

Legal and Policy Considerations in the Realisation of Right to Free and Compulsory Primary Education in Kenya

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Abstract

Internationally considerations have been given to the need for nations to ensure that there is development in education. Right to education should be promoted and enhanced through the employment of laws and policies. Therefore, the United Nations Declaration on Human Rights (UNDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) are international best practices that can be invoked to compel the realisation of right to free and compulsory primary education. To realise this from a domestic perspective will require the government to consistently fashion out policies and laws for the realisation of free and compulsory primary education. Kenya is one of such countries that have translated these international best practices on the right to free and compulsory primary education through its domestic laws. In particular, the Constitution of Kenya 2010, Basic Education Act and Children's Act 2001 have set the pace for the realisation of the right. This article seeks assess the policy and legal considerations as motivating factors for supporting the realisation of right to free and compulsory legal education in Kenya.

Keywords: Constitution of Kenya, Harambees, Free primary education, Disbursement of grant

1. Introduction

The idea of human rights is as old as humans. However, it did not gain prominence until after the Second World War leading to the emergence of the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR eventually gave birth to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The two treaties and the UDHR constitute the International Bill of rights. While the ICCPR and the ICESCR recognize different classes of rights, there is however one which is recognized by both treaties. This right is right to education. This development underscores the importance of this right. This study therefore examines the actualization of the right to free and compulsory primary education in Kenya.

This study is divided into six parts. The first part introduces the study. The second part traces various attempts in actualizing the right to free and compulsory primary education in Kenya and thus provides the context for the understanding of the right. The third part discusses the achievement and challenges in respect of free and compulsory primary education in Kenya. The fourth part examines the legal framework on the right to free and compulsory primary education in Kenya. Since Kenya is a party to the Convention on the Rights of the Child and since free and compulsory primary education is meant for children, the concluding observation of the Committee on the Convention of the Rights of the Child in respect of Kenya's effort is examined in the fifth part. The sixth part is the concluding part of the study.

2. Historical Background

2.1. Period between 1850 and Early 1900

Education in Kenya for half a century (from the period around 1850 to early 1900) was racially segregated into African, European and Asian schools. In 1908, an educator advisor Professor Nelson Frazer was appointed to British East Africa. He proposed that separate educational systems should be maintained for Europeans, Asians, and Africans. He urged the Government to take a greater responsibility for the education of all races in Kenya by establishing a Department of Education. By 1924, there appeared to be three distinct types of schools for Africans. In the first category, were the schools run by the government. According to Short; '...In these schools, education is definitely coloured by the call of the European to the African to take his place in the life of the community as a whole.'¹ In the second category were the Christian mission schools which aimed at replacing traditional African customs with Christian, Western ideas.² In the final category were the schools where some attempt was made to preserve the African way of life,³ for example the Massai School at Narok and the Lubwa school at Kericho. These segregated systems have subsequently been abolished following independence due to the belief that all children should study together to foster national unity.

¹ Short, E., (1971), *Education in a Changing World*, London: Pitman Publishing, p. 4.

² Abreu, Elsa, (1982), *The Role of Self-Help in the Development of Education in Kenya 1900-1973*, Nairobi: Kenya Literature Bureau, p. 5.

³ Ibid

2.2 Education under the Missionaries

The foundation for modern education in Kenya was laid by missionaries who introduced education as a means to spread Christianity, teaching practical subjects, such as carpentry and gardening, which were mainly useful around the missions.¹ Education was aimed at children and adolescents,² and many parents opposed it because it took away children from their tribal way of life. The parents did not see any immediate benefits to be gained by sending their children to school when they could be herding cattle or goats or helping in the farm. The period of missionary venture into Kenya coincided with political partition of Africa by the European powers. Thus, as the partition progressed the colonial powers came to rely more on the missionaries to extend their various brands of 'civilization'. It is improbable that the missionaries could have expanded their educational system without Government financial aid. On its part the administration could not have hoped to staff, manage and supervise these systems without missionary administrative help. It was a symbiotic relationship. By 1910, thirty-five mission schools had been founded and government continued to support the role of missions as another arm of European administrative influence. The British Government was generally favorably disposed towards the activities of the missions.³ Nevertheless, as the Colonial authorities in Kenya and Britain began to take interest in education and the missionaries began to find it increasingly difficult to finance the school systems they had established, a pattern of cooperation developed in which missions came to depend largely on Government financial support while the State relied on the missionaries for supervision, management and partial financing of the schools. Within the framework of racial segregation and European domination, the missions enjoyed a virtual monopoly in the field of African education until the 1920s.⁴ Though a meager amount were collected as fees, pupils were not denied access for non-payment.⁵

