on the social cultural setting, possess competence that is similar to that of adults. The best approach is therefore not to focus on the arbitrarily fixed ages but to selectively and progressively grant rights to children.

⁵⁴ Cantwell N.(2011) Are Children's Rights Still Human?inInvernizzi, A., & Williams, J. M. (2011). *The human rights of children: From visions to implementation*. Burlington, Vt: Ashgate Pub. P43

⁵⁵ Ibid

3.3 Do Children Have (Human) Rights?

Three schools of thought have emerged in relation to children's rights. The first school argues that children have rights, the second notes that children do not have rights and that their wellbeing is guaranteed through their guardians while the third group notes that children have rights, which are not human rights. I will first focus on the first two before visiting the third conception.

According to Child liberationists, the current separation of a child and an adult is a form of discrimination which perpetuates the 'misconception' of children as incompetent and therefore not warranting all rights⁵⁶. Liberationists argue that this misconception is further perpetuated by agents of child indoctrination such as the school, the family and religion all of which rationalize the perception of children as being unable to make 'right decisions'⁵⁷. Firestone criticises this dichotomy and argues that children should be given all the rights possessed by adults⁵⁸. However insisting that children are incompetent and therefore unable to make right choices, O'Neill argues that if children want to obtain adults rights, then they should grow up⁵⁹. For O'Neill, there is a clear difference in capability between adults and children, and erasing this dichotomy is not part of the solution, rather children should be given rights that would enable them live a proper childhood and attain adulthood. She insists that the focus should be on parental obligation towards children, and not on children themselves⁶⁰. However, according to Archard the argument that children are incompetent and therefore not deserving of rights is faulty because even adults

⁵⁶ Archard Supra note 6 at 70-72

⁵⁷ Ibid p 45 See also Freeman supra note 32 at 25

⁵⁸ See Firestone cited in Archard Supra note 7 at 70

⁵⁹ See O'Neill cited in Freeman Supra note 32 at 25

⁶⁰ See O'Neill cited in Bainham, A. (2005). *Children, the modern law*. Bristol: Family Law/Jordan Pub, p 102

make mistakes but still have rights⁶¹, a position he shares with Freeman who opines that autonomy and self-determination are the basis of human beings and therefore denying children these rights amounts to denying them their ‘‘state of being’’⁶². However, opponents note that autonomy is based on the assumption that an individual knows what is best for him and that he exercises his rights to choose what is best for him⁶³. Thus, because children do not always know what is best for themselves (at least in the long term), it would be against their own interest to be left to choose. However, this argument is sharply criticised by Dworkin who notes that freedom of choice includes the freedom to choose what is wrong⁶⁴. Within Dworkin’s context, it can then be argued, as Freeman does, that the process of making errors is part of the child’s development process, a position that is dismissed by Purdy who compares granting children rights to releasing mental patients from a state hospital, arguing that their actions would not only be dangerous for them but for the society at large⁶⁵. However as advanced by CRC as well as by numerous scholars, although a child’s opinion in relation to what he wants is important, that opinion is subject to the approval of adults who determines whether it’s in ‘his interest’⁶⁶. A child’s opinion is therefore minimalized because the convention gives adults the right to veto it if they consider it inappropriate. Moreover, Article 3 (1) only states that the interest of the child should be given ‘a primary consideration’ but doesn’t stipulate that it is to be given ‘‘the primary consideration’’ therefore giving room for other opinions too. Whereas it’s difficult to determine whether the use of ‘‘a’’ instead of

⁶¹ See Archard supra note 7 at 76

⁶² See Freeman, supra note 32 pp30-32

⁶³ See Archard Supra note 7 at 79

⁶⁴ Dworkin cited in Freeman Supra note 32 at 32

⁶⁵ Purdy L.M(1992) In their best Interest? The case Against Equal Rights For Children. Ithaca, NY: Cornell University Press p 217

⁶⁶ See article 3 of the UN convention on the rights of the Child

“the” was deliberate or an act of omission, it is clear that CRC opens room for other considerations.

Libertarians argue that children should be involved in voting because the outcome of the vote affects them⁶⁷. They postulate that since the underlying premise of democracy is for an individual to influence how she is governed, it is unfair to exclude children from voting, a position supported by Archard who opines that giving the children this right doesn't necessarily mean they will use it; they can have a right that they don't use⁶⁸. However this argument ignores the fact that participation in the democratic process requires a grasp of governance processes, an understanding which some children may not have, though a section of children, especially those in the late teens may be well versed with democratic processes and should be progressively allowed to exercise these rights⁶⁹. Cohen recognizing that children may not have such capacity, champions for children's advisors to help them make such decisions⁷⁰. However, Cohen's position is equally untenable because it simply replaces one adult with another but doesn't necessarily free the child because this advisor (who is an adult anyway) is more likely to be selected by the guardian. Either way even if left to vote, due to psychological attachment, the child will most likely emulate the guardian⁷¹. Another school of thought justifies libertarian rights for children on the basis of equality which is premised on the assumption that all individuals should be treated equally and should not be discriminated against.⁷² They

⁶⁷See Archard Supra note 7 at 99

⁶⁸ Ibid

⁶⁹ See Cantwel supra note 34 at pp 43-45

⁷⁰ See Cohen cited in Archard Supra note 7 at 75

⁷¹Waylen, A. and Stewart-Brown, S. (2010), Factors influencing parenting in early childhood: a prospective longitudinal study focusing on change. *Child: Care, Health and Development*, 36: 198–207. doi: 10.1111/j.1365-2214.2009.01037.x .

⁷² See Dworkin cited in Freeman supra note 32 at 28

argue that it is meaningless to outlaw discrimination based on race, religion or sex but allow it on the basis of age⁷³. This assertion, which amounts to an equal treatment of adults and children, may however be counterproductive in the long run because it would negate any special treatment or privileges advanced to children such as juvenile courts, and juvenile correctional facilities which are designed for children's unique needs.

