

# Realization of the Right to Education: Towards Free Primary and Secondary Education For All in Kenya

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## **Abstract**

*This paper evaluates the state of education as a human right and demonstrates that it is possible to implement and ultimately protect the right to education within a domestic context. Despite its importance, the right to education has received limited attention from scholars, practitioners and international and regional human rights bodies as compared to other economic, social and cultural rights (ESCRs). NGOs have been increasingly interested in using indicators to measure and enforce a state's compliance with its obligations under international human rights treaties. Education is one of the few human rights for which it is universally agreed that the individual has a corresponding duty to exercise this right. This paper first of all draws up an inventory of the many international instruments which mention the right to education and analyse*

*them in order to obtain a more precise idea of the content of this right, which often appears blurred. The paper also discusses the right to education as it is guaranteed in articles 13 of the Covenant on Economic, Social and Cultural Rights (ICESCR), article 28 of the Convention on the Rights of the Child (ICRC) and article 13 of the Protocol of San Salvador. The enjoyment of many civil and political rights, such as freedom of information, expression, assembly and association, the right to vote and to be elected or the right of equal access to public service depends on at least a minimum level of education, including literacy. Similarly, many economic, social and cultural rights, such as the right to choose work, to receive equal pay for equal work, the right to form trade unions, to take part in cultural life, to enjoy the benefits of scientific progress and to receive higher education on the basis of capacity, can only be exercised in a meaningful way after a minimum level of education has been achieved.*

*Similarly, this paper discusses education in Kenya as a basic need and a human right (enhancing access, participation, retention, achievement and quality of schooling) to girls and*

*boys and by extension women and men especially with the promulgation of the new Constitution of Kenya 2010 that recognizes education as a Bill of Rights and everyone is bound by the Bill of Rights. This means that all people in Kenya must respect education as a human right. The Bill binds all government institutions and state officers. They are required to respect human rights and deal appropriately with the special needs of individuals and groups in our society. In this paper, the provision of education in the first 4 to 18 years of schooling is considered to be basic, thus a basic right in Kenya.*

## **Introduction**

Education can be defined in a broad sense to imply “the entire process of social life by means of which individuals and social groups learn to develop consciously within and for the benefit of the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge” (Hogson, 1998, p. 3). Generally, the term education is used in international instruments to refer to *formal institutional instruction*. For example, in the UNESCO Convention Against Discrimination in Education of 1960, “education”

refers to “all types and levels of education and includes access to education, the standard and quality of education and the conditions under which it is given” (UNESCO Convention Against Discrimination Article 1(2)). The objectives of education may vary according to the national context, but there is a growing consensus under present international human rights law that tolerance and respect for human rights are major characteristics of educated human beings (Sarelin, 2006, p. 3). Thus, the role of *human rights education* is vital in order to create a universal human rights culture (Nowak, 2001, pp. 245-271, pp. 245-246). Human rights education is also crucial when asking questions in relation to what children are taught in school.

The Special Rapporteur on the right to education on the United Nations Commission on Human Rights, Katarina Tomasevski, is concerned that these questions are asked much too rarely (Tomasevski, 2003, p. 15). Education is widely perceived as something inherently good. It is however, wrong to conclude that getting all children to school is the same as the right to education. In addition to human rights education, opposing human rights violations and indoctrination in schools are major concerns (Tomasevski, 2003, p. 8). Although there

is a strong interrelation between the right to education and human rights education, this paper is limited to the former and does not go into the role of human rights education. On December 10, 2008, the world celebrated the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights (UDHR) (The Secretary-General, Message of the Secretary General on Human Rights Day <http://www.un.org/event/humanrights/2008/statementssg.shtml>).

This historic milestone marked another achievement of the universal human rights system (Mahon, 2008). The United Nations General Assembly's adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Human Rights Education Associates, 2009). The Optional Protocol to the ICESCR institutes an individual complaint mechanism to address state violations of economic, social and cultural rights (ESCRs) (Human Rights Education Associates, 2009). This new mechanism for state accountability underscores the importance of human rights in international law and the role of ESCRs as integral to a "trend towards a greater recognition of the indivisibility and interrelatedness of all human rights" (Mahon, 2008, p. 618). Today, the challenge the human rights scholars,

practitioners and inter-governmental organizations face is how to fulfill promises of the UDHR and ICESCR as economic and social rights grow in importance (Kalantry, 2009, p. 4).

