

Volume II, Issue I 2026



Riara Law Review

EDUCATION AND THE LAW: EMERGING CONVERSATIONS

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PREFACE



Nurturing innovators is Riara University's core objective, and the Riara University Law School fraternity has taken this up with vigour. Indeed, the classroom is not only a space to impart education, but a forum for enriching ideas.

The ideas in this volume, starting from the very idea to publish it, came from students themselves. Their study in Education Law and Policy was enough to spark in them an interest to review their own and others' journey within the Kenyan education system, and to come up with concrete solutions on how to uplift the Kenyan educational experience. From basic education to higher education and emerging technologies, they know what ought to be done. Policymakers, are you listening?

Above and beyond education, this volume is testament to the younger generations' resolve to build a better country. Leaders of tomorrow? That cannot be further from the truth. They are the leaders of today, for leadership is about charting the way forward. To the students and faculty that burnt the midnight oil compiling this volume, kudos! You are truly innovators

Ryan Kamundia Gitahi
Editor in Chief

ACKNOWLEDGMENTS



In his seminal works and in honoring the legacy of the late Ngũgĩ wa Thiong’o, he beautifully stated, **“I’m more trying to connect; I’m more listening to people. Whatever I get is very meaningful to me.** if there is one decision I have taken with myself, it is to embrace this very spirit, to learn at any point and at any time. It has been the highest honour to serve as the Managing Editor and Project Lead for the Riara Law Review, Volume 1, 2025. This journey has been particularly special, interacting with the brilliant penned thoughts and ideas of colleagues, some of whom I have shared classrooms with since our very first undergraduate class; to see how we have all grown in our writing and scholarly voice is incredibly rewarding. It was also a unique privilege not only to lead the editorial effort but to contribute to this volume as a writer amongst the talented authors whose commentaries we worked on as the editorial team.

I am profoundly appreciative of our Dean, Dr. Victor Lando, whose guidance and rigorous standards were instrumental in the recommendation and approval of the commentaries. My gratitude also extends to Mr. Washington Ombis for his peer review of the articles, and to our Editor in Chief, Kamundia Gitahi, for an incredible partnership as we steered the Law Review through our tenure. As we now hand over the reins to the next incoming team, I am excited to see the new heights they will reach, confident that they will bring even more value and scholarly engagement to this vital platform. The future of the Riara Law Review, is bright, indeed.

Bobby Dhiman
Managing Editor and Project Lead

**RELIGIOUS SCHOOLS IN BASIC EDUCATION:
A STUDY OF RIGHT AND RESTRICTIONS
ROSE NYOKABI CHEGE**



Abstract:

This commentary looks at the legal and policy framework governing schools while focusing on the tension between institutional rules and constitutional rights of learners. It is of no contention that religious schools contribute and play a significant role in basic education as it promotes moral and ethical values. However, some practices often raise questions on freedom of religion, equality, and access to education. With reference to constitutional provisions, statutes, judicial precedents, and international instruments, this study explores the extent in which religious institutions may enforce faith-based practices while safeguarding the fundamental rights stipulated under the constitution.

*Case law analysis, specifically *Seventh Day Adventist Church (East Africa) Limited v Minister for Education* [2017], *Phillip Okoth and LSK v BOM, St. Anne's Primary Abero*[2023], and *Fugicha v Methodist Church in Kenya (Suing Through its Registered Trustees) & 3 others* [2016] will reveal the progressive judicial protection of minority faiths and persistent inconsistencies that may occur. Additionally, international comparison will also be highlighted and thereafter, reforms that may be implemented to well balance the effectiveness of this fundamental right. The measures including, accommodation policies, strengthening oversight, and training stakeholders on religious diversity, would ensure the upholding of national standards while protecting constitutional freedoms in the basic education system of Kenya.*

Introduction

Education is one of the basic human needs and among the key determinants of national development categorized as a human right.¹ Religious schools in Kenya play a significant role in Basic Education by providing moral and ethical guidance, fostering social cohesion, and contributing to the development of well-rounded individuals. These institutions have continually supplemented state efforts in providing access to Basic Education. However, their operation raises critical legal and policy questions regarding the balance between the rights of religious institutions to pass on their beliefs and the constitutional rights of learners to equality, freedom of religion, and access to education. This report looks to explore the legal and regulatory framework governing religious schools in Kenya, examining the extent to which rights and restrictions are applied to ensure compliance with national education standards, while safeguarding constitutional freedoms.