Critics of children rights argue that the rights language is neither suitable for the family nor for the children because the family is held together by such values as love and companionship which achieve more for children but cannot be claimed on the basis of rights⁷⁴. However, criticising this view, Freeman argues that not all children obtain these values and those who do so, may not obtain them to the highest possible level⁷⁵. If it was possible for all children to obtain them then rights wouldn't be necessary, but the impracticality of this creates the need for rights⁷⁶. In other words the rights language may not achieve the best for children but may avoid the worst. John Holt, another critic notes that these values are stereotypic misconceptions created as cover ups for the oppression that children undergo at the family level⁷⁷. Holt's criticism highlights the need to focus on ways of controlling child oppression at the family level without necessarily removing the child from the umbrella of the family which is central to the development of children.⁷⁸.

Though the State has a role in providing a suitable environment for the realization of children's rights, a lot needs to be done with regard to the moral justification of these

⁷³ Ibid See also Farson cited in Bainham supra note 60 at 98

⁷⁴ See Donnelly Supra note 35 at pp 10-11

⁷⁵ See Freeman, supra note 32 at 24

⁷⁶ Ibid

⁷⁷ See Holt cited in Freeman supra note 32 at 24

⁷⁸ See article 9 of UN convention on the Rights of the Child see also article 18 of the African charter on child rights and welfare .Also see Article 16(3)of the Universal Declaration of Human Rights .See also Article 10 of the UN Covenant on Socio-Economic Rights .

rights to promote a shift in focus from the current controversy on applicability to implementation. Whereas scholars have perceived family values and rights as mutually exclusive, this study advocates for an integrated approach that encompasses both values and rights as a way of promoting children's well-being. At the same time, steps should be taken to ensure that institutions that are meant to guarantee children rights such as the school and family do not turn into sites of child abuse, an action that calls for comprehensive coordination by all stakeholders in the children rights movement.

3.4 Theorizing children's rights: Interest Theory vs Will Theory.

According to the Will theory, an individual has a right to something if he can exercise a choice over the enforcement or waiver of duties imposed on someone else to provide it⁷⁹. The will theory perceive a rights holder as a small "sovereign" who is able to exercise discretion as to whether duty bearers should fulfil their roles in relation to his right. Some scholars rely on this theory to advance children rights, arguing that children are autonomous beings who should be allowed to fully and independently make decisions⁸⁰. However the Will Theory is inadequate to justify children's rights because there are some rights that the child has but over which she cannot waive the parent's obligation. For instance, although a child may waive a parent's obligation to buy her a doll, she cannot prevent the parent from taking her to primary school or hospital. Basic education is thus a right that the child has no capability of waiving a parent or government's obligation over. On the other hand, the Interest Theory argues that an individual has a right to something if he has an

⁷⁹Wenar, L.(2011), "Rights", *The Stanford Encyclopedia of Philosophy* URL = <<http://plato.stanford.edu/archives/fall2011/entries/rights/>>. Accessed on 13/07/2013

⁸⁰ See Freeman Supra note 32 at pp26-30

interest in it⁸¹. This theory conceives rights not as an end in themselves, but as means to some end. That is, rights as mechanisms of obtaining some higher good for the individual. Thus children have rights to education, because it's a way of improving their future. However critics of this theory argue that it is inadequate because it assumes that the individual knows her interest, yet children may not fully understand their long term interests in all situations⁸². This criticism is however untenable because the identification of interests is not solely the responsibility of the child⁸³. Rather all parties to the issue involving the child can discuss with the child to identify her interests. Indeed teachers, parents, governments and NGOs are often involved in formulating what children's interests are on a daily basis. Moreover, the negotiations of all legal instruments to protect children have been done in their absence, but this has not prevented children from benefiting out of these instruments. The interest theory goes a long way in justifying children rights and will thus form the foundation of this study. Using this theory, this paper will demonstrate how communities, NGOs and governments are using different mechanisms to guarantee children's interests in Kenya and how cultures can be used to improve their effectiveness.

⁸¹ See Wenar supra note 78

⁸² Bainham, Supra note 59 at 102

⁸³ See article 3 of UN convention on the rights of the child,

CHAPTER FOUR

4.0 THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE NEXUS BETWEEN CULTURE AND HUMAN RIGHTS.

This chapter first traces the history and scope of CRC. It then analyses the relationship between culture and human rights then puts a case for the adoption of culture in implementing human rights.

4.1 The CRC

An attempt to come up with a framework to promote the rights of children can be traced back to 1959 when the UN General assembly adopted the Declaration on the Rights of the Child⁸⁴. Indeed most of the language in this declaration later found its way into the CRC. However even after the adoption of the 1959 declaration, there seemed to be little change in the status of children, partly due to its nature as merely a declaration but more so because of lack of an enforcement mechanism⁸⁵. The continued deterioration of the status of children, led the UN to declare the International Year of the child in 1979, a period which exposed widespread child abuses, prompting Poland to press for enactment of CRC⁸⁶.

The CRC came into force in the year 1989, after a long negotiation and drafting period involving NGOs, governments and the UN. The CRC contains 45 articles dealing with various aspects of children rights and the implementing agencies. In the

⁸⁴ See UN Declaration on the Rights of the Child Accessed from <http://www.un.org/cyberschoolbus/humanrights/resources/child.asp> on 14/07/2013

⁸⁵ See Cantwell Supra note 33 pp 38-40

⁸⁶ Ibid at 39 see also UN International Years:International Year of the Child,Accessed from http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/31/169 on 14/07/2013

year 2000, two optional protocols to the convention were adopted; one that increased the recruitment age of children into the armed forces from 15 to 18 years and the other that focused on the eradication of sexual exploitation of children⁸⁷. The convention comprehensively addresses the socio-economic and political challenges that face children⁸⁸.

Because they are generally uncontested, and due to word limits, this research will focus on the realization of a few children's socio-economic rights within the context of the Kenyan culture. These are:

Articles 28 and 29: Right to quality education that takes into account the child's personality and developmental needs; Articles 24 and 25: Right to comprehensive health care services; Article 37(a): Protection from cruel inhuman and degrading treatment; Articles 20, 26 and 27: Right to social security and adequate standards of living for all children, including those deprived of family.

