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TOPIC:

**TOWARDS A HUMAN RIGHTS APPROACH TO REALISATION OF FREE
PRIMARY EDUCATION IN KENYA**

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DECLARATION

I, **REGINA WAMBUI NDERITU**, do hereby declare that this is my original work and the same has not been submitted and is not currently being submitted for a degree in any other University.

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This project has been submitted for examination with my approval as the University Supervisor.

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Dedication

To David, Derrick, Austine and Sebastian,

My beloved family,

Thank you for your love and support.

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I am greatly indebted to my supervisor, **Dr. Ruth Aura**, for her immense contribution in making this project a success. Thank you for your thorough and incisive attention to my thesis and for introducing a fresh perspective to my original ideas. I don't know what I would have done without you.

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I would also like to thank my employer, the **Office of the Attorney General and Department of Justice** for financial and material assistance throughout the entire training period.

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Last but not the least, I would like to thank my **Father in Heaven** for the far that He has brought me.

List of Conventions/ Treaties

African (Banjul) Charter on Human and Peoples' Rights (ACHPR)

African Charter on Rights and Welfare of the Child (ACRWC)

African Youth Charter (AYC)

Charter of the United Nations (UN Charter)

Convention on Rights of the Child (CRC)

Constitutive Act of the African Union

Convention on Elimination of all Forms of Discrimination against Women (CEDAW)

Convention against Discrimination in Education (CDE)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Elimination of all Forms of Racial Discrimination (ICERD)

International Covenant on Social, Economic and Cultural Rights (ICESCR)

Universal Declaration of Human Rights (UDHR)

Vienna Declaration of Human Rights and Programme of Action 1993

List of Statutes

Basic Education Act No. 14 of 2013

Children Act No. 8 of 2001

Commission on Administrative Justice Act No. 23 of 2011

Constitution of Kenya 2010

Education Act, Cap 211 Laws of Kenya (Repealed)

Kenya Institute of Curriculum Development Act No. 4 of 2013

Kenya National Commission on Human Rights Act No. 14 of 2011

Kenya National Examinations Council Act No. 29 of 2012

Kenya National Examinations Council (Amendment Bill) Act No. 1 of 2016

Legal Aid Act No. 6 of 2016

National Gender Equality Commission Act of 2011

National Government Constituencies Development Fund Act No. 30 of 2015

Social Assistance Act No. 24 of 2013

Treaty Making and Ratification Act No. 46 of 2012

Teachers Service Commission Act No. 20 of 2012

Technical and Vocational Education and Training Act No. 29 of 2013

List of Cases

David Kipruto Cheruiyot v Kenya Fluorspar Co. Limited [2008] eKLR

Githunguri Residents Association v Cabinet Secretary, Ministry of Education and Five Others [2013] eKLR

John Kabui Mwai & 3 Others V Kenya National Examination Council & 2 Others [2011] eKLR

Kenya Bus Service Ltd & 2 Others vs Attorney General [2005] eKLR

Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 Others [2013] eKLR

Rose Wangui Mambo & 2 Others v Limuru Country Club & 17 Others [2014] eKLR

Section 27 and 2 Others vs. Minister for Education (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012)

Teachers Service Commission vs. Kenya National Union of Teachers (KNUT) & Another [2012] eKLR

Teachers Service Commission vs. Kenya Union of Post Primary Education Teachers (KUPPET) & Another [2013] eKLR

WJ and LN (Suing through their guardians) v Astarikoh Henry Amkoah and 4 Others [2011] eKLR

List of Acronyms/Abbreviations

ACRWC	: African Charter on Rights and Welfare of the Child
AU	: African Union
CAJ	: Commission on Administrative Justice
CEB	: County Education Board
CRC	: Convention on the Rights of the Child
CRPD	: Convention on Rights of People with Disabilities
CSECR	: Committee on Social, Economic and Cultural Rights
CSOs	: Civil Society Organizations
DQAS	: Directorate of Quality Assurance and Standards
EAT	: Education Appeals Tribunal
ECOSOC	: Economic and Social Council
ESQAC	: Education Standards Quality Assurance Council
FPE	: Free Primary Education
ICCPR	: International Covenant on Civil and Political Rights
ICERD	: International Convention on Elimination of all forms of Racial Discrimination
ICSECR	: International Covenant on Social, Economic and Cultural Rights
KCPE	: Kenya Certificate of Primary Education
KNCHR	: Kenya National Commission on Human Rights
KNUT	: Kenya National Union of Teachers
MDGs	: Millennium Development Goals
MoEST	: Ministry of Education Science and Technology
NACONEK	: National Council for Nomadic Education in Kenya
NEB	: National Education Board
NGO	: Non-Governmental Organization
OHCHR	: Office of the High Commissioner for Human Rights
TSC	: Teachers Service Commission
UDHR	: Universal Declaration on Human Rights
UN	: United Nations

UNCHR : United Nations Commission on Human Rights
UNDP : United Nations Development Programme
UNESCO : United Nations Education Science and Cultural Organization
UNGA : United Nations General Assembly
UNHRC : United Nations Human Rights Council
UNICEF : United Nations International Children's Emergency Fund
(Now United Nations Children's Fund)
UNTS : United Nations Treaty Series

Table of Contents

Content	Page
Declaration.....	i
Dedication.....	ii
Acknowledgements.....	iii
List of Conventions/ Treaties.....	iv
List of Statutes.....	v
List of Cases.....	vii
List of Abbreviations/Acronyms.....	vi
Abstract.....	xii
Chapter 1	
Introduction and Background	
1.0 Introduction	1
1.1 Background of the Study.....	2
1.2 Statement of the Problem.....	3
1.3 Objectives of the Study.....	4
1.4 Research Questions.....	5
1.5 Hypothesis.....	5
1.6 Justification.....	5
1.7 Theoretical Framework.....	7
1.7.1 Arguments against Social Justice.....	8
1.8 Research Methodology.....	10
1.9 Literature Review	11
1.9.1 Propriety and Effectiveness of the Legal and Policy Framework.....	11
1.9.2 Access to FPE.....	13
1.9.3 Right to Education and Social Justice.....	15
1.10 Definition of Terms.....	16
1.11 Chapter Breakdown.....	21

Chapter 2

A Critical Appraisal of the effectiveness of the Legal and Policy Framework Governing Realisation of FPE in Kenya

2.0 Introduction	22
2.1 Key Legal and Policy Interventions on the Right to Education.....	22
2.2 Normative Elements of Education under FPE.....	25
2.3 Access to FPE.....	26
2.3.1. Access without Discrimination.....	26
2.3.2 Affordability.....	30
2.4 Availability of FPE.....	36
2.4.1 Availability of Physical Facilities.....	36
2.4.2 State of Infrastructure.....	37
2.5 Acceptability of FPE	40
2.5.1 The Teacher as an FPE Resource.....	41
2.5.2 Learning Environment.....	44
2.5.3 Quality Monitoring.....	46
2.6 Adaptability of FPE.....	48
2.7 Conclusion.....	53

Chapter 3

A Case for a Rights Based Approach to Realisation of Right to Education under FPE

3.0 Introduction.....	55
3.1 The Rights Based Approach.....	55
3.2 Historical Perspectives of the Rights Based Approach.....	56
3.3 Pillars of RBA.....	57
3.3.1 Equality and Non-discrimination.....	57
3.3.1.1 Reducing Inequalities and Discrimination in Realization of FPE.....	57
3.3.2 Participation	59
3.3.3 Interdependence of Rights.....	62
3.3.4 Accountability.....	63
3.3.4.1 Judicial Enforcement of Right to FPE.....	65
3.3.4.1.1 Emerging Jurisprudence.....	66

3.3.4.2 Quasi-Judicial Enforcement of Right to Education.....	69
3.3.4.3 Political Processes.....	71
3.3.4.4 Administrative Processes.....	72
3.3.4.5 Public Pressure.....	72
3.4 Integrating RBA into Realisation of FPE	73
3.5 Conclusion.....	77
Chapter 4	
Conclusions	
4.0 Introduction.....	78
4.1 Research Summary.....	78
4.2 Conclusions.....	79
Bibliography.....	83

ABSTRACT

The right to free primary education is a fundamental human right entrenched in the corpus of international human rights law, the Constitution of Kenya 2010 and domestic legislation.

This study critically examines the effectiveness of the legal and policy framework governing realisation of the right to free primary education in Kenya in facilitating education of children from poor and marginalised backgrounds. The study establishes the fundamental linkage between realisation of this right, poverty reduction and social justice. It further evaluates the extent of realisation of the normative elements of the right to free primary education, notably, accessibility, acceptability, availability and adaptability. It highlights the progress made by the State and non-state actors and examines the gaps in the law and policy and other factors impeding realisation of the right to free primary education by children from poor and marginalised backgrounds. The study further proposes legislative, policy, social and best practices interventions to enhance the realisation of the right.

This study is largely based on the theory of distributive justice propounded by John Rawls. The study also examines criticisms and arguments projected by the opponents of this theory.

The study proposes the adoption of the Rights Based Approach to poverty and inequalities reduction in facilitating realisation of the right. Underpinned by the pillars of accountability; participation; interdependence of rights; and equality and non-discrimination, this Approach resonates well with the concept of social justice. The Approach also has universally recognised benchmarks which ensure that right holders participate in prioritizing programmes that will facilitate realisation of the right.

Finally, the study gives a research summary and presents conclusions drawn from the research.

CHAPTER 1

“I believe that education is the civil rights issue of our generation. And if you care about promoting opportunity and reducing inequality, the classroom is the place to start. Great teaching is about so much more than education; it is a daily fight for social justice.”

Arne Duncan, October 9, 2009¹

1.0 Introduction

In the contemporary world, attainment of education is a key pillar for socio-economic and political development. It is also an important pillar for promotion of social justice. The attainment of education is an infinite process which entails acquisition of skills. Over time, realisation of education has acquired a human rights dimension making it an entitlement of every human person.

Realization of the right to education plays a critical role in attainment of social justice through empowerment of people irrespective of their social, economic, political and cultural backgrounds. It also enables them to take up opportunities and improve their life chances. Facilitating realization of the right to education is therefore a poverty reduction strategy which offers all pupils equality of opportunity which ultimately can get them out of the poverty cycle.

In recognition of the need for empowerment and attainment of social justice, the right to Free Primary Education (FPE) has been enshrined in policy and legal framework.

This study critically examined the effectiveness of the legal and policy framework governing realisation of FPE in Kenya in facilitating realisation of FPE by children from poor, disadvantaged and marginalised backgrounds. It examined the gaps in the law and policy and other factors impeding realisation of the right to FPE by children from poor and marginalised backgrounds and proposed legislative, policy and social interventions to enhance the realisation of the right.

¹Arne Duncan, a renowned educationist, was nominated in 2009 as the 9th United States Secretary of Education. <<http://www2.ed.gov/news/staff/bios/duncan.html>> accessed on 5th March 2014

The study evaluated the extent of realisation of the normative elements of the right to free primary education, notably, accessibility, acceptability, availability and adaptability. It also highlighted the progress made by the State and non-state actors and established other factors impeding realisation of the right to free primary education. The study also established the fundamental linkage between realisation of this right, poverty reduction and social justice.

The study proposed the adoption of the Rights Based Approach underpinned by the pillars of accountability; participation; interdependence of rights; and equality and non-discrimination.² This Approach resonates well with the concept of social justice. It has capacity to ensure that children from poor, disadvantaged and marginalised backgrounds realise right to FPE and other coterminous rights. The Approach also has universally recognised benchmarks which ensure that right holders claim their rights and duty bearers carry out their obligations. It also makes provisions for accountability mechanisms in cases of threatened or actual violation of the right.

The study finally gave conclusions drawn from the research.

1.1 Background of the Study

Shortly after independence, the Government formulated Sessional Paper No. 10 of 1965 titled 'African Socialism and its Application to Kenya'³ which identified eradication of ignorance, poverty and disease as the gateway to economic growth in the country. This marked the beginning of an arduous journey of reforming the education system.

Since then, strategies for the eradication of ignorance through the education system have been effected through recommendations of various task forces,⁴ formulation of policies and enactment of legislation. These efforts have overseen significant growth of the education sector.

² Celestine Nyamu-Musembi, *Human Rights and the Public Service*, (Commission on Implementation of the Constitution, Forthcoming, 2013) 13

³ Republic of Kenya, *'African Socialism and its Application to Kenya,' Sessional Paper No. 10 of 1965*

⁴ Elijah Bonyoh Don, 'A Critique of Kenya's Education Reform Process and Task Force Report' (2012) <<http://www.feskenya.org/media/publications/2012/A%20critique%20of%20Kenya's%20Education%20Reform%20Process%20and%20Task%20Force%20Report%20-%20Elijah%20Don%20Bonyo.pdf>> accessed on 26th March 2014. These taskforces include the Presidential Working Party on the Second University of 1981, the

The Kenyan economy has grown unevenly by leaps and bounds since 1963 creating a society with extremes of wealth and great poverty.⁵ These inequalities permeated the education sector precipitating the introduction of FPE in 2003. It was expected that children from poor backgrounds who were previously not able to access education would do so under FPE. Government reports however indicate that a good number of pupils eligible for FPE are still out of school.⁶

At the point of introduction of FPE, the Government neither invested in any additional physical infrastructure⁷ nor hired more teachers to deal with the expected increased enrolment.⁸ Since the inception of FPE in 2003, the curriculum has never been revised. In the year 2014, the Ministry of Education, Science and Technology (MoEST) confirmed that the FPE curriculum had not been reviewed in the last [fourteen] years.⁹ Further, children were being taught to pass examinations in a competitive situation without real focus on actual learning.

1.2 Statement of the Problem

The central problem of this study is the inadequate realization of FPE by children from poor and marginalized backgrounds in Kenya. The Government has put in place a legal and policy framework for FPE governance in compliance with treaty obligations and education for all goals to ensure that children from poor and marginalized backgrounds realize their right to FPE. Despite these interventions, the implementation of legal and policy framework governing FPE still presents challenges in terms of addressing inequalities and poverty. Its implementation continues to sustain or increase inequalities.¹⁰

Presidential Working Party on Education and Manpower Training for the Next Decade and Beyond of 1988 and the Commission of Inquiry into the Education System of Kenya of 1999.

⁵ L. N. Basu, *Human Rights in a Global Perspective*, (Diamond Printing Press, 2009) 157

⁶ See Ministry of Education and UNESCO, 'Education for All End of Decade Assessment Report, 2001-2010' (2010)

⁷ MoEST, *Kenya Education Sector Support Programme 2005 – 2010, (KESSP) , Delivering Quality Education and Training to All Kenyans* (2005) 1

⁸ When FPE was introduced, teacher recruitment had been frozen arising from the World Bank and the International Monetary Fund policies in Africa.

Action Aid, 'IMF Policies and their Impact on Education, Health and Women's Rights in Kenya, *The Fallacies and Pitfalls of the IMF Policies*' (Action Aid International, Kenya, 2009) 27

⁹ MoEST, 'Achievements of the Jubilee Administration at One Year', *Daily Nation* (Nairobi, 18th August 2014) 34

¹⁰ Richard Jolly, 'Inequality in Historical Perspective, in George Mavrotas & Antony Shorrocks, (eds) *Advancing Development Core Themes in Global Economics*, (Palgrave Macmillan, 2007) 71

FPE has notable challenges, reports from the Government show that despite access to FPE in public primary schools, the quality of education is severely compromised due to overcrowding.¹¹ Other challenges noted are lack or poor condition of the education infrastructure;¹² shortage and quality of teachers;¹³ and an outdated curriculum that is out of sync with market realities prevailing in the Country.¹⁴ It is further noted from credible reports that some pupils who are eligible for FPE are still out of school while those who have gone through FPE are not equipped with relevant skills to lift themselves out of poverty.¹⁵

This study sought to investigate and establish why the realization of FPE is not optimal for children from poor and marginalized backgrounds despite the existing legal and policy framework. What other factors are at play in impeding the realization of FPE in Kenya by children from poor and marginalised backgrounds? This study sought to answer these questions to unearth the problem.

1.3 Objectives of the Study

The overall objective of this study was to critically examine the effectiveness of legal and policy framework governing realization of FPE by children from poor and marginalised backgrounds for purposes of promoting of social justice.

Flowing from this, the study sought;

1. To critically examine the effectiveness of legal and policy framework governing realisation of the right to FPE by children from poor and marginalized backgrounds.
2. To examine other factors that impede the realization of the right to FPE in Kenya by children from poor and marginalized backgrounds.

¹¹See Republic of Kenya, *Second – Fifth Report to the Committee on Economic, Social and Cultural Rights*, (2013)

¹²See MoEST, *Kenya Education Sector Support Programme 2005 – 2010, (KESSP) , Delivering Quality Education and Training to All Kenyans* (2005) and Ministry of Education and UNESCO, ‘*Education for All End of Decade Assessment Report* (2001-2010)

¹³See Republic of Kenya n 11

¹⁴The FPE curriculum is examination oriented with a strong focus on passing examinations and has not been revised in the last 14 years. See MoEST, ‘Achievements of the Jubilee Administration at One Year’, *Daily Nation* (Nairobi, 18th August 2014) 34

¹⁵See UNICEF/UNESCO, *A Human Rights Based Approach to Education for All*, 2007

3. To identify best practices and recommend changes on the policy and legal framework governing realization of FPE by children from poor and marginalized backgrounds.

1.4 Research Questions

This study sought to address the following questions;

1. Is the existing legal and policy framework governing realization of FPE in Kenya effective in promoting realization of the right to FPE by children from poor and marginalized backgrounds?
2. What other factors impede realisation of FPE in Kenya by children from poor and marginalized backgrounds?
3. What are the best practices and what recommendations can be made to enhance the legal and policy framework to facilitate realization of FPE by children from poor and marginalized backgrounds with the ultimate goal of promoting social justice?

1.5 Hypothesis

The existing legal and policy framework governing realisation of FPE in Kenya on its own is ineffective for realisation of the right to FPE by children from poor and marginalized backgrounds and therefore there is need for legal, policy and social change.

1.6 Justification for the Study

The realization of the right to education under FPE is central to the enjoyment of many rights of the child.¹⁶ Katerina Tomasevski, a former United Nations Special Rapporteur on the right to education, is of the view that a large number of human rights problems cannot be solved unless

¹⁶Children's Legal Action Network (CLAN), '*Child Rights and Child Protection; A Hand Book for Community Children's Paralegal Workers*'. (1st Ed. CLAN, 2003) 3

the right to education is guaranteed.¹⁷ She further contends that this right has a multiplier effect and straddles the division of human rights into civil and political, on the one hand and economic, social and cultural on the other hand by embodying them all.¹⁸ The right to be voted into office has no meaning to an illiterate person. Education enables individuals to access information about health and nutrition thus promoting the right to health.

Effective implementation of FPE was expected to propel Kenya towards achievement of Millennium Development Goal number 2 of attaining universal free primary education by year 2015.¹⁹ However, 2015 is already past and FPE is not yet a reality for the disadvantaged and marginalized. The international community has gone back to the drawing board and has formulated 17 Sustainable Development Goals among which quality education features as Goal number 4.²⁰ There is need to consolidate the gains, examine the challenges and come up with a roadmap to accelerate progress in the realization of this Goal beyond 2015.

Realization of the right to education engenders community and national development. The realization of the right and development are mutually reinforcing. At the national level, Kenya's development blueprint, Vision 2030, identifies education as one of the instrumentalities through which Kenya will progressively achieve economic growth.²¹ Vision 2030 is a development blueprint with the aim of driving Kenya towards attaining a middle income status by the year 2030.²² It is underpinned by the economic, social and political pillars. Education falls under the social pillar and is expected to play a key role in promotion of a just and cohesive society enjoying equitable development.

¹⁷UNESCO, 'The Right to Education' <http://portal.unesco.org/geography/en/ev.php-URL_ID=9349&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html> accessed on 24th June 2014

¹⁸Katerina Tomaševski, 'Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable', (Novum Grafiska AB, Gothenburg, 2001) 9

< http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf > accessed on 20th June, 2014

¹⁹Picture Kenya, 'Facts about Free Primary Education in Kenya'

< <http://picturekenya.com/283free-primary-education-in-kenya/#sthash.yK7VEav.dpuf>> accessed on 23rd February 2014

²⁰United Nations, 'Sustainable Development Goals'

< <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>> accessed on 29th July 2015

²¹MoEST, 'Education Reforms & Recommendations'

<<http://www.education.go.ke/ShowPage.aspx?department=1&id=1164>> accessed on 18th March 2014

²²Republic of Kenya, *Sessional Paper No. 10 of 2012 on Kenya Vision 2030*

The Committee on Social, Economic and Cultural Rights (CSECR) in its General Comment No. 13 on the right to education emphasizes that “the right to education is an empowerment right and the primary vehicle through which economically and socially marginalized individuals can lift themselves out of poverty.”²³ It further affirms that education plays a crucial role in shielding children from exploitative and hazardous labour and sexual profiteering.²⁴

1.7 Theoretical Framework

This study is principally grounded on the theory of distributive justice propounded by John Rawls. The study also examines criticisms and arguments projected by the opponents of this theory. Rawls’ theory of distributive justice is “an extension of the social contract theory propounded by Thomas Hobbes, John Locke and Jean-Jacques Rousseau.”²⁵ Under the social contract theory, man existed freely without any governance framework. In this state of nature, everyone had the right to everything and there was no limit to the right of natural liberty. Man however created a civil society to give him protection in return for subservience²⁶ under the social contract ending the difficult conditions of the state of nature.²⁷ A social contract reached in the state of nature would not be fair because it would favour those who are privileged by the conditions of the state of nature.²⁸

Rawls in enhancing the social contract theory is of the view that there must be systematic interventions to safeguard those who find themselves disadvantaged by the social contract. This he does by way of propounding the theory of distributive justice which takes a two pronged typology.