2.3 Education under the Colonial Authorities

The colonialists tended to regard all non-whites as 'inferior' to them. It was left to the non-whites to better their position in life and education was seen as the basis of it.⁶ These racially motivated moves were influential in justifying the establishment of segregated educational systems for Europeans, Asians and Africans. Differential educational treatments were given to these various classes to prepare them for their racially-determined positions in life. Education for the Africans was directed 'to fit them for services or apprentices'.⁷ In other words, the purpose of schools for Africans was to keep them in perpetual subjugation to the authority of the ruling colonial masters. The colonial government was interested in and catered for the education of European children. Abreu is of the opinion that it was necessary for the government to provide the maximum educational facilities for European children to prepare them for further education in Britain or South Africa.⁸ The Africans' education, the Government considered, was being looked after adequately by the missionaries. In regard to Asians' education, the majority of the Asian communities started schools on religious grounds, which grew due to religious differences. To the Asians, education was seen as a means of preserving their cultural heritage.⁹ The Arabs meanwhile continued to send their children to the Qur'anic schools, although some individuals like Ali bin Salim considered the value of Western education to be higher than Qu'ranic schools for administrative posts pressed the government for Arab and Swahili children.¹⁰ Consequently, a school was opened for Arab children at Mombasa in 1912. Religious instruction was not to be included in the curriculum; as a result very few students went to school.

The Phelps-Stokes Commission of 1920 stressed the need to educate the Africans not only for jobs but to integrate them into the society. By 1922, the government was providing £2,272 (\$3,375) in the form of grants to schools with £1,200 (\$ 1,888) out of it for Europeans alone, the remaining amount for Asian schools; none was directed towards schools for Africans or Arabs.¹¹ Evidently, concern was shown for only European and Asian education during the period. An Education Ordinance set up by a Central Advisory Council on Education came into effect on 11th February, 1931, which provided that fees were to be paid in government schools,¹² and any child owing fees may be refused admission into school until all the fees due up to date had been paid.¹³ Legal

¹ Ibid p.22.

² Ibid p.23

³ Sheffield, James, (1973), *Education in Kenya: An Historical Study*, Columbia: Columbia University Teachers College Press, p. 5.

⁴ Ibid

⁵ Ibid

⁶ Abreu, Elsa, (1982), *The Role of Self-Help in the Development of Education in Kenya 1900-1973*, Nairobi: Kenya Literature Bureau, p.7.

⁷ Ibid, p. 35.

⁸ Ibid, p. 27.

⁹ Castle, E. B., (1966), *Growing up in East Africa*, Nairobi: Oxford University Press, p. 41.

¹⁰ Abreu, supra, p8.

¹¹ Abreu, Elsa, (1982), *The Role of Self-Help in the Development of Education in Kenya 1900-1973*, Nairobi: Kenya Literature Bureau, supra

¹² Section 39(1) Education Ordinance Laws of Kenya 1948.

¹³ Section 39(2) Education Ordinance Laws of Kenya 1948.

proceedings were instituted for the recovery of any fees or other sums due in respect of a pupil at a government school.¹ Despite not being free, education was declared as compulsory and it was the duty of parents who have children of school age to ensure their children attended schools.² However, parents who were unable to pay the fees prescribed for tuition under the ordinance were to apply for exemption from the payment of such fees.³ It is not in order to make education compulsory when it is not free; children from poor backgrounds were certainly not put into consideration.

2.4 Education in the Post Independent Era

Upon attaining political independence in 1963, the Government assumed central responsibility for education at all levels by removing various communal and religious bodies who managed the segregated system. The Kenyatta Government (1963-1978), the first post-independence government in Kenya, declared in the ruling party's manifestos of 1963 and 1969 that the Government was committed to providing seven years of free primary education. In 1971, a presidential declaration abolished tuition fees for the districts with unfavorable geographical conditions, mainly in the North-Eastern Province, and parts of the Rift Valley and Coast provinces.⁴ The education system emphasised national unity, which was encouraged by the removal of racial segregation from the school system. Kenya embarked on an ambitious educational program aimed at universalising access to education.⁵ According to Jomo Kenyatta, the first president of Kenya, the young nation faced three major threats: ignorance, poverty, and disease. The Kenyatta Government touted UPE as a viable weapon for combating these perceived enemies and this commitment was amplified in the reports of various education commissions, notably the Ominde Commission of 1964 and the Gachathi Commission report of 1976, as well as in various national policies.⁶

2.4.1 Earlier Attempts at Free Primary Education

In 1974, President Kenyatta declared that fees were abolished for all primary school children in classes one to four throughout the country and for the entire primary school in 1978.⁷ During this period primary education enrolment which was 892,000 in 1963 increased to 2,881,000 in 1975. Due to the abolishment of school fees by the government, there was an average primary school enrolment growth rate of 10% per annum from 1963-1975.⁸ Between 1978 and 1979, enrolment increased from 2,994,849 to 3,692,649. However, despite the abolishment of tuition fees, there were still a number of costs such as uniforms, building funds, equipment levy and activity fee the pupils were expected to pay.