In contrast to civil and political rights – which have been more actively recognized and accepted by the world’s nations – economic, social and cultural rights have been neglected by certain countries who find them to be anathema to their conception of state obligations in society (Steiner & Alston, 2000). This practice of distinguishing between these “first” and “second generation” rights, however, is no longer widely accepted (Melish, 2006). Indeed, the false distinction between ESCRs and CPRs is collapsing: both types of rights require both positive and negative obligations from states which are responsible for upholding them (Udombana, 2006). ESCRs are now seen by the human rights community and other states as essential to the full realization of human rights and necessary to live a life with dignity (Nrula, 2006). Despite an increased focus on ESCR, there have been major obstacles impeding their legal application. Historically, some scholars and practitioners have viewed these rights as non-justifiable (Peerenboom, 2005). In fact, one of the main obstacles to justifi-

ability of ESCRs under the ICESCR is measuring whether or not a state party has satisfied its obligations with respect to the rights enumerated in the treaty. The main reason for this measurement challenge is the concept of progressive realization embedded in the ICESCR. With respect to many of the obligations set forth in the ICESCR, states parties to the treaty are not required to provide them immediately upon ratification of the treaty (ICESCR art. 2 Dec.16, 1966, p. 993). Instead, the concept of progressive realization permits states parties to increasingly progress over time in realization of the right (although no time period is specified in the Covenant) (ICESCR 1966 art. 2(1), General Comment 3 at para. 2). In other words, a state party would be in compliance with the ICESCR even if it was not guaranteeing 100 % of the people within its jurisdiction the full enjoyment of treaty rights immediately upon ratification. However, states parties may not halt or retrogress on progress (Dennis & Stewart, 2004). Thus, it is important to know what percentage of the population enjoys the rights in question.

The right to education is one of the most complex rights in international human rights law (Nowak, 2001). It is a “multiplier” (Tomasevski,

2006) or “empowerment” right (Coomans, 1995) as well as an essential means to promote other rights, (UN ESCR General Comment No. 13). The denial of the right to education leads to “compounds of denials of other human rights and the perpetuation of poverty” (Tomasevski, 2004 Report) even in the United States, where ESCRs are generally less well-recognized, and many state constitutions guarantee the right to education (Lavesque, 1997; Steinke, 1995).

Recognizing that “it is doubtful that any child may reasonably be expected to succeed in life if he or she is denied the opportunity of an education” (*Brown v. Board of Education of Topeka*, 1954). Several key international instruments mention the right to education including those relating to specific groups such as children, racial minorities and women (ICERD art.5 (e) (v). Dec 21, 1965, 660 U.N.T.S. 195), but the ICESCR provides the most comprehensive protections of the right (General Comment 13; Beiter, 2006). As such, we focus our paper on the realization of ICESCR in Kenya. By focusing on the right to education in Kenya, we hope to rejuvenate scholarship and professional dialogue surrounding the realization of free and compulsory primary and secondary education to all



in Kenya. We will first analyze the language of the ICESCR and elaborate on the concepts emanating from the ICESCR. In section II, we will briefly discuss the historical and theoretical foundations for the right to education as it relates to ICESCR; in section III, we will propose a methodology for measuring treaty compliance with ESCRs; in section IV, we will discuss the right to education in Kenya.

### **The Right to Education in the ICESCR: A Brief History and Theory**

Competing theoretical perspectives have shaped the right to education guarantee as enumerated in the international instruments including Articles 13 and 14 of the ICESCR (ICESCR art. 13). During the last few centuries, the responsibility to educate populations has generally shifted from that of the parents and the Church under a liberal model to that of the State (Beiter, 2006; Hogson, 1998; Nowak, 2001, p. 191). What had been an upper-class privilege was repositioned as a “means of realizing the egalitarian ideals upon which the French and American Revolutions were based...” (Beiter, 2006, p. 20, quoting Hogson, 1998, p. 8). Such revolutions exemplified the old axiom that “political and social upheaval is often accompa-

nied by a revolution in education” (Rury, 2002). Indeed, although liberal concepts of education in the 19<sup>th</sup> century reflected a fear of too much state involvement in the education system by giving parents the primary duty to provide an education to their children, states began regulating curricula and providing minimal educational standards (Beiter, 2006, p. 22; Nowak, 2001, pp. 191-192). Under socialist theory, the State was the primary means to ensure the economic and social well being of communities (Nowak, 2001, p. 192; Hogson, 1998, p. 9). By the dawn of the 20<sup>th</sup> century, such ideals underscored the need to respond to the rapid industrialization and urbanization of rapidly-developing countries such as the United States (Rury, 2002, pp. 135-137).

