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The issue of child vulnerability is a concern of many postcolonial African governments. The deplorable conditions under which orphans and other vulnerable children live compounds general family poverty in Sub-Saharan Africa. Governments and international bodies have passed laws to improve the situation of children. However, this paper will demonstrate, the status of children in Sub-Saharan Africa has continued to deteriorate, thus putting into question the effectiveness of these legislations. 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 an introduction and five sections. Section one 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 section focuses on children's social-economic rights and the extent of their attainment in Kenya. Section two engages with theoretical discussions about the nature of human rights in general and examines various human rights approaches. It shall explore the philosophical and moral justifications for children rights. Using examples from different jurisdictions, it will demonstrate the differences and contradictions in the conception of childhood. Then the nexus between cultures and human rights in general as well as the history and nature of the CRC is discussed. Section four 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). This part also explores how culturally sensitive approaches to development such as community led care facilities, *harambee* projects, and kinship foster care for orphans and vulnerable children could be used to attain a

better life for children. The conclusion summarises the main thematic areas of discussion and highlights future areas of research.

The overall objective of the study is to examine how African culture can be used to achieve the goals of CRC. The specific research objectives were: 1) To investigate whether and to what extent African cultural values are (in)consistent with the CRC; 2) To explore how the changing cultural values alter or reinforce any existing patterns of oppression against children; 3) 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; 1) Is there a relationship between African cultural values and CRC; 2) Do the changes in African cultural values alter or reinforce any existing patterns of oppression against children; 3) Can the African cultural values, national legislation and CRC be used to design an integrated approach in handling children's rights in Kenya?

Methodology and Theoretical Framework

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

The interest theory of human rights provides this study with 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 health and education because of the significance of these requirements in facilitating their development.

Summary of the Problem

Whereas many writers have examined the various strategies of improving the situation of children in Africa, little has been done to determine how African culture can be utilized to realize these rights. Much of the literature tends to portray African culture as part of the problem and not solution.[1] This misconception of culture as being retrogressive has resulted into top down programs that are not only ineffective but also culturally and financially unsustainable. Emphasis has thus been put on state-controlled systems and legal approaches that focus on the enactment and implementation of domestic and international laws and policies relating to child welfare.[2] However, 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 of the role of culture in the process. Even scholars like Alberto Minujin, Enrique Delamonica, Edward Gonzalez, and Alejandra Davidziuk, who advocate for a more comprehensive approach, have failed to highlight the important role of culture towards the achievement of children's rights.[3] Criticizing the Poverty Reduction Strategy Paper (PRSP), which is one of the main policy approaches advanced by the UN Committee on the Status of the Child, they argue that PRSP ignores the underlying needs of poor families and their children.[4] 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, James Jarso argues that the deplorable situation of children in Kenya is due to the failure of the government to implement national and international legislations and conventions.[5] However, Jarso fails to acknowledge the resource limitation that makes the legislative approach ineffective. Moreover, the overly western orientation of some conventions makes them quite difficult to implement without cultural

considerations.[6] 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 children.[7]

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 that underpin the day to day life of African children. Though important, 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 on a 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.

The Challenges Facing Children in Kenya

According to UNICEF, by 2010, 35 percent of all urban children in Kenyan slums were undernourished, with 2.2 million adolescents found living with AIDS.[8] The high level of HIV is mainly caused by deprivation which compels teenagers especially girls to drop out of school and engage in prostitution.[9] Other persistent challenges include Female Genital Mutilation (FGM), which is practiced by thirty-eight of the forty-two Kenyan ethnic communities, and child labor.[10] Estimates from UNICEF indicate that between 1999 and 2003, 25 percent of Kenyan children were involved in child labor.[11] This is despite the country ratifying numerous international conventions and enacting The Children's Act, 2001.[12] Key factors fuelling child labor are child poverty and the increasing demand for

cheap labor.[13] The table below highlights child labor prevalence in Kenya. It is estimated that in total, 926,541 provide labor in various sectors as reflected in the table below.