4.2 Culture and Human Rights

Culture can be defined as a system of shared meaning and way of life exhibited by members of a particular community.⁸⁹ Whereas culture is inherently dynamic and highly susceptible to globalization and urbanization,⁹⁰ there are certain aspects of

⁸⁷ See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography Accessed from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> See also Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict accessed from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx> on 14/07/2013

⁸⁸ See Cantwell Supra note 75

⁸⁹ Haralambos, M., & Holborn M. (1995). *Sociology: themes and perspectives*. London, Collins Educational. p3

⁹⁰ See Boaventura D. S. (2008) 'Nuestra America: Reinventing a Sabalturn Paradygm of Recognition and Redistribution,' *Theory Culture and Society* 18 (2-3), pp 185-217. See also Rosemary C. (2005) 'Legal Culture in and Against the Market : Neo-Liberalism and the Global Proliferation of Meaningful Differences', *Law Culture and Humanities*(1) pp 35-52

African culture which, even though constantly being redefined,⁹¹ have remained persistent to date. For instance, African identity is not only influenced by modernity and globalization but also by customs and tradition, and an individual subscribes to both of these identities (on one hand as a participant in the cultural traditions and customs, and on the other, as a ‘modern’ individual)⁹² based on convenience and societal expectations at any given time. Whereas culture has often been perceived as being inconsistent with the human rights language, a growing number of scholars are beginning to doubt this assertion arguing that human rights are generally abstract and their implementation must involve local cultures.⁹³ For instance, An Na’im notes that though cultural consideration was never at the centre of human rights considerations, it is possible to develop cultural legitimacy retrospectively through ‘enlightened’ interpretation of human rights⁹⁴. This involves identifying and reinforcing aspects of culture that are consistent with human rights principles, because people are more likely to accept human rights principles that are rooted in their culture⁹⁵. He insists that human rights should be based on the least common similarities among the various cultures⁹⁶. However dismissing this assertion, Donnelly argues that the forces of modernization have undermined traditional communities and the protection that they may have given to the members who now need the protection of human rights

⁹¹ See Deng F. (1990) A cultural Approach to human Rights in An Na’im A. and Deng F. (eds) *Human Rights In Africa: Cross Cultural Perspectives*. Washington D.C. Brookings Institutions. See also Silk J. (1990). Traditional Culture and the Prospect for Human Rights in Africa, An Na’im A.A and Deng F. (eds) *Human Rights In Africa: Cross Cultural Perspectives*. Washington D.C. Brookings Institutions.

⁹² Middleton K. (2002). Ancestral Incest and Colonial Subjectivities in the Karembola (Madagascar), in Webner R., (ed) *Postcolonial Subjectivities in Africa*. London, Zed Books

⁹³ Freeman, M. (2002). *Human rights: An interdisciplinary approach*. Cambridge, UK: Polity Press. p 109

⁹⁴ See An Naim, A.A. (1992) Towards a Cross Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel and Inhuman or Degrading Treatment or Punishment in An Naim A.A (ed). *Human rights in Cross Cultural Perspectives: A quest for Consensus*. Philadelphia: University of Pennsylvania Press. p21

⁹⁵ Ibid

⁹⁶ Ibid

even if the concept is alien to their culture⁹⁷. Donnelly's nostalgic assertion that modernization has eroded cultures and all its benefits is contentious because, as will be demonstrated in this paper, most African societies have retained cultural patterns which can be tapped into to realize the goals of human rights⁹⁸. This is not to say that cultures offer the ultimate solution to human rights challenges, but rather to advocate for an integrated approach in implementing human rights so as to boost their acceptance, reduce the cost of implementation, and make them more effective.⁹⁹

Whereas Kenya has 42 different ethnic communities, there are certain cultural similarities among them¹⁰⁰. These include: The importance of kinship ties, Communal fellowship and the assumption that all community member are fundamentally interdependent, socio-economic reciprocity and community obligations towards children and the disadvantaged including orphans.¹⁰¹

⁹⁷ See Donnelly cited in Freeman Supra note 32 at 64

⁹⁸ Wiredu, K. (1980). *Philosophy and an African culture*. Cambridge .: Cambridge University Press.

⁹⁹ An Naim Supra note 94 at 20

¹⁰⁰ See 2009 Kenya Population Census Results accessed from

<http://www.knbs.or.ke/docs/PresentationbyMinisterforPlanningrevised.pdf> on 14/07/2013

¹⁰¹ These features of African culture are extensively discussed by Deng, Supra note 90, Silk, Supra note 90 Middleton Supra note 90. See also Howard R. (1990) Group Verses Individual Identity in the African Debate on Human Rights, in An Na'im A. and Deng F. (eds) *Human Rights In Africa: Cross Cultural Perspectives*. Washington D.C. Brookings Institutions, pp160-163

CHAPTER FIVE

5.0 USING THE CRC AND AFRICAN CULTURE TO PROMOTE CHILDREN'S RIGHTS IN KENYA: AN EXPLORATORY ANALYSIS

This chapter examines various aspects of children's rights and their attainment in Kenya. It explores how culturally sensitive approaches could be used to promote children's right to education and livelihood as well as ways of using culture to eradicate retrogressive practices such as FGM. It concludes by advocating for an integrated approach that would appreciate local realities in the implementation of children's rights.

