

Applying the Abidjan Principles on the Right to Education

A Research Report, January 2024





The Conceptualisation and Regulation of APBET Schools in Kenya.

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Acronyms

African Charter	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
APBET	Alternative Provision of Basic Education
APHRC	African Population and Health Research Center
CEB	County Education Board
CESCR	UN Committee on Economic, Social and Cultural Rights
CRC Committee	UN Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
EACHRights	East African Centre for Human Rights
GP	Guiding Principles
ICESCR	International Covenant on Economic, Social and Cultural Rights
LCPS	Low-cost private school
MoE	Ministry of Education
NACONEK	National Council for Nomadic Education in Kenya
RELI Africa	Regional Education Learning Initiative -Africa
SAP	Structural adjustment programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation

Executive Summary

To realise the right of all children in Kenya to receive an education of good quality, without marginalisation, discrimination or exclusion, the State must address inequalities that are due to the commercialisation and privatisation of education and the absence of clear policies regulating the registration of low-cost private schools. Low-cost private schools in Kenya are sometimes referred to as Alternative Provision of Basic Education and Training (APBET) schools. However, LCPS do not comply with the definition and role of APBET schools as described under the 2009 Policy on APBET, nor are they private schools under the provisions of the Registration Guidelines for Basic Education Institutions, 2021.¹

This Brief applies Guiding Principle 2 (GP2) of the Abidjan Principles² to APBET schools, and recommends how such schools could be classified and regulated under Kenya's policy framework and in relation to the right to education. The goal is to ensure that APBET schools promote and do not undermine the achievement of good public education in Kenya's informal urban settlements.

Section I describes the history of public education in Kenya, including challenges faced by the State, the impact of Structural Adjustment Programmes (SAPs) on the right to free education, and the growth of private schools. This section sheds light on the gaps that private schools emerged to fill, introduces the principal current challenges in education, and discusses how they might be addressed.

Section II distinguishes public from private education, outlines how international human rights law defines private and public education, and explains the definitions set out in the Abidjan Principles.

Section III describes the human rights obligations associated with the provision of public and private education, and their implications.

Section IV lists the types of school recognised by Kenya's legal framework, and compares this to the description of "public" and "private" as provided for under the Abidjan Principles. It then discusses two categories of school that are not clearly recognised in Kenyan law and shows how these can be classified applying GP2 of the Abidjan Principles.

Section V sets out policy recommendations to strengthen the right of everyone to public education of high quality.

¹ The Policy for Alternative Provision of Basic Education and Training, defines alternative provision as: "provision that intentionally seeks to provide an option/choice that is responsive and relevant to the needs of the targeted population. These options must have a parity of esteem and convey comparable chances". Policy for Alternative Provision of Basic Education and Training, May 2009, p. 8

² The Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education were adopted in Côte d'Ivoire on 13 February 2019, after a three-year participatory consultation and drafting process.

Introduction

In Kenya, the accessibility of public education has persistently encountered hurdles, frequently mitigated by the existence of low cost private schools, referred to as Alternative Provision of Basic Education and Training (APBET) schools.³ A government report in 2019 mapped 1,677 learning institutions in Nairobi's informal settlement, of which 41.1 % were individually owned, 38.8% communally owned, 11.2% owned by local faith-based organisations, and 2.5% by foreign non-governmental organisations.⁴ The same study reported that 87% of the schools mapped were not registered with the Ministry of Education (MoE). Most were either registered under other authorities, such as the Ministry of Gender, Children and Social Services or the Registrar of Societies, or not registered at all. As a result, they operated without MoE oversight.⁵ An (undated) report by the Education Department of Nairobi City County found that, based on data collected on Public Early Childhood and Development Centres (ECD) and primary schools, only 225 public schools were operating in Nairobi.⁶ The 2019 census listed 1,546 pre-primary and primary schools in Nairobi, giving a clear indication that the city's informal urban settlements are essentially being served by private providers.

The Urban Education Group⁷ has shown that the proliferation of low-cost private schools is one of many challenges facing pupils in Nairobi's informal settlement. The challenges faced by learners in Nairobi's informal settlements on accessing public education and the proliferation of the LCPs and APBET schools have been a regular concern for the Urban Education Group. Ahead of the annual meeting of Kenya's Regional Education Learning Initiative (RELI) in July 2022, the African Population and Health Research Center (APHRC), Dignitas, the East African Centre for Human Rights (EACHRights), the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), and the Regional Education Learning Initiative Africa, co-organised a learning visit to a low-cost private school in one of Nairobi's informal settlements.⁸ The community dialogue that took place afterwards brought together members of civil society, parents, teachers, learners, and officials from the MoE, to discuss and contextualise education issues in urban informal settlements. The issues raised included: gaps in the provision of public education in urban informal settlements; privatisation and

³ "Privatisation of education and its impact on the realization of the right to education in Kenya," EACHRights, June 19, 2019.

⁴ Ministry of Education. "Mapping of Basic Learning Institutions Operating in the Informal Settlements of Nairobi County: Report." National Council for Nomadic Education in Kenya, July, 2020. 13-14.

⁵ Ibid.

⁶ Nairobi City County: Education Department Data on Nairobi Public ECD Centres and Primary Schools and Locations, n.d. accessed 24/02/2024 <https://nairobi.go.ke/wp-content/uploads/Public-Primary-Schools.pdf>

⁷ The Urban Education Group is composed of State and non-State actors who work to improve access to education for children living in urban informal settlements. It is hosted by the Africa Population and Health Research Center (APHRC) under the Regional Education Learning Initiative (RELI).

⁸ For more information about this event, see GI-ESCR, Learning visit on urban education in Dagoretti, Nairobi, Kenya, <https://gi-escr.org/en/our-work/on-the-ground/learning-visit-on-urban-education-in-dagoretti-nairobi-kenya>.

commercialisation of education and its impact on access to good quality education; school leadership, management, and governance; and regulatory frameworks that improve or hinder educational provision for children in urban informal settlements.⁹

The MoE is currently reviewing the 2009 APBET policy in consultation with stakeholders, so it is a good moment to consider this issue. This brief aims to provide a clear understanding of APBET schools and clear any confusion between APBET, public and private schools. The brief:

- a. Analyses ‘public’ and ‘private’ education through the lens of human rights.
- b. Sets out the State’s obligations regarding public and private education.
- c. Describes the different types of Kenyan school (public, private, APBET, and community or *Harambee*) and the regulatory framework that applies to them.
- d. Makes recommendations for policymakers that seek to ensure that the new APBET policy will strengthen the right of all to good quality public education, not deepen poverty and inequality in urban informal settlements.