Sector	Number of Children Involved in labor	Percentage (of the total children involved in child labor)
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 2.1.1 Distribution of child laborers in Kenya by sector

Source: Republic of Kenya, 2003.[14]

Though the law stipulates harsh penalties for those who employ children, the above table shows that child labor is indeed prevalent in Kenya. Scholars have criticised the law as being unable to address the underlying factors that compel children to drop out of school into the labor market.[15] 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 labor market and compels children in child-headed families to work for their survival.[16]

Whereas remarkable steps have been taken in the education sector, resulting into an increase in enrolment in primary schools, the challenge of retention still remains.[17] Although an impressive 83 percent of all school going age children enrol in schools every year,[18] a significant number drop out in the course of the eight year primary schooling period, with UNICEF putting the figure at three out of every ten children.[19] This is despite the fact that the

Children's Act, the UN Convention on the Rights of the Child and the African Charter on

The Rights and Welfare of the Child guarantee basic education to children. Key factors

associated with the high dropout rate include teenage pregnancy and child poverty.[20] The

transition rate from primary to secondary school is also low, with the World Bank noting that

only 24 percent of those who finish primary school proceed to secondary school.[21] The low

level of transition can be attributed to the high fees for secondary school (in contrast to free

education in primary schools). Furthermore, even when available, logistical challenges such

as long distances to school, and the cost of other education requirements still keep children

away.[22]

According to African Child Policy Forum (ACPF), family poverty, which relates

closely to child poverty, currently stands at 45 percent in Kenya. It is manifested through

malnutrition and general poor healthcare that results in high infant mortality rate, which is

estimated to be 92 per 1000 births.[23] Poverty thus violates a child's right life, dignified

treatment and livelihood under the UN Convention on the rights of the Child, the African

Charter on the Rights and Welfare of the Child, and the Kenyan Constitution.[24]

The above challenges are so intertwined and self-reinforcing that a purely legal

approach may not be 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 (2001), and

the Prohibition of FGM Act (2011) have not done much to radically change the situation of

children in Kenya. The UN Convention on the Rights of the Child, which is the main

universal authority on child rights, does not provide any opportunity for alternative

mechanisms of ameliorating these conditions, 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. *Rethinking Children's Rights: A Review of Various Contestations*

The definition of human rights is highly contested. On the 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 legitimacy.[25] Supporters of this view, such as Talbott, note that rights are requirements for citizens to develop and exercise their autonomy. This conception is erroneous, as 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 constitution.[26] Though all constitutional rights are human rights, not all human rights are constitutional rights.[27] The "statist" conception of rights advanced by Talbott has also attracted feminist critics. Feminists argue that because the dominant 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 level.[28] Child liberationists, concur arguing that children essentially face the same problems as women[29] with the only difference being that for women, the oppressors are men while for children, it is parents. This criticism, whereas valid in relation to women's right, is invalid with regard to the children, because it casts aspersion on the whole institution of the family, which is considered as one of the rights of a child and is the foundation on which the UN Convention on the Rights of the Child is based. Moreover, children who have escaped from the private sphere into the public one, such as child laborers, child soldiers, or street children are generally considered as being more oppressed and exploited.[30] Leif Wenar 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 it.[31] This view is criticised by Nickel who argues that a call for human rights doe not

necessarily translate into a call for a particular entity to grant them; rather it is a call for the recognition of this right.[32] His 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 does not make them any less justifiable.[33] The most problematic conception of rights is perhaps that advanced by Donnelly. According to him, human rights are rights that individuals have because they are human beings.[34] However, an examination of the 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 not usually considered a rights violation. To navigate through the complex definitional barrier of human rights, this paper takes a more philosophical approach, by focusing on the key principles that underpin human rights. These are survival, dignity, equality, and freedom.[35] Human rights are the necessities that human beings are naturally entitled to so as to live a life of dignity, freedom, and equality.