The Moi Government (1978-1992), continued with the free-tuition primary education policy. This could not be sustained because following the implementation of SAP in the 1980s. The government reneged on the reforms recommendation, and parents and communities were required to contribute to their children's schooling. Cost sharing in education was introduced. Parents continued paying tuition, buying books and desks because the government did not have adequate resources. This definitely resulted in a net decrease in primary school enrolment.⁹

Another change in Kenyan educational system during this period was that in 1984, the President initiated a major reform by decreeing that the country would change from the 7-4-2-3 system of education, between primary and university years, to the 8-4-4 system. The argument was that the former system was too academic, elitist and theoretical, and that the new system would be more practical oriented. Consequently, the new system, which started in January 1985, placed more emphasis on vocational subjects in the final years of primary education and throughout secondary school.¹⁰ Changes in the national policy introduced in the mid-1980s placed more of the cost burden on households.¹¹ This meant that parents had to contribute more towards the education of their children through the cost-sharing programme. Many schools were constructed through "Harambees"¹² (fundraising efforts) organized by the community. In principle, household contributions were supposed to be voluntary, but in practice, children whose parents did not pay were often suspended.¹³ Enrolment rates began to

¹ Section 39(4) Education Ordinance Laws of Kenya 1948.

² Section.25 Education Ordinance Laws of Kenya 1948.

³ Section 26 Education Ordinance Laws of Kenya 1948.

⁴ Abreu, supra p.60.

⁵ Ibid

⁶ Republic of Kenya (1964), *Kenya Education Commission Report (The Ominde Report)*, Nairobi: Government Printer.

⁷ Somerset, Anthony, (2009) 'Universalising Primary Education in Kenya: the Elusive Goal', **45**, (2), *Comparative Education* 233–250 at 233.

⁸ Ibid, at 234.

⁹ Ibid, at 236

¹⁰ Ibid, 237.

¹¹ Vos et al (2004), 'Achieving Universal Primary Education: Can Kenya Afford it?' *Economics Working Papers*. Paper 200447, (University of Connecticut: Digital Commons@U Conn, Economic Working Papers, Department of Economics available at: http://digitalcommons.uconn.edu/econ_wpapers/200447 accessed 13 November 2013.

¹² 'Harambees' (literally "pulling together") the system requires that the parents are to contribute to school construction and maintenance costs.

¹³ Bold et al. (2010) 'Determinants of Educational Achievement in Kenya since the Introduction of FPE', *Department of Economics Oxford*

fall steadily around this time because education costs were a problem for the poor. In sum, at the first attempt of free primary education in Kenya, due to a stagnated economy since the early 1980s, this brought about cost sharing policy which altered free primary education policy in 1989. This policy change resulted in a drop in enrolment by approximately 20% between 1989 and 1995 due to the inability of parents to bear the economic burden of education.¹ The falling enrolment in the ensuing years was used as opportunity to make free primary education a popular issue in the 2002 election. The incoming Kibaki government followed through on its promise to reintroduce Free Primary Education in 2003.

2.4.2 The Second Universal Free Primary Education Initiative (FPE)

Upon winning the December 2002 election, the National Rainbow Coalition (NARC) Government implemented one of its pre-election pledges to provide universal primary education. It declared that as of January 4, 2003, all Kenyan children were entitled to enroll in public primary schools.² Having just only a week between the announcement of the election results and the new school year, the new government went into “crisis mode,” summoning senior officials of the Education and Finance Ministries, to map out a strategy for implementing the plan.³ On the announcement for the FPE in the middle of the 2002 financial year, no plan or budgetary allocation was put in place for its implementation. The new government released \$6.8 m in emergency grants of \$380 per primary school to cover immediate needs like exercise books, pencils and other supplies.⁴ Following the initiation of the FPE, the new Minister for Education, Science and Technology clarified that no child would be required to pay fees or levies to any public primary school and that every child should report to the nearest public primary school for admission. As a result, in many schools, there were more children capacity allowed and due to the limited space and facilities available, many children were turned away. The main rationale for the FPE in Kenya was to eliminate illiteracy and to raise children who in future would participate more effectively in the social, economic and political development of the nation.