I. Background

This section delves into the availability and accessibility of public education in Kenya. It examines the initial push for free primary education in Kenya, the influence of Structural Adjustment Programs on primary education, and how the declining standards of public education contributed to the significant proliferation of private schools in the country, particularly within informal settlements.

A. Free primary education between 1971 and 1980

After Kenya gained independence in 1963, the government appointed the Ominde Commission in 1964 to survey Kenya’s educational resources and make proposals for a national education policy.¹⁰ Its report recommended revising the curriculum to make it more relevant to Kenyan children and called for free primary education. It advised government planners to build schools and recruit teachers to meet the needs of the entire population.¹¹ To help meet this goal and accommodate students who could not be placed in the limited number of public schools, the then President,

⁹ *Ibid.*

¹⁰ “Kenya Education Commission Report Part II (Ominde Commission)”, Ministry of Education, July 22, 1964.

¹¹ *Ibid.*, para. 560.

Jomo Kenyatta, encouraged the spirit of Harambee (fundraising events) to fund the construction of additional schools.¹² This led to the formation of Harambee (community) schools. The 1968 Education Act identified four categories of school: public;¹³ assisted;¹⁴ maintained;¹⁵ and unaided.¹⁶

In 1971, President Kenyatta eliminated tuition fees in the marginalised districts of North-Eastern Province, Rift Valley Province, and the Coast Province.¹⁷ This was the first attempt to provide free primary education. In 1973, a second presidential decree provided free education for children in grades 1-4 in all districts of the country.¹⁸ However, due to lack of planning and poor execution,¹⁹ the MoE was unable to cope with the high enrolment. About 1.4 million enrolments for grade 1 were registered, compared to the 400,000 that were expected. Enrolment for grades 1-6 rose from 1.8 million in 1973 to more than 2.8 million in January 1974.²⁰

To address these challenges, in 1976 the government set up the Gachathi Commission.²¹ The Commission was asked to evaluate the education system, define new educational goals for the second decade of independence, and formulate an action plan. It found that the cost of education had become a major burden to parents, causing them to withdraw children from schools, noted that a shortage of trained teachers was harming the quality of education, and recommended that the government should urgently address these challenges.²² However, the government implemented the changes with minimal public engagement. The subsequent financial burden placed on parents for equipment, teaching, and learning materials ultimately contributed to higher dropout rates.²³

12 George S. Eshiwani, "Education in Kenya since independence," *International Journal of Educational Development*, No. 14, 4 (1993).

13 Education Act (1968), Section 2, "Public school" means a school maintained or assisted out of public funds.

14 Education Act (1968), Section 2, "Assisted school" means a school, other than a maintained school, which receives financial assistance from the Ministry or assistance from the Teachers Service Commission established by the Teachers Service Commission Act (Cap. 212).

15 Education Act (1968), Section 2, "Maintained school" means a school in respect of which the Ministry or a local authority accepts general financial responsibility for maintenance.

16 Education Act (1968), Section 2, "Unaided school" means a school which is not receiving grants out of public funds.

17 "Report of the national committee on educational objectives and policies (the Gachathi Report)" Kenya Law Reports, 1976.

18 Macrina Lelei and John C. Weidman, "Towards Achieving Universal Primary Education in Kenya: The Free Primary Education Policies," in *Comparative International Perspectives on Education and Social Change in Developing Countries and Indigenous Peoples in Developed Countries*, eds. Gaetane Jeane-Marie, Steve Sider, Charlene Desir (Information Age Publishing, 2015).

19 Daniel Sifuna, "The illusion of universal free primary education in Kenya," *Wajibu* 20. (not dated)

20 George S. Eshiwani, "Education in Kenya since independence," *International Journal of Educational Development*, no. 14, 4 (1993).

21 Report of the national committee on educational objectives and policies, (the Gachathi Report), Kenya Law Reports, 1976.

22 Kisilu M. Kitainge, "Reforming education and training? Lessons from development of vocational education and training in Kenya," *Australian Journal of Adult Learning*, Vol 44,1 (April, 2004) 50-51.

23 Ibid, 52.



B. The impact of Structural Adjustment Programmes on primary education

In the late 1980s-1990s, the government adopted proposed Structural Adjustment Programmes (SAPs) suggested by the World Bank and the International Monetary Fund. This reduced public expenditure on social services and introduced cost-sharing policies.²⁴ These policies undermined the free primary education policies instituted in the 1970s, reduced the access to education of disadvantaged children, lowered the quality of education and enrolment, depressed completion and retention rates, and increased the number of out-of-school children.²⁵ In this period, the Mackey, Kamunge and Koech Commissions were appointed to make sure that education benefitted children and contributed to economic growth.

In 2003, the government re-introduced the free primary education (FPE) policy. This caused a new surge of enrolment in public schools but, because the State did not commensurately increase investment,²⁶ the quality of public education deteriorated, due to overcrowded facilities, high teacher-pupil ratios, and substandard learning environments, particularly in rural areas and urban informal settlements.²⁷

24 Linda Oduor-Noah, "The growth of private actors in education in East Africa", in *Realising the Abidjan Principles on the Right to Education; Human Rights, Public Education, and the Role of Private Actors in Education*. eds. Frank Adamson et al. (Camberley Surrey: Edward Elgar, 2021) 191.

25 Ibid.

26 World Bank, *Development Indicators*. <https://databank.worldbank.org/reports.aspx?source=2&series=SE.XPD.TOTL.GD.ZS&country=WLD>

27 Margaret Wawira and Abraham Ochieng', "Low-Cost Private Schools: School Choice for the poor at the expense of Quality?" (Right to Education Initiative, 2017).

C. The growth of private schools

Falling standards of public education after the introduction of FPE led large numbers of parents to transfer their children from public to private schools,²⁸ particularly in informal settlements which had fewer public primary schools.²⁹ Parents opted to enrol their children in private schools and to pay fees.³⁰ The failure of the government to provide sufficient public primary schools led to the tremendous growth of (LCPS).³¹ 'Low-cost private schools' are schools that target relatively poor households, offer an education at low cost, but also, in most cases, offer education of low quality.³²

Confronted by the dearth of formal education opportunities, individuals, communities, and organisations met the educational needs of out-of-school children and youth in a range of ways, including by creating non-formal schools.³³ In 2009, recognising this trend and that marginalised communities required access to basic education and training, the MoE introduced the Policy for Alternative Provision of Basic Education and Training (APBET). This policy streamlined the curriculum, teacher training, and the registration of non-formal education institutions, but lacked implementation guidelines.