This commentary will look at the legal framework guiding freedom of religion and basic education. It will also outline the governance and regulators of religious schools. Thereafter, it will show the reality in the tension of institutional rules and individual freedom of religion by looking at key precedents. It will further look at the global perspective and suggest mitigation reforms as an attempt to rectify the issues earlier seen. This will give a concise and relevant analysis on the complex balance between constitutional freedom and institutional procedures.

LEGAL FRAMEWORK

1. COK, 2010

The Constitution of Kenya, 2010, being the ‘Grund Norm’ is the most appropriate legal foundation that guides the laws of Kenya. Article 32 stipulates the freedom of conscience, religion, belief, and opinion, expressly stating that every person has said right. It goes further to state that they can practice said religion and they cannot be discriminated against based on this (also stipulated in Article 27(4)). Article 43(1)(f) recognizes the right to education for every person while article 53(1)(b) states that every child has the right to free and compulsory basic education. Article 8 of the Constitution also highlights that there shall be no state and religion. These are the relevant articles of the constitution that will guide the discussion.

2. Basic Education Act, 2013

The Basic Education Act gives effect to Article 53 of the Constitution to promote and regulate free and compulsory basic education. The relevant provisions to be undertaken are Section 34 and section 31(3) of the aforementioned act. The former addresses the factors that a school or person responsible for admitting students shall not discriminate any child on grounds of ethnicity, gender, sex, religion among others. The latter reflects that a parent or guardian shall have the right to participate in the character development of his or her child.

¹ Vallérie Musanga Khamati, ‘The Role of Church-Sponsored Schools in the Moral Education of High School Students in Nairobi County’ (MA thesis, Pan Africa Christian University 2023) <https://repo.pacuniversity.ac.ke/items/54573044-36cf-4a5f-9f38-b9392220e63e>

Additionally, section 27 provides for the role of Sponsors. Subsection c stipulates that they are to provide supervisory and advisory services in matters regarding spiritual development, while subsection d imposes the maintenance of spiritual development while safe guarding the denomination or religious adherence to others. It is to be noted that a sponsor is defined under section 2 as “a person or institution who makes a significant contribution and impact on the academic, financial, infrastructural and spiritual development of an institution of basic education”

3. Children’s Act, 2022

The Children’s Act under section 15 stipulates that every child has the right to freedom of thought, conscience, religion, and religious education, subject to appropriate parental guidance, and in the best interest of the child. It further states that in subsection 2 that,

“the religious guidance and education provided to a child under this section shall not in any way limit or hinder the child’s access to and enjoyment of any of the basic right and fundamental freedoms guaranteed by the Constitution, this Act or any other law.”

4. International Laws

International instruments also protect and provide for the recognition of the right to education for children. Specifically, the Universal Declaration of Human Rights under Article 26 recognizes the right to education and allows parents to choose religious or moral education for their children. In the same vain, the African Charter on the Rights and Welfare of the Child under Article 11 protects the right of children to education and cultural identity.

The above will guide our discussion.

GOVERNANCE AND OVERSIGHT OF RELIGIOUS SCHOOLS IN BASIC EDUCATION

Religious expression in schools needs to be examined from multiple perspectives: the institutional faith-based practices, the personal religious biases of teachers, and the diverse religious beliefs of students. To begin, this section will explore the regulation of religious schools in basic education and the extent to which they may enforce faith-based practices. It will then examine how these practices are applied to students in practice, as well as the influence of teachers’ personal biases on the learning environment.

1. Regulation of Religious Schools in Basic Education

The governance and regulation of schools in Kenya falls under the mandate of the Ministry of Education, through a hierarchical structure established under the Basic Education Act, 2013. The Cabinet Secretary(CS) is the head of governance and management of basic education overseeing all operations, while the National Education Board advise the CS and the relevant department on relevant policy matters.² Supporting the CS is the Principal Secretary(PS), who serves as the administrative and account officer of the Ministry and supervises the Director-General(DG).³ The DG is responsible for implementing education policies and managing the day-to-day life administration of basic education at the national level with directives from the CS⁴

At the county level, County Education Boards serve as agents of the National Education Board to oversee, in consultation with the county government, various function such as interpreting national policies, planning and promoting education among other.⁵ They are to work in collaboration with the Teachers Service Commission and to assess a private school, their teaching programmes and the school's materials to inspect the schools facilities and to perform any other appropriate functions.⁶ Lastly, every public institution of basic education is mandated to have a Board of Management for governance. Private schools must establish a Parents Teachers Association(PTA) instead.⁷ Every public school or institution of basic education shall, submit on an annual basis a report to the Director of Basic Education.⁸