²³CSECR, General Comment No. 13: The Right to Education (Art 13 of the Covenant), in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (1999) UN Doc. E/C.12/1999/10, Preamble

²⁴Ibid

²⁵Anon, ‘Legal Theory Lexicon: Distributive Justice’ <<http://lsolum.typepad.com/legaltheory/2014/01/legal-theory-lexicon-distributive-justice.html>> accessed on 25 February 2014

²⁶The Freeman Foundation for Economic Education, ‘John Locke ‘Natural Rights to Life, Liberty, and Property’ <<http://www.fee.org/>> accessed on 25 July 2013

²⁷Ibid

²⁸Ibid

These two typologies are expressed through the “equal liberty principle and the difference principle.”²⁹ Under the equal liberty principle, he asserts that people living in a society have equal liberties. Consequently, every person should receive an equal guarantee to all human rights.

Under the difference principle however, all economic inequalities should be dealt with by ensuring that the greatest benefit goes to the vulnerable and the most disadvantaged to ensure fairness.³⁰ Rawls’ principle of distributive justice implies that both the society and the individual have a duty to those in serious need.

According to Rawls, under the difference principle, laws and policies should be aligned towards improvement of life prospects of the disadvantaged in society.³¹ With the introduction of socio-economic rights and in particular the right to education in the Constitution of Kenya, the Government has changed its laws and policies to facilitate realization of FPE while passing on the burden to fund FPE to the tax payer with the hope that the country and the disadvantaged will reap benefits. The theory also advocates for distribution of opportunities since formal equality of opportunity may lead to social inequalities.

1.7.1 Arguments against Social Justice and the Redistributive Theory of Justice

Opponents of social justice argue that it makes poverty more attractive even to those who would otherwise have been motivated to work and support themselves.³² The critics accuse beneficiaries of social justice programs of conceiving poverty as a legally enforceable moral claim on the wealth of others.³³

²⁹Anon, ‘Rawls’ Theory of Justice’
<<http://www83.homepage.villanova.edu/richard.jacobs/MPA%208300/theories/rawls.html>> accessed on 26th March 2014

³⁰Ibid

³¹Ibid

³²Mario Rizzo, ‘Economic Perspectives against the Welfare State’
<<http://www.csmonitor.com/Business/ThinkMarkets/2010/0520/Economic-perspectives-against-the-welfare-state>> accessed on 22nd August, 2014

³³ Ibid

Robert Nozick, a critic of Rawls theory of distributive justice, argues that individuals have the right to retain their property even against the State and have no obligation to help those worse off unless they had obtained their wealth from them improperly.³⁴ According to Nozick, redistribution cannot be justified except to rectify a previous injustice and there can be no question of redistribution of wealth for social purposes. He is of the view that taxation for purposes of redistribution is a violation of individual rights, “.reduces incentives for economic initiative, depresses economic growth and may cause an unsustainable debt burden.”³⁵

Other opponents of social justice include Newt Gingrich who is of the view that social justice programmes breeds citizens who are content with "subsidized idleness," while extending the burden to taxpayers.³⁶ In his view, redistribution is equivalent to condoning and financing the laziness.³⁷

Though unintentionally, “social justice may appear to increase the net value of being in the condition that it seeks to change... [poverty].... either by increasing the rewards or by reducing the penalties.”³⁸ However, affirmative action is temporary in nature and the equality precipitated by redistribution effected through affirmative action eventually engenders social justice and societal cohesion which are both recipes for universal and lasting peace.³⁹ It also creates a sense of identity and belonging to the society resulting in ownership of Government and its institutions.⁴⁰

The realization of the right to education under the FPE in Kenya is premised on the theory of distributive justice since it affords an opportunity to all pupils to learn under the equality

³⁴ Ibid

³⁵ Joseph Westfall, ‘Government Grants Pit the Right to Freedom against the Right to a Minimum Level of Well-Being’

< <http://www.scu.edu/ethics/publications/iie/v8n3/welfare.html> > accessed on 21st August, 2014

³⁶ Ibid. Newt Gingrich was the Speaker of the American House of Representatives in America from 1995 to 1999.

³⁷ Westfall n 35

³⁸ Michael Lacewing, ‘Rawls and Nozick on Justice’

<<http://cw.routledge.com/textbooks/alevelphilosophy/data/A2/Political/JusticeRawlsNozick.pdf> >accessed on 21st August 2014

³⁹ Constitution of the International Labour Organisation, Preamble

< <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf> > accessed on 23rd August 2014

⁴⁰David C. Rose, ‘Social Justice Theory: A Solution in Search of a Problem’

<<http://www.libertylawsite.org/liberty-forum/social-justice-theory-a-solution-in-search-of-a-problem/>> accessed on 25th August 2014

principle and at the same time introduces affirmative action programmes under the difference principle for the poor and marginalised.

1.8 Research Methodology

This was a desk/library based research on the effectiveness of the legal and policy framework governing realisation of the right to education under FPE in Kenya by children from poor and marginalized backgrounds. The design of the study was qualitative in nature. The research relied on both primary and secondary data.

Primary data included the Constitution of Kenya 2010, treaties, conventions, protocols, domestic statutes and statutes from other jurisdictions. Reported cases were also referred to for purposes of highlighting the emerging jurisprudence on the realisation of the right.

Reference was made to secondary data available in books, policies, government reports, journal articles, the internet, newspapers, commission/committee reports and recommendations, reports and papers by the MoEST, policy documents and reports of treaty monitoring bodies to highlight interventions by the State, gains and recommendations on the way forward.

A critical review of relevant literature on realization of the right to FPE was made to evaluate progress and status of implementation of the right. The qualitative data gathered was critically evaluated against the research objectives of this study. The study also benchmarked with other jurisdictions on implementation of the right for best practices.

The study also identified other factors impeding realisation of FPE key among them poverty and exclusion in the country's development agenda. Resultantly, it critically examined the Rights Based Approach to poverty reduction and proposed its adoption towards planning, programming and implementation of FPE to ensure optimal realisation of the right by children from poor and marginalized backgrounds.

1.9 Literature Review

Many authors have written on the efficacy of the legal, policy and institutional regime governing realisation of the right to education under FPE in Kenya. Below is a discussion of the contribution of these authors in the FPE discourse and the gaps which the study herein sought to address.

1.9.1 Propriety and Effectiveness of the Legal and Policy Framework for FPE

Daniel Sifuna,⁴¹ a renowned authority in education matters, observes that FPE is currently faced with the challenge of poor quality because of overcrowding, lack of teachers and inadequate learning materials. His work further contends that the institutional framework governing education in Kenya is deficient arising from funding and infrastructure challenges.⁴² He concludes that the State responds to these challenges in an *ad hoc* manner which operates toacerbate the problem.

At the time of writing his paper, there was no comprehensive policy and legal framework governing FPE. The Government has put this framework in place precipitating the need to investigate whether this framework which became operational *ex post facto* has engendered realisation of FPE by the poor and marginalized.

Paul Kenya⁴³ adds his voice to the implementation of FPE in Kenya in his thesis by looking at how the FPE policy has been implemented in some schools in Migwani Division.⁴⁴ His work identifies maladministration and mismanagement, curriculum development, poverty and parental apathy as some of the gaps in the realisation of FPE in Migwani Division.

⁴¹Daniel Sifuna, 'The Illusion of Universal Free Primary Education in Kenya'
<http://africa.peacelink.org/wajibu/Arts/art_6901.html> accessed on 12th March, 2014

⁴²Ibid

⁴³Paul Kenya, 'The Kenya Free Primary Education Policy (FPE):An Assessment on the Impact and Sustainability of Free Primary Education in Migwani Division' (2008)
<<http://architecture.brookes.ac.uk/research/cendep/dissertations/PaulKenya.pdf>> accessed on 24th March, 2014

⁴⁴Under Section 15(2) (c) of the National Government Co-ordination Act, No. 1 of 2013 Divisions have been replaced by Wards and are administered by Assistant County Commissioners.

In his literature review, Paul briefly identifies the rights of the child as enumerated in the ICSECR,⁴⁵ Convention on the Rights of the Child (CRC)⁴⁶ and Children Act⁴⁷ and identifies the Education Act⁴⁸ as the main legal enactment providing for education governance in Kenya. It is important to highlight that Paul wrote his paper in 2008 before the promulgation of the Constitution of Kenya 2010 and the enactment of Basic Education Act.⁴⁹

The promulgation of the Constitution is an important variable in that it conferred a human rights status to the realization of education in Kenya. There is need to interrogate its effect on realization of FPE. Further, the Basic Education Act has laid down provisions that have revolutionalized education governance. There is therefore need to inquire into whether the constitutional underpinning; and the enactment of the Basic Education Act have brought about the much needed reform of the education sector to ensure it lives up to its expectation as a vehicle for social justice.

Paul looked at realisation of FPE in Migwani Division (as it then was) which is limited in scope while this study focuses on realization of FPE in Kenya as a whole by children from poor and marginalized backgrounds giving it a wider perspective.

A study carried out by the United Nations Education Science and Cultural Organization (UNESCO) Nairobi Office in collaboration with MoEST in 162 primary schools in Kenya in February 2004⁵⁰ established that poverty, serious teacher shortage, inadequate classrooms and other infrastructure problems such as toilets shortage were some of the challenges affecting FPE.

⁴⁵International Covenant on Economic, Social and Cultural Rights(adopted on 16th December 1966 entered into force on 3rd January 1976) 993 UNTS 3(ICSECR)

⁴⁶Convention on the Rights of the Child, (adopted 20th November 1989, entered into force 2nd September 1990), 1577 UNTS 3 (CRC)

⁴⁷Act No 8 of 2001

⁴⁸Cap 211 of the Laws of Kenya(Repealed)

⁴⁹Act No. 14 of 2013

⁵⁰UNESCO, *Challenges of Implementing Free Primary Education in Kenya Assessment Report* (March 2005) <http://hivhealthclearinghouse.unesco.org/sites/default/files/resources/FPE_Kenya.pdf >, accessed on 20th March 2014

The study noted that FPE was started without a clear communication strategy and extensive stakeholder consultations. Pupils, parents and teachers heard of it for the first time during campaigns for the 2002 presidential and parliamentary elections.⁵¹

The study, done in 2005 shortly after the commencement of FPE, recommended the formulation of a comprehensive FPE policy, a coherent legal framework and a bottom-up FPE communication strategy. The Government has now put in place a legal and policy framework to govern FPE. It has also put in place a communication strategy. In light of this, it is important to investigate the effectiveness of these developments in operationalization of FPE.

1.9.2 Access to FPE

Every child has a right to realize FPE irrespective of his or her situation in life. William Aseka⁵² focuses on inclusion in realization of FPE by children with disability and observes that children with disabilities fall under a special category of persons who require distinct attention and should be guaranteed human rights by the State.

The Constitution of Kenya under Article 54 forbids discrimination on the basis of disability. For this reason, the right to education for disabled children is compulsory. He notes that the concept of compulsory education has at least two main elements. Firstly, access of a child to education is not optional. Secondly, it is mandatory to ensure that all children whether or not disabled should access primary education without discrimination.⁵³

Aseka remarks that education for children with disabilities is not guaranteed in Kenya due to poverty, poor planning and most important, approaching disability from a ‘medical model’ instead of a ‘social model.’ By way of explanation, he indicates that the medical model presumes that children with disabilities are a problem which needs to be ‘fixed’ through exclusion. Conversely, a social model supports the notion of inclusive education. He concludes that a social model

⁵¹Ibid

⁵²William Aseka, ‘Education for All, Even for Children with Disabilities in Kenya’ <<http://africlaw.com/2013/04/05/education-for-all-even-for-children-with-disabilities-in-kenya/>> accessed on 11th April 2014

⁵³Ibid

identifies the environment as a problem and not the children with disability. He recommends that the Government should fix the environment to make it conducive for inclusion rather than excluding children from mainstream education.

His study is important in that it advocates for inclusion of children with disability in the education process. However, there is need to inquire into realization of the right to education for poor and marginalised children which is what this paper seeks to address.

Lucyline Nkatha Murungi in her Article on the right to education⁵⁴ outlines the constitutional provisions governing enforcement of the right to education and the principles guiding the judicial enforcement of the right in case of actual or threatened violation. The Article does not outline ways and means of access to justice for purposes of the enforcement of the right by children from poor and marginalised backgrounds. Further, it was done shortly after the promulgation of the Constitution and little or no case law was available on the enforcement of the right.

This study explores the available mediums for access to justice for enforcement of the right by children from poor and marginalised backgrounds. In addition, it investigates availability of an emerging jurisprudence on judicial enforcement of the right.

1.9.3 Right to Education and Social Justice

The right to education is an empowerment right which has capacity to empower poor and marginalized children by lifting them out of poverty with the ultimate goal of promoting social justice.

Cheserek and Mugalavai adopt an economic perspective in their study and discuss the challenges impeding achievement of an enabling education sector that supports industrialization in Kenya by the year 2030. They identify access, equity, quality, relevance and efficiency in the

⁵⁴Lucyline Nkatha Murungi, 'The Right to Education under the Constitution of Kenya: Scope and Prospects for Enforcement,' in Japhet Biegon & Godfrey Musila, *Judicial Enforcement of Socio-Economic Rights under the new Constitution; Challenges and Opportunities for Kenya*, Vol. 10, (Kenyan Section of the International Commission of Jurists, 2011) 217-244.

management of educational resources as the main challenges facing the education sector in Kenya.⁵⁵ Writing in 2012 before the Basic Education Act⁵⁶ had become operational,⁵⁷ they recommended that the Government should come up with an incisive legal framework to govern realization of education in Kenya in order to meet the ultimate goal enumerated in vision 2030 of making Kenya attain a middle income status by the year 2030.

Whereas an economic perspective is important in promoting economic development, it should not be the overriding concern since it does not integrate empowerment and economic independence at the individual level.

This study examines realization of education from a human rights perspective as a vehicle for empowerment in order to lift its beneficiaries out of poverty and for promotion of social justice.

Manohar Tigga, in his Article, ‘Right to Education and Social Justice’⁵⁸ seeks to determine the extent to which the Indian educational system has educated the “disadvantaged, weak and marginalized sections of the society.”⁵⁹

Tigga opines that covertly or overtly, the State and its citizens are responsible for the uneducated and the poor who have a right to live a decent and dignified life. He is of the view that every child is morally responsible and talented if proper opportunities are availed.

He further says that education is an avenue for stimulating socio-economic, political and cultural transformation. In this regard, the Government of India should introduce various measures to enhance the access to education by the poor and marginalised. He identifies one such measure as moderating merit with equity by setting aside positions for children from poor backgrounds in

⁵⁵Cheserek G. J., and Mugalavai, V. K, ‘Challenges and Reforms Facing Kenyan Education System in the 21st Century: Integrating the Principles of Vision 2030 and Constitution 2010’ (2012) (JETERAPS) 473

⁵⁶Act No 14 of 2013

⁵⁷The preamble to the Basic Education Act provides that the commencement date shall be 25th January, 2013.

⁵⁸Manohar Tigga, ‘Right to Education and Social Justice’

<http://www.daijiworld.com/chan/exclusive_arch.asp?ex_id=2068> accessed on 12th may 2014

⁵⁹Ibid. Basic education for children aged 6 to 14 years is a human right under the 86th amendment of the Indian Constitution. The law in Kenya should be amended to reflect this age gap to avoid a situation where adults are accessing FPE together with minors and to pre-empt class repetitions.

institutions of higher learning. He concludes that merit should not be the only defining factor in affording opportunities since some children are disadvantaged due to past discriminations.⁶⁰

Manohar Tigga's Article gives a synopsis of the extent to which India has taken care of the education of poor and marginalized children. There is a need to interrogate and document the Kenyan equivalent.

From the foregoing discourse, the abovementioned scholars and the UNESCO Office have made immense contributions to the debate on realization of the right to FPE. However, there is need for further inquiries into the effectiveness of the legal and policy framework governing the realization of the right to education to inform reforms on realisation of FPE by children from poor and marginalized backgrounds precipitating this study.

1.10 Definition of Terms

In order to understand the interaction between the concept of education, human rights and their practical linkages to social justice, it is imperative to define some key terminologies.

1.10.1 Education

Education has been defined as 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 capabilities, attitudes, aptitudes and knowledge."⁶¹

The Convention against Discrimination in Education defines education as all types and levels of education including access; standard; quality; and the conditions under which it is given.⁶² Chris Wosyanju further describes education as the process through which knowledge, skills, norms, attitudes and values are imparted with the aim of integrating the individual in a given society.⁶³

⁶⁰Tigga n 58

⁶¹Beiter, Klaus Dieter, *The Protection of the Right to Education by International Law*, (Martinus Nijhoff. 2005) 19

⁶² Convention against Discrimination in Education (adopted on 14th December 1960 and entered into force on 22nd May 1962) UNESCO Doc.(CDE) Art 1(2)

⁶³ Chris Wosyanju, 'The System of Education in Kenya'

From these three definitions, education is conceived as a means through which individuals and societies acquire knowledge, skills and values to fulfil their respective needs.

1.10.2 Right and Human Rights

A right is an entitlement of persons everywhere and at all times. It has been defined as “a power, privilege, demand or claim possessed by a particular person by virtue of law.”⁶⁴ With regard to human rights, there is no universally acceptable definition. Various scholars have however attempted to define the term. Professor Eze defines human rights as “....demands or claims which an individual or groups make on society, some of which are protected by law...”⁶⁵ Jack Donnelly is of the view that human rights are prerequisites of a life of dignity worthy of every human being.⁶⁶

Human rights therefore are those entitlements that apply to human persons predicated on human dignity and equality. This finds anchorage in the Preamble to the Universal Declaration of Human Rights (hereinafter UDHR) which proclaims that “All human beings are born free and equal in dignity and rights.”⁶⁷

1.10.3 Social Justice

The term ‘social justice’ refers to an “approach to the distribution of goods in society with legal and institutional monitoring of the distribution of opportunities among citizens to ensure that all are given a fair and equal chance to succeed in life.”⁶⁸ This concept is anchored in the Constitution of Kenya 2010 both as a national value⁶⁹ and as a national aspiration.⁷⁰

<<http://international.iupui.edu/kenya/resources/Education-in-Kenya.pdf>> accessed on 24th March 2014

⁶⁴Anon, ‘Right, Legal Definition of Right’ <<http://legal-dictionary.thefreedictionary.com>> accessed on 22nd July, 2013

⁶⁵ Issa G. Shivji, *The Concept of Human Rights in Africa* (Codesria Books Series, 1989) 21

⁶⁶Anon, ‘Introduction to Human Rights Theories’ <<http://www.sfu.ca>> accessed on 22nd July, 2013.

⁶⁷Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res. 217 A (III) (UDHR) Art 1

⁶⁸Sonia Exley, ‘A Note on Social Justice and Education’

<<http://www.thersa.org/action-research-centre/learning,-cognition-and-creativity/education/social-justice/a-n-on-social-justice-and-education>> accessed on 14th May 2014

⁶⁹Constitution of Kenya 2010, Art 10

Social justice presupposes that the society is morally bound to help its disadvantaged members through taxation and redistribution. Redistribution of social goods eventually results in “amelioration of the conditions of the poor and the beginning of a generation that is free from socio-economic need.”⁷¹ The Government promotes social justice by way of taxation, policy making, planning and implementing programmes targeting improvement of the economic conditions of the poor.

Education plays a critical role in realization of social justice in that it empowers the people, enables them to take up opportunities and improves their life chances. Overall, it helps them to achieve socio-economic development and emancipation.⁷²

1.10.4 The Right to Education

Education is protected by both national legislation and international instruments as a human right. The Committee on Social, Economic and Cultural Rights (CSECR) in its General Comment on the right to education has defined the right of education to include the normative ingredients of availability, accessibility, acceptability and adaptability.⁷³

Domestication of this right in Kenya was done through the Children Act⁷⁴ in 2001 and policy interventions. The criticality of the right was further enhanced when it was accorded a constitutional status with the promulgation of the Constitution of Kenya in 2010. To operationalize effective constitutional protection of the right, the Basic Education Act⁷⁵ was enacted in 2013.

