

**KENYA CIVIL SOCIETY ORGANISATION SUBMISSION TO THE
UNIVERSAL PERIODIC REVIEW 3RD CYCLE**

**PRIVATISATION OF EDUCATION AND ITS IMPACT ON THE
REALIZATION OF THE RIGHT TO EDUCATION IN KENYA.**

BY:

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INTRODUCTION AND SUMMARY

1. The East African Centre for Human Rights (EACHRights) is a non-partisan regional non-governmental organisation that seeks to undertake programmes that will promote, protect, and enhance the realization of Economic, Social, and Cultural Rights (ECOSOC Rights) in Kenya, Uganda and Tanzania for vulnerable and marginalized groups. The organization specializes on the Right to Education; Child Protection and the Right to Health for children. Through its education programme, the organization seeks to further the right to education agenda by: addressing privatization of education; holding the state accountable to improving education access, availability and quality; and empowering affected communities.
2. This submission covers the period between 2015 and 2019 and addresses the growth of privatisation of Education in Kenya and its negative impact on the realization of the right to free, inclusive and quality education for all children in Kenya.
3. During the previous UPR cycle, the Government of Kenya was urged to continue strengthening its successful educational policies for primary, secondary and higher education in order to provide the greatest welfare and quality of life to its people. These were reflected in recommendation Nos. 142.151; 142.170; 142.171; 142.172; 142.173; 142.174; 172.175; CRC

Rec 38; and ESCR Rec 58 21.1.1. Specifically, the government was urged to take policy, legislative and other measures to improve access to education for all, particularly the vulnerable and marginalized. In regard to the role of private actors in education, the government was requested to take all the necessary measures to ensure that the Alternative Provision of Basic Education and Training policy and registration guidelines are fully implemented.

THE NATIONAL REGULATORY FRAMEWORK

4. Basic education in Kenya is recognised as a human right in Article 43(1) (f) of the Constitution of Kenya (2010) which acknowledges that everyone has the right to education. More specifically, children's right to education is entrenched in Article 53 (1) (b) which provides that every child has the right to free and compulsory basic education.
5. Article 2 (6) of the Constitution of Kenya recognises that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". Kenya has ratified a number of human rights treaties including the Universal Declaration of Human Rights (UDR), United Nations Convention on the Rights of the Child (UNCRC), International Covenant on Economic, Social and Cultural Rights (CESCR), African Charter on Human and Peoples' Rights (ACHPR), and 'African Charter on the Rights and Welfare of the Child (ACRWC) among others. All are legally binding on the State.
6. The Basic Education Act (2015) guarantees free and compulsory education for all children. It further guarantees equitable and equal access, promotes quality and relevance, accountability, non-discrimination and equal standards across all basic education institutions.
7. In 2009 and 2016 respectively, the State launched the Alternative Provision of Basic Education and Training (APBET) Policy (2009) and Guidelines (2016) which provided for the existence of a third category of schools that would be situated in urban informal and other marginalized settlements. In February 2019, a positive step was made to revitalise this function with the mandate for regulating APBET schools moved to the National Council for Nomadic Education in Kenya (NACONEK).
8. The Abidjan Principles (2019) provide that "States must take all effective measures, including particularly the adoption and enforcement of effective regulatory measures, to ensure the realisation of the right to education where private actors are involved in the provision of education". Additionally, Principle 45 states that "There is a strong presumption that retrogressive measures taken in relation to the right to public education are impermissible. If, in exceptional circumstances, retrogressive measures are taken, the State has the burden of

proving that any such measure is in accordance with applicable human rights law and standard”.¹