2.4.2.1 Process of Planning and Implementation of the FPE in Kenya.

Kenya’s implementation of the FPE programme was called the ‘big bang’ fee abolition programme, because the Kenyan government announced it would stop charging fees for primary school education — just days before the beginning of the 2003 school year, the result was pandemonium because a number of things had to be done very quickly, to allow the immediate implementation of the FPE. The free primary education reform in Kenya was introduced as a result of political euphoria arising from the 2002 general elections whose results brought the National Rainbow Coalition to power, under President Mwai Kibaki. To meet school expenses, the Government adopted a strategy for direct transfer of funds (excluding teachers’ salaries) to individual school accounts.

2.4.2.1.1 Mode of disbursement of the grant

At the national level, in the implementation of free primary education, the Kenyan Ministry of Education established a system in which all 18,000 public primary schools can receive Capitation Grants. The annual amount of 1,020 Kenyan shillings (14 US dollars) per pupil was for educational materials, as well as for the repairing of school facilities and ensuring quality assurance. The total grant amount for each school is determined by the number of pupils enrolled. The Capitation Grants had been based on student enrolment and 1,020 Kenyan shillings (US\$14) were allocated per pupil per year.⁵ Under the free primary education policy, each school was directed to keep two accounts to receive the capitation grants from the Ministry of Education.⁶ These accounts were to be managed by the School Management Committee (SMC). The first account entitled SIMBA (School Instructional Materials Bank Account) covers direct teaching and learning materials, and the second is a General Purpose Account (GPA) to be spent on various costs including wages for support staff, repairs, maintenance, quality assurance, water and electricity.⁷ By means of these two different bank accounts, each school receives grant payments twice a year.⁸ The government is supposed to provide 650 shillings (10 US dollars) for SIMBA and 370 shillings for GPA per pupil per year.⁹

Funds were disbursed to schools through the two accounts managed by the school management committee (SMC). This committee was composed of a teacher from each standard, the head of the school, the deputy head

University Working Paper (Oxford: Oxford University, available at www.iig.ox.ac.uk/ accessed on 13 November 2013.

¹ Sommerset supra.

² Oketch, Moses & Anthony Somerset, (2010), *Free Primary Education and After in Kenya: Enrolment impact, quality effects, and the transition to secondary school* Create Pathways to Access, Research Monograph No. 37 University of Sussex, Sussex, p.1

³ Available at: <http://www.un.org/africarenewal/magazine/january-2010/abolishing-fees-boosts-african-schooling#sthash.vNEMbQPG.dpuf> accessed 25 April 2013.

⁴ Ibid.

⁵ Vos et al (2004), ‘Achieving Universal Primary Education: Can Kenya Afford it?’ *Economics Working Papers*. Paper 200447, (University of Connecticut: Digital Commons@U Conn, Economic Working Papers, Department of Economics available at: http://digitalcommons.uconn.edu/econ_wpapers/2000447 accessed 13 November 2013.

⁶ Sawamura, N. & Sifuna, D. (2008), ‘Universalising Primary Education in Kenya: Is It Beneficial and Sustainable?’ 11. (3) *CICE Hiroshima University, Journal of International Cooperation in Education*, pp.103 -118 at 106.

⁷ Ibid

⁸ Ibid

⁹ Ibid

teacher, the chairman of the SMC, and an elected parent representative. Before releasing the bulk of FPE funds to schools, the Government engaged in rigorous capacity building in April 2003 through educating the primary school head teachers, chairmen, and treasurers of respective SMCs on the *modus operandum* of the funding for the FPE programme.¹ The training was focused on financial management and procurement procedures, and relevant manuals were provided to all schools. The government enhanced the school audit unit by employing additional auditors and, for the first time, required an annual audit of primary school account books. To ensure effective FPE implementation, the government institutionalized the monitoring of funds and other resource use and accounts were displayed for possible scrutiny by stakeholders.²

Along with abolishing school fees, the Government strictly prohibited each school from collecting levies or any money from parents.³ In terms of funding, expenditure on education as a percentage of the total government expenditure rose from 16.5 % in 2000/01 to 20.1 % in 2003/04.⁴ Likewise as a percentage of the GDP, education expenditures rose from 6.1 percent in 2000/01 to 7.1 percent in 2003/04.⁵ This was one of the highest allocations for education in Africa. Education also absorbed between 35-40 percent of the recurrent Government budget of which the primary education sub-sector received 51 percent annually. Of the 79.4 billion shillings allocated to education in 2003/4, the Government had disbursed about 5.6 billion shillings to all Kenyan primary schools by the end of 2003.⁶ By the end of 2004, a total of 16 billion shillings had been released. The government also allocated an additional 300 million shillings for the administration and monitoring of its progress.⁷