The right to education provisions in the ICESCR was derived from both the socialist and liberal theoretical traditions: i) as the primary responsibility of the State to provide educational services, and ii) as the duty of the State to respect the rights of parents to establish and direct private schools to ensure that their children receive an education that is in accordance with their religious and moral beliefs (Beiter, 2006, p. 24). Thus, the ICESCR enumerates a combination of obligations

requiring both non-interference and positive action on the part of states parties to provide education to their citizens. Even with these competing traditions shaping the right to education under the ICESCR, the aims and objectives of education have moved towards a growing consensus in international human rights law: that education should enable the individual to freely develop his/her own personality and dignity, to participate in a free society and to respect human rights (Nowak, 2001; UDHR, 1948, p. 13).

Despite its widespread acceptance and fundamental importance, the right to education was not directly or specifically declared an international human right until the post-World War II era (Hogson, 1998). At that time, the international community contemplated the adoption of an International Bill of Human Rights (Humphrey, 1975-1976), including the 1948 Universal Declaration of Human Rights (UDHR); a document that has become the contemporary foundation of human rights codification and the primary source of internationally recognized human rights standards (Hannum, 1995-1996). In 1946, the United Nations Educational Scientific and Cultural Organization (1945) employed a committee of leading scholars to find

common ground among the various cultural and philosophical foundations of all human rights, including the right to education (Glendon, 1997-1998).

Then, the United Nations Human Rights Commission (UNHRC) prepared a first draft of the Declaration (Glendon, 1997-1998). The draft was circulated among all United Nations member states for comment and went to the UNHRC for debate (Glendon, 1997-1998). After many revisions and lobbying efforts, the Economic and Social Commission (ECOSOC) approved the final draft of the UDHR and submitted it to the United Nations General Assembly in the fall of 1948. At the time of its passage, the most ground-breaking part of the UDHR was its fourth section – Articles 22 through 27 – which protected ESCRs as fundamental rights. The addition of ESCRs was not viewed as a concession to the Soviet Union’s insistence on including these rights; rather, it was seen as a deliberate inclusion of rights articulated in constitutions across the globe. These guarantees received broad-based support; however, it was much more difficult to find agreement as to the relationship of these “new” economic and social rights to the “old” civil and political rights.

## **.The Right to Education under ICESCR**

### *Article 2 (1): Progressive Realization*

All of the rights in the ICESCR are subject to the concept of progressive realization enumerated in Article 2 (1). Progressive realization means that states parties are not obligated to realize these economic, social and cultural rights over time. Additionally, realization is subject to states parties' maximum available resources (ICESCR; Beiter, 2006, p. 382). Here, the committee allots states "wide discretion to determine which resources to apply and what to regard as maximum" (General Comment 3). Moreover, the CESCR has declared that the concept of progressive realization "imposes an obligation to move expeditiously and effectively as possible towards the goal of the full realization of the right in question (General Comment 3, p. 9). In general, states parties must progressively realize economic and social rights under the ICESCR.

Even though the rights in the ICESCR can be realized progressively over time, states parties are obligated to immediately "take steps" toward the full realization of those rights (Steiner & Alston, 2000, pp. 246-249). According to the

Committee's General Comment No. 3, the requirement that states parties "take steps" toward full realization means that "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the state concerned" (General Comment 3, pp. 376-377). Furthermore, "such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."

*Articles 2(2)3: Nondiscrimination Equal Treatment*

Articles 2 (2) and 3 obligate states parties to ensure all rights under the ICESCR, including the right to education, are enforced equally and without discrimination (ICESCR at art. 2 (2). Article 3 specifically mandates states "to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights are set forth in the present Covenant." The obligation of non-discrimination is of immediate effect (General

Comment 3; General Comment 13).

*Articles 13 & 14: The Right to Education*

**a) Primary Education**

Articles 13 and 14 of the ICESCR specifically articulate the guarantees of the right to education (ICESCR, at art. 13 & 14). These articles impose differing obligations for each level – primary, secondary and tertiary levels of education. Article 13 recognizes that “primary education shall be compulsory and available free to all.” Although not explicitly enumerated in the ICESCR, the Committee has stated in its General Comment No. 13 that primary education should be immediately available to all even if it is not immediately made compulsory and free to all (General Comment 13, para. 51). Further, under the ICESCR, states parties that have not secured compulsory, free primary education at the time of treaty ratification must develop a plan within two years and must implement it within a reasonable number of years after ratification (ICESCR; Beiter, 2006). The education plan must also be “sufficiently detailed” and contain all necessary actions to secure “the comprehensive realization of the right “to education” (General Comment 11, 1999).