PRIVATISATION OF EDUCATION IN KENYA

9. According to the Report of the Special Rapporteur on extreme poverty and human rights (2018) “privatization often involves the systematic elimination of human rights protections and further marginalization of the interests of low-income earners and those living in poverty.”²
10. In Kenya prior to 1990, the number of private schools was negligible. The 1980s were however characterised by reduced public expenditure on education due to the introduction of cost sharing policies instigated by the introduction of structural adjustment policies (SAPs).³ One of the visible outcomes of SAPs in the education sector was the reduced access to education for disadvantaged children, especially girls from the rural communities, the urban poor and children with disabilities. This was also an era characterised by widening social and economic disparities that evidenced increasing levels of poverty.
11. The growth of private schools continued as a result of the introduction of free primary education (FPE) program in 2003. This increase is mostly attributed to the massive influx of students into public schools and resultant deterioration in quality due to over-burdened facilities.⁴⁵ Other challenges experienced in public education included low teacher-pupil ratio, unavailability of learning facilities and poor learning environment especially in urban slums.⁶⁷ Additionally, were frequent teacher strikes, high cost (including hidden costs and additional charges and levies) of education and poor quality of education have been highlighted as the main challenges facing the realization of the right to education as documented by various research reports.⁸
12. Of the approximately 500,000 children in Nairobi, 60% are thought to be enrolled in low-fee private schools mainly situated in informal settlements, where the majority of households

¹ Abidjan Principles (2019): The Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education

<https://static1.squarespace.com/static/5c2d081daf2096648cc801da/t/5caf90114785d3c2ac9b7eef/1555009556517/Abidjan-Principles-Designed-online-v4.pdf>

² Alston, P(2018) Report of the Special Rapporteur on extreme poverty and human rights , 26 September 2018 . Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms Extreme poverty and human rights* <https://undocs.org/A/73/396>

³ Ibid.

⁴ Allavida Kenya, 2012, Access to and Quality of basic education in Kibera

⁵ GI-ESCR & Hakijamii, 2015; Oketch, Mutisya & Sagwe, 2012a; Ohba, 2013; Oketch & Rolleston, 2007

⁶ Ibid

⁷ Kenya National Commission on Human Rights, Fourth State of Human Rights Report, 2010-2014 – Human Rights: The Elusive Mirage, pg 58.

⁸ UNGEI School Fees Abolition Initiative - School Fees: A Major Barrier to Education Access, http://www.ungei.org/infobycountry/247_712.html

survive on less than \$1 a day.⁹ Similarly, in urban areas such as Nairobi, Eldoret and Mombasa, more than 50% of children attend so called “low-fee” private schools¹⁰.

13. Between 2011 and 2017, public primary schools increased by 18.82% and public secondary schools increased by 71.54%. Conversely, private primary schools increased by 114% and secondary schools increased by 63%. These figures do not include the large number of unregistered non-formal and informal schools, which would fall under this category as well. The analysis below clearly demonstrates the observed growth in private actors in education between 2011 and 2017.^{11 12 13 14}

Figure 1: Increasing trends in privatization¹⁵



14. The escalation in the number of private schools has been most severely felt in informal settlements. Kenya’s urban informal settlements experience severe shortages in the supply of basic services including the provision of basic education services. Public schools are often found at the periphery of these settlements, making them inaccessible to especially younger children who face difficulties in navigating the long distances. Failure by the State to provide sufficient number of public primary schools has led to significant growth of low fee private schools which emerged to fill the supply gap.¹⁶ This sharp increase in private actors has therefore occurred without corresponding growth or improvements in public education.

⁹ Moses Ngware, APHRC, ‘Kenya’s Free Education Policy Could Actually be Deepening Inequality’, 2 October 2015, <http://aphrc.org/kenyas-free-education-policy-could-actually-be-deepening-inequality/>

¹⁰ APHRC, Quality and Access to Education in urban informal Settlements in Kenya, October 2013, <http://aphrc.org/publications/quality-and-access-to-education-in-urban-informal-settlements-in-kenya>

¹¹ Oduor-Noah, L. (2019). Presentation during the Comparative and international Education Society (CIES) 2019. Based on Economic surveys conducted by the Kenya National Bureau of Statistics 2016 and 2017.

¹² Kenya National Bureau of Statistics (2014) Economic Survey 2014. Nairobi: KNBS <http://www.ke.undp.org/content/dam/kenya/docs/IEG/Economic%20Survey%202016.pdf?download>

¹³ Kenya National Bureau of Statistics (2016) Economic Survey 2016. Nairobi: KNBS

¹⁴ Kenya National Bureau of Statistics (2018) Economic Survey 2018. Nairobi: KNBS. Available at: <http://www.knbs.or.ke/download/economic-survey-2018/>

¹⁵ Ibid.