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. The first area of contestation is the overlap between the definition of a child and a youth. The UN Convention on the Rights of the Child considers a child to be anyone younger than eighteen years old.[36] On the other hand, UNESCO defines a youth as anyone between the age of fifteen and eighteen;[37] an individual who is between the ages of fifteen and eighteen years old falls into both categories. This overlap implies that youth empowerment through employment as advocated by various NGO's and governments could potentially be a violation of Article 32 of the UN Convention on the Rights of the Child since it encompasses youth employment.

The challenge of defining a child is not only a problem for 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…"[38]

It is unclear whether this convention envisaged childhood to end at fifteen years old or whether it only has special protection for those under fifteen. The Special Court for Sierra Leone (SCSL) endorsed fifteen as the age of criminal responsibility so as to effectively handle child soldiers,[39] 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 victims.[40] Though this age standard remains on its statutes, no child actually appeared before SCSL due to this criticism.[41] The contention in relation to the age of criminal responsibility is perhaps more clear in domestic jurisdiction where countries have low ages for criminal responsibility, with England and Wales setting the bar at ten years old.[42] Kenya has the age of criminal responsibility at eight years old.[43]

Another area of contestation is participation in the democratic process. Austria, Brazil, and Cuba set the voting age at sixteen, while Korea and Indonesia grant the right to vote to seventeen year olds.[44] Interestingly Britain which denies those under eighteen the right to vote, allows children over thirteen to work, and serve in the military at sixteen.[45] One thing that comes out in the discourse on childhood is the level of contradiction. For instance, it is absurd to assume that individuals who are under eighteen are developed enough for military service but not competent to participate in the voting process. Furthermore, those who dismiss eighteen years old 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 school of thought, notes 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."[46]

It is impossible to arrive at a universal limit for 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, at
which time children are considered adults and are therefore given adult responsibilities,
including property ownership.[47] 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. Boys, upon attaining puberty, are
given the roles of protecting pastoralist communities against cattle rustlers and other forms of
insecurity.[48]

The key challenge in defining who is a child lies in the dichotomy between childhood
and adulthood. Generally, adulthood is associated with competence while childhood is
associated with "childishness" and mental incompetence.[49] Freeman, one of the sharpest
critiques of this dichotomy, proposes progressive realization of children rights, arguing that
children have rights because they are both "beings" and are "becoming."[50] He lists
"becoming rights" as the right to survival, development, protection, health, and education. He
considers "being rights" as freedom of expression, association, and assembly, and the
children's right to express themselves fully in matters concerning themselves.[51] Whereas his
conception of the "becoming rights" is generally acceptable, the "being rights," are
contestable. The enjoyment of these "being rights" should be subject to the supervision and
approval of the guardian. For instance, if left completely free, a child could perhaps choose to
marry 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, but not to elect a member of parliament. Cantwell highlights the obvious problem - that some children possess the same level of thinking as adults and should therefore have some "adult rights."[52] He proposes a structure which would differentiate between infants, children, and young people. Though he does not state when being an infant stops or childhood starts or ends, he falls short of resenting that young people who are sixteen or seventeen years of age are still referred to as children, against their will and despite their increased mental capacities.[53]

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.

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, and the third group notes that children have rights, which are not human rights.

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 rights.[54] 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."[55] Firestone criticises this dichotomy and argues that children should be given all

the rights possessed by adults.[56] 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 up.[57] For her, 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 themselves.[58] According to Archard, the argument that children are incompetent and therefore not deserving of rights is faulty because even adults make mistakes but still have rights,[59] 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."[60] 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.[61] As 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. This argument is sharply criticised by Dworkin, who notes that freedom of choice includes the freedom to choose what is wrong.[62] 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 large.[63] As the UN Convention on the Rights of the Child and numerous scholars note, 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."[64] 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 does not stipulate that it is to be given 'the

primary consideration,' therefore giving room for other opinions. Whereas it is difficult to determine whether the use of ''a'' instead of ''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 them.[65] 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.[66] 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, and should be progressively allowed to exercise these rights.[67] Cohen, recognizing that children may not have such capacity, champions for children's advisors to help them make such decisions.[68] However, Cohen's position is equally untenable because it simply replaces one adult with another but does not 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 mimic their guardian.[69] 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.[70] They argue that it is meaningless to outlaw discrimination based on race, religion, or sex but allow it on the basis of age.[71] This assertion, which amounts to an equal treatment of adults and children, may 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 child 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

rights.[72] 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 level.[73] If it was possible for all children to obtain them, then rights would not be necessary, but the impracticality of this creates the need for rights.[74] 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 level.[75] 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.[76]