⁷⁰Ibid Art 19(2)

⁷¹Christopher Mbazira, ‘Litigating Socio-Economic Rights In South Africa: A Choice Between Corrective and Distributive Justice’, (Pretoria University Law Press (Pulp) 2009) 3
< http://www.pulPuPac.za/pdf/2009_07/2009_07.pdf > accessed on 17th May 2014

⁷²Shahid Siddiqui, ‘Education and Social Justice’

<<http://www.saglobalaffairs.com/back-issues/643-education-and-social-justice.html>,> accessed on 5th August 2014

⁷³CSECR, General Comment No. 13: The Right to Education (Art 13 of the Covenant), in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (1999) UN Doc. E/C.12/1999/10 Para 6

⁷⁴Act No. 8 of 2001

⁷⁵Act No 14 of 2013

1.10.5 Compulsory Free Primary Education

The Basic Education Act does not define FPE but provides that the Cabinet Secretary for the time being responsible for matters relating to basic education and training is obligated to ensure that every child realises the right to free basic education.⁷⁶ A clearer definition is offered by the Constitution of India which provides that “all children between the ages of 6 and 14 years shall have the right to free and compulsory elementary education at a neighbourhood school.”⁷⁷

In Kenya despite FPE being accessed by children in this age gap, adults also access FPE.⁷⁸ FPE operates within the confines of 8-4-4 system of education which was started in Kenya in 1985 and is undertaken within the first phase of 8 years ordinarily by pupils aged from 6 to 14 years.⁷⁹ After 8 years of primary schooling, the pupils take the Kenya Certificate of Primary Education (KCPE) examination whereupon candidates are examined in six main subjects notably, Kiswahili, English, Mathematics, Science, Social Studies and Religious Education. The results of this exam determine whether children proceed to high school or engage in other activities.

The Ministry of Education, Science and Technology (MoEST) and the parastatals affiliated to it is responsible for the realisation of the right to education under FPE.⁸⁰ It is also responsible for the development of the FPE curriculum and gives guidelines on recommended text books under the approved syllabus. Further, it disburses a capitation grant of Kenya shillings 1,020/= per

⁷⁶Basic Education Act No. 14 of 2013 s 28

⁷⁷UNICEF India, ‘The Right to Education: Frequently Asked Questions:’
<http://www.unicef.org/india/education_6144.htm> accessed on 24th March, 2014.
Constitution of India, Art. 21 A.

⁷⁸In practice, anyone who wishes to go through FPE can do so irrespective of age. A classic case of adults accessing the FPE is Mr. Kimani Maruge who joined standard one at 84 years of age becoming the oldest person to start primary school. ‘Standard Digital News - Celebrating Four Decades of Free Primary Education Policy’
<http://www.standardmedia.co.ke/mobile/?ArtID=2000102381&story_title=celebrating-four-decades-of-free-primary-education-policy> accessed on 26th March 2014.

The Government has however put in place adult education infrastructure for use by persons who are beyond fourteen years of age. Section 28(2) (a) of the Basic Education Act provides that the Cabinet Secretary shall in consultation with the National Education Board and the relevant County Education Board provide for the establishment of adult and continuing education centers. Adult continuing education is defined as the learning processes within the perspective of lifelong learning in which an adult is granted an opportunity in an institution of basic education for purposes of developing abilities, enriching knowledge and improving skills.

⁷⁹Ministry of Education and UNESCO, *Education for all, End of Decade Assessment Report, 2001-2010*(2010) P. 11

⁸⁰Basic Education Act No. 14 of 2013 s 28

child enrolled in a public primary school, annually.⁸¹ The funds are disbursed in two deposits per year, usually, six months apart and are supposed to cater for text books, stationery, support staff wages, repairs, maintenance and other sundry expenses.⁸²

1.10.6 Development

There is no consensus on the generic meaning of the term development. Some actors measure development through economic progress or the Gross Domestic Product of a State.⁸³ While economic growth has capacity to reduce poverty, sometimes it results in extremes of wealth concentrated in a few hands and extremes of poverty in the larger population.⁸⁴ Other actors are of the view that it should be quantified by the social parameter of poverty reduction through promotion of the standards of living of the human person.

Development in this paper is perceived in the context of poverty reduction by increasing the wellbeing of the human person through enhancement of opportunities as opposed to pursuit of economic growth.

1.10.7 Poverty

There are many perceptions of poverty. Some perceptions look at poverty as natural phenomenon or the aftermath of laziness, lack of initiative and focus. Others look at it as state of want. The United Nations Development Programmes (UNDP) appreciates poverty in terms of deprivations in health, education and standard of living and uses these variables to develop a state ranking system referred to as the Multidimensional Poverty Index (MPI).⁸⁵

⁸¹Ibid n 79, 39

⁸²Ibid n 79, 119

⁸³World Bank, 'What is Development?' <http://www.worldbank.org/depweb/beyond/beyondco/beg_01.pdf> accessed on 25th September 2015

⁸⁴Ibid

⁸⁵United Nations Development Programme Human Development Reports, 'Multidimensional Poverty Index' <<http://hdr.undp.org/en/content/multidimensional-poverty-index> > accessed on 31st July 2014

This study perceives poverty as a social phenomenon aggravated by discrimination and exclusion.⁸⁶In this regard, poverty amounts to “interrelated and mutually reinforcing deprivations which impact on people’s ability to claim and access their civil, cultural, economic, political and social rights.”⁸⁷ The presence of multiple deprivations in terms of health, food, education and safe drinking water translates to poverty.

1.11 Chapter Breakdown

The research findings were presented in four chapters. Chapter One had the introduction, background and justification of the study. It also comprised the statement of the problem, the objectives, hypothesis, theoretical framework, research questions and literature review.

Chapter Two critically examined the effectiveness of the legal and policy framework governing realisation of FPE in Kenya in facilitating realisation of FPE by children from poor and marginalized backgrounds. The Chapter established the fundamental linkage between realisation of this right, poverty reduction and social justice. It further evaluated the extent of realisation of the normative elements of the right to free primary education, notably, accessibility, acceptability, availability and adaptability and their interplay with social justice. It highlighted the progress made by the State and non-state actors and examined the gaps in the law and policy and other factors impeding realisation of the right to FPE by children from poor and marginalized backgrounds. The Chapter further proposed legislative, policy, social and best practices interventions to enhance the realisation of the right to FPE by children from poor and marginalized backgrounds.

Chapter Three proposed the adoption of the Rights Based Approach to poverty reduction and discussed its application to realisation of the right to FPE in Kenya.

Chapter Four provided a summarised outline and highlighted the conclusions drawn from the research.

⁸⁶OHCHR, ‘Principles and Guidelines For a Human Rights Approach To Poverty Reduction Strategies’ iii
<<http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>>accessed on 31st July 2014

⁸⁷ Ibid

CHAPTER 2

A CRITICAL APPRAISAL OF THE EFFECTIVENESS OF THE LEGAL AND POLICY FRAMEWORK GOVERNING REALISATION OF FPE IN KENYA

2.0 Introduction

Education is a key pillar for socio-economic and political development as well as promotion of social justice. Its realisation has taken a human rights dimension that advocates for education for all to kick out illiteracy and poverty in society. To this end, many governments and the international community have come up with legal and policy frameworks at national, regional and international levels that address realisation of the right to education. Other interventions have also been developed in the form of programmes and activities. This Chapter highlights selected key international and regional instruments protecting the right to FPE as well as legal and policy interventions that Kenya has adopted to promote the realization FPE. A critical analysis is undertaken to establish their effectiveness or otherwise in facilitating the realization FPE by children from poor and marginalized backgrounds.

The study also interrogates other factors other than the laws or policies that impede the realization of FPE by children from poor and marginalized backgrounds. Suggestions are made on way forward in closing the gaps identified in the analyses.

2.1 Key Legal and Policy Interventions on the Right to Education in Kenya

Kenya has ratified or acceded to many international and regional instruments safeguarding the right to education and has actively pursued their domestication. The said instruments are applicable in Kenya through enactment of legislation, formulation of policy or executive implementation.

The beginning point in the international human rights discourse is the Universal Declaration of Human Rights (UDHR).⁸⁸ Article 26 of the UDHR provides that everyone has the right to education which should be free at the elementary stages. Though the UDHR is a Declaration, its extensive application has informed state practice and *opinio juris* giving it the status of international customary law applicable to all States.⁸⁹ As part of a general rule of international law, it is applicable to Kenya by virtue of Section 2(5) of the Constitution of Kenya 2010.

The international treaties which contain safeguards for the right to education ratified or acceded to by Kenya include the International Covenant on Social, Economic and Cultural Rights (ICESCR),⁹⁰ the Convention on Rights of the Child (CRC)⁹¹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁹² and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁹³

The right to education has also found continental application in Africa. Kenya is a state party to the African Charter of Human and Peoples' Rights,⁹⁴ the African Charter on the Rights and Welfare of the Child (ACRWC)⁹⁵ and the African Youth Charter (AYC)⁹⁶ all of which contain varied forms of protection of the right to FPE.

International law informs formulation of national statutes and the two systems are applicable concurrently. Article 2(6) of the Constitution of Kenya 2010 provides that all treaties that have been ratified by Kenya form the *corpus juris* of Kenyan municipal law. In this regard, the international and regional instruments guaranteeing the right to education ratified by Kenya are

⁸⁸Universal Declaration of Human Rights (adopted 10th December 1948 UNGA Res. 217 A(III) (UDHR)

⁸⁹Malcolm Shaw, *International Law*, 6th edn, (Cambridge University Press, New York, 2008) 34

⁹⁰International Covenant on Economic, Social and Cultural Rights (adopted on 16th December 1966 entered into force on 3rd January 1976) 993 UNTS 3 (ICESCR) Art 13

⁹¹Convention on the Rights of the Child (adopted 20th November 1989, entered into force 2nd September 1990) 1577 UNTS 3(CRC) Art 28

⁹²Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13(CEDAW) Art 10

⁹³International Covenant on Elimination of all Forms of Racial Discrimination (adopted 21st December 1965 entered into force 4th January 1969) UNTS 195 UNGA Res. 2106(XX) (ICERD) Art 7

⁹⁴African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)(ACHPR)

⁹⁵African Charter on the Rights and Welfare of the Child (adopted on 1st July 1990, entered into force on 29 Nov, 1999)OAU Doc. CAB/LEG/24.9/49 (1990)(ACRWC)

⁹⁶African Youth Charter (adopted 2nd July 2006 entered into force on 8th August 2009) AU Doc (AYC) Art 13(1)

applicable domestically by virtue of Article 2 (6) of the Constitution. Kenya has also enacted the Treaty Making and Ratification Act⁹⁷ which lays down the procedure of domestication of treaties. Future treaties safeguarding this right will be ratified or acceded following the procedures laid down in the Act.

In 1965, the Government formulated Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya to steer Kenya on a different education trajectory from the one inherited from the colonialists. The policy identified ignorance as one of the challenges affecting post-independence Kenya.⁹⁸ In December the same year, the Education Act⁹⁹ was enacted to govern realization of basic education.

In 1988, the Government formulated a policy on Education and Training for the Next Decade and Beyond which introduced cost sharing in education between Government, parents and communities.¹⁰⁰ This effectively introduced a cost element in primary education preventing many children from poor and marginalised backgrounds from accessing primary education.

With the enactment of the Children Act¹⁰¹ in 2001, the right to education was accorded a statutory status. In 2003, the Government introduced FPE through a policy directive. This was a significant step in Kenya's attempts at compliance with its international treaty obligations and ensuring education for all.

In 2005, the Government formulated a policy¹⁰² which proposed a raft of measures to enhance realisation of the right to FPE. These included establishing and improving boarding schools in arid and semi-arid areas, expansion of Government supported school feeding programmes and removing all barriers to accessing FPE by disadvantaged groups.¹⁰³

⁹⁷Act No. 46 of 2012, Laws of Kenya

⁹⁸ Republic of Kenya, *Sessional Paper No: 10 of 1965 on African Socialism and its Application to Planning in Kenya* (1965)

⁹⁹ Cap 211 of the Laws of Kenya (Repealed)

¹⁰⁰ Republic of Kenya, *Sessional Paper No. 6 of 1988 on Education and Training for the Next Decade and Beyond*

¹⁰¹ Children Act No 8 of 2001 s 7

¹⁰² Republic of Kenya, *Sessional Paper No. 1 of 2005 as a Policy Framework for Education, Training and Research on Meeting the Challenges of Education, Training and Research in Kenya in the 21st Century* (2005)

< <http://www.education.go.ke/home/index.php/downloads/category/6-policy-doc> > accessed on 23rd May 2015

¹⁰³ Ibid 42

The status of this right was elevated when it found its way into the Constitution of Kenya 2010 and acquired a constitutional underpinning. Article 53(1) (d) of the Constitution provides that every child has a right to free compulsory basic education.

After the promulgation of the Constitution in 2010, the MoEST established a taskforce to oversee the Realignment of the Education Sector to the Constitution.¹⁰⁴ Among the key achievements of the Taskforce was the drafting of the Basic Education Bill which was enacted into the Basic Education Act.¹⁰⁵ This Act replaced the Education Act ¹⁰⁶ and gives effect to Article 53(1) (d) of the Constitution.

2.2 The Normative Elements of Education under FPE

The Committee on Social Economic and Cultural Rights (CSECR)¹⁰⁷ identifies the normative elements of the right to education under FPE as availability, accessibility, acceptability and adaptability.¹⁰⁸ The CSECR is a treaty body that monitors implementation of the right to education among other rights enshrined in the ICSECR.¹⁰⁹ It also has power to issue authoritative statements (General Comments)¹¹⁰ on nature and realization of socio-economic and cultural rights which include the right to education.¹¹¹

¹⁰⁴ MoEST, *Report of the Task Force on the Re-Alignment of the Education Sector to the Constitution of Kenya 2010 'Towards a Globally Competitive Quality Education for Sustainable Development (2012)* <http://www.vision2030.go.ke/cms/vds/Task_Force_Final_Report_Feb_20123.pdf > accessed on 20th May 2014

¹⁰⁵ Act No 14 of 2013. The Preamble to the Act provides that it became operational on 14th January 2013.

¹⁰⁶ Education Act, Cap 211 Laws of Kenya (Repealed)

¹⁰⁷ The Committee was established pursuant to a resolution of the United Nations Economic and Social Council since the ICSECR did not provide a treaty monitoring body. ECOSOC, 'Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' ECOSOC, Res. 1985/17(adopted 28th May 1985)

¹⁰⁸ CSECR, General Comment No. 13: The Right to Education (Art 13 of the Covenant), in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1999) UN Doc. E/C.12/1999/10, Para. 6

¹⁰⁹ International Covenant on Economic, Social and Cultural Rights (adopted on 16th December 1966 entered into force on 3rd January 1976) 993 UNTS 3(ICSECR)

¹¹⁰ All State parties to the ICSECR give their input during the formulation of these General Comments. Kenya is a State Party to the ICSECR having ratified the treaty on 1st May 1972. OHCHR, 'Ratification Status for CESCR - International Covenant on Economic, Social and Cultural Rights,' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en > accessed on 23rd March 2014

¹¹¹ Salman M. A. Salman & Siobhan M. Lankford, *Human Right to Water* (World Bank, Washington D.C, 2004) 43

For wholesome realisation of the right to education under FPE, these four normative elements must be present. It is therefore imperative to critically examine how these elements interact with the legal and policy framework and how they are implemented to foster social justice.

2.3 Access to FPE

Access to FPE is the most important normative element of this right since it lays down the foundation for its realisation. Accessibility of right to education under FPE adopts a tripartite typology. These include access to public primary schools without covert or overt discrimination on any ground.¹¹² Secondly, the educational institutions have to be physically accessible either by attendance at some reasonably convenient geographic location or via modern technology. Thirdly, FPE has to be affordable to all.¹¹³

2.3.1 Access without Discrimination

The Convention against Discrimination in Education¹¹⁴ defines the term discrimination as “any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth has the purpose or effect of nullifying or impairing equality of treatment in education and in particular with the effect of depriving any person or group of persons of access to education of any type or at any level or limiting any person or group of persons to education of an inferior standard.”¹¹⁵

Section 5 of the Children Act¹¹⁶ provides that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.

The Constitution at Article 27(1) provides that every person is equal before the law and has the right to equal protection and benefit of the law. The Article further provides that the State or any

¹¹² Article 27 of the Constitution of Kenya 2010 lists grounds of discrimination.

¹¹³ CSECR n 108

¹¹⁴ Convention against Discrimination in Education (adopted on 14th December 1960 and entered into force on 22nd May 1962) UNESCO Doc. (1960)

¹¹⁵ Ibid Art 1

¹¹⁶ Act No. 8 of 2001

person shall not discriminate directly or indirectly against any person on any ground.¹¹⁷ It also provides that any person with any disability is entitled to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person.¹¹⁸

To ensure that duty bearers are accountable, the Children Act provides that any child whose right to education has been, is being or is likely to be contravened may have an application for redress made to the High Court on his or her behalf.¹¹⁹ According to the Act, anyone who infringes a child's right to primary education is guilty of an offence and punishable by a jail term of not more than 12 months or a maximum fine of Kenya Shillings Fifty Thousand notwithstanding penalties contained in any other law.¹²⁰ Such a person is liable upon summary conviction thus making it possible for the court to convict absent suspects.¹²¹ A parent or guardian who does not facilitate admission of his or her child to a basic education institution shall be "deemed to have committed an offence and is liable to a fine not exceeding one hundred thousand or to a period not exceeding two years or to both."¹²² The Act outlaws tests for purposes of admission into public primary schools.¹²³

School attendance is compulsory. Head teachers may investigate reasons for non-attendance and issue written notices to parents or guardians requiring them to facilitate attendance. Failure to comply with such a notice without a reasonable cause is an offence punishable by a maximum fine of Kenya Shillings Five Hundred Thousand or imprisonment term of not more than two years or both.¹²⁴

Section 39 (c) of the Basic Education Act obligates the Cabinet Secretary to "ensure that children belonging to marginalized, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education." The Act further provides that the

¹¹⁷ Constitution of Kenya 2010 Art 22(4)

¹¹⁸ Ibid Art 54 (1)

¹¹⁹ Children Act No. 8 of 2001 s 22(1)

¹²⁰ Ibid s 20

¹²¹ Ibid

¹²² Basic Education Act No. 14 of 2013 s 31

¹²³ Ibid s 34(4)

¹²⁴ Ibid s 40

realization of FPE should be guided by the principle of equitable access to basic education and educational institutions.¹²⁵

The Constitution at Article 27 (6) provides that to give full effect to the realization of the right to education under FPE, the State “shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination” on the basis of genuine need. At Article 21(3), it identifies children as a vulnerable group and obligates all State organs and all public officers to address their needs.

Despite the legal and policy framework for access to FPE by every child including the poor and marginalised outlined hereinabove, recent statistics reveal that out of the 1,312,206 children who entered class one in 2007 only 880, 486 sat for their KCPE in 2014.¹²⁶ Since most of these 431,720 children who did not complete their primary education come from poor or marginalised backgrounds, the cycle of poverty continues to perpetuate itself.

The Basic Education Act provides for the establishment of a National Council for Nomadic Education with a mandate of responding to challenges faced by children from nomadic and vulnerable communities in accessing education.¹²⁷ Towards this end, in May 2015, MoEST launched the National Council for Nomadic Education in Kenya (NACONEK).¹²⁸

The Council’s target group is children who are not accessing education in West Pokot, Turkana, Samburu, Marsabit, Wajir, Mandera, Tana River, Kajiado, Baringo and Tharaka Nithi Counties. NACONEK is also expected to address educational needs of children in urban informal settlements in Nairobi, Mombasa, Nakuru, Kisumu, Eldoret, Kitale and Thika.¹²⁹

¹²⁵ Basic Education Act No 14 of 2013 s 4

¹²⁶ Jacob Kaimenyi, ‘Press Statement on the Release of 2014 Examination Results’
<<http://www.education.go.ke/home/index.php/downloads/category/19-press-releases-2015> > accessed on 24th
March 2015

¹²⁷ Basic Education Act No 14 of 2013 s 94

¹²⁸ MOEST, ‘Official Launch of the National Council for Nomadic Education in Kenya (NACONEK)’ *Daily Nation*
(Nairobi, 15th May 2015) Advertising Feature, II.

¹²⁹ *Ibid* III

Most of the people living in poverty whose children cannot access FPE in Kenya in these Counties have been experiencing discrimination on the basis of birth, property and social origin.¹³⁰ Turkana is the least educated County with more than 80 per cent of its inhabitants having never stepped in a classroom according to a Report¹³¹ that exposed great disparities in education levels in the Country. The Report further points out that Counties in arid and semi-arid areas, notably, Wajir, Garissa, Mandera, Marsabit, Samburu and Tana River have the least educated people with an average of 70 in every 100 people having no education.¹³² The low levels of education offer a legitimate explanation for the extensive poverty in these Counties.¹³³

There are children who are not realizing their right to FPE in other counties and informal settlements beyond NACONEK's jurisdiction which are not necessarily classified as marginalised. NACONEK's mandate should therefore be enhanced to include all children in the whole country who are marginalized or poor and cannot access FPE as a result.

The budgeting and operational guidelines for the Council are dictated by MoEST. There is need to reconstitute it into a parastatal to grant it operational autonomy and efficiency.

In addition to these initiatives, the government has introduced affirmative action programmes to enhance access to FPE. These include introducing school feeding programmes which facilitate provision of mid-day meals to primary school children in arid and semi-arid areas and informal settlements throughout Kenya.¹³⁴ The Government has also made budgetary commitments towards providing girls from public primary schools with sanitary towels to enable them participate in the learning process without missing school monthly during menstruation.¹³⁵

¹³⁰ Article 27 of the Constitution of Kenya 2010 prohibits discrimination along these lines among others.