¹⁶ James Tooley et al, (2008) Impact of free primary education in Kenya, a case study of private schools in Kibera,

15. The United Nations Committee on the Rights of the Child in its concluding observation on Kenya (2016) stated that “The low quality of education, and the rapid increase in private and informal schools, including those funded by foreign development aid, providing substandard education and deepening inequalities”.¹⁷ The growth of private actors have continued without the requisite monitoring and regulation by the state and demonstrates a tendency for inadequate planning and preparedness with the roll out of education reforms¹⁸. Due to lack of adequate monitoring those who are able to access these schools are exposed to school environments and teaching methods of variable quality.

16. In February 2012 the Taskforce on the Realignment of the Education Sector to the Constitution 2010 acknowledged the State had failed to provide the stringent supervision required to ensure that commercialization of education does not compromise access to and quality of education¹⁹²⁰. It is on this basis that the Kenyan government justified the establishment of a third category of schools that would complement public sector efforts in providing education in marginalized areas. These schools would fall under the category of the Alternative Provision of Basic Education and Training institutions.²¹ The Alternative Provision of Basic Education and Training policy (2009) quotes:

“In an effort to reach the spiraling numbers of non-enrolled children, the ministry of education in collaboration with development partners sought to provide broad policy frameworks to ease participation of a variety of service providers. These providers were registered under different government departments....and sought to provide school age children with education...these providers were instrumental in initiating low cost schools...they came to be categorized as non-formal schools.”

17. However, the lack of a stringent enforcement of the regulatory framework has left room for further infringement of the right to education especially where commercial, for-profit actors are concerned, who emerged to exploit loopholes in the policy.²²²³ Additionally, of the over 4,000 low fee private schools in Kenya very few have been registered and are therefore operating illegally. According to stakeholders, at one point the government halted registration

¹⁷ UNCRRC Concluding observations Pg. 15

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/KEN/CO/3-5&Lang=en

¹⁸ Somerset, 2007; Oketch & Rolleston, 2007; Nishimura & Yamano, 2008; Wambayi, 2004, Abuya et al, 2015, Oketch, Mutisya & Sagwe, 2012a; Ohba, 2013

¹⁹ Ministry of Education, Report of the Task Force on the Realignment of the Education Sector to the Constitution of Kenya 2010, February 2012, pg. 254

²⁰ Global Initiative for Economic, Social and Cultural Rights (GI-ESCR); Hakijamii (2015) Kenya’s support to privatisation in education and its impact on discrimination and segregation. Preliminary parallel Report submitted by the Economic and Social Rights Centre (Hakijamii) and the Global Initiative for Economic, Social and Cultural Rights on the occasion of the examination of the report of Kenya during the 71st session of the UN Committee on the Rights of the Child. Available: http://globalinitiative-escr.org/wp-content/uploads/2015/09/FINAL-150907-Hakijamii_GI-ESCR-Kenya-Parallel-report-ICESCR-privatisation-right-to-education.pdf

²¹ Kenya Ministry of Education, Policy for Alternative Provision of Basic Education and Training (May 2009), p. 11.

²² Edwards, D.B., Klees, S.J., Wildish, J.L (2015) Dynamics of Low-Fee Private Schools in Kenya: Governmental Legitimation, School-Community Dependence, and Resource Uncertainty. Available at: http://download.ei-ie.org/Docs/WebDepot/2015_Kenya_Low-FeeSchools_final.pdf. Accessed: 16.11.2016

²³ Wambayi (2004) Wambayi, O.N. (2004) Unit Cost of Basic Education – Kenya. Ministry of Education Science and Technology: Nairobi. Available at: https://oris.nacosti.go.ke/modules/library/publications/research_reports/NACOSTI-DL-RR-1051.pdf. Accessed: 16.11.2016

of APBET schools.²⁴²⁵ The lack of national database on specifically non-state schools makes it difficult for the schools to be monitored effectively.