The Basic Education Act, which replaced the 1964 Education Act in 2013, regrettably made no specific provision for non-formal schools, and for purposes of legal registration only recognised two types of school, 'public' and 'private'. Fortunately, the Act did include a clause allowing the Cabinet Secretary to designate additional types of school.³⁴ Using this provision, the MoE developed the 2015 Registration Guidelines for Alternative Provision of Basic Education and Training, to regulate the registration of and set standards for APBET schools.

A significant gap, nevertheless remained between the scope and definition of APBET schools, as outlined in the 2015 APBET Registration Guidelines³⁵ and the 2021 Registration Guidelines for Basic Education Institutions,³⁶ and their implementation. In practice, APBET schools are not the same as low-cost private schools. Arguably, the failure to clearly define and distinguish between the two has contributed to slow progress in bringing APBET schools effectively under MoE oversight. Most low-cost private schools operating in Nairobi's urban informal settlements do not currently comply with any of the official definitions

28 Tessa Bold et. al., "Does abolishing fees reduce school quality? Evidence from Kenya" Working Paper-Centre for the Study of African Economies (CSAE) 2011-04 (2010).

29 James Tooley, Pauline Dixon and James Stanfield, "Impact of free primary education in Kenya," *Educational Management Administration and Leadership* 36, no. 4, (October 1, 2008), p. 449-469

30 Ibid.

31 Margaret Wawira and Abraham Ochieng', "Low-Cost Private Schools: School Choice for the poor at the expense of Quality?", (Right to Education Initiative, 2017).

32 Ibid.

33 Ministry of Education, *Policy for Alternative Provision of Basic Education and Training (APBET)*, 2009.

34 *Basic Education Act*, 2013, Section 95.

35 *Registration Guidelines for Alternative Provision of Basic Education and Training (APBET)*, (MoE 2015).

36 *Registration Guidelines for Basic Education Institutions*, (Ministry of Education, 2021).

It is also crucial to note that in Nairobi's informal settlements,³⁸ where over 70% of the city's population reside, 63% of children attend non-government schools,³⁹ not because their parents necessarily prefer private to government schools, but because no government schools are available in their vicinity or the few that are available are overcrowded.⁴⁰ While low cost schools and APBET schools are responding to the demand for education, significant concerns have been raised regarding the health and safety of pupils, and the quality of education they provide.

40 *Ibid.*



II. Distinguishing ‘public’ from ‘private’ education in terms of human rights

This section reviews how ‘public’ education is distinguished from ‘private’ education in contemporary human rights law, including the Abidjan Principles on the human rights obligations of States to provide public education and regulate private involvement in education (the “Abidjan Principles”).

What are the Abidjan Principles?

The Abidjan Principles: Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education, were adopted in Côte d'Ivoire on 13 February 2019. This was after a three- year participatory consultation and drafting process. They consolidate human rights law concerning the provision of public education by States and offer invaluable guidance on the application of the right to education, particularly in scenarios involving private actors.

Since their adoption, the APs have been recognised by multiple legal institutions and human rights bodies, including the United Nations Human Rights Council [2019](#), [2021](#) and [2023](#) the African Commission on Human and Peoples’ Rights’ [General Comment 7](#), the [United Nations Human Rights Council](#), and by Farida Shaheed, [UN Special Rapporteur on the right to education](#). Despite these gains, there remains an increasing global push towards privatisation in education and an accompanying downward spiral towards lower standards.

Kenya has ratified key international human rights treaties (including the ICESCR, CRC, ACHPR and ACRWC), and is thereby obliged to comply with provisions in them that address the right to education.⁴¹

A. ‘Public’ and ‘private’ education in international human rights law

International human rights treaties and instruments set out standards and principles with respect to the right to education, and clarify the nature of public and private education. The main international provisions that give content to this right are article 13 of the ICESCR and articles 28 and 29 of the CRC.⁴² Both instruments affirm the right to education,⁴³ and that primary education should be compulsory and available to all without

⁴¹ Constitution of Kenya 2010, Article 2(6) states that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.

⁴² A number of international and regional treaties affirm and protect the right to education. The most important include: Article 26 of the Universal Declaration of Human Rights (UDHR); Article 5(1)(a) of the 1960 UNESCO Convention on Discrimination in Education (CADE); Article 13 of the Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); Article 17 of the Revised European Social Charter; Article 2 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

⁴³ International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13(1), and Convention on the Rights of the Child (CRC) Article 28(1).

cost;⁴⁴ set out the objectives that should guide education;⁴⁵ and identify the measures that States should take to ensure the right is fully realised at different levels of education.⁴⁶ Regionally, the African Charter on Human and Peoples' Rights (ACHPR) also recognises the right to education (article 17) and that States that sign the ACHPR have a duty to provide it (article 25). The African Charter on the Rights and Welfare of the Child (ACRWC) recognises the right of every child to free and compulsory education (article 11) and that States that sign the ACRWC have a duty to provide it (article 11[3-6]).⁴⁷

Other relevant provisions in international treaties make clear that individuals have the right to establish and choose (or place their children in) schools 'other than those established by the public authorities'.⁴⁸ The specific identification of this right suggests that the dominant form of education (the 'norm') is assumed to be *public* education provided by the State (i.e., 'established by the public authorities'), and that *private* forms of education play a supplementary role.⁴⁹

This view is supported by article 13(2)(e) of the ICESCR, which states that '[t]he development of a system of schools at all levels shall be actively pursued'. By contrast, private institutions (as envisaged under articles 13(3) and 13(4) of ICESCR) necessarily develop on an individual, ad hoc basis. It follows that the obligation of States to 'develop a system of schools' requires States to develop and maintain a continuing public education system and that article 13(2)(e) of ICESCR implies that the State has a duty to provide education primarily through public educational institutions, which private institutions may complement in accordance with articles 13(3) and 13(4).

The Committee on Economic, Social and Cultural Rights (CESCR),⁵⁰ the expert body that interprets the ICESCR, has confirmed this reading, stating that: 'it is clear that article 13 regards States as *having principal responsibility for the direct provision of education* in most circumstances, as '[o]nly the State [...] can pull together all the components [of education] into a coherent but flexible education system'.⁵¹ A further reason for requiring the State to provide education primarily through public provision is that an education system run wholly by private operators would be unable to guarantee a standard of education consistent with the requirements of international human rights law. In particular, it could not meet the require-

44 ICESCR Article 13(2)(a), and CRC Article 28(1)(a).

45 ICESCR, Article 13(1), and CRC Article 29(1).

46 ICESCR Article 13(2), and CRC Article 28(2).

47 References can also be found in the Protocol to the African Charter on Human and People's Rights on the Rights of Women (Article 12), and the African Youth Charter (Articles 13 and 20).