2.4.2.1.2 Coping Strategies and Mechanisms

To ensure the effective implementation of the FPE, different strategies and mechanisms were put in place by the Government. Principally, the MoEST issued circulars on guidelines of the FPE implementation mainly to field officers and heads of schools. It also produced manuals on financial management and procurement procedures for use in primary schools. An FPE Task Force was formed and was mandated to identify the immediate and long-term issues on the implementation of the FPE. In the national budget for fiscal year 2005/06, the expenditure for the MoEST for 26.4% of the total budget and much of it was provided by donor agencies.⁸ To allay the fear that the FPE would lower the quality of education in public primary schools, the ministry intensified quality monitoring and standards assessment visits to all schools to ensure that disbursed funds were used prudently to meet the needs of curriculum implementation. A necessary precondition for free primary education to have a positive impact is that central budgets are large enough to fund the influx of new students. According to Bold *et al's* assessment, education spending in Kenya since the introduction of the FPE has certainly been impressive.⁹

3 Achievements and the Challenges of the FPE in Kenya

It has been widely acclaimed that the FPE programme has had positive effects on children and parents in Kenya.¹⁰ The drive to achieve the educational MDG target is a positive indicator of the nation's commitment to its human rights obligations in respect of the right to education in conformity with the adopted conventions.¹¹ In pursuant of that obligation, the current education curriculum in Kenya has been formulated to enhance national unity, social, economic and cultural aspirations of Kenyans.¹² The introduction of FPE has led to a tremendous increase in the enrolment of students in all schools across the country. The abolition of school fees and levies removed one of the major barriers to access to education for children of parents with limited resources and reversed a trend of declining enrolment rates. Bold *et al* find that the number of pupils in public primary schools increased from 5.9 million in December 2002 to 6.9 million in January 2003 and to 7.1 million in December 2004¹³. In 2006, there were about 7.6 million pupils enrolled in public primary schools, non-formal schools, and

¹ World Bank in Collaboration with UNICEF,(2009) *Abolishing School fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi and Mozambique*, Washington D.C: World Bank, p.131.

² Ibid.

³ MoEST (2005), *Policy Framework for Education, Training, and Research*, Sessional Paper No.1 of 2005 Nairobi: Ministry of Education, Science and Technology.

⁴ Ministry of Education, Science and Technology (MOEST), (2004) *Report of the Task Force on Implementation of Free Primary Education*. Nairobi: Ministry of Education, Science and Technology.

⁵ Ibid

⁶ Government of Kenya. (2005) *Education Statistical Booklet 1999-2004*, Nairobi: Ministry of Education Science and Technology.

⁷ Ibid

⁸ Ministry of Education Science and Technology (MOEST) 2006b

⁹ Bold et al. 'Determinants of Educational Achievement in Kenya since the Introduction of FPE', *Department of Economics Oxford University Working Paper* (Oxford: Oxford University 2010), available at www.iig.ox.ac.uk/ accessed on 13 November 2013.

¹⁰ Otieno Samuel, (2003), 'Kenya: A Top Achiever of Universal Education' *The East African Standard (Kenya)*, Saturday, 26 July 2003 available at: <file:///E:/Kenya%20A%20top%20achiever%20of%20universal%20education%20%20Norwegian%20Council%20for%20Africa.htm> accessed 12 April 2014.

¹¹ Kenya Ministry of Education and Science, (MOEST)2008

¹² Ibid

¹³ Bold, *et al*, 'Determinants of Educational Achievement in Kenya since the Introduction of FPE', *Department of Economics Oxford*

non-formal education centres throughout Kenya.¹ This translates to an increase of over 29% in a span of three years.² Other indicators of success include provision of quality education, improved completion rates, reduced repetition and dropout rates, improved textbook-pupil ratio, and enhanced supply of instructional materials.