18. Inadequate resourcing of the APBET and quality assurance functions has led to limited enforcement of the APBET guidelines which further compounds the poor quality of education provided in APBET schools. Additionally, the state established and legitimized a 3rd tier of lower quality education without a long term plan on how this level of schools would systematically improve in quality over a designated period.
19. Kenya currently lacks guidelines around the oversight and implementation of education public private partnerships.

IMPACT OF PRIVATISATION

20. School fees even when considered relatively low, is often unaffordable for a large section of the population. As a result, the introduction of fee-charging private schools results in further stratification, whereby relatively richer students go to different schools from the poorest and poor students attending schools of declining quality. There are therefore now three types of schools in Kenya whose distinction is the source of segregation: Firstly are formal private schools, including “elite, proprietor-owned schools, charging high fees and providing in return high-quality education to pupils from middle-income and upper-income families.” They “recruit their intakes from much wider geographic catchment areas than most public schools – but from much narrower socioeconomic catchments”, and “achieve outstanding results” in national examination.²⁶ Secondly are public schools, which charge low or no fees, whose quality varies, and which accept all children, often children in difficult circumstances and from lower socioeconomic backgrounds. Lastly, are low-cost private schools, which often provide sub-standard education, charge moderate fees, and take children from relatively poor and lower-middle class households.
21. The growth of private schools in Kenya creates or deepens inequalities: We have observed that even small changes in fees lead to further micro-segregation amongst the poor. Children from high income families attend expensive high quality schools which are known to perform well, while children from the poorest and most vulnerable families are relegated to public and low cost private schools which are grossly under resourced. This in turn increases inequality in accessing education and also deepens cycles of poverty and exclusion. This kind of segregation

²⁴ WERK OCTS project synopsis

²⁵ EACHRights (2019) Mathare school mapping report (unpublished) EACHRights (2019) Regulating low fee private schools: An assessment on low fee private schools in Nairobi county , implementing the APBET policy and guidelines (Unpublished)

²⁶ Moses Oketch and Anthony Somerset, “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 (May 2010), available on http://www.create-rpc.org/pdf_documents/PTA37.pdf.

has a negative impact on the overall quality of an education system. The highest performing education systems across OECD countries are those that combine quality with equity.²⁷

RECOMMENDATIONS TO THE STATE

22. Establish more public schools especially in urban informal settlements.
23. Expand existing facilities and personnel in public primary schools to enable them to effectively accommodate more pupils and to enhance free quality basic education.
24. Engage in stringent enforcement of the regulatory framework, especially concerning private actors. This will require increased resourcing for the improved monitoring of private actors and provision of quality assurance support.
25. Review the APBET Policy and registration guidelines against the Abidjan principles²⁸ to close gaps and loopholes already identified including: the definition of an APBET school, harmonization of licensing regimes, and provision of quality assurance support.
26. Develop an up-to-date, comprehensive database of all schools in Kenya including low fee private and other schools.
27. Adequate dissemination of reviewed APBET guidelines and all regulations that apply, to all stakeholders.
28. Fast track the integration of APBET schools into the formal system by developing a road map and action plan that outlines requirements for the progressive improvement of quality standards in APBET schools and how APBET schools will transition to either full public or private registration categories over a specified period.
29. Development of guidelines on education public private partnerships including: establishing open contracting and access to information initiatives for all education PPPs; providing a clear outline of the scope and parameters that are to be adopted (at both national and county levels); conducting participatory, independent feasibility and impact assessment studies for each education PPP proposed. The state should additionally only commence with PPPs in non-core services until the necessary accountability framework has been put in place.

²⁷ OECD, *Equity and Quality in Education: Supporting Disadvantaged Students and Schools*, OECD Publishing (2012).

²⁸ Abidjan Principles (2019): The Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education
<https://static1.squarespace.com/static/5c2d081daf2096648cc801da/t/5caf90114785d3c2ac9b7eef/1555009556517/Abidjan-Principles-Designed-online-v4.pdf>