48 ICESCR Articles 13(3) and 13(4), CRC Article 29(2) and African Charter on the Rights and Welfare of the Child (ACRWC) Article 11(4). Article 5(b) of UNESCO's Convention against Discrimination in Education explicitly states that private educational institutions are permissible "if the object of the institutions is [...] to provide educational facilities in addition to those provided by the public authorities".

49 Jacqueline Mowbray, "Is there a Rights to Public Education?" in *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, eds. Frank Adamson et al. (Camberley Surrey: Edward Elgar, 2021) 56.

50 The Committee is composed of 18 independent experts who monitor the implementation by States parties of the International Covenant on Economic, Social and Cultural Rights.

51 "The State of the World's Children: The education for all," (UNICEF 1999), 63.

ments that education should be free and equally accessible to all without discrimination. Put differently, only a public education system is equipped (by definition) to meet the needs of groups whose needs may not be met by private providers, and so guarantee equal educational opportunities for all.⁵²

In summary, contemporary human rights law affirms that States have a duty to provide public education and so declares a right to public education, regardless of the presence of private providers and the extent to which they also offer educational services.⁵³ Under international human rights law, States must also respect the liberty of individuals and bodies to establish and run private schools ('schools other than those established by the public authorities'). In Fredman's words, 'the State is under an obligation, at the very least, to *permit private provision* of education'.⁵⁴

1. What is public education?

Although the relevant international instruments enshrine a right to education and oblige States to provide public education, they do not define 'public' or 'private' education institutions.⁵⁵ As explained by Mowbray, this is because the understanding and classification of public and private vary in different national contexts⁵⁶ and because it is generally recognised that States determine a school's standing.⁵⁷

At the same time, the State's discretion has limits. International human rights law establishes several criteria that should generally characterise *public* education.⁵⁸ They include:⁵⁹

- Public schools should, in general, be established at the initiative of the State and not at the initiative of private actors.
- Public schools must be funded by the State, although funding alone is not sufficient to make a school public.

52 Jacqueline Mowbray, "Is there a Right to Public Education?" in *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, eds. Frank Adamson et al. (Camberley Surrey: Edward Elgar, 2021) 61.

53 Ibid, 59 and 64.

54 Sandra Fredman, "State funding of private education: the role of human rights" in *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, eds. Frank Adamson et al. (Camberley Surrey: Edward Elgar, 2021) 107.

55 The Glossary of the UNESCO Institute of Statistics defines a 'public educational institution' as an "Institution that is controlled and managed directly by a public education authority or agency of the country where it is located or by a government agency directly or by a governing body (council, committee etc.), most of whose members are either appointed by a public authority of the country where it is located or elected by public franchise".

56 Jacqueline Mowbray, "Is there a Rights to Public Education?" in *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, eds. Frank Adamson et al. (Camberley Surrey: Edward Elgar, 2021) 53.

57 Ibid.

58 Ibid.

59 Ibid, 54-55.

- Schools that operate primarily to make a profit for private actors cannot be considered public.⁶⁰
- States must 'direct' the operation of public schools: States must be able to exercise substantial control over their operation, meaning that how they operate is ultimately determined by the State or by a publicly appointed school board and not by private actors.

The ACHPR has interpreted the term 'public' in its General Comment No. 7 on State obligations under the African Charter on Human and Peoples' Rights with regard to social services in the context of private provision.⁶¹ Its interpretation is broad and forward-looking:

*"The term 'public' as referred to in this General Comment may thus require a different understanding from the one that is predominant in many parts of the continent and the world. Public social services have in practice not always been developed and governed according to their public nature. They have, at many times, served the interests of the wealthy and powerful, contributing to the oppression or exclusion of certain groups. In this General Comment, the term 'public' is less concerned with the public nature of the entity delivering the services, that generally is the State, than with the practical modalities of how the service is delivered, and to what standards the service provider is held to account. In this understanding, public provision of social services is distinctive in that it allows for the equal and democratic involvement of all members of the community or society in their design, organisation, governance, financing, delivery and monitoring of social services, in the exclusive pursuit of the public interest. As a result, publicly delivered social services must be able to take a long-term perspective and must be democratically accountable to the public, as opposed to commercial actors and their shareholders and investors which typically respond to a range of private interests."*⁶²

In addition to being limited by the above criteria, a State's discretion to include an educational institution in its public system may be subject to review by relevant international human rights bodies.⁶³

60 The Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child (CCRC) have consistently considered for-profit education providers as private institutions. See, for instance, CESCR, Concluding Observations: Pakistan, U.N. doc E/C.12/PAK/CO/1 (20 July 2017), para. 81; and CCRC, Concluding Observations: Chile, U.N. doc CRC/C/CHL/CO/4-5 (30 October 2015), paras. 67–68. See also the Report of the Special Rapporteur on the Right to Education, Kishore Singh, U.N. doc. A/HRC/29/30 (10 June 2015), para. 68; and the Report of the Special Rapporteur on the Right to Education, Kishore Singh, U.N. doc. A/69/402 (24 September 2014), para. 106.

61 African Commission on Human and Peoples Rights (ACHPR) General Comment No. 7, State obligations under the African Charter on Human and Peoples' Rights with regard to social services in the context of private provision, (July 28, 2022), para 14.

62 Ibid, para 14.

63 Jacqueline Mowbray, "Is there a Rights to Public Education?" in *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, eds. Frank Adamson et al. (Camberley Surrey: Edward Elgar, 2021) 76.

2. What is private education?

International human rights instruments do not provide a definition for 'private education'.⁶⁴ Instead, both the ICESCR and the CRC recognise that individuals and bodies are entitled 'to establish and direct educational institutions', provided they conform to the educational objectives set out in international law and to the minimum standards laid down by the State (ICESCR art 13 (4), CRC art. 29(2)). It is clear from these provisions that private educational institutions:

- Are established at the initiative of individuals or bodies (and not the State) (ICESCR article 13(4), and CRC article 29(2)).
- Are not funded by the State. States are under no obligation to fund private educational institutions; however, if they elect to do so, they must not discriminate or breach any prohibited grounds.⁶⁵
- Must comply with applicable human rights laws and standards and strictly observe the substantive, procedural and operational requirements set out in Guiding Principles 64 to 73 of the Abidjan Principles.
- Are directed (and controlled) by private actors (ICESCR article 13(4), CRC article 29(2)).
- Are required to conform to the minimum educational standards laid down by the State and to observe the aims of education defined in the main international human rights instruments (ICESCR articles 13(3) and 13(4), and CRC article 29(2)).