## **b) Secondary and Tertiary Education**

While primary education must be made immediately available to all, secondary education must be made generally available to all (ICESCR at 13 (2) (b) and tertiary education must be made “equally accessible to all on the basis of capacity” (ICESCR id). In addition, states parties must progressively achieve provision of free secondary and tertiary education (ICESCR at art. 13 (2) (b). With regard to secondary, tertiary and fundamental education, (General Comment 13, at para. 21-22) states must immediately take steps toward full realization under Article 13 (2) (b) – (d) (General Comment 13 id). These steps must include adopting and implementing a national education strategy, which should provide mechanisms, such as indicators and benchmarks, to measure progress towards the full realization of the right to education. The Committee also affirms obligations under Article 13 (2) (e), noting that states must provide educational fellowships to assist disadvantaged groups.

## **The Right to Education in Kenya**

This right is enshrined in Article 13 of the ICESCR and other instruments discussed in earlier sections of this paper.



### *Legal Framework*

Chapter Four of the Bill of Rights, Part 3, Section 53 (The New Constitution of Kenya, 2010) provides that every child has the right to education. It obligates the state to institute a programme to implement the right of every child to free and compulsory pre-primary and primary education and in so doing to pay particular attention to children with special needs. Further, the state is obligated to take measures to make secondary and post-secondary education progressively available and accessible (Ngondu-Houghton, 2005, p. 105).

There are 14 Acts of Parliament that touch on different aspects of education in Kenya. These include: the Education Act (1968), the Children Act (2001), the Adult Education Board Act, related Acts of Parliament, Teachers Service Commission Act, Kenya National Examination Act, Universities Act and various Acts and Charters creating universities. Most of these laws create institutions of education and administrative institutions such as boards. There are, however, many early childhood development; special education and alternative approaches to education such as non-formal education.

The education sector has for a long time suffered from lack of proper legislative and policy framework and this led to the development of the *Draft Education Bill of 2003* which was approved by the government of Kenya and passed into law on August 17, 2012 (*Daily Nation*, Friday August 17, 2012). *The Draft Education Bill, 2003* aimed to repeal the Education Act consolidate all the laws relating to education in Kenya; and provide a legal framework for the organization, management and coordination of education. The Bill contained progressive provisions with regard to promotion of the right to education for all. In addition, the Bill gave the Minister of Education the responsibility of promoting and coordinating the education and training of the people of Kenya. It also provides examples of policy guidelines to be followed including: access and equity, quality and relevance, affordability, efficiency, management, gender equality, adult continuing alternative education, environmental education and conservation, promotion of health with emphasis on HIV and AIDS, promotion of education of girls and women in vulnerable and marginalized circumstances.

The revised Education Bill, 2012 makes learning compulsory from pre-school to form four,

which together constitutes basic education. Previously, pre-school was not compulsory and basic education only covered primary level. The revised Education Bill, 2012 states: “Any person who contravenes this section shall be liable on conviction to a fine not exceeding KShs. 100,000 or to imprisonment for a term not exceeding one year, or both” (*Daily Nation*, Friday August 17, 2012 id). The fine shows that the government is serious in the implementation of the Bill of Right in line with the promulgated new Constitution of Kenya, 2010. In addition, the government states that it shall be the responsibility of every parent or guardian to admit or cause to be admitted his or her child, as the case may be, to a basic education institution. However, no mechanisms have been put in place to ensure that the law is enforced effectively.

The analysis of the current policy framework for the development of education in Kenya can only be effectively done from a historical perspective. This is because some policies, which were made decades ago are still operational and have great consequences on the realization of key aspects of the right to education. The Kenya government since independence had an unequivocal commitment to the development of the education

sector, as seen by the progressive increase in budget allocation relative to other sectors over the years, with a view to increase availability, accessibility and quality of education (Elimu Yetu Coalition, 2003). *The Kamunge Report*, with its devastating effects on accessibility to education for majority of Kenyans became the core policy document of the education sector to date especially after the shelving of the *Master Plan on Education and Training, 1997-2010*.