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 rights to promote a shift in focus from the current discussion on applicability to implementation. Whereas scholars perceive 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 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.

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 it.[77] The will theory perceives 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 decisions.[78] 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. Obviously basic education is 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 because he has an interest in it.[79] 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 is a way of improving their future. 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 situations.[80] This criticism is not tenable because the identification of interests is not solely the responsibility of the child.[81] 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 helps justify 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.

The UN Convention on the Rights of the Child (CRC)

The first attempt at a framework to promote the rights of children happened in 1959, when the UN General assembly adopted the Declaration on the Rights of the Child.[82] 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

mechanism.[83] The continued deterioration of the status of children led the UN to declare the International Year of the child in 1979, a period which brought to the forefront widespread child abuses, prompting Poland to press for enactment of an international convention on the rights of the child.[84]

The CRC came into force in 1989, after a long negotiation and drafting period involving NGOs, governments, and the UN. The CRC contains forty-five articles dealing with various aspects of children rights and the implementing agencies. In the year 2000, two optional protocols to the convention were adopted; one that increased the recruitment age of children into the armed forces from fifteen to eighteen and the other that focused on the eradication of sexual exploitation of children.[85] The convention comprehensively addresses the key challenges to child welfare ranging from health, education, and labor.[86]

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.[87] Whereas culture is inherently dynamic and highly susceptible to globalization and urbanization,[88] there are certain aspects of African culture which, even though constantly being redefined,[89] have remained constant. 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 (as a participant in the cultural traditions and customs, and as a 'modern' individual)[90] based on convenience and societal expectations at a 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.[91] 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 in relation to fundamental human rights through

"enlightened" interpretation of human rights.[92] 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 culture.[93] He insists that human rights should be based on the least common similarities among the various cultures.[94] Dismissing this assertion, Howard 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 even if the concept is alien to their culture.[95] Howard's nostalgic assertion that modernization eroded cultures and all its benefits is contentious because, as Kwasi Wiredu asserts and this paper demonstrates, most African societies have retained cultural patterns which can be tapped into to realize the goals of human rights.[96] 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.[97]

There are certain cultural similarities among Kenya's forty-two different ethnic communities.[98] These include the importance of kinship ties, communal fellowship, the assumption that all community members are fundamentally interdependent, socio-economic reciprocity, and community obligations towards children and the disadvantaged, including orphans.[99]