It follows from the above that the State can exercise less control over the activities of private education providers than over public institutions. Critically, this implies that the State can not force private providers to fulfil all of the State's obligations under article 13(2) of the ICESCR, and articles 28 and 11(4) of the CRC; for example, States cannot oblige private providers to ensure free access to primary or higher levels of education.⁶⁶ The State may intervene in the operations of private schools only to ensure they meet the aims of education (as defined by the main international human rights instruments) and comply with minimum educational standards.⁶⁷

64 The Glossary of the UNESCO Institute of Statistics defines a 'private educational institution' as an "Institution that is controlled and managed by a non-governmental organization (e.g. a church, a trade union or a business enterprise, foreign or international agency), or its governing board consists mostly of members who have not been selected by a public agency". The Glossary includes statistical terms related to education, science, technology and innovation, culture, and communication & information.

65 CESCR, General Comment No. 13 (1999), on the right to education, UN Doc. E/C. 12/1999/10, para. 54.

66 Mowbray explains this in the following way: "Article 13(2) of ICESCR says that primary education should be 'available free to all', and secondary and higher education should be 'accessible to all', that is, affordable by all. However, the State cannot require private schools to be 'free to all' or 'affordable for all', because, under article 13(4), States can only intervene in the operation of private schools to ensure their compliance with educational objectives and minimum educational standards". See Mowbray, J. , 'Is there a Right to Public Education?', in *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, eds. Frank Adamson et al, (Camberley Surrey: Edward Elgar, 2021) 60.

67 *Ibid*, 59-60.

B. How the Abidjan Principles define ‘public’ and ‘private’ education

The Abidjan Principles define ‘public’ and ‘private’ education in Guiding Principles 2 and 3, and provide a framework for understanding these definitions in human rights terms.

1. The definition of public schools under Guiding Principle 2

GP2 of the Abidjan Principles states:

“For the purpose of this text, public educational institutions refer to institutions which are:

- a. recognised by the State as public educational institutions;
- b. effectively controlled and managed by the State or genuine representatives of the population they serve; and
- c. not at the service of any commercial or other exploitative interests that undermines learners’ right to education.”

The criteria set out in GP2 speak only of ‘recognition’, ‘management’ and ‘control’ of public institutions, and indicate that public education institutions must not serve ‘commercial’ or ‘other exploitative interests’. Unlike most traditional classifications, the criteria do not refer to ‘ownership’ or ‘funding’. In other words, to be considered public under the framework of the Abidjan Principles, a school is not required to be funded or even owned by the State. What matters is the State’s *recognition* of a school’s public status.

‘Recognition’ is understood to mean that the school’s nature is declared in a law or ordinance; there is no implication that the State must be actively involved in the school’s ownership, management, or funding. Additionally, for a school to be public, GP2 offers two options: Schools may be “effectively controlled and managed by the State” (in terms similar to traditional definitions of public), where the word ‘effective’ implies that State management must be real, not indirect, nor superficial; or schools may be “effectively controlled and managed by (...) genuine representatives of the population they serve”.

As Adamson and others have explained, the expression ‘genuine representatives’ can include a broader range of actors, not just traditional public authorities associated with the State.⁶⁸ In addition to democratically elected formal authorities of the State, or regional or city councils, the term can include non-formal authorities, such as communities, in particular indigenous groups.⁶⁹ Adamson adds that the word ‘genuine’ in ‘genuine representatives’ implies the public’s democratic

⁶⁸ Frank Adamson et al., “Human rights to evaluate evidence on non-state involvement in education,” (UNESCO, 2021).

⁶⁹ *Ibid*, 16-17.

involvement in determining their representatives.⁷⁰ When they included non-traditional forms of public representation, those who drafted the Abidjan Principles chose to define the right to public education in terms that are relevant to people living in a diversity of contexts.⁷¹

To prevent unscrupulous private institutions from claiming to be “effectively controlled and managed by ... genuine representatives of the population they serve”, the third criterion states that, to be considered public, an educational institution must not be “at the service of any commercial or other exploitative interests”.⁷² This term seems to include profit, and might include other self-interested motives (such as a faith motive), where these are predominant and benefit specific individuals or institutions.⁷³ The strength of criterion 3 is that, to discover a school’s nature, authorities must consider its practices. These will identify schools that may have registered as public, or private non-profit, but make profits indirectly or integrate commercial practices.⁷⁴

It is important to highlight again that the definition of ‘public’ in the Abidjan Principles does not refer to funding or ownership. This means that an educational institution that meets the above criteria and is funded privately (for instance through fees or donations) may still be considered public; and equally that not all schools that receive public funding should be considered public in nature.

In sum, under the Abidjan Principles’ criteria, a public educational institution is one that is *controlled by the public* (criterion 2), *for the public interest* (criterion 3), and *recognised by the State* (criterion 1). The definition requires authorities to assess actual conduct when they classify schools.

2. How Guiding Principle 3 of the Abidjan Principles defines private schools

Guiding Principle 3 of the Abidjan Principles reads as follows:

“Educational institutions not meeting these cumulative conditions [under GP2] are “private” for the purpose of this text. This includes:

- a. both private instructional educational institutions that directly deliver education services, and private institutions that play a non-instructional educational role in the delivery of education services; and
- b. both commercial and non-commercial actors.”

Under the Abidjan Principles, educational institutions that do not meet all three of the criteria that define public schools are considered private, irrespective of their commercial or non-commercial nature.

⁷⁰ *Ibid*, 16.

⁷¹ *Ibid*, 17.

⁷² *Ibid*.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

III. States' human rights obligations with respect to 'public' and 'private' provision of education, and their implications

This section delves into the human rights obligations of States concerning the provision of education, distinguishing between 'public' and 'private' education. Guiding Principles 29-33 of the Abidjan Principles outline the obligations related to public education, emphasising the duty of States to provide free, high-quality public education to all individuals within their jurisdiction. Conversely, regarding private education provision, State's role shifts to regulating and ensuring that they meet minimum educational standards while respecting individual rights to education. The classification of schools as public or private carries significant implications, dictating the State's responsibilities and the rights of individual claimants in cases of violations or failures to uphold the right to education.