¹³¹ Daily Nation Online, 'Pulling Apart or Pooling Together Report'
<<http://mobile.nation.co.ke/News/Turkana-is-the-least-educated-says-report/-/1950946/2087018/-/format/xhtml/-/11j7jwo/-/index.html>> accessed on 31st July 2014

¹³² Ibid

¹³³ Susanne Schech & Alwiya Alwy, 'Ethnic Inequalities in Education in Kenya' (2004) 5(2) IEJ 8
<<http://files.eric.ed.gov/fulltext/EJ903854.pdf>>, accessed on 31st July 2014

¹³⁴ UNHRC, *Kenya's National Mid Term Report under Universal Periodic Review of the United Nations*, (2012) 13

¹³⁵ Mutula Kilonzo, Minister for Education in Kenya, 'Sanitary Towels Programme'
<<http://www.education.go.ke/ShowPage.aspx?department=1&id=1168>> accessed on 27th May 2014

It is pertinent to point out that some of these affirmative action programmes are implemented in an *ad hoc* manner and pegged on budgetary allocations without institutionalised mechanisms of monitoring implementation. Further, due to budgetary constraints, it is not always possible to consistently maintain these programmes.

Parliament should set aside sufficient funds annually for implementation of affirmative action programmes under FPE. The MoEST should undertake regular monitoring and evaluation to ensure that funds are utilized for the purpose they were delineated. Awareness should also be created to enlighten the poor on the existence and benefits of these programs to pave way for their uptake.

2.3.2 Affordability

The Children Act¹³⁶ at Section 7 provides that every child shall be entitled to *free*¹³⁷ basic education which shall be compulsory. The Basic Education Act provides that public schools shall not charge tuition fees and only the Cabinet Secretary can approve any other charges.¹³⁸

Public primary schools are still charging fees. A case in point is *Githunguri Residents Association v Cabinet Secretary, Ministry of Education and Five Others*.¹³⁹ The Petitioner in this case brought an action on behalf of parents and children within Githunguri Sub-County complaining of charging illegal/unapproved fees, sending away children for non-payment of fees and unaccountable use of financial resources.

The Court held that FPE is too important to be left to the budgetary circumstances of families. The Court emphasised that ‘free’ means absolutely free and is not subject to attendant costs in the name of activity, building, lunch and transport costs. The Court declared that the actions of

The Government introduced provision of sanitary towels for teenage girls in the 2011/12 financial year.

¹³⁶ Act No. 8 of 2001

¹³⁷ Emphasis mine

¹³⁸ Basic Education Act No. 14 of 2013 s 29

¹³⁹ *Githunguri Residents Association v Cabinet Secretary, Ministry of Education and Five Others*[2013]eKLR

the Respondents infringed the right of children to access free and compulsory basic education and issued an order prohibiting the Respondents from imposing any unapproved fees.

In 2003, the Government introduced and operationalized FPE as a policy directive.¹⁴⁰ Two years later, the Government formulated another policy¹⁴¹ which proposed a raft of measures to enhance realisation of the right to FPE. These included establishing and improving boarding schools in arid and semi-arid areas, expansion of Government supported school feeding programmes and removing all barriers to accessing FPE by disadvantaged groups.¹⁴²

The Children Act ¹⁴³provides that all children have a right to receive according to need, financial or material assistance from the State and be protected from practices that threaten their access to education. The Constitution of Kenya 2010 further provides at Article 43 (1) (e) that every person has the right to social security and obligates the State to provide appropriate social security to persons who are unable to support themselves and their dependants.¹⁴⁴ Section 20 of the Social Assistance Act provides that social assistance may be extended to an orphan, a child under the care of a terminally ill or disabled person who is unable to care for the child, an abandoned child or a child whose parents or guardians are unable to provide basic needs.

The Government provides Kenya Shillings One Thousand and Twenty (1,020/=) capitation grant per child per year to take care of school needs.¹⁴⁵ This notwithstanding, some parents cannot afford basic needs for their families and other incidental costs of education such as uniform, transport and basic needs due to poverty. The capitation grant is not enough to buy school essentials, leave alone take care of a school's infrastructure needs thus triggering some further charges for basic maintenance.¹⁴⁶

¹⁴⁰ MoEST, *Education For All End of Decade Assessment Report 2000-2010* (2012) 8

¹⁴¹ *Republic of Kenya, Sessional Paper No. 1 of 2005 as a Policy Framework for Education, Training and Research on Meeting the Challenges of Education, Training and Research in Kenya in the 21st Century*(2005)
< <http://www.education.go.ke/home/index.php/downloads/category/6-policy-doc>> accessed on 23rd May 2015

¹⁴² Ibid 42

¹⁴³ Children Act No. 8 of 2001 s 10

¹⁴⁴ Constitution of Kenya 2010 Art 43(3)

¹⁴⁵ Uwezo Kenya, 'Pressure to Double Capitation Grant Mounts'

<<http://twaweza.net/go/pressure-to-double-capitation-grant-in-kenya-mounts>> accessed on 19th August 2014

¹⁴⁶ Ibid. An ideal example is Lavington Primary School in Nairobi, where parents pay Kshs. 1,500/= per child per term for maintenance of infrastructure.

The capitation grant has remained at Kenya Shillings 1,020/= since 2003 despite rising inflation. The cost of books has grown exponentially due to inflation and the introduction of Value Added Tax on a range of books manufacturing inputs and consumer goods.¹⁴⁷ Many Kenyans live with the reality or the threat of extreme poverty and despair¹⁴⁸ thus impeding their ability to claim and access human rights¹⁴⁹ including the right to FPE.

The Government should increase capitation grants to reflect market needs. Stakeholder consultations will be very important in informing the new capitation grants. The Government should also evaluate the criteria for allocating funds with a view to enhancing the allocations for pupils from poor backgrounds. These capitation grants should be disbursed in good time preferably during school holidays for prior planning and to ensure that books and other scholastic materials are purchased in good time.¹⁵⁰

Head teachers, deputies, teachers and Boards of Management should be trained on requisite management skills, book keeping, accounting and e-procurement procedures for effective funds management.

School managers should also come up with innovative initiatives of generating income to avoid overreliance on the Government for funds such as use of solar energy and farming on school land. They can also benchmark for best practices in countries such as India where they recycle cardboard boxes into a combination of a backpack and a school desk.¹⁵¹

¹⁴⁷ Gerald Andae, 'Funds Allocated to Pupils in Free Education Set for Review'
< <http://www.businessdailyafrica.com/Funds-allocated-to-pupils-in-free-education-set-for-review/-/539546/2273166/-/11i2hpv/-/index.html> > accessed on 24th April 2014

In October 2013, the Government introduced a 16 % on books, precipitating an increase in retail prices of books by 14 per cent by publishers.

¹⁴⁸ OHCHR, 'Principles and Guidelines For a Human Rights Approach To Poverty Reduction Strategies' iii
<<http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>>accessed on 31st July 2014

¹⁴⁹ Ibid

¹⁵⁰ The capitation grant for the second term of the year 2014 which started in May was released late in July 2014 just as the school term was about to end. It took the intervention of the Deputy President to have the funds released to the schools.

¹⁵¹ Rakshar Kumar, 'Let there be Desks and Bags for Pupils' *Saturday Nation* (Nairobi, 20th September, 2014)10.
The backpack described hereinabove has enough space for a lunch box and school books. When all the contents are removed, it doubles up as a desk allowing children to sit cross-legged on the floor and work upright.

The Children Act at section 10 provides that all children “shall be protected from economic exploitation and any work that is harmful to the child’s health or physical, mental, spiritual, moral or social development or likely to be hazardous or to interfere with the child’s education.”

Some children from poor income households resort to child labour at the expense of realization of the right to education to supplement family incomes. It is estimated that almost three million children in Kenya are engaged in child labour while an almost similar number combines work and school.¹⁵²By entering the labour market prematurely, they are deprived of an education which can help in lifting them, their families and communities out of poverty.¹⁵³

Apart from poverty, there are other non-monetary barriers such as early pregnancies¹⁵⁴ and marriages;¹⁵⁵cultural mind sets;¹⁵⁶ female genital mutilation; insecurity; and conflict which impede realization of right to FPE. ¹⁵⁷Cases of early pregnancies among FPE pupils are prevalent.¹⁵⁸ One such incidence was reported in the Daily Nation Newspaper on 24th June 2014, where 39 girls terminated their education after getting pregnant. Out of the 39 girls, 27 were

¹⁵² Bureau of International Labour Affairs (ILAB) , ‘2012 Findings on the Worst Forms of Child Labour’ 366 <<http://www.dol.gov/ilab/reports/pdf/2012TDA.pdf>> accessed on 30th July 2014

Children are engaged in the worst forms of child labour in Kenya. Many of them participate in hazardous activities in the agricultural and fishing sectors. Children work day in day out on tea and sugarcane plantations; and production of coffee, *miraa* (a stimulant plant), rice, sisal and tobacco. They also reportedly pick cotton and work in the production of flowers. These children often work for long periods with dangerous tools and machinery. They also carry heavy loads and are exposed to toxic substances and harmful pesticides.

¹⁵³ Ibid

¹⁵⁴ See Abel Nyamesa Morara, Bernard Chemwei, ‘Drop Out among Pupils in Rural Primary Schools in Kenya: The Case of Nandi North District, Kenya’(2013) 4(19) JEP <<http://www.iiste.org>> accessed on 27th July 2016
See also Elizabeth Asasha, ‘Alarm as Nine Pupils of One School Found Pregnant’ (*Citizen Digital*, 21 June 2016) <<http://citizentv.co.ke/news/alarm-as-nine-pupils-of-one-school-found-pregnant-131087/>> accessed on 27th July 2016

See page 66. *WJ and LN (Suing through their guardians) v Astarikoh Henry Amkoah and 4 Others* [2011] eKLR. This matter relates to minors aged 12 and 13 respectively who were impregnated by their Deputy Head teacher.

¹⁵⁵ Maasai Girls Education Fund, ‘Economic, Cultural and Physical Barriers’ <<http://www.maasaisgirlseducation.org/the-need/barriers-to-education/economic-cultural-physical-barriers>> accessed on 26th July 2016

¹⁵⁶ Ibid

¹⁵⁷ Parents who can afford to purchase educational opportunities usually take active steps to cushion their children against the adverse effects if faced with situations such as early pregnancies, insecurity and conflict.

¹⁵⁸ See Nyamesa n 154

from public primary schools.¹⁵⁹ The State should come up with day care arrangements for children of FPE mothers to allow them back to school.

Section 14 of the Children Act provides that no “person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development.”

Some communities still practise socio-cultural practices such as female genital mutilation and early marriages affecting full participation of female pupils in the FPE.¹⁶⁰ A report released by Plan International, an NGO, in 2012 showed that Kilifi had the highest prevalence of child marriages with 47.4 percent, followed by Homa Bay with 38 percent. Kwale had 37.9 percent, Bondo 29.5 percent and Tharaka 25.3 percent.¹⁶¹

Communities that expose their children to early marriages, female genital mutilation, early pregnancies and child labour should be sensitised on the benefits of educating their children to foster attitude change. They should also be enlightened on the dangers of such practices in terms of their health and economic cost not only to the victims but also to the society.

Insecurity has also played a key role in impeding access to FPE. Following terror attacks in Lamu and Garissa Counties in 2014 and 2015 respectively, schools were closed thus compromising realization of FPE in the respective areas.¹⁶² Conflict brought about by

¹⁵⁹ Denis Lubanga, ‘Alarm as 39 School Girls Get Pregnant,’ *Daily Nation* (Nairobi, 24th June 2014)19. The Teacher’s Service Commission, MoEST officials and the Police are expected to take action against the teachers accused of the vices.

¹⁶⁰ *Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)*, ‘Female Genital Mutilation and Education, Sectoral and Supraregional Project Ending Female Genital Mutilation’ (2009) <[http://www.intact-network.net/intact/cp/files/1290689250_FGM%20&%20Education-%20GTZ%20\(2009\).pdf](http://www.intact-network.net/intact/cp/files/1290689250_FGM%20&%20Education-%20GTZ%20(2009).pdf)> accessed on 24th May 2014

¹⁶¹ Plan International, *Because I am a Girl, Kenya Country Report on Study of the Factors Influencing Girls’ Access, Retention and Completion of Primary and Secondary School Education* (2012) <<https://plan-international.org/where-we-work/africa/kenya/about-plan/news/under-age-marriages-rampant-in-kenya-despite-being-outlawed/>> accessed on 24th May 2014

¹⁶² Lucinda Borkett Jones, ‘Kenya: Almost 100 Schools Forced to Close as Christian Teachers Fear Al-Shabaab Attacks’ <<http://www.christiantoday.com/Art/kenya.almost.100.schools.forced.to.close.as.christian.teachers.fear.al.shabaab.attacks/55217.htm>> accessed on 27th June 2015
At least 95 schools in northern Kenya were forced to close after many teachers refused to work fearing attacks from Islamist militant group al-Shabaab.

competition for resources has also been a major obstacle to accessing education for children. Children caught in conflicts are killed, orphaned or displaced. Some end up in separated families, camps and /or traumatized situations which adversely affect their realization of right to education among other rights.¹⁶³

The Government should scale up its efforts in addressing large scale historical inequalities that lead to conflict. In places plagued by insecurity and conflict, it should set up early warning systems and step up security. In addition, it should establish internal dispute resolution mechanisms at the village level to deal with conflict flare ups to avoid a situation where families are fleeing for their safety adversely affecting their children's right to education.

From the foregoing, it is apparent that the legal and policy framework has made provisions for the assistance of those in dire need to realize their right to FPE. These provisions are however fragmented and devoid of any coherent institutional framework and accountability mechanisms for 'securing financial support from public funds necessary for realization of the right to education by children in financially disadvantaged family situations.'¹⁶⁴ Wabwile observes that "Unless something is done to introduce a [coherent] national regime of state-funded child support benefits, the right [to education] remains a paper right and a pipe dream for the hundreds of thousands of poor children in Kenya."¹⁶⁵

NACONEK's mandate should be enhanced to provide for a state funded child's education support benefits scheme to facilitate realization of FPE by poor and marginalized children. Its services should be devolved to all the counties for easier access to remedy this situation.

¹⁶³ Nation Team, '14 Schools Closed Due to Attacks' *Daily Nation* (Nairobi, 11th July 2014) 17

In Lamu County during the month of July 2014, hundreds of residents fled their homes as a result of sporadic attacks by gunmen who were leaving a trail of death and destruction. As a result, 14 schools were closed indefinitely.

¹⁶⁴ Wabwile M. N., 'Rights Brought Home?: Human Rights in Kenya's Children Act 2001', in Bainhaim, A and Rwezaura, B (eds.) *The International Survey of Family Law* (Bristol: Jordan Publishing, 2005) 394 cited in Godfrey Odongo, 'Harmonisation of Laws Relating to Children in Kenya' 13 <www.africanchildforum.org> accessed on 13th June 2014

¹⁶⁵ Ibid

2.4 Availability of FPE

Availability of the right to FPE entails presence of functional buildings, educational institutions and programmes in sufficient quantities to ensure protection from the elements, sanitation facilities, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, libraries, computer facilities and information technology infrastructure.¹⁶⁶

2.4.1 Availability of Physical Facilities

Section 28 of the Basic Education Act provides that the Cabinet Secretary shall, in consultation with the National Education Board (NEB) and the relevant County Education Board (CEB) provide for the establishment of primary schools for all categories of children. The Children Act also obligates the Cabinet Secretary to establish rehabilitation schools¹⁶⁷ and remand homes¹⁶⁸ which offer institutionalized educational opportunities to children. The law also obligates charitable children's institutions to incorporate a basic education component to facilitate realization of this right.¹⁶⁹

Availability of primary schools infrastructure is a significant contributor to school attendance and expected outcomes. Before introduction of FPE, the Kenyan society appropriated the responsibility of developing primary schools infrastructure.¹⁷⁰ Support for the infrastructure development was also extended by local and international partners, religious institutions, Civil Society Organizations (CSOs), parents, among others.¹⁷¹ Introduction of FPE however saw the

¹⁶⁶ CSECR, General Comment No. 13: The Right to Education (Art 13 of the Covenant), in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1999) UN Doc. E/C.12/1999/10

¹⁶⁷ Children Act No. 8 of 2001 s 47 (1)

¹⁶⁸ Ibid s 50(1)

¹⁶⁹ Section 58 of the Children Act defines a charitable institution as "a home or institution which has been established by a person, corporate or unincorporate, a religious organization or a Non-Governmental Organization and has been granted approval by the Council to manage a program for the care, protection, rehabilitation or control of children."

¹⁷⁰ MoEST, *Kenya Education Sector Support Programme (KESSP), 2005 – 2010, Delivering Quality Equitable Education and Training to All Kenyans*, (2005) 1

¹⁷¹ Ibid

burden shift towards the State. In its enthusiasm to implement FPE, “the Government overlooked the most obvious challenge that increased admission into schools would bring, infrastructure.”¹⁷²

This has resulted in a major backlog of infrastructure development creating a shortage of schools and permanent classrooms particularly in poor communities over time.¹⁷³ In some Counties, the distance between the residences of many children and the nearest public primary school is so great that it is practically impossible for them to have access.¹⁷⁴ Shortage of schools largely contributes to the low enrolment rates since long distances can deter the uptake of services.¹⁷⁵ An ideal example is West Pokot Sub-County, where more than 40 % of children who have attained school going age had not started school as at 2014 despite availability of FPE due to scarcity of schools.¹⁷⁶

2.4.2 State of Existing Infrastructure

In places where physical infrastructure is available, it should have some bare minimum characteristics which include; adequate buildings for protecting children and teachers from weather elements, adequate sanitation facilities for both sexes, safe drinking water, resource centres, books and other scholastic materials.¹⁷⁷

FPE brought with it increased population in classrooms thus placing unreasonable demands on the public primary school’s infrastructure due to overcrowding.¹⁷⁸ The FPE infrastructure is further strained by *en masse* migration of pupils from private primary schools to public primary

¹⁷²Jacqueline Kubania, ‘Sorry State of Infrastructure in Kenya’s Primary Schools’
<<http://mobile.nation.co.ke/lifestyle/Sorry-state-of-infrastructure-in-Kenyas-primary-schools/-/1950774/2249632/-/format/xhtml/-/cs4wvlz/-/index.html>> accessed on 1st July, 2014

¹⁷³ Ibid

¹⁷⁴ Rachel Glennerster, Michael Kremer, Isaac Mbiti and Kudzai Takavarasha, ‘Access and Quality in the Kenyan Education System: A Review of the Progress, Challenges and Potential Solutions’ 12
<<http://www.povertyactionlab.org/publication/access-and-quality-kenyan-education-system>> accessed on 24th May 2014

¹⁷⁵ Ibid

¹⁷⁶ Nation Team, ‘Children Out of School Despite Free Education’ *Daily Nation* (Nairobi, 11th July 2014)18

¹⁷⁷ CSECR, General Comment No. 13: The Right to Education (Art 13 of the Covenant), in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (1999) UN Doc. E/C.12/1999/10

¹⁷⁸ Anna Rabin, ‘Quantity not Quality in Kenya’s Move to Universal Primary Education’
<<http://thinkafricapress.com/kenya/quantity-not-quality-kenyas-move-universal-primary-education>> accessed on 18th June 2014

schools mostly in classes seven and eight¹⁷⁹ to circumvent the system of reserving quotas for form one admissions of KCPE candidates into national secondary schools.¹⁸⁰

According to the United Nations Children’s Fund (UNICEF), Kenya is a long way from meeting the prescribed sanitation standards.¹⁸¹ The recommended Government ratio for physical facilities in schools is 25 girls and 30 boys per latrine.¹⁸² It is estimated that in some places, 100 pupils share one latrine which exposes them to the risk of infections associated with lack of proper sanitation.¹⁸³ Further, some Kenyan public primary schools are no longer safe due to the poor state of the toilets.¹⁸⁴ In addition to the threat of injury, the sanitation situation creates an enabling environment for waterborne diseases. A classic example of this situation is Kimobo Primary School in Mount Elgon Constituency where pupils were sent home after the school was closed down indefinitely due to health and safety concerns posed by the toilets in January 2014.¹⁸⁵

Two years into the FPE programme in 2005, the Government identified an infrastructure lacuna. To address this problem, it launched the Kenya Education Sector Support Programme (KESSP).¹⁸⁶ KESSP was mandated to address the infrastructure headache in a wholesome manner for all public schools by developing solutions customized to fit each school.¹⁸⁷

Investigations by KESSP revealed that the biggest infrastructure challenges facing schools were inadequate classrooms, inadequate and poor state of sanitation facilities and limited number of primary schools especially from poor and marginalized areas. KESSP established that there was

¹⁷⁹ Augustine Oduor, ‘Thousands of Pupils Move from Private to Public Schools’, *Standard Newspaper* (Nairobi, 15th February 2014) 1

¹⁸⁰ Ibid. In 2012, 17,000 pupils moved from private to public primary schools. The number increased to 42,000 in 2013 and 58,000 in 2014. This information was gathered by Kenya Private Schools Association (KEPSA) from its members.

¹⁸¹ Jacqueline Kubani, ‘Sorry State of Infrastructure in Kenya’s Primary Schools’ <<http://mobile.nation.co.ke/lifestyle/Sorry-state-of-infrastructure-in-Kenyas-primary-schools/-/1950774/2249632/-/format/xhtml/-/cs4wvlz/-/index.html>> accessed on 1st July 2014

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ MoEST, ‘Kenya Education Sector Support Programme (KESSP), 2005 – 2010, Delivering Quality Equitable Education and Training to All Kenyans (2005) 1

¹⁸⁷ Ibid

a shortfall of 43,000 classrooms countrywide with 325 of the available ones falling below expected standards.¹⁸⁸

In response to these findings, KESSP proposed a coherent infrastructure development programme to assist all schools with serious infrastructure backlogs based on priority needs.¹⁸⁹ This programme was not implemented and more than ten years after the launch of KESSP, the infrastructure headache in public primary schools has persisted. Misappropriation of FPE funds led to a drastic decline in education funding by the Government and international donors resulting in unsuccessful implementation of KESSP proposals.¹⁹⁰ To mirror this situation, in the 2013/2014 financial year, the Government spent only Kshs. 135 million as infrastructure grants for 229 primary schools.¹⁹¹ This is a drop of water in the ocean in view of the shortages on the ground.