After the introduction of the FPE in 2003, the primary school completion rate increased from 62.8% in 2002 to 68.2% in 2003 and rose further to 76.2% in 2004.³ The primary school dropout rate also declined from 4.9 % in 1999 to 2.0 % in 2003. One of the key achievements of the FPE is the provision of learning materials, particularly textbooks in primary schools, which has greatly improved the quality of education. Children now receive textbooks, exercise books, pencils, and geometrical sets. By the year 2004, public primary schools had approximately 9 million textbooks for the five core subjects.⁴

Government and donor support for the FPE reached more than US\$130 million between 2003 and 2005.⁵ The principal external partners for the FPE were the World Bank, DFID, CIDA, and the Swedish International Development Cooperation Agency (SIDA). The World Bank's Free Primary Education Support Project began in Kenya in 2003 and was implemented over three years, seeking to support the Government's efforts to provide free primary education and attain the MDG of universal primary education by 2015. The project components included increased funding for instructional materials; capacity building efforts such as school-based teacher development and support; improving school accounting systems; development of an education management information system; financing education system design and program preparation; and monitoring and evaluation. Ninety-three per cent of the US\$50 million grant was spent on the instructional materials component.⁶ Despite these positive effects of the FPE, its implementation has proved quite difficult and it has been confronted with different challenges.

First, insufficient planning led to crowded classrooms sharing few resources and inadequate facilities. Secondly, construction of additional schools and classrooms was not part of the initial FPE budget, and the enrolment surge placed a strain on the existing schools.⁷ Thirdly, with the abrupt implementation of free primary education, most parents, stakeholders, teachers, students were confused of the goals and meaning of free primary education. There was confusion over the meaning of free primary education and in particular the role of the stakeholders. Some skeptics felt that the free primary education policy was a political move or gimmick - a political venture by the government to fulfil its election promise and comply with international conventions.⁸ Fourthly, a lack of adequate training was highlighted in the FPE implementation. School managers had no or little prior knowledge, capacity, or skills to handle large sums of money at the school level. Indeed, most primary schools had not previously operated functional bank accounts, which was a necessity under the policy. There was no established accountability system at that level, and many feared resource mismanagement by SMCs. Finally, there was the problem of under staffing, even before the declaration of the FPE, the country had faced a teacher shortage caused by a public-sector employment freeze ordered by the Government in 1997.⁹ Despite encountering some teething problems such as shortages of teaching staff and other necessary education inputs, the FPE has, nevertheless, significantly boosted Kenya's chance of realizing universal primary education as stipulated in the EFA and the MDG programmes.

4 National Laws and Policies on the Right to Education in Kenya

Pursuant to Article 2 of the ICESCR which requires State Parties to take necessary steps including particularly the *adoption of legislative measures* - with a view to achieving progressively the full realization of the rights recognized in the Covenant, national laws and policies are important because they concretely define the framework of rights and obligations for actors in the country. The Constitution is the highest legislative norm as it sets out general principles to which all other national laws and policies have to adhere. As previously emphasised it is strongly recommended that the right to education is enshrined in national constitutions.

University Working Paper, supra.

¹ Bold, T., M. Kimenyi and J. Sandefur, (2013) 'Public and Private Provision of Education in Kenya', 22, (AERC Supplement) *Journal of African Economies*, 239-56, at 240.

² Ibid.

³ Vos *et al* 'Achieving Universal Primary Education: Can Kenya Afford it?' *Economics Working Papers*. Paper 200447, (University of Connecticut: Digital Commons@U Conn, Economic Working Papers, Department of Economics 2004), available at; http://digitalcommons.uconn.edu/econ_wpapers/200447 accessed 13 November 2013.

⁴ Ibid

⁵ World Bank in Collaboration with UNICEF, *Abolishing School fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi and Mozambique*, (Washington D.C: World Bank 2009), p.40.

⁶ World Bank (2003) *Lifelong Learning in the Global Knowledge Economy: Challenges for Developing Countries*. Washington D.C: The World Bank. <http://documents.worldbank.org/curated/en/528131468749957131/Lifelong-learning-in-the-global-knowledge-economy-challenges-for-developing-countries> accessed 23 June 2014.

⁷ UNESCO, (2005), *Challenges of Implementing Free Primary Education in Kenya* Nairobi Office: UNESCO, March 2005) p.24.

⁸ Otiye, Wawire, (2011), 'Free Primary Education in Kenya and its Challenges in Fighting Illiteracy' *Journal of Education and Practice* 2 (3) (available at www.iiste.org/Journals/index.php/JEP/ accessed 06/08/14

⁹ The World Bank & UNICEF, *Abolishing School Fees in Africa* supra, p.146.

Consequently, where an educational policy or law does not respect the Constitution, it can then be challenged before the courts.