A. State obligations with respect to public education

Guiding Principles 29-33 of the Abidjan Principles set out States' obligations in the sphere of public education. Guiding Principle 29 affirms that States have a duty to provide "free, public education of the highest attainable quality" and that individuals have a corresponding right to receive such education:

"States must respect, protect, and fulfil the right to free, quality, public education. They must provide free, public education of the highest attainable quality to everyone within their jurisdiction as effectively and expeditiously as possible, to the maximum of their available resources. The involvement of private educational institutions does not in any way impair or nullify this obligation."

In her commentary on Guiding Principle 29, Mowbray (2021) explains that the obligation to fulfil (provide), requires States to establish, fund, and operate sufficient public schools to meet the needs of the population, while the principle of non-discrimination (article 2(2) of the ICESCR) affirms that individuals have a right to access such education without discrimination.⁷⁵ She points out that non-discrimination requires States to ensure that public schools are "available in sufficient quantity within the jurisdiction of the State party", in order to ensure that public education is reasonably available to all.⁷⁶ As a result, the right to education, read together with the prohibition on discrimination, requires States to provide a public education to all learners who wish to pursue it. Though learners and their parents remain free to choose private educational institutions (as provided by article 13(3) of the ICESCR), the

⁷⁵ Jacqueline Mowbray, "Is there a Rights to Public Education?" in *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, eds. Frank Adamson et al. (Camberley Surrey: Edward Edgar 2021).

⁷⁶ Ibid.

State must nevertheless make some form of public education reasonably available to all. Mowbray goes on to show that the precise scope of the State's obligation will depend on the context, reflecting the fact that the 'reasonableness' of the State's actions will determine whether or not it respects or violates the right. What remains clear is that, under international human rights law, States are obliged to make public education reasonably available to all, and that rights-holders have a corresponding and justiciable right to demand public education.

B. State obligations with respect to private education

In terms of human rights law, the main difference between private and public education is that there is no obligation to provide private education: rather, individuals or bodies are at liberty to set up and run private schools (at their own initiative) provided they respect minimum educational standards set by the State. In other words, whether private schools exist depends on the willingness of private actors to create them; the State has no duty to ensure their existence; and populations have no legal grounds to insist that the government should establish private schools in their location.⁷⁷

Where private schools do exist, the State has a duty to ensure that they respect the right to education.⁷⁸ To fulfil this duty, the State must *regulate* the activities of private education actors, "to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs".⁷⁹ States must regulate private actors because the State is ultimately responsible for respecting, protecting and fulfilling the rights of individuals in its jurisdiction, including their right to education.⁸⁰ The presence of private actors in the field of education does not diminish this responsibility.⁸¹

The State's first obligation with respect to private schools is therefore to regulate them, notably by monitoring their application of the minimum educational standards that apply to all educational providers (with regard to governance, professional qualifications, discipline, etc.),⁸² as well as their compliance with the broader requirements of international human rights law.⁸³ Monitoring and enforcement are critical because the State is accountable for any abuses of rights that private schools may commit.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ See CESCR (2017), 'General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', UN Doc E/C.12/GC/24 (10 August 2017) para. 22.

⁸⁰ See CESCR (1999), 'General comment No. 13 on the right to education', UN Doc. E/C.12/1999/10, para. 46; and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), paras. 6, 16, and 18.

⁸¹ See CESCR (2017), 'General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', UN Doc E/C.12/GC/24 ; see also CESCR, 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights', E/C.12/2011/1, 20 May 2011; and the Abidjan Principles, Guiding Principle 29. In para 33 of its General comment No. 16 (2013) on State Obligations Regarding the Business Sector, UN Doc CRC/C/GC/16 the CRC Committee also stressed that States have an obligation to respect, protect and fulfil children's rights even when services have been privatised.

⁸² See Abidjan Principles, Guiding Principle 55 (2019).

⁸³ See Abidjan Principles, Guiding Principles 84-87.

C. Implications

This description of State obligations indicates why the classification of schools as public or private has wide-ranging implications (see Table 1). On the one hand, it determines the role and duties of the State vis-à-vis specific providers of education, including the forms of control, monitoring, financial support and other types of support it may offer. On the other, it determines the nature of the claims that individual rights-holders may ultimately bring against the State for violating their full enjoyment of the right to education or failing to ensure that other actors respect that right.

Table 1. State obligations with respect to public and private schools.

Obligation to respect, protect and fulfil the right to education for everyone in accordance with equality and non-discrimination (Overarching Principle 1, General Principles 10-28 of the Abidjan Principles).	
State obligations regarding public education	State obligations regarding private education
Obligation to provide public education (GPs 29-33). States must: <ul style="list-style-type: none"> - Develop (and maintain) a continuing system of public schools. - Ensure reasonable and non-discriminatory access to it. - Ensure that public education is inclusive. 	States must respect and protect freedom in education. (States have no obligation to provide private education) (GP47). <ul style="list-style-type: none"> - Parents are at liberty to choose schools for their children that have not been established by public authorities. - Individuals and bodies are at liberty to 'establish and direct educational institutions'.
Obligation to 'direct' the operation of public schools (art. 13 of ICESCR, art. 28 of CRC). States must: <ul style="list-style-type: none"> - Exercise substantive control over the school. 	States should intervene in the operations of private schools when they fail to comply with the educational objectives set out in international law or with to the minimum educational standards set by the State (art. 13(4) of ICESCR, art. 29(2) of CRC).
States must fund public schools (art. 13 of ICESCR, art. 28 of CRC).	States have no obligation to fund private schools (art. 13(4) of ICESCR, art. 29(2) of CRC). If the State does choose to fund them, it must ensure that it meets all necessary requirements and does so without discrimination (GPs 64-73).
States must establish an effective and transparent monitoring system (GP83), to monitor public schools' compliance with domestic and human rights obligations.	States must adopt and enforce effective regulatory measures (OP 4, GPs 51-53). <ul style="list-style-type: none"> - The State must establish 'minimum educational standards' (on governance, professional qualifications, curricula, etc.) (GPs 54-57). - The State must establish an effective and transparent system to monitor private schools' compliance with minimum regulations and relevant standards (GPs 84-87).
States must provide access to an effective remedy for violations of rights (OP 9, GPs 88-90).	

IV. The types of school in Kenya and how the Kenyan legal framework defines them

Kenya's Basic Education Act (2013) classifies basic education institutions as either public or private schools.⁸⁴ It interprets the word 'school' to mean "an institution registered under this Act that meets the basic prescribed standards and includes institutions offering alternative approaches of multi-grade, double-shift, mobile schooling, out of school programmes, adult and continuing education, distance or correspondence instruction, or accelerated learning and talent based institutions".⁸⁵ This definition recognises the diverse landscape of educational institutions in Kenya but then simplifies it into just two categories.