The dire need for infrastructure development and improvement has prompted well-wishers, local companies and multinationals to step in the gap in a bid to provide relief for some of the worst affected schools.¹⁹² Other initiatives include partnerships with other States.¹⁹³

The law has obligated the Cabinet Secretary for education to facilitate establishment of schools. Despite this, shortage and poor condition of infrastructure is prevalent in areas afflicted by marginalization and poverty. While intervention by local, foreign and State partners will go a long way in improving the infrastructure situation in the country, the Government should endeavour to implement its obligations of providing adequate FPE infrastructure in these areas.

Infrastructure gaps identified by KESSP and upcoming ones should be addressed as a matter of priority. The Government should revitalise, re-engineer and integrate KESSP as a permanent

¹⁸⁸ Ibid

¹⁸⁹ Ibid

¹⁹⁰ Ibid

¹⁹¹ MoEST, 'Achievements of the Jubilee Administration at One Year', *Daily Nation*, (Nairobi, 18th August 2014)34

¹⁹² Kubania n 181

In March 2014, for instance, the Safaricom Foundation completed an ablution block at Imara Primary School, in Kayole in Embakasi Constituency at a cost of Kshs. 6 million. The school has developed 16 new boys' toilets and 21 new girls' units.

¹⁹³ See Kenya Primary Education Project in Poor Urban Areas of Nairobi (KPEP) under the sponsorship of the Federal Republic of Germany. Anon, 'Primary Education in Poor Urban Areas of Nairobi' <<http://www.primaryeducation-kenya.org/>> accessed on 18th August 2014

programme of MoEST in order to continuously address the infrastructure challenge in a wholesome manner. Other stakeholders such as parents, corporate bodies, *alumni* associations, States, County Governments and Members of Parliament should be encouraged to support infrastructure initiatives in public primary schools. A specific percentage such as 15% of the National Government Constituencies Development Fund¹⁹⁴ should be applied for infrastructure development or refurbishment of public primary schools.

2.5 Acceptability of FPE

Acceptability of the right to education under FPE is guaranteed if the form and substance of education exhibits good quality and high standards. The World Education Forum defines education as the extent to which education can be described as having a high standard which “satisfies basic learning needs and enriches the lives of learners and their overall experience of living.”¹⁹⁵

For education to be of acceptable quality, it must have two very important ingredients, notably, effective teaching and a conducive learning environment.¹⁹⁶

2.5.1 The Teacher as an FPE Resource

Teachers are an integral resource in the realization of the right to FPE. Effective teaching can only be done by well trained, adequately remunerated and highly motivated teachers. The core of teaching profession is to create, secure, transfer and provide knowledge to learner.¹⁹⁷ Due to their

¹⁹⁴ The Fund is established by Section 4 of the National Government Constituencies Development Fund Act No. 30 of 2015.

¹⁹⁵ World Education Forum, *The Dakar Framework for Action on Education For All: Meeting Our Collective Commitments*, (26-28 April 2000) Para 42

¹⁹⁶ CSECR, General Comment No. 13: The Right to Education (Art 13 of the Covenant), in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (1999) UN Doc. E/C.12/1999/10

¹⁹⁷ Vishnu Ganpat Gadekar, ‘Significance of Right to Education for Social Justice’ <http://www.srjis.com/srjis_new/images/Arts/75%20Prof.%20Vishnu%20Gadekar.pdf> accessed on 30th April 2014

fundamental role in the realization of this right, they require sufficient qualifications and effective training to adequately carry out their roles and responsibilities.¹⁹⁸

Section 31(1) (c) of the Technical and Vocational Education and Training Act¹⁹⁹ provides that the Board of Technical and Vocational Education and Training Authority shall ensure the maintenance of standards, quality and relevance in all aspects of training within the national training system. Section 7(1) (r) provides that the Board must approve the process of introduction of new training programmes and review existing ones in Technical and Vocational Education and Training institutions. Teachers training colleges are institutions of technical training and therefore fall under the scope of this Act. Section 44 (4) of the Basic Education Act provides that the Cabinet Secretary shall ensure that every special school or educational institution with learners with special needs is provided with appropriately trained teachers.

The Constitution creates the Teachers Service Commission (TSC)²⁰⁰ and bestows upon it the functions of registration, recruitment, employment, deployment, promotion, transfer, exercising disciplinary control and termination of the employment of teachers. Governed by the Teachers Service Commission Act,²⁰¹ the Commission also has powers to “review standards of education and training of persons entering the teaching service; review the demand for and supply of teachers; and advise the Government on matters relating to the teaching profession.”²⁰²

For a school leaver to qualify for primary school teacher education training he or she must have acquired a minimum grade of C (plain) in the Kenya Certificate of Secondary Education (KCSE). In addition, one must have obtained a minimum grade of D (Plain) in Mathematics and C- (Minus) in English.²⁰³ These entry grades into teacher training colleges are low thus affecting the output of trained teachers.

¹⁹⁸ Nick W. Namunga & Ruth N. Otunga, ‘Teacher Education as a Driver for Sustainable Development in Kenya’ (2012) IJHSS 228

¹⁹⁹ Act No. 29 of 2013

²⁰⁰ Constitution of Kenya 2010 Art 237

²⁰¹ Act No. 20 of 2012

²⁰² Constitution of Kenya 2010 Art 237

²⁰³ MoEST, *Primary Teacher Education (PTE) Syllabus, Vol I*, 2001, ii

These subjects include Mathematics, English, Kiswahili, Science, Social Studies and Religious Education, Professional Studies, Creative Arts, Physical Education and Information, Communication and Technology (ICT). In the second year, students take five core subjects, in particular, English, Kiswahili, Education, Physical

The entire teacher training takes two years. During the first year, students study 10 subjects which is also the case in the second year.²⁰⁴ They also undertake three sessions of teaching practice during the second, fourth and sixth terms of the 6 terms in the programme, as the tenth subject during both years.²⁰⁵ The curriculum is so overloaded that few of the teachers have a complete mastery of the subjects. There is also lack of specialization and adequate practical teaching experiences.

TSC in collaboration with the Board of Technical and Vocational Education and Training Authority should review the current teacher curriculum for primary school teachers to incorporate further skills and more teaching practice. Entry grades to Teachers Training Colleges should be raised and the period of study expanded to three years.

In every discipline, there is need for continuous capacity building. However, in-service training for primary school teachers is inadequate resulting in poor teaching²⁰⁶ and lack of awareness on emerging issues. In a study conducted by UNESCO, it was observed that some teachers are weaker than their pupils.²⁰⁷ This was further confirmed by a World Bank sponsored Survey published in 2013 done in 300 schools on Service Delivery Indicators (SDI) in Kenya.²⁰⁸ The Report from the Survey indicated that only 35.2% of teachers in public primary schools demonstrated acceptable mastery of the subjects they taught²⁰⁹ while “seniority and years of training did not correlate with higher levels of knowledge.”²¹⁰

Education, ICT and four subjects in either Option A or Option B. Option A comprises Science, Home Science, Agriculture and Mathematics while Option B comprises Music, Art and Craft, Social Studies and Religious Education.

²⁰⁴ MoEST, *Primary Teacher Education (PTE) Syllabus, Vol 1*(2001) ii

²⁰⁵ Ibid

²⁰⁶ Kenya National Union of Teachers (KNUT) ‘Trends of the Needs of Teachers in Public Schools in Kenya’ (KNUT, May 2015) 74

²⁰⁷ UNESCO, *Teaching and Learning: Achieving Quality for All*, *Education For All Global Monitoring Report 2013*(2013) 39

<http://unesco.org.pk/education/documents/2014/launch_gmr/GMR_Summary.pdf >accessed on 24th May 2104

²⁰⁸ Gayle Martin and Obert Pimhidizai, ‘Service Delivery Indicators in the Education and Health Sectors, Kenya July 2013’ The surveys leading to the report were conducted by the Kenya Institute of Public Policy Research and Analysis (KIPPRA) and Kimterica with support by the World Bank and the USAID. The World Bank’s SDI Team provided quality assurance and oversight.

²⁰⁹ Ibid vi

²¹⁰ Ibid vi

Regular in-service and refresher courses should be planned, availed and made mandatory for teachers to expand their skills base.

The teachers perceive their remuneration as inadequate precipitating regular strikes. Article 37 of the Constitution provides that all persons including teachers have “the right, peaceably and unarmed, to assemble, demonstrate, picket and present petitions to public authorities.” Most public primary school teachers are members of the Kenya National Union of Teachers (KNUT) a trade union which advocates for better remuneration, terms of service and welfare of teachers implementing the FPE programme.

Many a time, KNUT is on a collision course with the Government regarding teachers’ wages and welfare resulting in industrial action. Every year, the nation is treated to theatrics by striking teachers agitating for better pay the latest being the September 2015 strike which lasted for five (5) weeks.²¹¹ The clamour for better wages and terms and conditions of service thus interferes with realisation of the children’s right to education.

The teachers must be adequately remunerated and motivated to stay in class rather than seeking alternative money-making ventures or even resorting to strikes at the expense of their pupils. Teachers should also be given attractive institutionalised incentives to teach in marginalised areas of the Country. In addition to salary and allowances raises, the Government and other stakeholders²¹² should devise additional ways of motivating teachers, including upgrading, promoting and rewarding best-performers in terms of academics and extra curriculum activities. Further, a merit-based salary system based on the evaluation of individual teachers like the one in South Korea should be pursued to encourage teacher commitment.²¹³

²¹¹ Nancy Agutu, ‘Kenya: KNUT Announces Teachers Strike, Claims Outsiders Running TSC’ <<http://allafrica.com/stories/201509030213.html> > accessed on 3rd September 2015

²¹² These stakeholders include parents and *alumni* associations.

²¹³ State University, ‘South Korea - Teaching Profession’ <<http://education.stateuniversity.com/pages/1406/South-Korea-TEACHING-PROFESSION.html> > accessed on 17th May 2016

2.5.2 Learning Environment

The pupil to teacher ratio at primary school level has been increasing due to increased enrolment.²¹⁴ FPE increased enrolment in public primary schools without enhancing the teacher population. The problem was aggravated by enrolment of overage learners since the Government had not given an age limit.²¹⁵ This led to an acute shortage of teachers with a teacher/ pupil ratio of 1:50.4 in 2008, 1:51.6 in 2009, 1:54.1 in 2010 and 1:56.6 in 2011.²¹⁶ An ideal example of this dire situation is Olympics Primary School in Nairobi County which has 28 teachers against a population of 3,247 pupils.²¹⁷

The educational outcomes at the end of FPE are worrying. An alarming Report published by *Uwezo*, an NGO, released in May 2014 indicates that in Class 3, only 3 out of 10 pupils can do Class 2 work.²¹⁸ Further statistics in the Report indicate that 11 out of 100 Class 8 candidates cannot do simple Class 2 division while 1 out of 5 children in Classes 6 to 8 cannot explain the meaning of the colours on the Kenyan flag.²¹⁹

The shortage problem is further exacerbated by indiscipline and apathy in the teaching fraternity characterized by absenteeism, lack of commitment and lateness. The Survey on Service Delivery Indicators (SDI) in Kenya further revealed that teachers in public primary schools spent only 2 hours and 40 minutes daily to teach pupils *in lieu* of the mandatory 5 hours and 40 minutes.²²⁰ As a result, children in public primary schools receive an average of 20 days less teaching in a

²¹⁴ National Bureau of Statistics, 'Facts and Figures 2012' 22
<<http://www.usaid.gov/sites/default/files/documents/1860/9%29%20Kenya%20facts%20and%20figures%202012.pdf>> accessed on 31st July 2014. The Kenya National Bureau of Statistics indicated in the Report mentioned hereinabove that the teacher/ pupil ratio in Kenya stood at 1:50.4 in 2008, 1:51.6 in 2009, 1:54.1 in 2010 and 1:56.6 in 2011.

²¹⁵ UNESCO, *Report on Assessment of the Challenges of Implementing Free Primary Education in Kenya, 2005*, <[unesco_hiv_and_health_education_clearinghouse_challenges_of_implementing_free_primary_education_in_kenya._assessment_report_-_2014-07-14%20\(1\).pdf](http://unesco_hiv_and_health_education_clearinghouse_challenges_of_implementing_free_primary_education_in_kenya._assessment_report_-_2014-07-14%20(1).pdf)> accessed on 20th May 2014

²¹⁶ Ibid

²¹⁷ Elizabeth Mcsheffry, 'Stress and Burnout the Silent Killer in Kenyan Offices', Daily Nation , 11th September 2014 DN2 3

²¹⁸ *Uwezo Kenya, 'Are Our Children Learning?' Annual Learning Assessment Report (2012) 3*
<<http://www.twaweza.org/uploads/files/Kenya-Report-2012-WebFinalUpdate.pdf>> accessed on 24th April 2014

²¹⁹ Ibid 4

²²⁰ UNESCO (n 207) 10

term.²²¹When teachers absent themselves from school frequently, pupils go unattended thus reducing the amount of instructional time resulting in incomplete syllabi²²² and poor appreciation of curriculum content.

These poor performance trends have prompted the Government to introduce a quota system on admission of public and private primary school pupils to national secondary schools. Reserving quotas for children from public schools is a tacit acknowledgement that the quality of education in public primary schools is below standard.²²³ This has resulted in parental apathy and lack of support for FPE; and denigration of teachers and the teaching profession.

TSC should discharge its constitutional mandate of advising the government on the existing teacher shortage problems to precipitate action on the high teacher pupil ratios. In the 2014/2015 financial year, the Government set aside funds for employment of new 2,479 public primary school teachers and a further 4663 to replace those who have left service through natural attrition.²²⁴ In 2014, the Ministry of Devolution and Planning pioneered recruitment of over 30,000 volunteer graduates to teach in public primary schools.²²⁵ Multi-grade and double-shift teaching techniques should be explored in instances where there is acute shortage of space and personnel.²²⁶

These initiatives if implemented optimally will go a long way to ease the shortage, address the quality chasm and should be sustained in the coming years.²²⁷

²²¹ UNESCO (n 207) vi

²²² George N. Reche, *et al*, 'Factors Contributing to Poor Performance in Kenya Certificate of Primary Education in Public Day Primary Schools in Mwimbi Division, Maara District, Kenya' (2012) 5(2) 127
<http://www.ijhssnet.com/journals/Vol_2_No_5_March_2012/14.pdf .> accessed on 1st August 2014

²²³ George Kegoro, 'Jubilee Has its Priorities in Education Wrong,' *Sunday Nation* (Nairobi, 2nd February, 2014) 19

²²⁴ Ouma Wanzala, 'Over 10,000 Job Vacancies for Teachers,' *Daily Nation* (Nairobi, 31st July 2014) 5

²²⁵ Government of Kenya, 'Kenya National Volunteers Program'

<<http://presidency.go.ke/index.php/volunteers-programme> > accessed on 18th August 2014

²²⁶ Roger Avenstrup, 'Reducing poverty through Free Primary Education; Learning from Experiences of Kenya, Lesotho, Malawi and Uganda', in Louise Fox & Robert Liebenthal (eds) *Attacking Africa's Poverty: Experience from the Ground* (Washington DC, 2006) 236

²²⁷ Presidential Service Communication Unit, 'Uhuru Launches Volunteer Initiative', *Daily Nation* (Nairobi, 19th September, 2014) 68. The programme was launched by the President on 18th September 2014 with the first batch of 150 volunteers who had undergone a two weeks training deployed to teach in primary schools in West Pokot, Kilifi, Machakos, Garissa, Nyeri, Samburu, Kisumu and Busia.

Since teacher absenteeism is a problem in many schools, improving teacher attendance in these schools is critical to improve the quality of education. The MoEST and TSC should seek dialogue with KNUT to assist in tackling the problem of non-attendance. Severe disciplinary action including dismissal should be handed down to errant teachers to create room for the hiring of teachers who are willing to teach.

There is need for sensitisation on attitude change on the part of teachers and parents to decisively deal with apathy and lend support towards FPE. Consequently, both teachers and FPE will be held in high regard as is the case in South Korea and Finland which are among the five best FPE performing countries in the world.²²⁸

2.5.3 Quality Monitoring

The Basic Education Act²²⁹ establishes the Education Standards Quality Assurance Council (ESQAC) and bestows upon it the mandate of ensuring that standards and quality in institutions of basic education are maintained. The Council is also required to “supervise and oversee curriculum implementation and delivery..... [and]monitor and evaluate standards and quality in basic education.”²³⁰

Prior to the enactment of the Basic Education Act in 2013, the MoEST had a Directorate of Quality Assurance and Standards (DQAS) ²³¹ mandated to monitor and evaluate quality and standards through independent assessments and inspections.²³² Cheserek and Mugalavai²³³ have observed that the DQAS did not have the requisite autonomy to monitor quality in public primary schools since assessments and inspections were done in-house making it difficult to deal

²²⁸ MBC Times, ‘20 Best Education Systems in the World’ <<http://wwwmbctimes.com/English/20/20-best-education-systems-in-the-world>> accessed on 16th May 2016

²²⁹ Act No. 14 of 2013

²³⁰ Ibid s 64

²³¹The DQAS was established under section 43 of the Education Act Cap 211 of the Laws of Kenya which granted the Minister power to prescribe, subject to such exemptions as may be specified, the standards to which the premises of educational institutions should conform.

²³² Education Act, Cap 211 of the Laws of Kenya s 39

²³³ Cheserek G J and Mugalavai V K, ‘Challenges and Reforms Facing Kenyan Education System in the 21st Century: Integrating the Principles of Vision 2030 and Constitution 2010’, (2012) 4 JETERAPS 477

with quality defaulters.²³⁴ Further, their study indicates that due to budgetary constraints, the DQAS was underfunded and thus was unable to fulfil its mandate.²³⁵

ESQAC was constituted in July 2015 and is still in its infancy. The Act clothes ESQAC with relative autonomy²³⁶ but does not give it complete operational independence. The Council is still part of MoEST and the annual budgetary allocation is done through the Ministry. Under the current legal regime, ESQAC does not have sufficient autonomy and whether it will fulfil its mandate will entirely depend on the goodwill of the Cabinet Secretary in charge of education.

There is need to grant full independence to the ESQAC for robust quality monitoring and evaluation. Adequate funding should also be given to the Council and its employees to promote efficiency and independence in its operations. In particular, the law should be amended to reconstitute it into a parastatal.

Section 39 (f) of the Basic Education Act provides that it shall be the duty of the Cabinet Secretary to ensure that quality of basic education conforms to the set standards and norms. The Act also recognizes the need for concerted efforts by TSC, National Education Boards, (NEB) national quality assurance bodies and the County Education Boards (CEB) in the maintenance of standards, quality and relevance of education.²³⁷

There is bound to be tension between TSC and ESQAC in the carrying out their respective inspectorate mandates. On one hand, TSC must ensure teachers under its employment are performing optimally while ESQAC must conduct inspections as part of quality monitoring. Care needs to be taken to ensure that there is synergy in the implementation of the mandate of the two institutions.

²³⁴ Ibid

²³⁵ Ibid

²³⁶ Section 65 of the Basic Education Act No. 14 of 2013 provides that the Cabinet Secretary shall by regulation prescribe relative autonomy of Education Standards and Quality Assurance Council.

²³⁷ Basic Education Act No. 14 of 2013 s 67

2.6 Adaptability of FPE

Adaptability of FPE should be understood from the standpoint of flexibility in order to easily respond to society's dynamics and the pupils' needs.²³⁸ Beneficiaries of FPE who do not transit to secondary schools or vocational institutions must be equipped with relevant skills such as literacy, numeracy, financial literacy, entrepreneurship skills among other key skills to foster their economic independence to enable them lift themselves out of poverty.