As the Constitution is the highest law of the land and source of all governmental powers, the Constitution of a country sets out general principles to which all other national laws and policies have to adhere. As observed by the US Supreme Court in *Gonzales v. Reich*, ‘... The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. ...’¹ Thus, the examination of the protection of the right to education in Kenya will first begin with the Kenyan Constitution, then followed by other relevant laws.

4.1 The Right to Education in the Constitution of Kenya

Kenya’s new constitution was promulgated on 27th August 2010 and replaced the previous Constitution of 1963. The international treaties which Kenya has signed form ‘part of the law of Kenya’ according to Article 2(6) of the constitution. This means that as in monist states, explicit incorporation of international treaties is not required for the domestication of treaties. And by the impression of Article 2(5) of the constitution, the general rules of international law are considered to be part of Kenyan law and thus applicable in Kenya, but shall be subject to the Constitution.² Kenya being a state party to both the Child Rights Convention (CRC)³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴ primary education should be compulsory and available free to all. The 2010 Constitution of Kenya departs from its predecessor by including a list of socio-economic rights formulated as direct entitlements. The economic, social and cultural rights are provided for under Article 43(1). Of key concern, Article 43(1) (f) provides for the right to education. In the concluding observations adopted by the ESCR Committee after examining Kenya’s initial reports in 1993, the Committee had recommended that Kenya should incorporate the Covenant rights into its domestic law. The provisions of Article 43 are based on the concluding observations.⁵ In addition to the general right to education under Article 43, other key constitutional provisions relating to the right to education include, Article 53(1)(b)⁶, Article 54(1)(b)⁷ and Article 55(a).⁸ According to the constitution, education for children is an obligation that can be enforced through the courts. Article 21 reinforces the protection of the right to education, as it states in section 1 that:

[...] It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. [...] (4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.⁹

The Basic Education Act¹⁰ was enacted in 2013 to give effect to Article 53 of the Constitution. Section 4 of the Act stipulates the principles that inform the provision of basic education. It provides that; ‘...The provision of basic education shall be guided by the following values and principles- a) the right of every child to free and compulsory basic education... c) promotion of quality and relevance...’

In Part 1 of the Fourth Schedule of the Constitution the obligation of the National Government as regards education is clearly spelt out as follows: ‘The National government is responsible for legislating on the following matters as regard to education: matters on education policy, standards, curricula, examinations and the granting of university charters.’¹¹ The National Government is also responsible for matters relating to primary schools, universities, tertiary educational institutions and other institutions of research and higher learning schools, special education, secondary schools and special education institutions.¹² The system of education administration, from this constitutional provision is mainly centralised. There has been some concern that centralised school management, funding and monitoring has undermined local accountability and ownership.¹³ It is a well-known fact that the driving force of educational decentralisation is the need for democratisation and the improvement of public service delivery, coupled with the trend in international funding agencies.¹⁴ The World Bank’s argument is that the shift in decision making power, as well as the diminishing of distance between the service provider and the recipient, is considered by aid agencies and advocates improving service to the citizens, particularly when the

¹ *Gonzales v. Reich* (2005) 545 US 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 - Supreme Court.

² Article 2(1) & (4) Constitution of Kenya.

³ Date of accession of ICESCR by Kenya; 1st May 1992

⁴ Date of ratification of CRC by Kenya; 30th July 1990

⁵ Viljoen, F., (2012) *International Human Rights Law in Africa*, (2nd edition), Oxford: Oxford University Press, p.550.

⁶ Article 53(1), 2010 Constitution of Kenya ‘[e]very child has the right [...] (b) to free and compulsory basic education’.

⁷ The constitutional provision provides for access to education institutions and facilities for persons with disabilities and for the youth

⁸ Provides for the right of access to relevant education and training.

⁹ Article 21 (1) Constitution of Kenya 2010.

¹⁰ No. 14 of 2013 it repealed Education Act Cap 206 Laws of Kenya.

¹¹ Item 15, Fourth Schedule Part 1 Constitution of Kenya 2010.

¹² Item 16, Fourth Schedule Part 1 Constitution of Kenya 2010.

¹³ Bold *et al* supra, p.7

¹⁴ *Ibid*.

central government is inefficient and corrupt.¹ Specifically in the education sector, central government devolves and delegates power to local governments. It is argued that under free primary education policy, the intention of the central government's policy is to provide equal and universal opportunities for education for all. It is hereby submitted that there should be combined responsibilities between the central government and the various units in the country.