A. Comparing the Kenyan legal/regulatory framework to the Abidjan Principles: public schools

Section 43(1)(a) of the Basic Education Act (2013) defines public schools in Kenya as "schools established, owned or operated by the Government and includes sponsored schools". This means that these schools are recognised by the government as public schools and effectively controlled and managed by the government in terms of learning facilities, teaching staff, curricula, learning materials, and capitation grants. It can be said that the operation of public schools under the Basic Education Act matches GP2(a)(b) of the Abidjan Principles, which state that public schools are schools that are "(a) recognised by the State as public educational institutions, and (b) effectively controlled and managed by the State or genuine representatives of the population they serve".

B. Comparing the Kenyan legal/regulatory framework to the Abidjan Principles: private schools

Section 43(1)(b) of the 2013 Basic Education Act defines private schools as schools "established, owned or operated by private individuals, entrepreneurs and institutions". Private schools in Kenya are funded by their proprietors, by sponsors, or by school fees and other contributions. They are also expected to comply with certain minimum conditions that are set out in the 2013 Basic Education Act and the 2021 Registration Guidelines for Basic Education Institutions, and cover physical facilities, teachers, curricula, etc.

Kenya's definition of private schools falls within the Abidjan Principles, which considers as private all educational institutions that fail to meet the GP2 criteria:

- c. "a. both private instructional educational institutions that directly deliver education services, and private institutions that play a non-instructional educational role in the delivery of education services; and
- d. b. both commercial and non-commercial actors."

⁸⁴ Basic Education Act, 2013, Section 43.

⁸⁵ Basic Education Act, 2013, Section 2.



C. The definition and operation of APBET schools with regard to GP2 and GP3 of the Abidjan Principles

Kenya's policy on APBET schools (2009) defined 'basic education' as "a wide range of educational activities offered in formal, informal and non-formal settings". In formal settings, basic education "refers to primary and secondary education". Non-formal education is defined as "organised, systematic and quality education and training programs, outside the formal school system, that are consciously aimed at meeting specific learning needs of children, youth and adults". The policy was intended to guide and standardise the educational needs of pupils at non-formal schools that had formed to cater for out-of-school children.

Over the years further guidelines and regulations have been adopted to improve the quality of APBET schools.

1. The 2009 policy for Alternative Provision on Basic Education and Training

The 2009 APBET policy aimed to provide alternative basic education and training that would meet the specific needs of targeted populations. The overall objective was to assist in the acquisition of literacy, numeracy, and communication skills.

The policy stipulated that all APBET schools were to be registered under the MoE, which was instructed to develop registration guidelines. Under the 1968 Education Act (replaced in 2013 by the Basic Education Act), the Ministry set out the minimum requirements for effective school operations. These addressed the education achievements and skills that managers of APBET schools should attain, while the MoE supervised quality assurance and standards by monitoring curriculum delivery, assessing performance, reviewing learning materials, and designing training manuals for APBET teachers. Although the policy was designed for children learning an alternative curriculum curated by the MoE and Kenya Institute of Education, in practice, schools that describe themselves as APBET schools teach the curriculum used by public schools.

Unfortunately, the APBET policy was not reviewed when the 2010 Constitution and the 2013 Basic Education Act were adopted, and as a result, it is not completely aligned with these legal instruments. The MoE tried to operationalise the policy when it introduced the Registration Guidelines for APBET Institutions in 2015;⁸⁶ and in 2021, it followed up with the Registration Guidelines for Basic Education Institutions which provided guidelines that set out standards that every school must meet before it can be registered as either a private or a public school.

2. The 2015 Registration Guidelines for APBET institutions

The Registration Guidelines for Alternative Provision of Basic Education and Training Institutions were promulgated by the MoE in 2015 in accordance with section 95(3)(i) and 95(3)(j) of the 2013 Basic Education Act, in order to register and regulate APBET schools. The guidelines defined procedures for registering APBET institutions and minimum standards that they were required to meet. The aim was to ensure that the MoE registered all recognised APBET schools. The guidelines defined APBETs as an “organised form of learning set up to deliver basic education and training to the disadvantaged persons who due to various circumstances cannot access formal schools”.

However, before the 2015 Registration Guidelines had been approved, the Basic Education Regulations were also enacted in 2015.⁸⁷ These supplemented the provisions of the Basic Education Act (2013), and in Part V addressed APBET schools, although the 2013 Act made no mention of them. The Regulations introduced capitation grants for learners under the age of 18⁸⁸ as well as grants for infrastructure improvement.⁸⁹ They also allowed APBET institutions to make use of basic education facilities or other public and private premises (upon request),⁹⁰ and required them to teach the curriculum approved by the MoE.⁹¹ A further key provision permitted alternative public basic, adult and continuing education institutions to charge fees, to be approved by the Cabinet Secretary in consultation with the County Education Board.⁹²

3. The 2021 Registration Guidelines for Basic Education Institutions

The most recent Registration Guidelines for Basic Education Institutions set out the requirements that institutions offering basic education and training must meet in order to be registered under Section 76(1) of the Basic Education Act. Registration is important because it enables the State to plan the education sector, as well as monitor and regulate educational institutions.

⁸⁶ *Registration Guidelines for Alternative Provision of Basic Education and Training Institutions*, Ministry of Education, 2015.

⁸⁷ *In exercise of the powers conferred to the Cabinet Secretary of Education, under section 95 of the Basic Education Act*, 2013.

⁸⁸ *Basic Education Regulations*, Ministry of Education, 2015, Section 69.

⁸⁹ *Ibid*, Section 75.

⁹⁰ *Ibid*, Section 68.

⁹¹ *Ibid*, Sections 70 and 78.

⁹² *Ibid*, Section 74.

Under the guidelines, a public or private school can only register if it meets the necessary requirements and is approved by the County Education Board (CEB). The guidelines are aligned with Part X of the 2013 Basic Education Act, which describes the licensing, registration, and accreditation procedure for schools in Kenya. The guidelines also recognise APBET institutions and define them as “non-formal education institutions offering the national curriculum”.

APBET schools do not satisfy the definition of a public school in GP2 of the Abidjan Principles, because they are generally established by individuals or non-state actors, who direct their operations, and they are not recognised as ‘public’ by the State. Under GP3 of the Abidjan Principles, most APBET schools would be defined as private institutions because they are run by private individuals or organisations.