Right to Education, livelihood and Social Security

Although the rights to education and livelihood are fundamental to the well-being of children, their realization, especially to orphans and vulnerable children, remains a significant challenge for the Kenyan government.[100] The government may oversee free primary education, but there are still costs associated with stationery, uniforms, food, and health services that are beyond the reach of poor families.[101] 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 school feeding program, an initiative that has also been tried by WFP and World Bank in Brazil and India.[102] The World Bank and WFP approach (which covers only a few districts in Kenya), involves delivering food to schools as social safety nets for vulnerable children with the aim of attracting and retaining pupils.[103] 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 government to fully embrace this approach.[104] A more sustainable bottom up community driven approach is therefore necessary to cater to more regions. This involves empowering community members to boost their agricultural output, part of which is to be delivered to the school.[105] 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 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 the Mayenya Upendo support group, which cultivates crops in community land[106] and gives part of the proceeds to two local schools in the area as part of the school feeding program.[107] Their effort has seen the members of the community join the program and currently each family gives two kilograms of maize to the schools per month.[108] This approach would fit into the capability approach to human development and human rights, as advocated for by Clair and Amatya Sen who argue that human rights involves empowering people to realize their life goals and capabilities.[109] 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. Several international instruments have emphasised the role of the family in a child's development process.[110] However due to the death of parents, conflicts, or extreme poverty that compel children to run away from home, children can end up outside family protection.[111] 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 income.[112] In a study of families in Garissa and Nairobi, Munene and Ruto note that such children often 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.[113] Such children are denied the right to education and end up marrying and establishing similar vulnerable families, thus worsening the cycle.[114] The Kenyan government's response, influenced by global children rights movement, has been ineffective and piecemeal.[115] A program does place such children in children homes, but there are few and ill equipped. In 2007, there were approximately 1,700,000 vulnerable and street children in Kenya[116] against a total of 64 registered children homes, most of which were run by NGOs.[117] 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 with foster families especially relatives and supporting them through cash transfers,[118] with periodic state officer visits to monitor progress. Article 43(a) of the Kenyan Constitution provides the legal basis for such a program, as it mandates the state to provide social security and protection to vulnerable families and children.[119] Moreover, Articles 9,10, and 11 of the UN Covenant on Socio-Economic Rights, of which Kenya is a signatory, provides a broader foundation for such a program since the Kenyan constitution allows any ratified international instrument to automatically become part of the laws of Kenya.[120]

Culturally, if a child loses one parent, especially the breadwinner (who is often the father), the community has the obligation to help the mother support the children.[121] 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 deceased.[122] 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.[123] Indeed, statistics from UNICEF currently indicate that about 50 percent of orphans in Kenya, and 45 percent in Uganda, live with their grandparents.[124] Grandparents 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 help orphans.[125] Placing children in a kinship foster care 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 adopters.[126] Within the African setting, orphans retain their parent's names and as such, would easily claim inheritance through ancestry.[127] 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.[128]

HIV/ AIDS is decimating whole families and creating a new group of child-headed households, especially in urban slums.[129] Upon the death of both parents, the eldest child is often compelled to take charge of the family and provide livelihood. They do not fit within the classical legal categorization of family and hence lack the necessary identification documents, causing child headed households to often miss out on the few government programmes for vulnerable families.[130] The marginalization of this group of children means

there is no government policy to deal with child headed families.[131] Hence, their welfare is pegged on NGOs, and well-wishers who often place them in institutional care.[132] 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 children.[133] 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 which such children are being relieved.[134] The solution would thus be to embrace a more kinship-oriented approach. This may involve placing the children in foster homes and supporting the families[135] through fee waiver in schools, direct cash transfer, or other material support.[136] 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.[137] Since cultural support networks are held together by kinship ties, any external intervention should only seek to strengthen these networks.[138] 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 family.[139] Whereas this has been dismissed as potentially abusive and similar to domestic child labor,[140] such criticisms ignore the socio-cultural factors that inform these 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 labor but as part of the child's responsibility to the family.[141] Moreover, benefits such as education far outweigh the little work that the child performs after school.[142] This is not to deny the possibility of child abuse, but authorities can further streamline this framework to guard against it, 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, as a woman, a mother, and a child.[143] As a woman, she faces general socio-economic gender inequalities in all sectors of life, as a mother she experiences the challenges associated with 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 her guardian.[144] These challenges, coupled with demotivation and ridicule by fellow students, compel teenage mothers to drop out of school.[145] Having realised this, the government launched the return to school policy that would allow these girls free transfer to new schools. This has not worked, however, because the schools to which they are transferred are usually far away from home.[146] Foster care in homes near the new schools could be an alternative. However, some form of financial 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 system.[147] 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 adults.[148]

Some writers have proposed community based care facilities as the solution to the increasing number of HIV orphans in Kenya.[149] 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 orphans.[150] Through the help of the community and well-wishers, Monica currently houses 100 orphans. Monica's approach mirrors the practice of queen mothers in Ghana. The queen mother, often the wife of the chief, would have a number of orphans in her custody.[151] 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 grievances.[152] What is 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 that are primarily bureaucratic institution run by NGOs or government devoured of any community participation.[153] Community care facilities are developed, owned, and run by the local people through women groups, youth groups, and or elders.[154] Such facilities are not only more sustainable, but ensure that the people are at the centre of their development. Thanks to 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. This is contrary to the government or NGO run children homes that totally remove the child from the community and disconnect 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.