5.1 Right to Education, livelihood and Social Security.

Although the rights to education and livelihood are fundamental to the well-being of children, their realization to orphans and vulnerable children remains a big challenge to the Kenyan government¹⁰². This is because although the government runs free primary education, there are still costs associated with stationery, uniform, food and health services that are beyond the reach of poor families¹⁰³. The free primary education can thus never be a reality unless all these related challenges are tackled. One way of tackling them has been the use of school feeding program, an initiative that has also been tried by WFP and World Bank in Brazil and India¹⁰⁴. The World Bank and WFP approach, which also covers a few districts in Kenya, involves delivering food to schools as social safety nets for vulnerable children with the aim

¹⁰² See Ogola Supra note 18 at 7

¹⁰³ Ibid at 15

¹⁰⁴ See World Bank(2009)Rethinking School Feeding: Social Safety Nets, Child Development, and the Education Sector accessed from http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099080042112/DID_School_Feeding.pdf accessed on 14/07/2013 on 14/07/2013

of attracting and retaining pupils.¹⁰⁵ However, whereas the objective is quite admirable, the top down approach is unsustainable in the long run, due to rapid population increase, unpredictability of donor funding and the unwillingness or incapability of the Kenyan government to fully embrace this approach¹⁰⁶. A more sustainable bottom up community driven approach is therefore necessary to cater for more regions. This involves empowering community members to boost their agricultural output, part of which is to be delivered to the school.¹⁰⁷ Since parents in a given area grow almost similar types of crops, a collection of a specific amount of food like grains from each family, based on the number of children from that family in the school and the relative agricultural output of each family would be a more sustainable way of running the school feeding program. Dipankar Datta, in his research in western Kenya, highlights the work of Mayenya Upendo support group, which cultivates crops in community land¹⁰⁸ and gives part of the proceeds to two local schools in the area as part of the school feeding program¹⁰⁹. Their effort has seen the members of the community join the program and currently each family gives 2kg of maize to the schools per month¹¹⁰. This approach would fit into the capability approach to human development and human rights, as advocated for by Clair and Amartya Sen who argue that human rights involves empowering people to

¹⁰⁵ Ibid

¹⁰⁶ See WFP(2008) Rethinking School Feeding: Social Safety Nets, Child Development, and the Education Sector accessed from <http://documents.wfp.org/stellent/groups/public/documents/reports/wfp219433.pdf> on 14/07/2013 at 2.30 pm

¹⁰⁷ Datta, D. (2013). Protecting rights of orphan and vulnerable children: no substitute for community action in Nyanza, Kenya†. *Community Development Journal*, 48(1), 105-118.

¹⁰⁸ Article 63 of the Kenya Constitution defines community land as land jointly registered and owned by the whole community identified through culture or language. This land can only be used for the benefit of the whole community.

¹⁰⁹ Ibid at 112-114

¹¹⁰ Ibid

realize their life goals and capabilities¹¹¹. This community-led school feeding program is however, not meant to totally replace all the efforts pursued by other stakeholders but rather to enhance a cost effective way of attaining the same results and guarantee sustainability.

Closely related to livelihood is the need for family love and care, enshrined under articles 5,10,18 and 20 of the CRC. As highlighted earlier, several International instruments have emphasised the role of the family in a child's development process.¹¹² However due to death of parents, conflicts or extreme poverty that compel children to run away from home, children sometimes end up outside the family protection¹¹³. In some cases, parents deliberately let their children out of the family not only as a way of easing the family burden but also as a way of getting some income¹¹⁴. In a study of families in Garissa and Nairobi, Munene and Ruto note that such children end up employed as domestic workers and are not only exploited by being underpaid but that this little income is often given to their parents.¹¹⁵ Such children are denied the right to education and end up marrying and establishing similar vulnerable families thus worsening the cycle¹¹⁶. The Kenyan government's response, influenced by global children rights movement, has not only been

¹¹¹ See Clair A. (2006). How Can Human Rights Contribute to Poverty Reduction? Philosophical Assessment of the Human Development Report, 2000 in Williams L. (ed) *International Poverty Law: An Emerging* see also Sen A. (1999). *Development as freedom*. New York, Knopf.

¹¹² See UDHR, UCSR, and CRC supra note 77 See also African Charter on Child Rights and Welfare.

¹¹³ See Engle, P. L., Groza, V. K., Groark, C. J., Greenberg, A., Bunkers, K., & Muhamedrahimov, R. J. (2011). VIII. The Situation for children without parental care and strategies for policy change. *Monographs Of The Society For Research In Child Development*, 76(4), 190-222. doi:10.1111/j.1540-5834.2011.00633.x

¹¹⁴ See Munene and Ruto supra note 12 pp 136-140

¹¹⁵ Ibid at 137

¹¹⁶ Ibid

ineffective but also very piecemeal¹¹⁷. It has a program which places such children in children homes, that are not only few, but also ill equipped. By 2007 there were about 1,700,000 vulnerable and street children in Kenya¹¹⁸ against a total of 64 registered children homes, most of which are run by NGOs¹¹⁹. This huge discrepancy poses an implementation challenge to service providers. The best approach in handling this would be through foster care which would involve placing such children under foster families especially relatives, supporting them through cash transfers¹²⁰ and have state officer visit them periodically to monitor their progress. The legal basis for such a program, especially targeting children, is actually in place because Article 43(a) of the Kenyan constitution mandates the state to provide social security and protection to vulnerable families and children¹²¹. Moreover, Articles 9, 10 and 11 of the UN covenant on socio-economic rights, of which Kenya is a signatory, can easily provide a broader foundation for such a program since the Kenyan constitution allows any ratified international instrument to automatically become part of the laws of Kenya¹²².