Section 73 (1) of the Basic Education Act provides that the Cabinet Secretary shall, upon advice of the NEB, continuously develop, review, evaluate and monitor the curriculum to ensure standards, quality and relevance in curriculum development. In any event, the curriculum shall be reviewed after every five years.²³⁹

In 1981, the Report of the Presidential Working Party on the Second University in Kenya (Mackay Report), recommended the introduction of the 8:4:4 system of education.²⁴⁰ The FPE curriculum under this system is tailored towards ensuring children pass KCPE exams without necessarily imparting necessary life, craft and entrepreneurial skills. Non-academic and non-examinable subjects such as physical education, library lessons, home science, and agriculture that impart life skills have been expunged from schools timetables and the time allocated to these subjects is used to teach examinable subjects or to administer tests.²⁴¹

The curriculum is also charged with adopting obsolete teaching methods which inhibit creativity and inquisitiveness thus producing passive and dependent-minded pupils.²⁴² In addition, employers have accused the current education curriculum at the primary, secondary and tertiary

²³⁸ CSECR, General Comment No. 13: The Right to Education (Art 13 of the Covenant), in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1999) UN Doc. E/C.12/1999/10

²³⁹ Basic Education Act No. 14 of 2013 s 73 (1)

²⁴⁰ Republic of Kenya, *Second University, Report of the Presidential Working Party on the Second University*, (Presidential Working Party, 1981)

²⁴¹ Kennedy Buhere, 'Curriculum Success Depends on Teachers; Involve Them in its Design', *Sunday Nation* (Nairobi, 13th July 2014) 14

²⁴² Peter C. Otiato Ojiambo, 'Quality of Education and its Role in National Development: A Case study of Kenya's Educational Reforms'

<http://kessa.org/yahoo_site_admin/assets/docs/6_PCO_OJIAMBO.140160327.pdf> accessed on 30th July 2014

levels of engendering a mismatch between formal learning and job opportunities in the labour market.²⁴³

The problem has been exacerbated by ranking of pupils and schools after KCPE exams. Until 2012, the Council used to rank pupils and schools according to their performances after the KCPE exams. The Government did away with it since candidates and schools are not similarly situated. Ranking does not give conclusive evidence of a pupil's competencies since it ignores effects of other variables such as physical resources, teacher-pupil ratio, teacher quality, teaching or learning materials and school management which also impact on performance.²⁴⁴ In addition, it brings about mindless competition where some pupils resort to cheating to get ahead. In 2015, the National Assembly reviewed this policy directive and instructed the Cabinet Secretary for the time being in charge of basic education to reinstate the ranking component.²⁴⁵

The National Assembly passed the Kenya National Examination Council (Amendment) Bill, 2016 on 3rd August 2016 which introduces ranking of institutions and candidates based on their performance in KCPE exams.²⁴⁶ This piece of legislation should not have been passed in view of the side effects of ranking. Going forward, attempts should be made to address inequities in education playing field to ensure that all pupils are similarly situated.

Every year, around 800,000 Kenyans attain working age after formal technical training with only 50,000 new wage jobs available annually.²⁴⁷ The transition rate to secondary school is about 73%

²⁴³ UNESCO, *Education for All Global Monitoring Report, Teaching and Learning: Achieving Quality Education For All*, (2013/14) <http://www.unesco.org/education/wef/countryreports/kenya/rapport_1.html> accessed on 31st January 2014

²⁴⁴ Patrick Alushula, 'Abolition of School Ranking after KCPE and KCSE Insincere' <<http://www.standardmedia.co.ke/Art/2000148606/abolition-of-school-ranking-after-kcpe-kcse-insincere>> accessed on 13th January 2015

²⁴⁵ Standard Team, 'School Ranking in Kenya to Resume after MPs Pass Motion' <<http://standardmedia.co.ke/Art/2000155269/school-ranking-in-kenya-to-resume-after-mps-pass-motion>> accessed on 13th April 2015

²⁴⁶ Wilfred Ayaga and Augustine Oduor, 'MPs Pass Law to Allow Exam Ranking' <<http://www.standardmedia.co.ke/article/2000210772/mps-pass-law-to-allow-exam-ranking>> accessed on 8th August 2016

²⁴⁷ Alicia Robb, Alexandria Valerio & Brent Parton(eds), *Entrepreneurship Education and Training Insights from Ghana, Kenya and Mozambique* (World Bank , 2007) 12

and there are very limited vocational training opportunities.²⁴⁸ With these rising unemployment levels, there is need to examine the FPE curriculum and review it to ensure that it has capacity to nurture talent, innovation and impart entrepreneurial attitudes and mind-sets. The curriculum and the techniques of its implementation should prepare school leavers for life in high school and for those who do not transit to secondary school for a life of practical craftsmanship, self-reliance and entrepreneurship leading to economic independence.

The Government through the Taskforce on Aligning Education and Training to the Constitution of Kenya and Kenya Vision 2030 identified gaps in the relevance of the primary education curriculum.²⁴⁹ In response, it tasked the Kenya Institute of Curriculum Development (KICD) to undertake a curriculum review and overhaul.²⁵⁰ KICD [has started] collecting data and proposals from pupils, teachers, trainees in teachers training colleges, parents, education experts and curriculum implementers on the shortcomings of the current curriculum and content of the future curriculum.²⁵¹ The ongoing curriculum review is expected to address learning areas, relevance, number of subjects to be taken by each student, number of years taken at each level and modules studied by the students.²⁵²

Extensive stakeholder consultations on the shortcomings of the current curriculum and content of the future curriculum²⁵³ will be very important. Other stakeholders such as churches, teachers' unions, parent associations, private schools and CSOs should also be brought on board in the curriculum review process.

The curriculum nature, aims and content should be in congruence with the developmental needs of the individual and the society.²⁵⁴ KICD should not only look at what needs to be taught but

²⁴⁸ Sabahi, 'Taking Stock of a Decade of Free Primary Education in Kenya'

<http://sabahionline.com/en_GB/Arts/hoa/Arts/features/2012/02/24/feature-01> accessed 10th May 2014

²⁴⁹ MoEST, 'Recommendations made by the Task Force on Aligning Education and Training to the Constitution of Kenya and Kenya Vision 2030'

<<http://www.education.go.ke/ShowPage.aspx?department=1&id=1164>> accessed on 14th January 2015

²⁵⁰ Nation Reporter, 'Review of Curriculum Launched' *Daily Nation* (Nairobi, 5th June 2014) 6

²⁵¹ Ibid

²⁵² Ibid

²⁵³ Ibid

²⁵⁴ G. M. Ishumi, *Education and Development*, (East African Literature Bureau, 1976) 45

what is obsolete and have it eliminated from the curriculum²⁵⁵ to avoid a curriculum overload. The content of the curriculum should be integrally linked rather than having a strict isolation of subjects to have a more balanced appreciation of knowledge. This integral linkage expounds the relationships among the subjects making them more relevant and connected.²⁵⁶ It should also be modernised to incorporate the needs of a market based economy and ICT to prepare pupils for the ICT dominated world.

Review of the FPE curriculum should be faithfully done after every five years²⁵⁷ to guarantee an updated curriculum at all times. This curriculum must engender skills that are market driven geared towards economic empowerment of pupils to lift them out of poverty. Teaching should include creative thinking, effective problem solving, self-reliance, critical reasoning and the capacity to gain new knowledge.²⁵⁸ This will operate to foster a quest for knowledge which transcends the official curriculum and inspire pupils to develop a lifelong desire for learning.²⁵⁹

Hopefully, KICD will get to the root of the curriculum problem and come up with far reaching curriculum changes to address the education needs of Kenyan children in the 21st Century. Once KICD comes up with an inclusive interdisciplinary curriculum, there will be need for its aggressive dissemination to create internal buy-in. People do not like extreme change because it seems destabilizing, a disturbance of *status quo* and an interference with the traditional ways of doing things.²⁶⁰

Extra-curriculum activities which have been relegated to the periphery due to the extreme competition in KCPE exams should be given premium to nurture talents at an early age. The

²⁵⁵ Heidi Hayes Jacobs, 'The Growing Need for Interdisciplinary Curriculum Content' in Heidi Hayes Jacobs, (eds) *The Growing Need for Interdisciplinary Curriculum Design and Implementation*. (Association for Supervision of Curriculum Development, 1989) 3

²⁵⁶ Ibid 6

The debate whether the curriculum should be interdisciplinary or subject based is yet to be settled. Kenya has a largely subject based curriculum approach whereupon children and teachers look at specific subjects in isolation without any integral linkages. (See MoEST, *Primary Teacher Education (PTE) Syllabus Vol 1* (2001)

²⁵⁷ Basic Education Act No 14 of 2013 s 73

²⁵⁸ Robert Fisher, *Teaching Children to Think* (Nelson Thornes Ltd, 2005) ix.

This kind of teaching is opposed to passive teaching of inert ideas that do not stimulate effective thinking and learning.

²⁵⁹ Ministry of Education Singapore, 'Nurturing Students'

< <http://www.moe.gov.sg/education/nurturing-students/> > accessed on 23rd July 2014

²⁶⁰ G. P. Oluoch, *Essentials of Curriculum Development*, (3rd edn, Longhorn Publishers, 2006) 55

curriculum should create room for children to identify, understand, fine tune and set the stage for exploitation of their talents in disciplines such as arts and sports. The MoEST should come up with mandatory structured talent identification programmes for every school to help pupils discover what they are good at.²⁶¹ These programmes should have a talent nurturing component with parents playing a critical role in the talent identification and nurturing process.²⁶² The Government should aim to progressively open talent academies in every county.

The Government formulated a youth policy in 2006 to enhance education and training for the youth.²⁶³ The policy proposes the prioritization of the development of a curriculum that addresses the youth's needs by availing affordable and accessible quality primary, secondary and university education.²⁶⁴ Under the policy, the State also has a responsibility of promoting and encouraging skills development of the youth through vocational training and internship opportunities.²⁶⁵ Those children who do not join secondary schools become part of the youth in the informal sector who need the State's support in training and entrepreneurship.

Lack of skills hampers the productivity of the informal sectors²⁶⁶ thus limiting its capacity. There is need for exposing pupils to multidimensional craft and entrepreneurial skills under the FPE curriculum to enhance the productivity potential of the informal sector.²⁶⁷ Efforts should also be made to provide training opportunities in institutions such as village polytechnics for the children who do not transit to secondary schools to increase their skills and productivity. Such skills will

²⁶¹ Sara Gable, 'Nurturing Children's Talents'

<http://www.classbrain.com/artread/publish/Art_27.shtml > accessed on 23rd September 2014

²⁶² Parents play a key role in talent identification and nurturing process since they are with their children most of the time and they can easily pick a child's hobby or talent and can work with him or her towards its development.

²⁶³ Republic of Kenya, *Kenya National Youth Policy*, 2006

²⁶⁴ Ibid 10

²⁶⁵ Ibid

In this regard, the Government has established a revolving *Uwezo* Fund where the youth can borrow funds for entrepreneurship and pay back with interest below market rates.

See <<http://uwezo.go.ke/>> accessed on 3rd January 2015

²⁶⁶ Isa Froumin, Shanti Divakaran, Hong Tan and Yevgeniya Savchenko, 'Strengthening Skills and Education for Innovation, in Mark A. Dutz, (eds), *Unleashing India's Innovation, Towards Sustainable and Inclusive Growth*, (Word Bank, 2007) 131

²⁶⁷ Ibid 132

enable class eight leavers take up *Uwezo* Funds²⁶⁸ or obtain financing under the Youth Enterprise Development Fund²⁶⁹ for economic empowerment.

The Government should also extend support to the informal sector through offering an enabling business environment, training, marketing produce from the informal sector among other initiatives. This will ensure that primary school leavers create, innovate and participate gainfully in the informal sector. It should also discharge its policy and constitutional obligation of taking measures to ensure that the youth access relevant education and training.²⁷⁰ This can be done through concrete and targeted attempts to progressively make secondary and tertiary education and vocational training free to ensure that all pupils eventually transit to these levels.

2.7 Conclusion

From the discussions in this Chapter, this study has identified gaps in the corpus and implementation of the law and policy governing realisation of FPE. It has also identified other factors impeding realisation of the right, notably, implementation of the law and policy; apathy towards FPE by teachers and parents; early pregnancies and marriages; insecurity and conflict; and child labour. It is evident that the legislative and policy framework at the international, regional and national levels largely provide avenues for addressing realisation of the right to education. The effectiveness of these frameworks in facilitating the realization of FPE by the poor and marginalized, however, remains largely problematic. The problems lie with implementation of the frameworks. Therefore, a multi- pronged approach that combine legal and social change must be embraced.

A good number of poor and marginalised children are not accessing education at all. Some of those accessing it are not completing their eight years of schooling due to poverty related causes. Some schools are still charging fees making them unreachable despite FPE being free.

²⁶⁸ This is a fund established by the Government of the day to provide loans without stringent repayment terms to the youth and women as way of economic empowerment. See <<http://uwezo.go.ke/>> accessed on 3rd January 2015

²⁶⁹ See <<http://www.youthfund.go.ke/about/>> accessed on 3rd January, 2015

²⁷⁰ Constitution of Kenya 2010 Art 55

Further, for some children from poor and marginalised backgrounds who are accessing FPE, the quality of education is severely compromised due to overcrowding; lack or poor condition of the education infrastructure; shortage and quality of teachers; and an outdated curriculum that is out of sync with market realities prevailing in the Country.²⁷¹ As a result, beneficiaries of FPE who do not transit to secondary schools or vocational institutions do not have life, entrepreneurial and craft skills necessary to lift themselves out of poverty.

The next Chapter examines the suitability of the Rights Based Approach to poverty and inequalities reduction to enhance realisation of FPE.

²⁷¹ See also See MoEST, *Kenya Education Sector Support Programme (KESSP) 2005 – 2010, Delivering Quality Education and Training to All Kenyans* (2005) and Ministry of Education and UNESCO, ‘*Education for All End of Decade Assessment Report, 2001-2010*’(2010) and MoEST, ‘Achievements of the Jubilee Administration at One Year’, *Daily Nation* (Nairobi, 18th August 2014) 34The FPE curriculum is examination oriented with a strong focus on passing examinations and has not been revised in the last 14 years.

CHAPTER 3

A CASE FOR A RIGHTS BASED APPROACH TO REALISATION OF FREE PRIMARY EDUCATION IN KENYA

3.0 Introduction

This study delineated poverty, inequalities and other poverty related non-monetary causes as the main challenges impeding realisation of FPE by children from poor and marginalized backgrounds. This Chapter critically examined the suitability of the Rights Based Approach to poverty reduction and proposed its adoption for effective realisation of FPE to promote social justice.

3.1 The Rights Based Approach

The Rights Based Approach (RBA) is a concept that seeks to identify and redress inequalities and discriminatory practices which lie at the heart of development problems.²⁷² It appreciates poverty in terms of a range of interrelated and mutually reinforcing deprivations, stigma, discrimination and social exclusion.²⁷³ RBA focuses on the most marginalized and endeavours to introduce poverty reduction interventions that target them.²⁷⁴

RBA is underpinned by the key pillars of accountability; equality and non-discrimination; participation; and interdependence of rights.²⁷⁵ The Approach envisages introduction of the concept of 'rights' from policy making, through enactment of legislation to implementation of FPE. The Approach works towards fulfilling the rights, rather than the needs of beneficiaries. The difference between rights and needs is that the outcome of an unmet need is dissatisfaction

²⁷²UNICEF, 'Human Rights-based Approach to Programming'

< <http://www.unicef.org/policyanalysis/rights/>> accessed on 10th December 2014

²⁷³ OHCHR, 'Principles and Guidelines For a Human Rights Approach to Poverty Reduction Strategies' iii

<<http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>> accessed on 31st July 2014

²⁷⁴United Nations Population Fund (UNFPA), 'The Human Rights-Based Approach'

<<http://www.unfpa.org/rights/approaches.html>> accessed on 3rd September, 2014

²⁷⁵ Celestine Nyamu-Musembi, 'Human Rights and the Public Service'(Commission on Implementation of the Constitution, forthcoming, 2013) 13

and the beneficiary has no legal claim while the outcome for an unrealised right is a violation and the beneficiary can make a legal claim.²⁷⁶

In implementation of FPE, children living in poverty do not only have educational needs but also right to education giving rise to legal obligations. Consequently, lack of access to FPE due to poverty is equivalent to violation of the right to education. Rights can be realised by individuals or as part of a group under RBA. The RBA perceives poverty as a human right violation and seeks to address it in a wholesome manner. It also goes a step further to ensure that duty bearers are empowered and held accountable in the exercise of their mandate and right holders are empowered to claim their rights. It also provides accountability mechanisms in cases of threatened or actual violation of the right. It thus leaves no room for non-realisation of the right, resonates with the concept of social justice and is the most suitable for realisation of the right to education.

3.2 Historical Perspectives of the RBA

The promotion of human rights and the fight against poverty form part of the core mandate of the United Nations (UN).²⁷⁷ For a long time, the United Nations system implemented Basic Needs Approach to development.²⁷⁸ This situation was reversed in 1997 after international consensus that the Approach was not achieving the desired goals and that real development required a paradigm shift from meeting needs to realizing rights.²⁷⁹ Resultantly, the UN engineered the

²⁷⁶Ibid. Under international and domestic law, human rights obligations whether civil and political or socio-economic are immediate. The law however envisages a situation where there is insufficiency of funds and makes provisions for progressive realization of socio-economic rights. A person can bring an action for non-fulfillment of socio-economic rights which are under progressive realization and it is up to the State to demonstrate the efforts and infrastructure put in place to facilitate realization of the right.

²⁷⁷ UNFPA (n 278) Para 1

²⁷⁸ L. N. Basu, *'Human Rights in a Global Perspective'*, (Diamond Printing Press, 2009) 170.

The Basic Needs Approach identifies social goods in society and takes active steps to facilitate their fulfilment. Examples of social goods include provision of basic shelter, health care and education for the poor and relief food for the hungry.

²⁷⁹ Tara Collins & Caroline Delany, 'Rights-Based Approach'

<http://03559de.netsolhost.com/htmfiles/hill/17_htm_files/Committee-e/Tara-ARightsBased.pdf> accessed on 2nd September 2014

gradual mainstreaming of human rights into the programmes and implementation of the mandate of its agencies.²⁸⁰

The UN entities gradually embraced the RBA to development which eventually filtered into governance mechanisms in States. To actualise the application of RBA in Kenya, the Constitution provides that the Bill of Rights applies to *all law*.²⁸¹

3.3 Pillars of RBA

As highlighted at the beginning of this Chapter, the RBA is reinforced by the pillars of equality and non-discrimination; accountability; participation; and interdependence of rights. It is therefore pertinent to interrogate how these pillars interact with the realization of FPE in its pursuit of social justice.

3.3.1 Equality and Non-discrimination

The criticality of the principle of equality and non-discrimination under the RBA in facilitating access to education cannot be overemphasised. All children are equal before the law and should realize their right to education without discrimination. Incidences of discrimination in the realisation of FPE have been discussed at length in Chapter 2.

3.3.1.1 Reducing Inequalities and Discrimination in Realization of FPE

Sometimes, formal equality and equal protection by the law of the right to education may lead to unequal outcomes. A marginalized child, in a marginalized community, living in a developing/marginalized country in a marginalized region is unlikely to enjoy the right to education²⁸² despite presence of abstract equality. In order to achieve substantive equality, there

²⁸⁰ UN Secretariat, 'The Human Rights Based Approach Statement of Common Understanding' <<http://www.unicef.org/sowc04/files/AnnexB.pdf>> accessed on 1st September 2014. This was pioneered by the UN Secretary-General, Dr. Koffi under a UN Programme for Reform that was launched in 1997.

²⁸¹ Constitution of Kenya 2010 Art 20 (1) (Emphasis mine)

²⁸² Patricia Kameri Mbote, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses,' (University of Nairobi, 2013) 27

is need to treat equals alike and non-equals in an unlike manner to ensure equality of outcomes.²⁸³

Affirmative action or differential treatment measures should be introduced and the existing ones enhanced to address educational needs of children from disadvantaged backgrounds. The measures are temporary in nature and should solely be employed to ensure that excluded groups are brought into the included space to facilitate their catching up with the rest of the population.²⁸⁴

Courts have not been left behind in the fight against inequality in education. This was aptly demonstrated in the case of *John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others*.²⁸⁵ In this matter, private schools in 2010 had registered 107,514 (or 14.41%) of all KCPE exam candidates as compared to 638,593 (or 85.59%) in public schools. After the KCPE exam results were announced the then Minister for Education indicated that out of the 4,517 available spaces in national secondary schools 1,224 places would be availed to pupils from private primary schools in line with the enrolment percentages.

The Applicants filed a Petition opposing this policy directive citing discrimination against candidates from private primary schools. In reaching the verdict, the Court took into consideration the national values and principles of governance specified in Article 10 (2) (b) of the Constitution notably “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.” The Court observed that though the State is under obligation to ensure “equality and freedom from discrimination.”²⁸⁶ It is also required to introduce affirmative action programmes to make amends for any disadvantage suffered due to previous deprivations.

²⁸³ Aristotle, *The Nicomachean Ethics*, (trans) David Ross revised by J. L. Ackrill & J. O. Urmson, (1991) cited in Patricia Kameri Mbote, ‘Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses,’ (University of Nairobi, 2013) 27

²⁸⁴ Mbote (n 282) 29

²⁸⁵ *John Kabui Mwai & 3 Others V Kenya National Examination Council & 2 Others*[2011] eKLR

²⁸⁶ Constitution of Kenya 2010 Art 27

The Court noted that due to limited financial resources on the part of the Government, it was not able to facilitate the immediate enjoyment of quality education. Resultantly, pupils from public primary schools were disadvantaged by abstract equality. The Court sought to temper merit with equity by holding that the affirmative action program was not discriminatory. Merit alone would have occasioned unfairness and prejudice to the candidates from public primary schools.

Article 59 (4) of the Constitution provides a latitude for the establishment of the National Gender and Equality Commission (NGEC). The Commission has been established and operates within the framework provided in the National Gender Equality Commission Act 2011²⁸⁷ with a mandate of co-ordinating and facilitating mainstreaming of gender issues, persons with disability, the youth, children, the elderly, minorities and marginalized communities²⁸⁸ in education and all sectors of society. It is also expected to “monitor, facilitate and advise on the development and implementation of affirmative action policies”²⁸⁹ in education.