However, the MoE mapping of 2019⁹³ recognised that some APBET schools were established by a community. When such schools are run explicitly for the community’s benefit, they fulfil two essential requirements of GP2: they do not serve a commercial interest, and they are operated by “genuine” representatives of the community they serve. To qualify as public schools under the Abidjan Principles, they need only State recognition. APBET schools could then be recognised as public schools.

93 Ministry of Education. “Mapping of Basic Learning Institutions Operating in the Informal Settlements of Nairobi County: Report.” National Council for Nomadic Education in Kenya, July, 2020.



D. Definition and operation of Harambee (community) schools

Community or Harambee schools predate APBET schools. Originated during the colonial era, they emerged as independent schools that provide culturally acceptable education for a variety of Kenyan communities.⁹⁴ After independence, many communities came together to establish and build community schools to give their children access to education.⁹⁵ In most cases, the communities expected that once the school opened, it qualified for government support: the government appointed teachers, paid their salaries,⁹⁶ and supplied textbooks and instructional materials. Most community schools were eventually integrated into the public system. Community schools were an alternative and transitory category of school, sitting alongside traditional public (government) and private schools, that increased the reach of public education.

Some current community schools were formed in economically deprived settlements of suburban Nairobi.⁹⁷ When the government mapped 1,677 basic learning institutions in Nairobi's informal settlements, it found that 39% of them were community-owned.⁹⁸ Before the 2013 Basic Education Act, some were registered by the Ministry of Culture and Social Services as community-based organisations and adult education departments; very few were registered by the MoE.⁹⁹ Most were sponsored or funded by churches, NGOs or individual community members.¹⁰⁰

Currently, community schools lack a precise legal framework. The 2015 APBET Registration Guidelines defined 'community-based organisations' as "institutions established by the community to support learning programs for the community and managed by the community". Although many of these schools operate in the same way as traditional Harambee schools, they do not have their status and, unlike them, do not benefit from State support. Applying the Harambee model to APBET schools that are genuinely run by their communities would arguably help the country to provide free, good-quality public education for all.

Community schools can be classified under GP2 of the Abidjan Principles as they fulfil criterion (b) of GP2 if they are "effectively controlled or managed by genuine representative(s) of the population they serve". However, to be considered public institutions of learning under

94 Edmond J. Keller, "Development policy and the evaluation of community self-help: the Harambee school movement in Kenya," *Studies in Comparative International Development* 18, no. 4 (December, 1983) 53–75.

95 *Ibid.*

96 Ministry of Education. "Mapping of Basic Learning Institutions Operating in the Informal Settlements of Nairobi County: Report." National Council for Nomadic Education in Kenya, July, 2020.

97 Eldah N. Onsomu et al., "Mechanisms and strategies of educational finance - Community schools in Kenya: Case study on community participation in funding and managing schools," UNESCO, 2004.

98 Ministry of Education. "Mapping of Basic Learning Institutions Operating in the Informal Settlements of Nairobi County: Report." National Council for Nomadic Education in Kenya, July, 2020.

99 *Ibid.*, 38.

100 *ibid.*

the Abidjan Principles, they also need to be “not at the service of any commercial or other exploitative interests” and to be recognised as public schools by the State.

It is important to remember that the State brought Harambee schools into the public system by taking over their management from the community and providing trained teachers and funding. In terms of GP2, taking community schools over and making them part of the public system would qualify as ‘recognition’ by the State. As explained above, funding is not relevant to determining whether a school is public; what matters is whether the school is found to be “at the service of any commercial or other exploitative interests”.

This implies that community schools in Nairobi’s informal settlements may be categorised as public educational institutions under the Abidjan Principles, provided they do not generate a profit and do not serve the interests of their owners, regardless of whether they are sponsored by individuals, NGOs, or churches. Additionally, they must be “recognised” by the State (GP2(a)) and “effectively controlled or managed by genuine representative(s) of the population they serve” (GP2(b)).

V. Policy Recommendations

Recognising that APBET and low-cost private schools emerged to address an educational gap in marginalised communities, there is still a need for the State to take proactive measures in bridging the gap in quality education and ensure universal access to free public education. The recommendations below are designed to help the Kenyan State to fulfil the right of everyone, including the most vulnerable and marginalised groups, to public education of good quality, while considering the impact of APBET and low-cost private schools.



- **Examine and apply Abidjan Principles criteria.**

When assessing and categorising APBET and low-cost private schools in Nairobi's informal settlements, policymakers should examine and consider applying the criteria set out in Guiding Principle 2 of the Abidjan Principles. Doing so would:

- Clarify the classification of these schools as 'public' or 'private' and promote their appropriate regulation by the MoE.
- Assist the State in fulfilling its obligations to these schools and their learners, and, more broadly, the children residing in urban informal settlements, who are entitled to free public education of good quality.

- **Develop specific guidelines and standards.**

To enhance the regulation and registration of private schools, including APBET schools and to differentiate between genuine and exploitative institutions, policymakers should consider the following steps:

1. Conduct a Review of the Basic Education Act
 - Policymakers should collaborate with relevant stakeholders to conduct a review of the Basic Education Act to determine if it is necessary to amend provisions thereof to ensure the effective regulation and registration of all private categories of schools including APBET schools and take into account the difference between APBET schools and LCPS. The following actions can facilitate this process:
2. Identify and distinguish Genuine Schools:
 - The MoE and the County Education Board should coordinate to identify and distinguish genuine, well-intentioned APBET and low-cost private schools from those exploiting the situation.
 - This can be achieved by developing specific guidelines to define adequate non-government schools operating in marginalised communities. The criteria should include:

- Integration of the school within the community.
- Active participation of parents in school activities.
- Transparency in the school financial management.
- Non-profit status
- Non-discriminatory admission policies.
- Support for marginalise groups.

This criterion can also help the state determine schools in the informal settlement and marginalised areas that can be converted and upgraded into public schools.

- **Ensure alignment with human rights obligations.**

Policymakers should ensure that APBET and low-cost private schools conform to the State's human rights obligations, guaranteeing access to free education of good quality without discrimination. The CESCR in its review of Kenya recommended that the State party bring the Registration Guidelines for Alternative Provision of Basic Education and Training in line with articles 13 and 14 of the Covenant and other relevant international standards; that it ensures that all schools, public, private, formal or non-formal, are registered; and that it monitors their compliance with the Guidelines. (E/C.12/KEN/CO/2-5) para 58.

- **Progressively improve standards.** Policymakers should collaborate with all relevant stakeholders, including communities, the private sector, civil society and school associations, to gradually enhance standards in all APBET and low-cost private schools. Such an approach will improve progress towards quality education.

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