A related concern is the question of orphans. Culturally, if a child loses one parent, especially the breadwinner (who is often the father), the community has the

¹¹⁷ Ibid

¹¹⁸ See Consortium For Street Children (n.d) Street Children Statistics Accessed from http://www.streetchildren.org.uk/uploads/resources/Street_Children_Stats_FINAL.pdf, accessed on 24/08/2013 at 1.30 pm. See also Boston University and University of Nairobi (2009). Kenya Research Situation Analysis on Orphans and other vulnerable Children accessed from <http://www.bu.edu/cghd/files/2009/12/Kenya-Research-Situation-Analysis-Country-Brief.pdf> on 13/07/2013

¹¹⁹ Human Rights Watch (Organization). (2001). *Kenya: In the shadow of death : HIV/AIDS and children's rights in Kenya*. New York: Human Rights Watch. P 24

¹²⁰ See Engle et al, supra note 113 at 206

¹²¹ Government of Kenya (2010) The Constitution of Kenya. Nairobi: Government Printers

¹²² Ibid article 2(6)

obligation to help the mother support the children¹²³. This is to ensure that the woman remains in the family and guard the children's inheritance as well as maintain the lineage of the deceased¹²⁴. However, if both parents die, the children are to stay with the remaining relatives until such a time that they mature and can possess their parent's inheritance.¹²⁵ Indeed statistics from UNICEF currently indicate that about 50% of orphans in Kenya, and 45% in Uganda live with their grandparents¹²⁶. Grandparents therefore give direct care to a larger number of orphans and empowering them is one way of guaranteeing the well-being of orphans. In Uganda, the activities of grandmothers is organised through the Uganda Grandparents Action Support that not only helps in resource mobilization but acts as a site for moral support and sharing of best practices on how to handle orphans¹²⁷. Placing children in a kinship foster care such as with grandparents allows them to occasionally visit their parental homes; a practice that ensures that they are conversant with their inheritance such as land as opposed to the 'modern' approach which encourages adoption, that includes children losing their identity and taking up the identity of the adopters¹²⁸. Within the African setting, orphans retain their parent's names and as such, would easily claim inheritance through ancestry¹²⁹. It was and is still an offence to grab any property that is considered an entitlement to orphans and such an action often results into social sanctions from the community.¹³⁰

¹²³ Umbima, K. (1991). Regulating Foster Care Services: The Kenyan Situation. *Child Welfare*, 70(2), 169-174.

¹²⁴ See Engle supra note 114 at 197

¹²⁵ Ibid

¹²⁶ UNICEF. (2007). *The state of the world's children*. New York Accessed from <http://www.unicef.org/sowc07/docs/sowc07.pdf> on 13/07/2013

¹²⁷ See Engle et al supra note 113 at 201

¹²⁸ Ibid

¹²⁹ See Umbima Supra note 124 at 174

¹³⁰ Ibid

Due to the emergence of HIV/ AIDS that is decimating whole families, a new group of child headed households is emerging, especially in urban slums¹³¹. Upon the death of both parents, the eldest child is often compelled to take charge of the family and provide livelihood. Because they do not fit within the classical legal categorization of family and also lack the necessary identification documents, child headed households often miss out on the few government programmes targeting vulnerable families¹³². The marginalization of this group of children explains why to date, there is no government policy to deal with child headed families¹³³. The result has been that their welfare is pegged on NGOs, and well-wishers who often place them in institutional care¹³⁴. Other than the criticism that it caters for a very small number of children, critics of institutional care argue that it is ineffective because it involves separating the children from each other therefore dismantling ‘‘the family’’ thus compromising the personal development of the children¹³⁵. Other sceptics argue that due to congestion and resource constraint, the conditions of these facilities may sometimes be just as bad as the situations from where such children are being relieved¹³⁶. The solution would thus be to embrace a more kinship oriented approach. This may involve placing the children in foster homes and supporting the families¹³⁷ through fee waiver in schools, direct cash transfer or any other material support¹³⁸. Datta proposes the expansion of the donor funded Kenya Education Sector Support Program to include guardians of orphans as a way of promoting equity in education,

¹³¹ See Engle et al supra note 113 at 199

¹³² Ibid

¹³³ Ibid

¹³⁴ Umbima Supra note 124 at 171

¹³⁵ See Engle et al supra note 113

¹³⁶ See Archard Supra note 6 at 73

¹³⁷ See Datta Supra note 107 at 109

¹³⁸ Ibid

which is the main goal of the program¹³⁹. Because cultural support networks are held together by kinship ties, any external intervention should only seek to strengthen these networks¹⁴⁰. Wolayo, heralding such a system notes that in Uganda children from poor families, but with both parents, often move to their kin's homes (mostly in the city) in an informal arrangement that would enable them access education while helping the host family¹⁴¹. Whereas this has been dismissed as potentially abusive and more like domestic child labour¹⁴², such criticisms ignore the socio-cultural foundation that inform such arrangements. A children living with relatives are often treated more like the biological children of the relative and any work performed is not considered as labour but as part of the child's responsibility to the family¹⁴³. Moreover, benefits such as education far outweigh the little work that the child performs after school¹⁴⁴. This is not to deny the possibility or existence of child abuse, rather authorities can further streamline this framework to guard against child abuse, by ensuring that those who live with such children are registered and monitored. This approach allows the child's life to continue without the disruption associated with relocating to the few and congested children homes.

Kinship care is also beneficial to teenage mothers who often find themselves having to juggle three sets of identities, Firstly as a woman, secondly as a mother and thirdly as a child¹⁴⁵. As a woman, she faces general socio-economic gender inequalities in all sectors of life, as a mother she experiences the challenges associated with

¹³⁹ Ibid

¹⁴⁰ Umbima Supra note 124 at 174

¹⁴¹ Ssemmanda W.(2007). Working With Customs. Promoting children's Rights to Livelihood by Making de facto Guardians Responsible, in Hellum Anne, Stewart Julie, Shaheen Ali, and Tsanga Amy. *Human Rights, Plural Legalities and Gendered Realities: Paths are made by Walking*. Harare, SEARCWL pp 62-63

¹⁴² See Munene and Ruto Supra note 12 pp 137-139

¹⁴³ See Ssemmanda Supra note 141 at 69

¹⁴⁴ Ibid

¹⁴⁵ See munene and Ruto, Supra note 12 pp 141-142

motherhood such as caring for the baby and as a child she lacks an independent identity and may not make major decisions without the approval of the guardian¹⁴⁶. These challenges, coupled with demotivation and ridicule by fellow students, compel teenage mothers to drop out of school¹⁴⁷. Having realised this, the government launched the return to school policy that would allow these girls free transfer to new schools, but this hasn't worked because the schools, to which they are set to transfer, to are often far away from home¹⁴⁸. Foster care in homes near the new schools would be an alternative since once the girl is through with school, she can relocate to her biological family. However some form of financial incentives through government cash transfer may be necessary for the foster family. Ssemanda Wolayo pointing to the success of this approach in Uganda notes that children born out of wedlock, especially by teenagers are often cared for by older relatives, outside the mainstream government legal system¹⁴⁹. This enables their mothers to continue with school while their babies are taken care of elsewhere (by host or biological families), an act which not only reduces stigma from peers but also ensures that the baby is well taken care of by adults¹⁵⁰.