The Commission should actively pursue comprehensive mainstreaming and discharge its advisory mandate in the education sector to ensure access to FPE by children from poor and marginalised backgrounds. MoEST should also undertake active consultations with NGEC during formulation of any regulations or affirmative action programmes affecting implementation of FPE to ensure inclusion of marginalised and excluded children.²⁹⁰

3.3.2 Participation

Participation essentially means having an informed input which will eventually shape decision making. Every child has a right to shape his or her own destiny through personal participation in

²⁸⁷ National Gender Equality Commission Act 2011 s 3

²⁸⁸ Ibid s 8(d)

²⁸⁹ Ibid s 8(e)

²⁹⁰ NGEC Communications, ‘NGEC Informed of FPE Challenges’

<<http://www.ngeckenya.org/news/6060/ngec-informed-of-fpe-challenges> > accessed on 23rd July 2015

In 2014 for instance, NGEC, Education officials and stakeholders converged at a Nairobi hotel to establish the extent to which equality and inclusion principles have been mainstreamed within the provision of FPE programme in the Country.

the realization of the right to education. The child has a legitimate need to be respected as the central actor in the realization of the right.²⁹¹

Participation involves providing children with an opportunity to confer with duty bearers bearing in mind their developing capacities. Section 4(4) of the Children Act provides that “[I]n any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child’s age and the degree of maturity.” Section 4 (o) of the Basic Education Act provides that the implementation of basic education shall be guided by the principle of “promoting the respect for the right of the child’s opinion in matters that affect the child.”

The RBA takes appropriate account of children’s evolving capacities when constructing opportunities for participation.²⁹²In view of children’s ‘unevolved capacities’, there should be additional safeguards that allow parents, guardians and caregivers to take part in the participation process.²⁹³ However, care should be taken to avoid underestimating children’s capacities. Factors such as age, personal experiences, degree of adult support and the child’s own personality and strengths influence their capacities.²⁹⁴

Decision making or participation on behalf of the children should be guided by the principle of the best interests of children. The Children Act at Section 4(2) provides that “[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The Constitution at Article 53(2) provides that a “child’s best interests are of paramount importance in every matter concerning the child.” The decisions affecting their education must be taken with the primary consideration of the best interests of the child and not

²⁹¹ Paul Smeyers, Richard Smith & Paul Standish, *The Therapy of Education, Philosophy, Happiness and Personal Growth*, (Palgrave Macmillan, 2010)10

²⁹²Gerison Lawsdown, *The Evolving Capacities of the Child* (UNICEF, 2005) X
<[http://www.unicef.org/lac/evolving-eng\(1\).pdf](http://www.unicef.org/lac/evolving-eng(1).pdf)> accessed on 1st September 2014

²⁹³ Ibid

²⁹⁴ Gerison Lawsdown, ‘What’s the difference? Implications of a Child-Focus in Rights-Based Programming’ 4
<http://www.savethechildren.org.uk/sites/default/files/docs/Whats_the_Difference_1.pdf> accessed on 1st September 2014

those of his parents or the State.²⁹⁵ An evaluation of actions or omissions made towards children's best interests in education must be benchmarked against their ability to protect the right²⁹⁶ to education.

The principle of a child's best interests is vague, open ended and indeterminate²⁹⁷ and whether a child's interest is given primary consideration chiefly depends on the construction applied. Although the international, regional and national legal frameworks provide a set of principles guiding the application of the child's best interests,²⁹⁸ practical application of the principle will essentially be guided by the cultural, social and economic context in which the child lives.²⁹⁹ As a result of this, the application of this principle may have different outcomes on the same set of facts depending on the construction applied.

The construction applied by the State and other duty bearers involved in fulfilling the right to education should be as liberal as possible to guarantee enjoyment of the right. The principle should be a primary but not the overriding consideration since other parties might have equal or superior legal interests in comparison with the child.

Since the inception of FPE, decision making adopted a top-bottom approach without significant participation of children or their representatives.³⁰⁰ The Basic Education Act at Section 54(7) (i) provides that the County Director of Education shall facilitate administration of Education Management Information Systems (EMIS) and related information and communication technology at the County level. The MoEST has put in place the Education Data Management under the EMIS³⁰¹ with the aim of facilitating top-bottom and bottom-top information flows for informed decision making. This information management processes should be harnessed to

²⁹⁵Sara Dillon, *International Children's Rights*, (Carolina Academic Press, 2010) 49

²⁹⁶ Ibid 51

²⁹⁷ Ibid 50

²⁹⁸ UNHCR, 'Guidelines on Formal Determination of the Best Interests of the Child(Geneva 2008)'

<<http://www.unhcr.org/4566b16b2.pdf> > accessed on 22nd February 2014

The UNHCR has formulated guidelines to be applied in the determination of the best interests of the child.

²⁹⁹ Dillon n 295, 50

³⁰⁰ UNESCO, *Challenges of Implementing Free Primary Education in Kenya Assessment Report* (March 2005)

<http://hivhealthclearinghouse.unesco.org/sites/default/files/resources/FPE_Kenya.pdf > accessed on 20th March 2014

³⁰¹ MoEST, 'Achievements of Jubilee Administration at One Year' *Daily Nation* (Nairobi, 18th August, 2014) 34

ensure that input from the children, education managers, teachers, parents and care givers is taken into account before decisions affecting poor and marginalised children's education are made.

3.3.3 Interdependence of Rights

Socio-economic rights within whose ambit the right to education falls have been neglected or marginalized from the mainstream human rights agenda.³⁰² The reason advanced for this status is that they have a distributive effect addressing poverty and inequality which challenge dominant social norms or threaten established political or economic order.³⁰³

For a long time, there has been a debate on hierarchy of rights which seeks to establish whether rights are equal and interdependent or some rank higher than others. Since the adoption of the UDHR, the United Nations has been advancing the unity of purpose of civil and political rights and socioeconomic and cultural rights.³⁰⁴ Freedom from fear and want can only be realised where everyone enjoys both socioeconomic and civil and political rights. The 1993 Vienna Declaration and Programme of Action sought to end the debate by proclaiming that human rights are inalienable, interrelated and *interdependent*.³⁰⁵

In view of this, the right to education is inalienable. It is also interrelated to and interdependent with other rights. The realisation of this right plays a central role in enjoyment of human rights. It is only after realising the right to education that one can comfortably enjoy civil, political, socio-economic, cultural and solidarity rights. Unless the basic social and economic standards necessary for subsistence are maintained, there cannot be realisation of the right to education.

³⁰² Amnesty International 'Defending Human Rights in a Changing World'(2008)22
<<https://www.amnesty.org/en/library/info/ACT30/006/2008/en>> accessed on 2nd September 2014

³⁰³ Ibid

³⁰⁴ Philip Alston and Ryan Goodman, ' *International Human rights, The Successor to International Human Rights in Context*, (OUP, 2013) 285

³⁰⁵ *Emphasis mine*. Vienna Declaration and Programme of Action, (adopted 12th July 1993) UNGA Res. A/CONF.157/23

One cannot possibly realize the right to health and food if he has not acquired sufficient knowledge on health and nutrition through education.³⁰⁶

3.3.4 Accountability

The RBA framework identifies duty-holders, their duties and obligations in the realization of the right to FPE. Claims should be made against such duty bearers and they should be held accountable when the right to education is not realised.³⁰⁷

The OHCHR identifies four categories of accountability mechanisms, notably, judicial, quasi-judicial, administrative and political processes.³⁰⁸ There are also other extrajudicial processes of enforcing human rights such as expression of outrage by the public.

An ideal accountability process ensures that duty-bearers in the FPE implementation process are answerable for their improper deeds or omissions in pursuit of their obligations. It also provides right-holders with an opportunity to understand how duty-bearers have discharged or failed to discharge their obligations by providing duty-bearers with an opportunity to explain their conduct.³⁰⁹

An accountability process must have three cardinal ingredients. These include a reporting process by persons whose rights are violated or threatened with violation; obtaining feedback from duty bearer; and remedy or way forward.

The important question that arises in the process of realisation of the right to education is whether there are horizontal duty bearers (i.e. private bodies and individuals) or just vertical duty

³⁰⁶ UNESCO, *Education for All Global Monitoring Report, Teaching and Learning: Achieving Quality Education For All* (2013/14) 24

³⁰⁷ Tara Collins & Caroline Delany, 'Rights-Based Approach' <http://03559de.netsolhost.com/htmlfiles/hill/17_htm_files/Committee-e/Tara-ARightsBased.pdf> accessed on 2nd September 2014

³⁰⁸ OHCHR, 'Principles and Guidelines For a Human Rights Approach To Poverty Reduction Strategies' 17 <<http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>> accessed on 31st July 2014

³⁰⁹ Ibid

bearers.³¹⁰ Verticalists argue that human rights only apply in situations where there is "State action" or State actors.³¹¹ Conversely, horizontalists argue that private individuals should be governed by the same set of standards and values as the State. Consequently, a person whose right to education has been abrogated should obtain redress independent of any constructive causal link with the State.³¹²

The Constitution at Article 20(1) is very particular on the applicability of the Bill of rights and provides that it "applies to all law and binds all State organs and all persons." The Constitution has further expanded the common definition of persons to include a company, association and other bodies.³¹³ It is therefore apparent that the Constitution envisages both vertical and horizontal application of the bill of rights. The Court's comments in the case of the *Kenya Bus Service Ltd & 2 Others v Attorney General*³¹⁴ supported this view when it stated,

"... fundamental rights are applicable both vertically and horizontally..... the individual ... should..... be protected from such non-state bodies who may for instance discriminate unfairly, or cause other constitutional breaches....." ³¹⁵

The Court adopted a similar view in the case of *David Kipruto Cheruiyot v Kenya Fluorspar Co. Limited*.³¹⁶ In this case, a parent brought an action on behalf of his children under the Children's Act No. 8 of 2001 against Fluorspar Primary School which was owned, managed and run by the Kenya Fluorspar Company Limited, a limited liability company. The Plaintiff contended that the Head Teacher of Fluorspar Primary School without justifiable cause or reason had unlawfully expelled the Plaintiff's children from the school after attending the said institution for two years.

After finding that the children's right to education had been violated, the Court ordered that the children be re-admitted to the Kenya Fluorspar Primary School in their respective classes with

³¹⁰ Anon, 'Is there Horizontal or Vertical Enforcement of Constitutional Rights in Vanuatu?' <<http://www.paclii.org/journals/fjspl/vol09no2/10.shtml>> accessed 24th May, 2014.

³¹¹ Eastern Book Company, 'Practical Lawyer' <http://www.ebc-india.com/lawyer/Arts/2005_7_9.html > accessed 24th August 2013.

³¹² Ibid

³¹³ Art 260 Constitution of Kenya 2010

³¹⁴ *Kenya Bus Service Ltd & 2 Others vs Attorney General* [2005] eKLR

³¹⁵ The judgement was delivered on 6th April 2011 after the promulgation of the Constitution of Kenya 2010.

³¹⁶ *David Kipruto Cheruiyot v Kenya Fluorspar Co. Limited* [2008]eKLR

immediate effect and further directed the District Education Officer of the area to ensure the enforcement of the order.

The State is also vicariously liable for acts of its agents who violate human rights. Courts have found the State vicariously liable for the acts of those implementing the right to education on its behalf. In *WJ and LN (Suing through their guardians) v Astarikoh Henry Amkoah and 4 Others*³¹⁷ the Petitioners, minors aged 12 and 13 years respectively, brought a Petition against their Deputy Head Teacher, Mr. Amkoah for defiling them. Both girls got pregnant as a result of the defilement and the realisation of their right to education among other rights was compromised. They accused TSC for failing to protect them from abuse and urged the Court to find the State vicariously liable for the violation of their rights by their Deputy Head Teacher.

Despite being tried and acquitted in a criminal Court for defilement, TSC instituted disciplinary proceedings against the Deputy Head Teacher and found him guilty of breaching the Teachers' Code of Conduct and Ethics. The Commission dismissed him and struck him off the register of teachers.

The Court found the TSC vicariously liable for the wrongful acts of the teacher and awarded damages in the sum of Kshs 2,000,000/= and 3,000,000/= to WJ and LN respectively payable by the State. The Court further entreated TSC to step up its protection of minors by putting in place an effective inspectorate mechanism to pre-empt such cases.

3.3.4.1 Judicial Enforcement of the Right to Education under the Constitution

Any child whose right to FPE is violated has the right to institute proceedings for enforcement of the right.³¹⁸The High Court also has jurisdiction to handle matters relating to protection of children's rights. Cardinal to the enforcement of the right to education is the establishment of the Children's Courts for conducting civil proceedings in respect of parental responsibility over their children's education.³¹⁹

³¹⁷ High Court at Nairobi Petition No. 331 of 2011 [2011]eKLR

³¹⁸ Constitution of Kenya 2010, Art 22(1) (a)

³¹⁹ Children Act No. 8 of 2001 s 73

Article 22 of the Constitution provides for dispensation with *locus standi*. As a result, an organization can bring an action on behalf of children whose right to education has been violated if they do not have the wherewithal to do so. This is what happened in the case of *Githunguri Residents Association v Cabinet Secretary, Ministry of Education and Five Others*³²⁰ discussed in Chapter 2. The Petitioner, a local residents association, brought an action on behalf of all parents and children within Githunguri Sub-County in Kiambu County challenging charging of fees by public primary schools.

The law anticipates that the State as the primary duty bearer in realisation of the right to education may plead inadequacy of resources.³²¹ The Court may call upon the State to demonstrate the absence of resources³²² to facilitate realization of right to FPE and may require it to demonstrate whether it has “take[n] steps, by all appropriate means, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization”³²³ of the right to FPE.

In interpreting the adequacy or reasonableness of obligation to use maximum of the available resources, the Court should examine the extent to which measures are deliberately targeted towards realization of education taking into account the rights of the vulnerable children going through the FPE.³²⁴

3.3.4.1.1 Emerging Jurisprudence

The enactment of the Children Act in 2001 and the promulgation of the Constitution in 2010 opened a floodgate of disputes involving realization of the right to education which have found

³²⁰ *Githunguri Residents Association v Cabinet Secretary, Ministry of Education and Five Others*[2013]eKLR

³²¹ Constitution of Kenya 2010 Art 20(5)

³²² The Constitution has bestowed the burden of proof of lack of finances upon the State at Article 20(5) (a).

³²³ International Covenant on Economic, Social and Cultural Rights (adopted on 16th December 1966 entered into force on 3rd January 1976) 993 UNTS 3(ICSECR) Art 2

³²⁴ CESCR ‘An Evaluation of the Obligation to Take Steps to the “Maximum of available Resources” under the Optional Protocol to the Covenant,’ Res. E/E12/2007/1 (10th May 2007)

The Court should also consider whether the motivations behind allocation or non-allocation of available resources is in accordance with international human rights standards whether among policy alternatives the one least intrusive of rights is chosen, the time frame within which steps are taken.

their way to Court. In *Teachers Service Commission vs. Kenya National Union of Teachers (KNUT) & Another*,³²⁵ the TSC brought an application to Court seeking to stop teachers from going on strike due to a salary dispute since this would compromise the children's right to education. In granting the orders sought, the Court held that postponing the rights of children to education for which both the Claimants and Respondents have the mandate to protect would cause an irreparable injury to the children.

Another landmark case protecting the children's right to education under FPE is *Teachers Service Commission vs Kenya Union of Post Primary Education Teachers (KUPPET) & Another*.³²⁶ In this case, the Petitioner sought orders to arrest the violation the right of the child to free and compulsory basic education as provided for in Article 53 of the Constitution arising from a teachers' strike. On the other hand, the Respondent maintained that the rights of the teachers to fair remuneration and non-discrimination as provided by Article 41 and 27 of the same Constitution had been violated.

The Court observed that every time the teachers down their tools, the children under their watch and tutelage suffered immeasurably. It entreated the Government to secure and protect the rights of the teachers in order to safeguard the rights of the children. To protect the children's right to education, the Court directed teachers to report to work.

The Bill of Rights in the Kenyan Constitution is modelled along the Bill of Rights in the South African Constitution. The Judiciary in South Africa has adopted a similarly liberal interpretation of the Bill of Rights despite not having a policy equivalent to the FPE. A case in point is *Section 27 and 2 Others vs. Minister for Education*,³²⁷ where the Court found that the Limpopo Department of Education and the Department of Basic Education had violated the pupils' right to basic education through non-provision of text books and directed the two Departments to

³²⁵ *Teachers Service Commission vs. Kenya National Union of Teachers (KNUT) & Another* [2012] eKLR

³²⁶ *Teachers Service Commission vs Kenya Union of Post Primary Education Teachers (KUPPET) & Another*, [2013] eKLR

³²⁷ *Section 27 and Others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012)

<<http://www.saflii.org/za/cases/ZAGPPHC/2012/114.html>> accessed on 20th February 2015

The right is provided for in section 29(1) (a) of the Constitution of South Africa.

redress the violation. The Court further obligated them to regularly table updates on implementation of the orders.³²⁸

From the foregoing discussion, it is apparent that the Judiciary in Kenya akin to the Judiciary in South Africa is at the forefront in safeguarding the right to education. However, poverty, which the right to education seeks to address, prevents most pupils from enforcing their right to education. Even in South Africa where there has been extensive litigation over housing, healthcare, social security and a range of other socio-economic rights, enforcement of the right to basic education under section 29(1)(a) of the South African Constitution has been largely neglected.³²⁹

In April 2016, Kenya enacted the Legal Aid Act³³⁰ which lays down a comprehensive framework governing *pro bono* services in enforcing the right to education. It provides that an application for legal aid may be made by an individual, a group or an organization on an individual's behalf³³¹ once they demonstrate that they are incapable of meeting the costs of legal services.³³² This low threshold will ensure that legal aid is easily accessible to children from poor and marginalized backgrounds. The Act also recognizes and gives special attention to vulnerable and marginalized groups. In this regard, it requires the National Legal Aid Service³³³ to provide legal aid services in litigation relating to a breach of rights and fundamental freedoms particularly involving vulnerable and marginalized groups.³³⁴

The Act should be implemented optimally to assist parents, children, guardians and caregivers from poor and marginalised backgrounds access free legal services in order to pursue the enforcement of the right to education.

³²⁸ Cited in *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 Others* [2013] eKLR

³²⁹ Chris McConnachie, 'The Rise of South Africa's Education Adequacy Movement, 2012' <<http://ohrh.law.ox.ac.uk/the-rise-of-south-africas-education-adequacy-movement/>> accessed on 20th March, 2014

³³⁰ Legal Aid Act No. 6 of 2016

³³¹ *Ibid* s 34 (1)

³³² *Ibid* s 29 (1)

³³³ The National Legal Aid Service is a corporate body established under Section 4 to administer of the Act.

³³⁴ *Ibid* s 29(3)(e)

3.3.4.2 Quasi-judicial Enforcement of the Right to Education

In addition to judicial enforcement of the right to education, there are other quasi-judicial procedures available to redress the violation of the right to education among other rights. These include;

3.3.4.2.1 Making a Report to the Commission on Administrative Justice

A person whose right to education has been abrogated may make a report to the Commission on Administrative Justice (CAJ) which derives its mandate from the Constitution and the Commission on Administrative Justice Act.³³⁵ A report may also be made on his or her behalf by a member of his or her family or any other person suitable to represent the aggrieved person.³³⁶

According to Article 59(2) (h) of the Constitution, the CAJ has the responsibility of investigating “any act or omission in public administration” in any sphere of Government including MoEST “that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice.” The parent Act³³⁷ also mandates the CAJ to inquire into allegations of maladministration which include delay in administrative action, discourtesy, incompetence, misbehaviour and inefficiency or ineptitude within the public service. The MoEST and by extension officers in public primary schools are part of public service and therefore the Commission has jurisdiction over them.

3.3.4.2.2 Making a Report to the Kenya National Commission on Human Rights

A person wishing to lodge a complaint alleging violation of the human right to education may do so orally or in writing addressed to the Kenya National Commission on Human Rights (KNCHR).³³⁸ KNCHR is an independent Commission established under Article 59 of the Constitution of Kenya 2010. It is operationalised by the Kenya National Commission on Human

³³⁵Commission on Administrative Justice Act No. 23 of 2011

³³⁶ Ibid s 32(2) (a)

³³⁷ Ibid s 8 (d)

³³⁸ Kenya National Human Rights Commission Act No. 14 of 2011 s 33

Rights Act, 2011. One of the main objectives of the Commission is to investigate and provide redress for human rights violations.

The Commission “receives and investigates complaints about alleged abuses of human rights” and “takes steps to secure appropriate redress where human rights have been violated.”³³⁹ It can also inquire into a human rights matter *suo motto* and recommend improvement of the operations of public offices.³⁴⁰

After concluding an investigation or an inquiry, the Commission should give feedback to the institution to which the investigation relates. Feedback should include the findings of the investigation, way forward and reasons thereof and appropriate recommendations.³⁴¹

The Commission may prepare and submit to the National Assembly a report arising from failure or refusal to implement its recommendations for appropriate action.³⁴² The Act is however silent on what amounts to appropriate action by the National Assembly and there is a need for formulation of rules and regulations to that end. KNCHR also has an obligation to give feedback to the complainant in writing³⁴³ and if misconduct is established during investigations, the same should be reported to the appropriate authority.³⁴⁴

Any violations or malpractices involving realisation of the right to education falls within the investigative ambit of the Commission.