In 1998, the government, responding to public discontent with the 8-4-4 system of education and to keep its election promise of its reform, appointed the *Commission of Enquiry into the Education System in Kenya*. The report of the commission, known as the *Koech Report*, has been argued to be the “most comprehensive and forthright of all educational commission reports since independence” (Elimu Yetu, 2003, p. 147). However, the *Koech Report* was not pleasing to the government of the day and so was never implemented. It covered virtually all aspects of education and evaluation in addition to providing a timeframe for the implementation of its recommendations, hence would have increased availability and equity of education to vulnerable groups within the timeframe.

The government, in liaison with other stakeholders in 1998 developed the *Master Plan on Education and Training (MPET), 1997-2010*, with the purpose of providing policy direction in preparing the country for the goal of industrialization by 2010. The report covered aspects such as: development of curricula geared at high quality and relevance to economic needs, efficient teacher development and deployment, resource mobilization and allocation, governance and management, improving efficiency and effectiveness, increasing equity in participation and reduction of cost to parents without necessarily increasing budgetary allocations from the exchequer. All these recommendations would have enhanced different aspects of the right to education in Kenya. However, the *Master Plan on Education and Training (MPET), 1997-2010* was never launched or implemented.

*The Free Primary Education (UPE) Policy, 2003* is a progressive policy that has significantly increased enrolment rates in the country. The goals of UPE are, however, threatened by the incidence of child labour with 1.9 million children being said to be engaged in it with 1.3 of them being completely out of school and with the rest combining work with

school. It is also threatened by lack of sustainable financial resources required to achieve its targets. Furthermore, the government of Kenya committed itself at a policy level to implement *Free Secondary Education* (FSE) albeit with many challenges. The FSE was prematurely introduced in 2008 with retrogression immediately thereafter. *The National Poverty Eradication Plan 1999-2005*, significantly focused on the goal of basic education for all, acknowledging declining enrolment and completion rates of the poor, the failure of the cost-sharing strategy and the declining social indication and restates the importance of paying for basic open cycle of education through public funds and using a key development service to help alleviate inequity.

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*The National Development Plan 2002-2008*, acknowledged the persistent challenges to education despite advances: cost of education and training, inequity in access, high wastage rates, problems of relevance and quality, among others. The plan set out to increase enrolment and completion rates especially for primary education, streamlining the financing of education and improving relevance of education within the context of industrialization. Early childhood development, primary education, secondary education, special education among other areas are core areas of focus and set goals and targets on improvement including raising transition rates from primary to secondary from 4% to 70% by the year 2008; reviewing the cost-sharing policy to realize the goal of UPE; strengthening the bursary scheme in secondary schools to increase accessibility; and to establish programmes for the disabled persons as well as to review the policy framework for special needs in education to increase availability and acceptability for people with special needs.

## **Conclusion**

Kenya faces critical challenges towards the implementation of the right to education (Report of ESCR June, 2009). While the student enrolment rate has continued to increase since the introduction of FPE by the government in 2003, it is estimated that about 1.7 million children are still missing out of the education system in Kenya (UNICEF Child Friendly Schools Manual, 2009, 11). Issues of non-discrimination and equity especially for children living with HIV and AIDS, pastoralists' children, urban slums and informal settlements, children with disabilities, children with albinism and out of school youth, pregnant girls and single mothers continue to bedevil the education sector. The two major factors contributing to the lack of equal access to education for all children are accessibility and affordability at primary, secondary and university levels of education.

The provision of bursaries and loans to aid poor and needy students in financing higher education is misapplied and not targeted. Current public primary, secondary and university institutions are unable to cope with the demand



particularly in poor urban settlements and rural areas. Feeding programmes which were introduced to promote school attendance have been inconsistently applied and not prioritized to benefit children in famine affected areas. The steady and consistent teacher recruitment, deployment and distribution in all primary schools to meet the desired teacher-pupil ratio of 1:40 have yet to be met (current ratio estimated at 1:60 to 1:80 and sometimes 1:100). At this juncture, it is critical that Kenya reviews the education sector's legal frameworks, policies and programmes with a view to improving its target taking into account the poverty mapping proposed in vision 2030 under the equity and poverty elimination programme in the social pillar. There is also an urgent need to strengthen the role of the state in financing, provision and regulation of education, if the poor, marginalized and vulnerable groups are to enjoy equal access to acceptable quality education. Finally, regulation of the education sector by the government is necessary, especially for the mushrooming dubious commercial institutions purporting to provide quality education.

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(stating that governments must respect the right to education and all economic, social and cultural rights when imposing economic sanctions and that primary education should not be considered a humanitarian exemption because of the negative consequences for vulnerable groups) [hereinafter General Comment 8].

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