Some writers have proposed community based care facilities as the solution to the increasing number of HIV orphans in Kenya.¹⁵¹ In his research on community action in Western Kenya, Datta cites the case of Monica Oduor who turned her house into an orphanage to care for HIV orphans¹⁵². Through the help of the community and

¹⁴⁶ Ibid

¹⁴⁷ Kwamboka O. (May, 23rd, 2008) Kenya: Teenage Mothers Denied Education *Inter Press Service News Agency*, Accessed from <http://www.apastyle.org/learn/faqs/cite-newspaper.aspx> on 24/04/2013 at 2.30

¹⁴⁸ Ibid

¹⁴⁹ See Ssemanda Wolayo Supra note 141 at 64

¹⁵⁰ Ibid

¹⁵¹ Engle et al Supra note 113 at 198

¹⁵² Ibid

well-wishers, Monica currently houses 100 orphans. Monica's approach mirrors the practice of Queen mothers in Ghana where the queen mother, often the wife of the chief, would have a number of orphans in her custody¹⁵³. As opposed to Kenya where such efforts are often informal, the Ghanaian government has a formal framework for working with queen mothers who have their own associations through which they channel their grievances¹⁵⁴. What is therefore needed in Kenya is a co-ordinated system in which stakeholders can provide people like Monica with the additional training on the management of the complex health needs of HIV orphan. Community care facilities are different from children homes which are primarily bureaucratic institution run by NGOs or government devoured of any community participation¹⁵⁵. Community care facilities are developed, owned and run by the local people through women groups, youth groups and or elders.¹⁵⁶ Such facilities are not only more sustainable to run, but ensure that the people are at the centre of their development. Moreover because of their location and high level of community involvement, such facilities ensure that children participate in their culture in line with Article 31 of the CRC which grants children the right to culture. This is contrary to the government or NGO run Children homes which totally removes the child from the community and disconnects her from her culture. However, to ensure that children in the community care facilities obtain quality education, it is necessary for stakeholders to establish a working relationship between the facilities and local schools.

¹⁵³ Ibid at 200

¹⁵⁴ Ibid

¹⁵⁵ Ibid at 192

¹⁵⁶ See Datta Supra note 107 pp 110-112

The spirit of *Harambee* can also be used to broaden children's access to education. *Harambee* is a form of African socialism that means 'pulling together'¹⁵⁷. With deep roots in African culture, it is an effective tool of community action which traces its origin to the immediate post-colonial period when it was felt that community action was necessary to augment government efforts in fighting diseases and illiteracy.¹⁵⁸ Many schools were built through '*Harambees*'. Community members would come together and using local materials, construct these facilities. During the day, work would be divided between men, women, boys and girls. Men would engage in masonry and digging trenches, women would fetch water, while children would gather stones, with older children being given tasks based on their capability to perform them¹⁵⁹. Once complete, the community would form school management boards, often made up of retired civil servants to manage the schools and pay the teachers through school fees, until such a time that the government would consider it necessary to take the responsibility of running the schools¹⁶⁰. Key advantages of such a system are community ownership and sustainability. However, with the advent of the 'statist' human rights instruments, that place the responsibility of providing education to the state, the *harambeespirit* is quickly fading off with the expectation that the government would replace community action. However data from UNICEF indicate that Kenya has only 18,000 public primary schools that are concentrated in urban areas leading to a scarcity in

¹⁵⁷ Harambee is the National Motto of Kenya and is inscribed on the court of Arm. See also Equal Rights Trust and Kenya Human Rights Commission (2012) *The Spirit Of Harambee: Addressing Discrimination and inequality in Kenya*. London: Pponta print Bayswater Accessed from http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf on 14/07/2013, Executive summary.

¹⁵⁸ UNESCO (2004) *Community schools in Kenya: Case study on community participation in funding and managing schools*. Paris: UNESCO. accessed from http://www.unesco.org/iiep/PDF/pubs/Kenya_B185.pdf on 14/07/2013 at 2.20 pm

¹⁵⁹ Ibid at 13

¹⁶⁰ Ibid at pp 48 and 64

rural areas, a problem that has resulted into many children being left out of school, with the World Bank putting the figure of out of school children at one Million by 2009.¹⁶¹ To overcome this, stakeholders should tap into the *harambee spirit* and promote the initiatives by communities to construct their schools and broaden children's right to education as happened in the 1960 to mid 1990s¹⁶². *Harambee* didn't just end at construction of health and education facilities. It included fundraising for school fees especially for children joining High schools and universities, both abroad and in domestic institutions. Such children were often viewed as the "eye" of the family, both in terms of their capabilities to motivate other children in the village but also due to the fact that they would be expected to give back to the community upon completion. Unfortunately, globalization is slowly eroding this practice, thus shifting the responsibility to the state and families¹⁶³.

Whereas human rights instruments and development blueprints tie the responsibility to the state, the state is incapable of realizing education and health for all children due to financial constraints, a reality noted by Sen and Pogge, who call for a greater involvement of the international community in guaranteeing these rights¹⁶⁴. Such a call has however been dismissed by O'Neill, who argues that since there's no direct relationship between the international community and the individual, any allocation of responsibility cannot be justified¹⁶⁵. To navigate over this unending debate over moral justification, the way forward is to strengthen the *Harambeespirit*, empower

¹⁶¹ See <http://data.worldbank.org/indicator/SE.PRM.UNER.FE/countries> see also <http://data.worldbank.org/indicator/SE.PRM.UNER.MA> Accessed on 13/07/2013 at 7.40 am

¹⁶² See UNESCO supra note 158 at 29

¹⁶³ See Donnelly cited in Freeman Supra note 31 at 64

¹⁶⁴ Pogge, T., & Unesco. (2007). *Freedom from poverty as a human right: Who owes what to the very poor?*. Paris: United Nations Educational, Scientific, and Cultural Organization. See also Sen Supra note 142

¹⁶⁵ O'neill, Onora. (1986). *Faces Of Hunger: An Essay on Poverty, Justice and Development*, London: Allen and Unwin

local communities and provide a legal framework for their involvement, a task which has been made easier by the recognition of education as a right under the Kenyan constitution.¹⁶⁶This would then complement government and donor efforts in guaranteeing the right to education .