³³⁹Ibid s 8 (d)

³⁴⁰Ibid s 8 (e)

³⁴¹Ibid s 42(2)

³⁴²Ibid s 42

³⁴³ Kenya National Human Rights Commission Act No. 14 of 2011 s 43

³⁴⁴ Ibid s 44

3.3.4.2.3 Making a Report to the Education Appeals Tribunal

The Basic Education Act establishes the Education Appeals Tribunal (EAT).³⁴⁵ Any person or organization aggrieved by the decisions of the CEB may appeal to the EAT within thirty days.³⁴⁶ The Tribunal has already been established and various officeholders have been appointed.³⁴⁷

The Act however does not provide for the appointment of a Chairperson. There is need to amend the law to make provisions for the appointment of the Chair to enhance its operational efficiency.

3.3.4.3 Political Processes

The State should ensure that the Legislature, Executive and Judiciary all carry out their distinct functions under the doctrine of separation of powers. In practice however, constitutional checks and balances confer powers to these arms of Government to ensure that no one institution has absolute autonomy resulting in excesses. Against this backdrop, any inaction or action resulting in breach or violation of the right to education without due consideration of constitutional parameters calls for encroachment of executive authority by Parliament.

A case in point is an impeachment motion moved in the National Assembly against the Cabinet Secretary for Education, Professor Jacob Kaimenyi on the grounds of high handedness in handling education matters and failure to work harmoniously with other stakeholders.³⁴⁸ The motion was however lost.³⁴⁹

³⁴⁵ Basic Education Act No 14 of 2013 s 93

³⁴⁶ Ibid ss 77-93(2)

³⁴⁷ The Tribunal was set up in 2015 but it is not properly constituted owing to the legal lacuna in the appointment of its Chair. See Basic Education Act No 14 of 2013 s 93

³⁴⁸ Benjamin Wafula, 'Impeachment Motion against Kaimenyi in Parliament' <<http://citizentv.co.ke/news/impeachment-motion-against-kaimenyi-in-parliament-90788/>> accessed on 23rd September 2015

³⁴⁹ Ibid

3.3.4.4 Administrative Processes

Administrative accountability mechanisms involve preparation, publication and scrutiny of human rights impact assessments.³⁵⁰ In Kenya, this is operationalised through Article 132 (1) of the Constitution which obligates the President to table a report annually to the National Assembly for debate on all gains, challenges and way forward in the realization of human rights among other national values. The said report should be published in the *Gazette* for access by the public. The debate in the National Assembly may precipitate action through allocation of funds for FPE programming or stimulating action by duty bearers.

3.3.4.5 Public Pressure

The redress for violation of the right to education can also be realized through public expression of outrage by demonstrators, pressure groups and Civil Society Organizations (CSOs). Public pressure can also be effectuated through mainstream print or social media. Highlighting such violations in the press may also exert pressure on the Government to redress the violation of the right.

This is exemplified by a case where a primary school girl known by the pseudo name Liz had been gang raped, thrown in a sewerage ditch and left for the dead.³⁵¹ The attack left her seriously wounded and amounted to a violation of her right to education among other fundamental human rights. The case was referred to the local police who ordered the suspected rapists to cut grass at the police station and released them.³⁵² Protestors took to the streets demanding justice for the girl. An online campaign was mounted whereupon over one million signatures were collected to

³⁵⁰ OHCHR, 'Principles and Guidelines For a Human Rights Approach To Poverty Reduction Strategies' Para 77 <<http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> >accessed on 31st July 2014

³⁵¹ Kashmiri Gander, 'Justice for Liz: Rapists Jailed for 15 Years Following Protests over Grass Cutting Punishment' <<http://www.independent.uk/news/world/Africa/justice-for-liz-rapists-jailed-for-15-years-following-protests-over-grass-cutting-punishment-10174293.html>> accessed on 24th April 2015

³⁵² Ibid

exert pressure for justice.³⁵³ This resulted in action by the duty bearers and the suspects were tried, convicted and sentenced to 15 years imprisonment.³⁵⁴

In Kenya, uptake of internet services and use of social media has recorded monumental growth. By the end of the year 2013, internet users were estimated at 21.3 million.³⁵⁵ This internet and social media penetration should be harnessed to pass on information on violation of the right to education to prompt stakeholder action.

3.4 Integrating RBA into Realisation of FPE

The integration of RBA into realisation of the right to FPE should be done through incorporation of international principles and standards guiding its implementation into national policy and legislative framework.

Children are perceived as inherent right holders under FPE while the State, parents, caregivers and guardians are the contemporaneous duty bearers. The Government through the instrumentality of MoEST and its affiliate parastatals is the primary duty-bearer with the obligations to observe, respect, promote, protect and fulfil the realization of the right.³⁵⁶ The first step in implementing RBA under FPE for the poor is to carry out an assessment of the unfulfilled human rights and the unimplemented obligations by the state, parents and care givers.

Disaggregated data must be collected on the people who require the State's assistance in realisation of FPE and analysed to determine the extent of their needs to inform appropriate interventions.³⁵⁷ Variables such as gender, geographical location, ethnicity, religion, should be

³⁵³ Ibid

³⁵⁴ Ibid

³⁵⁵ Communications Commission of Kenya, 'Annual Report for the Financial year 2013/2014'

<<http://ca.go.ke/images/downloads/PUBLICATIONS/ANNUALREPORTS/Annual%20Report%20for%20the%20Financial%20Year%202013-2014.pdf>> accessed on 29th May 2015

³⁵⁶ Constitution of Kenya 2010 Art 21(1)

³⁵⁷ There is a misconceived notion that poverty tends to be concentrated in areas suffering from economic deprivation and marginalisation. While this may be true to an extent, sometimes there are pockets of poverty even in areas that are mainstreamed into the economy and seem to be thriving economically. Geographical targeting therefore may not yield equality and non-discrimination precipitating the need for collection of disaggregated data on poverty levels everywhere and its analysis thereof. A case in point is Tharaka Nithi County which is surrounded

used to guide policy makers in identification of the poor. This information should be available to policy makers and decision makers to inform planning, budgeting and programming for the affirmative action.

Secondly, there should be purposeful identification of the main structural causes for the non-realization of rights. Thereafter, there should be an assessment of the respective capacities of rights-holders to claim their rights and of the duty-bearers to fulfil their obligations. This study identified poverty as the principal cause of the non-realization of the right to FPE at the right holder's level. At the duty bearer's level, Kenya is ranked at position 147 against 187 countries in the 2014 Human Development Report³⁵⁸ with 48.19% of its population living in multidimensional poverty.³⁵⁹ The Report further indicates that 48% of the population is multidimensionally poor with deprivations in health, education, standard of living and are living on approximately less than \$1.25 in a day.³⁶⁰ In light of this, both the State as the duty bearers and the children as right holders do not have capacity to fulfil and claim the right respectively.

FPE programming should entail responding to the structural causes of non-realisation of the right to FPE through capacity building of rights holders and duty bearers. Since rights are interdependent, the Government should explore realization of other coterminous rights such as access to health services and nutrition³⁶¹ food, housing among others which are cardinal to the realization of the right education.

The capacity of MoEST and all the State Parastatals and Commissions affiliated to it should be enhanced through increased funding and technical support. Kenya as a State Party to the

by thriving Counties such as Meru and Kirinyaga. It is one of Counties being targeted by NACONEK in order to promote equitable and inclusive quality education amongst marginalised and nomadic Communities.

³⁵⁸ United Nations Development Programme's (UNDP) Human Development Index measures development in terms of life expectancy, educational attainment and standards of living.

UNDP, 'Human Development Report 2014, 'Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience Explanatory n on the 2014 Human Development Report composite indices, Kenya'

<http://hdr.undp.org/sites/all/themes/hdr_theme/country-ns/KEN.pdf> accessed on 12th March 2015

³⁵⁹ Ibid

³⁶⁰ Ibid

³⁶¹ Nutrition can be provided through school feeding programmes such the provision of milk, lunch or porridge. School-based health initiatives such as creation of awareness on diseases, regular free medical camps for pupils and de-worming should be explored. The Government should prioritize access to FPE as opposed to other programs such as the laptop programme for pupils in Class One.

ICSECR should “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization”³⁶² of the right to FPE. Funding can be obtained through budget cuts in less essential programs or international assistance to facilitate capacity building measures such as recruitment of additional teachers, facilitating in-service training and development or enhancement of physical infrastructure.

Finally, there should be monitoring and evaluation of both outcomes and processes of implementation of the right guided by human rights standards and principles.³⁶³

There is need for a paradigm shift in the implementation of FPE leaning towards RBA in order to ensure that children from poor or marginalised brackets realise their right to education and are lifted out of the cycle of poverty. The shift should include departure from emphasis on meeting needs to realizing rights followed by mainstreaming of human rights into FPE programming. It is futile to extend rights to economically and socially deprived individuals without simultaneously overcoming the obstacles that prevent them from exercising these rights.³⁶⁴

There should be substantive equality in matters of access to education through apportioning of educational opportunities to ensure that the poor and the marginalised are incorporated in the mainstream process of realisation of the right. The MoEST has established several affirmative action policies towards this end. These interventions are not adequate since they benefit only a small percentage of pupils from public primary schools. The existing policies should be enhanced through technical support and increased funding while fresh ones should be introduced and entrenched in the law to bolster realisation of FPE.

³⁶² International Covenant on Economic, Social and Cultural Rights (adopted on 16th December 1966 entered into force on 3rd January 1976) 993 UNTS 3(ICSECR) Art 2

³⁶³ UN, ‘Statement of Common Understanding Adopted by Various United Nations Agencies on the Human Rights Based Approach’ <<http://www.unicef.org/sowc04/files/AnnexB.pdf>> accessed on 1st September 2014

³⁶⁴ Julio Faundes, ‘Rule of Law or Washington Consensus: The Evolution of the World Banks’ Approach to Legal and Judicial Reform’, in Amanda Perry Kessar, (eds) *Law in pursuit of Development : Principles into Practice*, (Routledge, 2009)P 190

These include sustained creation of public primary schools infrastructure in areas where they do not exist thus reducing the distance to schools,³⁶⁵ developing small satellite schools in villages,³⁶⁶ establishing mobile schools to increase access to FPE and establishing low cost or free boarding facilities in pastoralists' areas. Affirmative action programs should also be established for taking care of children of young mothers to allow them to go back to school. Keeping such children in school will ensure access to FPE and help reduce these births.³⁶⁷ These births may lead to a population explosion gradually overwhelming the education and other sectors if allowed to spiral out of control. Kenya as a State Party to the ICSECR should implement the concluding observations by the CSECR which include enhancement of provision of school transportation and mid-day meals in remote rural and deprived urban areas.³⁶⁸

Duty bearers should be held accountable for non-realisation, threatened or actual violation of the right either through internal accountability mechanisms, quasi-judicial or judicial processes. Politics, nepotism, favouritism and breaches of transparency and accountability should be avoided³⁶⁹ in the realisation of FPE for the poor or marginalised to ensure that the rightful persons receive State's assistance.

Participation by teachers, school managers, parents, children and other stakeholders in the education sector should be properly harnessed through the Education Data Management put in place by MoEST under the Education Management Information Systems (EMIS).³⁷⁰ This System

³⁶⁵ Rachel Glennerster, Michael Kremer, Isaac Mbiti & Kudzai Takavarasha, 'Access and Quality in the Kenyan Education System: A Review of the Progress, Challenges and Potential Solutions' <<http://www.povertyactionlab.org/publication/access-and-quality-kenyan-education-system>>P 12 accessed on 23rd August, 2014

³⁶⁶ UNESCO, 'A Human Rights-Based Approach to Education for All: A Framework for the Realization of Children's Right to Education and Rights Within Education' (2007) <http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf> accessed on 23rd August, 2014

³⁶⁷ Angela Oketch, 'Five Children per Woman: How Kenya Lost the Family Planning Battle' *Daily Nation* (Nairobi, 6th May 2014) 30

³⁶⁸ Republic of Kenya, 'Second – Fifth Report to the Committee on Economic, Social and Cultural Rights' (June 2013) 63

³⁶⁹ Kulundu Manda, 'A Review of Anti-Poverty Policies and Initiatives in Kenya' in Jane Kabubo Mariara, (eds) *Poverty and Policy in Kenya* (University of Nairobi Press, 2007) 159

³⁷⁰ Section 95(3) (k) of the Basic Education Act No. 14 of 2013 provides that the Cabinet Secretary for the time being responsible for matters relating to basic education and training may make regulations with respect to the conduct and management of schools and such regulations may provide for the promotion, development, management and governance of education through ICT integration, EMIS and statutory structural adjustment.

will operate to facilitate top bottom and bottom top information flows and facilitate informed decision making.

3.5 Conclusion

The RBA is a very effective Approach to poverty and inequalities reduction. Underpinned by the pillars of accountability; participation; interdependence of rights; and equality and non-discrimination, this Approach resonates well with the concept of social justice. It reduces inequalities and poverty by way of collecting disaggregated data on all right holders who are excluded from realising FPE and empowering them to access quality and relevant education and realise other coterminous rights. The capacity of duty bearers is also enhanced to enable them carry out their obligations. The Approach also has universally recognised benchmarks which ensure that right holders participate in prioritizing programmes that will facilitate realisation of the right. It also provides accountability mechanisms in cases of threatened or actual violation of the right.

There is need for creation of awareness on the existence of the law regulating realisation of FPE to sensitise duty bearers and rights holders on their rights and obligations³⁷¹ and the integral components of RBA for effective realisation of the right to education.

The framework developed under this section can be instrumental in transmitting views to and from the school management system.

³⁷¹The MoEST and all the parastatals affiliated to it should create awareness on the legal and institutional framework on the right to education through seminars, mass media, County Education Offices among other mediums. The Ministry should also distribute Information, Education and Communication (IEC) materials to the public to increase awareness levels.

CHAPTER FOUR

CONCLUSIONS

4.0 Introduction

As already discussed in the previous Chapters, the right to education is important for political, economic and social development. Cognizance is taken of the fact that not everyone is realising the right to FPE as it is pegged on various factors. Inequalities in society make poor and marginalized people unable to realise their right to education. Kenya is alive to the fact that it has a duty to ensure that its citizens realise the right to education regardless of their status or background. Towards this end, Kenya has resorted to legal and policy interventions to provide FPE to its citizens to enhance their literacy and reduce poverty levels. This Chapter presents the summary of the study and establishes whether the objectives set were realized, hypothesis was confirmed and gives conclusions from the analyses in the study.

4.1 Research Summary

The research was presented in four Chapters. Chapter One had the introduction, background and justification of the study. It also comprised the statement of the problem, the objectives, research questions, hypothesis, theoretical framework and literature review. Chapter Two critically examined the legal and policy framework governing implementation of FPE at the international, regional and national levels and made the correlation between this framework and social justice.

The Chapter also outlined the normative elements of the right to education under FPE, notably, accessibility, acceptability, availability and adaptability and critically examined how they interact with the provisions in the legal, policy and institutional framework and the extent to which they are being realized. It also analysed the progress made by the State and non-state actors and identified gaps in the law and policy and other factors impeding realization of FPE. The Chapter simultaneously proposed appropriate legislative and policy interventions to ensure optimal realization of the right to FPE.

Chapter Three critically evaluated the suitability of the Rights Based Approach to poverty reduction and proposed its adoption for effective realisation of the right to FPE by children from poor and marginalized backgrounds. The Chapter also discussed at length its application to realization of the right to FPE in Kenya.

4.2 Conclusions

Kenya has put in place a legal and policy framework for realisation of FPE. This study critically examined the legal and policy framework governing FPE in Kenya and its effectiveness in promoting the realization of the right to FPE by children from poor and marginalized backgrounds. The study identified gaps in its provisions, the institutions established therein and in its implementation. The study also identified other factors impeding realization of this right such as apathy from teachers and parents; female genital mutilation; insecurity and conflict; early pregnancies and marriages; and child labour. It further made proposals on legislative, policy and social interventions; and best practices necessary for realization of FPE. As a result, the objectives of the research were met.

The study confirmed that there is need for legal, policy and social change to complement and build on the existing legal and policy framework to promote realization of the right to FPE by children from poor and marginalized backgrounds. In this regard, the hypothesis of the research was proved correct.

Though the legal and policy framework appears to respond to realization of right to FPE, it has not sufficiently addressed inequalities, poverty and other factors impeding realization of this right. The implementation of the law and policy continues to sustain or increase inequalities.³⁷²

Despite FPE being free and compulsory under the Kenyan legal framework, some public primary schools are still charging fees. Even where no fees are required, some parents are too poor to take their children to school and will prefer having them engaged in child labour as opposed to

³⁷² Richard Jolly, 'Inequality in Historical Perspective, in George Mavrotas & Antony Shorrocks, (eds) *Advancing Development Core Themes in Global Economics*, (Palgrave Macmillan, 2007) 71

being in school. Education funding through capitation grants by the Government is insufficient to sustain children in school. To compound this problem, disbursement of the funds is usually not timely.

The legal and policy provisions facilitating access to FPE by the poor and marginalised are fragmented. They are found in Children Act, Social Assistance Act, the Constitution, Basic Education Act, Legal Aid Act and various policy frameworks. There is no specific institution charged with the responsibility of overseeing and monitoring implementation of these provisions to ensure realisation of FPE by children from poor and marginalised backgrounds.

In some instances, the FPE physical facilities are non-existent or the distance between the home and the nearest public primary school is very long. Where the facilities are available, in some areas, the infrastructure is dilapidated posing a risk to the children's health in terms of exposure to weather elements, outbreak of waterborne diseases or risk of injury due to poor sanitary facilities.

The FPE increased enrolment in public primary schools without a corresponding increase in the number of teachers resulting in high teacher pupil ratios in some schools. The situation is exacerbated by teacher absenteeism and lack of motivation. Regular teachers' strikes over pay disputes also operate to impede realization of the right to education.

Qualifications for entry into teacher training colleges are low bringing on board weak teachers into the FPE implementation process. To compound this problem, teacher training in Kenya is weak. This is brought about by a curriculum overload and inadequate teaching practice. Instances of in-service training are isolated and far between creating a skills gap for primary school teachers. The end result is that some teachers are weaker than their pupils.

Education governance in the MoEST and most of the affiliate institutions is weak. The managers of parastatals and councils established under the legal framework governing realisation of the right to education are not appointed in good time to ensure smooth succession.³⁷³

³⁷³ Anon, 'KNUT Wants Ministry to Appoint Commissioners to TSC'

There is bound to be tension between TSC and ESQAC in the carrying out their respective inspectorate mandates. On one hand, TSC must ensure teachers under its employment are performing optimally while ESQAC must conduct inspections as part of quality monitoring.

The planning, budgeting and programming for ESQAC and NACONEK is under the direct control of MoEST. Consequently, these institutions do not have the requisite autonomy to operate effectively and efficiently.

The current FPE curriculum is outdated having come into operation in 2002.³⁷⁴ A lot of changes have taken place since then in the international, regional and national social, economic, environmental, technological and political arenas which need to be integrated into the curriculum. Teaching under the current curriculum is characterized by rote learning³⁷⁵ and tailored to teach pupils on how to pass exams and not necessarily gain critical thinking, entrepreneurship and problem solving skills.

Ranking of schools and pupils in KCPE does not adequately measure a learner's skills and competencies and has no room for encouraging the nurturing of talent. The side effects of ranking outweigh the benefits.

The Constitution has laid down comprehensive provisions in the Bill of Rights protecting and directing the implementation of the right to FPE for everyone including the poor and marginalised. In addition, it presupposes mandatory implementation of RBA through obligatory application of the Bill of Rights to the entire body of laws.

<<http://www.smartkenya.co.uk/knut-wants-ministry-to-appoint-commissioners-to-tsc/>> accessed on 23rd September, 2014

The MoEST has been accused of delay in appointing top management in TSC and KNEC. It took the threat of a nationwide teachers strike to have the Chair of the TSC and the Commissioners appointed by the Cabinet Secretary responsible for education. The said Commissioners have since been appointed.

³⁷⁴ MoEST, 'Achievements of the Jubilee Administration at One Year', *Daily Nation*, (Nairobi, 18th August 2014), P 34

³⁷⁵ African Youth Charter (adopted 2nd July 2006 entered into Force 8th August 2009)Au Doc. (AYC) Art 4(i)

In this Article, the African Youth Charter entreats State Parties to ensure that education responds to societal needs. It should also inspire critical and analytical thinking as opposed to rote learning. Rote learning promotes a state of automatism making children know something without having to think about it.

The RBA proposed for adoption in this study is the most effective Approach to poverty and inequalities reduction. Underpinned by the pillars of accountability; participation; interdependence of rights; and equality and non-discrimination, this Approach resonates well with the concept of social justice. It reduces inequalities and poverty by way of collecting disaggregated data on all right holders who are excluded from realising FPE and empowering them to access quality and relevant education and realise other coterminous rights. The capacity of duty bearers is also enhanced to enable them carry out their obligations. The Approach also has universally recognised benchmarks which ensure that right holders participate in prioritizing programmes that will facilitate realisation of the right. It also provides accountability mechanisms in cases of threatened or actual violation of the right.

Emerging jurisprudence in the enforcement of the right to FPE confirmed that the Judiciary in Kenya is at the forefront in safeguarding the right to education for all including the poor and the marginalised. Courts have been giving a liberal interpretation to the provisions safeguarding the right to FPE.

Finally, the proposed recommendations from this research can inform legal reform, policy decisions and social interventions aimed at effective realization of the right to FPE.

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