The spirit of *harambee* can also be used to broaden children's access to education. *Harambeee* is a form of African socialism that means "pulling together."[155] 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 community action was necessary to augment government efforts in fighting disease and illiteracy.[156] Many schools were built through '*harambees.*' Community members would come together and using local materials, construct these facilities. 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 schools.[157] 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 *harambee spirit* is quickly fading off with the expectation that the government would replace community action. Data from UNICEF indicate that Kenya has only 18,000 public primary schools that are mainly concentrated in urban areas, leading to a scarcity in 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.[158] 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.[159] *Harambee* did not just end with the 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 role models of the family, both in terms of their capabilities to motivate other children in the village and 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 families.[160]

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 rights.[161] Such a call has been dismissed by O'Neill, who argues that since there is no direct relationship between the international community and the individual, any allocation of responsibility cannot be justified.[162] To navigate over this unending debate over moral justification is to strengthen the *harambee spirit*, empower 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.[163] This would then complement government and donor efforts in guaranteeing the right to education.

Female Genital Mutilation (FGM)

Statistics indicate that about thirty-eight of the forty-three ethnic communities in Kenya originally practiced FGM, though the rate has been declining gradually.[164] The practice, has been proscribed in most international instruments including the Beijing platform, CEDAW, CRC, the African Charter on the Rights and Welfare of the Child, the African Charter on Human Rights, and the African Protocol on the Rights of Women,[165] all of which Kenya ratified. However, the need for 'political correctness' in Kenya has affected the implementation of these instruments.[166] Leaders are often unwilling to come out strongly against the vice for 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 eighteen.[167] Communities that undertake FGM believe that it is a way of initiating girls into adulthood and that it encourages faithfulness in marriage.[168] Due to the fear of their daughters being considered social misfits and therefore not finding husbands, parents often encourage (or compel) their daughters to undergo the practice.[169] As at 2008, 27 percent of the women in Kenya had undergone it, with statistics ranging from 97.5 percent in North Eastern to 0.8 percent in the Western province.[170]

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

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: 2008/2009[171]

The above tables indicate the prevalence of FGM 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, albeit at a slow rate. In 1999, the Ministry of Health

launched the National Plan of Action for the Elimination of FGM (NPAF), which at the time was recorded at 38 percent.[172] A key factor making FGM eradication difficult is that though the elders the community gatekeepers still attach a lot of significance to the practice,[173] government led approaches, such as NPAF, have excluded them from the discussion. To the elders, eradicating FGM amounts to an erosion of their culture and rite of passage.[174] This reluctance by stakeholders to embrace a more culturally responsive approach and engage elders can be addressed through An Nai'm's concept of civic reasoning,[175] which involves two culturally different parties engaging each other in dialogue and coming up with a common position which can meet each party's expectations.[176] Civic reasoning involve compromises that should however not negate human rights principles, because as he argues, people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions.[177] Borrowing from An Na'im's framework, we can develop a means of tackling FGM that would bring all stakeholders (including elders) into a cross-cultural dialogue.[178] Donnelly advocates such an approach, noting the implementation of a 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 circumstances.[179] The success of the human rights project lies in its cultural responsiveness.

In Kenya, The Catholic Church, UNFPA, and local NGOs have been trying to popularize Alternative Rite of Passage (ARP), a culturally responsive way of tackling FGM.[180] 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

certificates in the presence of family members and the community to indicate that they have

obtained adulthood lessons. This approach retains the perceived ''logic'' behind FGM while

in essence eradicating it and has been deemed relatively more successful compared to the

government led legal approach that focuses on prosecuting perpetrators. Areas where ARP

has been tried such as Nyanza, Eastern and Rift Valley, record relatively lower levels of

FGM compared to North Eastern Province, which due to religious reasons, has remained

outside the scope of most ARP initiatives.[181] 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

Muslim-dominated area. Moreover, the ARP approaches used, such as teaching girls about

sexuality are considered "unislamic" and are often rejected.[182] 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 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.