5.2 Female Genital Mutilation (FGM)

Statistics indicate that about 38 of the 43 ethnic communities in Kenya originally practiced FGM, though the rate has been declining gradually¹⁶⁷.The practice, has so far been proscribed in most international instruments including Beijing platform, CEDAW, CRC, African Charter on Children Rights and Welfare, African charter on human rights and African Protocol on the rights of women¹⁶⁸ all of which are ratified by Kenya. However, for a very long time, the need for ‘political correctness’ in Kenya has affected the implementation of these instruments¹⁶⁹. Leaders are often unwilling to come strongly against the vice due to the fear of losing political support from communities that practice it, especially because the elders, who support it, are often involved in deciding the ‘community’s political direction’. The practice has also been outlawed in the Children’s Act which criminalizes FGM for children, but sadly leaves it open for those over 18 years.¹⁷⁰ Communities that undertake the vice

¹⁶⁶ See Article 43(f) of the Kenyan Constitution Supra note 153

¹⁶⁷ See Appendix For a full list of communities that practice FGM in Kenya See also UNFPA (2010)Taking Female Genital Mutilation/Cutting Out of the Cultural Mosaic of Kenya Accessed from <http://www.unfpa.org/public/news/pid/5409> on 14/07/2013 at 2.45

¹⁶⁸See Article 1 and Article 5 of Cedaw ,Article 4, 5 and 18(3)of the African Charter on Human Rights,see articles 112-124 of the Beijing platform for Action.

¹⁶⁹ See Kimani J.(Friday, July 12 2013)Circumcisers stick knives into girls as leaders trade blame.*The Daily Nation*Retrieved from <http://www.nation.co.ke/News/Circumcisers-stick-knives-into-girls-as-leaders-trade-blame/-/1056/1913154/-/fbaj5fz/-/index.html> on 15/07/2013at 7.40 am

¹⁷⁰ See Section 14 of the Kenya Children’s Act,2001 accessed from [http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/95bcf642e7784b63c1257b4a004f95e8/\\$FILE/Childre n%27s%20Act.pdf](http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/95bcf642e7784b63c1257b4a004f95e8/$FILE/Childre n%27s%20Act.pdf) on 25/08/2013 at 2.20 pm. See also Immigration and Refugee Board of Canada(2007)*Kenya: The practice of female genital mutilation (FGM); the prevalence of FGM among*

believe that it's a way of initiating girls into adulthood and that it encourages faithfulness in marriage.¹⁷¹ Due to the fear of their daughters being considered as a social misfit and therefore not getting husbands, parents often encourage (or compel) their daughters to undergo the practice¹⁷². As at 2008, 27% of the women in Kenya had undergone the vice, with statistics ranging from 97.5% in North Eastern to 0.8% in Western province¹⁷³.

Percentage of Women Circumcised By Province

Province	Percentage of Circumcised Women
Nairobi	13.8
Central	26.5
Coast	10.0
Eastern	35.8
Nyanza	33.8
Rift Valley	32.1
Western	0.8
North Eastern	97.5

Table 5.2.1 Adapted From Kenya Demographic Health Survey 2008/2009

Percentage of circumcised Women by age

specific ethnic groups; state protection available to victims (2005 - October 2007) available at: <http://www.refworld.org/docid/474e8954c.html> [accessed 15 July 2013]

¹⁷¹ See Kenya National Bureau of Statistics(2010) Kenya Demographic Health Survey accessed from http://www.unfpa.org/sowmy/resources/docs/library/R313_KNBS_2010_Kenya_DHS_2009_final_report.pdf on 15/07/2013 at 9.00 am pp64-68

¹⁷² Ibid

¹⁷³ Ibid See figure 5.2.1

Age(In Years)	Percentage of circumcised women
15-19	14.6
20-24	21.1
25-29	25.3
30-34	30
35-39	35.1
40-44	39.8
45-49	48.8
Over 50	Data unavailable

Table 5.2.2 Source: The Kenya Demographic Health Survey:2008/2009¹⁷⁴

The above tables indicate the prevalence of the vice amid the numerous legal interventions. Since the percentage of those circumcised reduces with the reduction in age, it can be argued that FGM is reducing, though at a slow rate. The Ministry of Health in 1999 launched the National Plan of Action for the Elimination of FGM (NPAF) which at the time was recorded at 38%.¹⁷⁵ A key factor that has made tackling the vice quite difficult is that though community cultural gatekeepers such

¹⁷⁴ Ibid

¹⁷⁵ See Immigration and Refugee Board of Canada(2007) *Kenya: The practice of female genital mutilation (FGM); the prevalence of FGM among specific ethnic groups; state protection available to victims (2005 - October 2007)* available at: <http://www.refworld.org/docid/474e8954c.html> [accessed 15 July 2013]

elders still attach a lot of significance to the practice¹⁷⁶, government led approaches, such as NPAF, have excluded them. To the elders, eradicating FGM amounts to an erosion of their culture and rite of passage for the girls.¹⁷⁷ This reluctance by stakeholders to embrace a more culturally responsive approach and engage elders can be addressed through An Na'im concept of civic reasoning¹⁷⁸ which involves two culturally different parties engaging each other in dialogue and coming up with a common position which can meet each party's expectations¹⁷⁹. Civic reasoning involve compromises that should however not negate human rights principles, because as he rightly argues, people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions¹⁸⁰. Borrowing from An Naim's framework, we can develop a means of tackling FGM that would bring all stakeholders (including elders) into a cross-cultural dialogue¹⁸¹ with the view of coming up with a culturally sensitive means of tackling the vice. Such an approach has also been advocated by Donnelly who argues that the implementation of human rights project must take into account local cultures and the contribution that they make to human dignity and must be mediated by judgement about particular local circumstances¹⁸², "The success of the human rights project lies in its cultural responsiveness.