4.2 Children's Act 2001

Kenya enacted the Children's Act in 2001. The Act received presidential assent on 31 December 2001 and became effective on 1 April 2002. The enactment of the Children's Act of 2001 gives effect to the obligations of Kenya under the CRC and the ACRWC. Since the enactment of the Children's Act, Kenya has been working to implement its ideals in domestic legislation concerning childcare and protection, and also seeks to enhance the welfare of children in Kenya. The Children Act further provides for the right to education. Section 7 of the Act provides that '(1) [e]very child is entitled to free and compulsory primary education the provision of which shall be the responsibility of the Government and the parents'. It is noteworthy that the Act specifically named the state and the parents as the duty bearer of this right, in line with RBA to education programming.

4.3 Policies on Education

The Kenyan government has also put in place policies and strategies that sought to ensure universal free and compulsory primary education for all by 2005² and education for all by year 2015.³ The government has committed to quality education, access, retention, equity in terms of gender and region, relevance and finances.⁴ Kenya introduced the FPE in 2003 and a task force on the implementation of the programme was established to guide the implementation of this initiative.⁵ The task force stipulates the abolition of all kinds of fees, levies and users charges. These charges are to be supplanted by public funding to ensure that primary education is free. On balance all the laws and policies of the country in respect of education are evidence that the state has made positive steps towards realising the right to education in Kenya.

4. Concluding Observations on Kenya's CRC Report

It is necessary to start by highlighting Kenya's initial report to show the remarkable improvement in the implementation of the Convention especially ensuring the right to free primary education after the first report. The initial report submitted to the CRC Committee in 2001 described an education system that was hampered by several constraints.⁶ Some of which were that the number of working children has been increasing due to rising levels of poverty in the country, the cost-sharing policy, which meant that Kenyan parents contribute to the recurrent school costs. This was a factor inhibiting children from having access to schooling. Further, children with disabilities were grossly under-enrolled in Kenyan schools.⁷ Children's right to education was, during the period covered by the first report, severely affected by the government's low budgetary allocations to the sector. Unlike the first report, the second CRC report submitted in 2007 highlighted a number of improvements towards implementing children's right to education.⁸ A positive development is the introduction of free primary education in 2003, which led 1.3 million children to leave work and register in schools that year. The report considered FPE an important milestone towards the implementation of the CRC. In the second report the following were also commended; the co-operation between the government and development partners accelerated the strengthening of the educational sector. The Children Act which has provided children with enhanced legal rights has been enacted. In all, by the time of the second report, there have been considerable improvements for Kenyan children in their right to education, through the Free Primary Education initiative. Overall, Kenya has made a number of important achievements towards the realisation of children's rights as stipulated in the CRC. With comprehensive and progressive legislations and policies in place Kenya is on course to make the right to free and compulsory primary education a reality, so as to release the great potential of every

¹ World Bank 2003 *Lifelong Learning in the Global Knowledge Economy: Challenges for Developing Countries*. Washington D.C: The World Bank, supra.

² UPE, 2005

³ MDG 2

⁴ MoEST (Ministry of Education, Science and Technology). 2005. "Sessional Paper No. 1 of 2005 on a Policy Framework for Education, Training, and Research." Available at www.un-kenya.org/ThemeGroups/SessionalPaperFinaljan.doc.158

⁵ Kenyan National Commission on Human Rights, (2013) *Assessing the Status of Actualisation of Basic Education in Kenya*. September available at www.knchr.org/assessingthestatusofactualizationofbasiceducationinkenya.aspx accessed 07/07/14

⁶ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: State Party Report: Kenya*, 16 February 2001, CRC/C/3/Add.62, [accessed 10 April 2015].

⁷ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: State Party Report: Kenya*, 16 February 2001, CRC/C/3/Add.62, para 360.

⁸ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Kenya*, 19 June 2007, CRC/C/KEN/CO/2, available at: <http://www.refworld.org/docid/4682102b2.html> [accessed 20 April 2015].

child in Kenya.

5. Conclusion

This study has attempted to analyse the actualisation of the right to free and compulsory primary education in Kenya. The first attempt at the FPE could not be sustained due to a combination of worsening economic conditions, reduced education budgets, and re-emergence of school fees. The introduction of cost sharing at the primary level in particular had a detrimental impact on the enrolment rate and school attendance particularly of children from poor households. This exacerbated the number of out- of -school children. The experience of Kenya has shown that the actualization of the right to free and compulsory primary education requires at least the following steps; first, commitment by the government to make and effectively implement appropriate policies. Second, careful planning, which involves prior analytical work to assess all that will be involved in both the human and financial resources. Third, invest the necessary resources to achieve the objectives and sustainability of the programme. Finally, mutual accountability and a responsibility mechanism between the government and the populace is also a key to the sustainability of the free and compulsory universal primary education programme.

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