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 is a child, 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 young females, 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.

ENDNOTES

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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.

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[98] See 2009 Kenya Population Census Results accessed from http://www.knbs.or.ke/docs/PresentationbyMinisterforPlanningrevised.pdf on 14/07/2013.

[99] These features of African culture are extensively discussed by Deng, Silk, & Middleton. See also R. Howard, "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* (Brookings Institutions,1990) 160-163.

[100] See Ogola, 7.

[101] Ibid., 15.

[102] See World Bank, "Rethinking School Feeding: Social Safety Nets, Child Development, and the Education Sector (2009)," 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.

[103] Ibid.

[104] See World Bank, "Rethinking School Feeding: Social Safety Nets, Child Development, and the Education Sector" (2008) accessed from http://documents.wfp.org/stellent/groups/public/documents/reports/wfp219433.pdf on 14/07/2013.

[105] D. Datta, "Protecting Rights of Orphan and Vulnerable Children: No Substitute for Community Action in Nyanza, Kenya," *Community Development Journal*, (2013) *8*(1), 105-118.

[106] 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.

[107] Ibid., 112-114.

[108] Ibid.

[109] See Clair. See also A. Sen, *Development as Freedom* (Knopf,1999)

[110] See UDHR, UCSR, and CRC. See also African Charter on Child Rights and Welfare.

[111] See P.L. Engle et al., "The Situation for Children without Parental Care and Strategies for Policy Change," *Monographs of The Society For Research In Child Development* (2011) 76(4), 190-222. doi:10.1111/j.1540-5834.2011.00633.x.

[112] See Munene and Ruto,136-140.

[113] Ibid., 137.

[114] Ibid.

[115] Ibid.

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

[117] Human Rights Watch, *Kenya: In the Shadow of Death : HIV/AIDS and Children's Rights in Kenya* (New York: Human Rights Watch, 2001) 24.

[118] See Engle et al., 206.

[119] Government of Kenya, The Constitution of Kenya (Government Printers, 2010).

[120] Ibid., Article 2(6).

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

[122] See Engle et al., 197.

[123] Ibid.

[124] UNICEF, The State of the World's Children (2007). Accessed from http://www.unicef.org/sowc07/docs/sowc07.pdf on 13/07/2013.

[125] See Engle et al., 201.

[126] Ibid.

[127] See Umbima, 174.

[128] Ibid.

[129] See Engle et al., 199.

[130] Ibid.

[131] Ibid.

[132] Umbima, 171.

[133] See Engle et al., 111.

[134] See Archard, 72.

[135] See Datta, 109.

[136] Ibid .

[137] Ibid.

[138] Umbima, 174.

[139] W. Ssemmanda, "Working with Customs: Promoting Children's Rights to Livelihood by Making de facto Guardians Responsible," in A. Hellum et al., *Human Rights, Plural Legalities and Gendered Realities: Paths are made by Walking* (SEARCWL,2007), 62-63.

[140] See Munene and Ruto, 137-139.

[141] See Ssemanda, 69.

[142] Ibid.

[143] See Munene and Ruto, 141-142.

[144] Ibid.

[145] O. Kwamboka, "Kenya: Teenage Mothers Denied Education," *Inter Press Service News Agency* (May 23, 2008). Accessed from http://www.apastyle.org/learn/faqs/cite-newspaper.aspx on 24/04/2013.

[146] Ibid.

[147] See Sssemanda, 64.

[148] Ibid.

[149] Engle et al., 198.

[150] Ibid.

[151] Ibid., 200.

[152] Ibid.

[153] Ibid., 192.

[154] See Datta, 110-112.

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[157] Ibid., 48, 64.

[158] 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.

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