¹⁷⁶ See Kenya National Bureau of Statistics supra note 196. See also UNFPA(2011)UNFPA-UNICEF joint Program on Female Genital Mutilation:Acceleration Change Accessed from http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Annual_report_on_FGM-C_2011_low_res.pdf on 15/07/2013 at 8.25 am

¹⁷⁷ Ibid

¹⁷⁸ An Naim A.A(2010) The Compatibility Dialectic:Mediating the Legitimate Coexistence of Islamic Law and State Law.*Modern Law Review*,73(1) pp1-29

¹⁷⁹ Ibid

¹⁸⁰ Ibid at 20

¹⁸¹ See An Naim supra note 115

¹⁸² See Donnelly cited in Freeman supra note 32 at 109

In Kenya, The Catholic church, UNFPA, and local NGO have been trying to popularize Alternative Rite of Passage (ARP), a culturally responsive way of tackling FGM¹⁸³. FGM is mostly carried out around the time of puberty, and is perceived to usher the girl into ‘adulthood’. The ARP approach recognizes these ‘justifications’ and tries to establish other ways of ushering girls into ‘adulthood’ without going through FGM. The girls who have reached puberty are taken to church facilities or asked to report to a community facility for a specified period of time during which they would be given lessons on adolescence, HIV, sexuality, teenage pregnancy and career choices. After the training the girls are given certificate in the presence of family members and the community to indicate that they have obtained enough lessons on ‘adulthood’. Because it retains the perceived ‘logic’ behind FGM while in essence eradicating it, the approach has been deemed to be relatively more successful compared to the government led legal approach which focuses on prosecuting perpetrators. Areas where ARP has been tried such as Nyanza, Eastern and Rift Valley record a relatively lower levels of FGM compared to North Eastern Province, which due to religious reasons, has remained outside the scope of most ARP initiatives¹⁸⁴. This is because ARP programmes have often been spearheaded or reinforced by the church which is more powerful in predominantly Christian areas such as Rift Valley and Nyanza while weak or altogether non-existent in North Eastern Province, a predominantly Muslim area. Moreover, the ARP approaches used, such as teaching girls on sexuality are considered ‘unislamic’ and are often

¹⁸³ See Oloo H.,WanjiruM.and Jones M.K.(N.D)Female Genital Mutilation practices in Kenya:The Role of Alternative Rights of Passage Accessed from http://www.feedtheminds.org/downloads/FGM%20Report_March2011.pdf on 14/07/2013 at 3.30pm
see alsoCatholic Review(March 13,2009)In one Kenyan diocese, an alternative rite of passage for girls retrieved from : <http://catholicreview.org/article/life/children/in-one-kenyan-diocese-an-alternative-rite-of-passage-for-girls#sthash.5mlbC3ZQ.dpuf> on 13/07/2013 at 9.10 am

¹⁸⁴ Ibid see also Kenya National Bureau of Statistics Supra note 176

rejected¹⁸⁵. There is thus a need for cross cultural dialogue, between Muslim religious leaders, local NGOs and government to examine the possibility of establishing ARPs that are consistent with Islam. ARP is however not a call for the abandonment of the government led ‘legal approach’ rather this paper advocates for an integrated and comprehensive approach that involves both.

¹⁸⁵ See UNFPA and UNICEF(2011) Unfpa-Unicef joint programme on female genital mutilation/cutting:accelerating change Accessed from http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Annual_report_on_FGM-C_2011_low_res.pdf on 15/07/2013 at 8.00 am

CHAPTER SIX

6.0 CONCLUSION

This study has tried to examine how dominant human rights approaches can be integrated with culture as a means of hastening the realization of human rights principles. The study has further delved into discussions on who a child is, arriving at the conclusion that the strict dichotomy between childhood and adulthood is unnecessary and that children should be progressively granted rights based on mental competence. With a focus on livelihood, education and the plight of the girl child, it has demonstrated how change agents in Kenya are engaging with local practices to promote the well-being of vulnerable children. It has explored how practices like *harambee* and kinship ties can be strengthened through a co-ordinated community action and government intervention to promote the realization of children's right to education. Due to high rates of HIV AIDs, there has been an upsurge in the number of HIV orphans and child headed households therefore outstretching the available institutional care programs. The durable solution as proposed in this paper is to empower communities to take charge of children within their jurisdictions. This will not only ensure that children access their rights to education, livelihood and culture but will also promote the community's right to development. The recognition of education and livelihood by the Kenyan constitution has provided the necessary legal framework for this initiative.

Finally the study has opened new potential research areas, such as the possibility of anchoring an integrated approach in legal statutes instead of the current system where it is basically the domain of NGOs and scholars as well as the possibility to

engage constructively with Islamic law scholars and clerics to promote the effectiveness of ARP as a means of fighting FGM among Islamic communities.

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APPENDICES .

1.1 Graduates of the Alternative Rites of Passage



Source UNFPA Kenya.

1.2 Graduates of ARP pose with their Certificates



Source:UNFPA

1.3 Map of Kenya



1.4. Communities that carry out FGM in Kenya

1. Embu
2. Kalenjin(Made up of 8 sub tribes)
3. Kamba
4. Kikuyu
5. Kisii
6. Maasai
7. Meru
8. Mijikenda(Made up of 9 sub tribes)
9. Somali
10. Taita-Taveta
11. Pokot
12. Samburu
13. Kuria
14. Rendille
15. Borana
16. Gabra
17. Njemps
18. Orma

19. Mbeere

20. Kamba

21. Turkana

Source: Assorted Sources