The Education Standards and Quality Assurance Council is established to oversee and maintain standards in Basic Education, including supervising curriculum implementation, monitoring assessment and ensuring compliance with policies and guidelines.⁹ As stipulated in section 67 of the Basic Education Act, the Cabinet Secretary, Teachers Service Commission, Standards and Quality Assurance Council, National Education Board, national assurance bodies and the County Education Boards are to ensure the maintenance of standards, quality, ad relevance of education and training as provided in the same act and any other written law.¹⁰ This included adhering to freedom of religion, and non-discrimination in admission among many other vital rights of the child.¹¹

In this regards, religious institutions, like all other basic education provides, are required to adhere to the regulatory framework and standards set out in the Basic Education Act, 2013 to ensure compliance with national education policies and the protection of learners rights.

2 **Section 5(2) Basic Education Act, 2013**

3 **S. 54, *ibid.***

4 ***Ibid.***

5 **Section 18, *ibid.***

6 **Section 18(j); s. 52(2), *ibid.***

7 **S. 55(3), *ibid.***

8 **S. 60, *ibid.***

9 **S. 64, *ibid.***

10 **2013; COK, 2010; Children's Act, CAP. 141; the Basic Education Regulations (No. 39 of 2015)**

11 **S. 15, Children's Act CAP. 141; s. 34, Basic Education Act, 2013**

2. The Reality of Religious Expression in schools

Despite the governance and regulatory framework shown above, religious practices in schools, especially faith-based institutions, often blur the line between institutional identity and student rights. The challenge lies in balancing the autonomy of religious schools to maintain their values with the constitutional obligation to protect individual freedoms. Thus, to fully understand the scope through which these lines are blurred, we will look at some court cases that illuminate the complexities of religious expression.

a. Seventh Day Adventist Church (East Africa) Limited v Minister for Education [2017] eKLR

In this case, the SDA church filed a petition in the High Court alleging that SDA students in several high schools were having their freedom of worship violated by being required to attend class, sit for exams and in some cases attend to cleaning duties on Saturdays. The petition further alleged that while some schools did not force SDA students to attend class on Saturday, no make-up classes or examinations were being offered to compensate for the students who were not in attendance. The Church pointed out that students belonging to the other Christian faiths whose day of worship was on Sunday had been given every opportunity and facility to practice their faith according to their beliefs. It was therefore the Church's position that SDA students were being denied the right to practice their faith as guaranteed under Article 32 of the COK 2012, dealing with the Freedom of Conscience, Religion, Belief and Opinion. However, in a ruling, Judge Lenaola disagreed with the Church's position and stated that the Saturday Programs were not discriminatory to the SDA students because they were applicable to all students from diverse religious beliefs. He dismissed the case by concluding that to exempt the Adventist students from the school's programs would mean granting them extra accommodation, which might end up being cumbersome and chaotic for the schools. It was concluded that any infringements to the students' rights was therefore reasonable and justifiable under Article 24 of the Constitution.

The Church successfully challenged this decision in the Court of Appeal. The Court concluded that the Appeal was indeed merited and that the rights of SDA students were being infringed upon. It further directed that an order given by Justice Lenaola in the previous High Court ruling be carried out. Order (b) of that ruling basically ordered the Cabinet Secretary for Education to put into effect appropriate laws that would obligate public schools to respect the rights of students under Article 32 of the Constitution.¹²

12 **Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017] KECA 751 (Civil Appeal 172 of 2014, Court of Appeal Nairobi, 3 March 2017) <https://eacj.org/religion/227-sda-church-court-ruling.html>**

This case shows the narrow line between the rules and regulations a school may impose for students and the right to freedom of religion guaranteed by the COK, 2010.

b. Phillip Okoth and LSK v BOM, St. Anne's Primary Ahero[2023]

This case centers around the fundamental rights of students belonging to the Jehovah's Witness denomination to refrain from attending mandatory Catholic Mass and non-classroom interfaith activities in school.¹³ The facts of the case were that nine(9) petitioners were Jehovah Witness students who attended St. Annes Primary School, Ahero. They petitioned the school against the compulsory attendance of non-classroom interfaith activities, which were deemed adverse to their freedom of religion. This prompted a meeting of the school's board of management which dismissed the concerns of the appellants, determining that all students in the school were bound by the rules and regulations which included a mandatory 30-minute Catholic Mass every Friday. Thus, the 1st petitioner was expelled upon the refusal to attend by the 1st respondent, the BoM St. Annes. She was later re-admitted on condition she would attend the Mass and was made to sign a declaration to that effect.

This led to a petition in High Court, where the appellants contended that the mandatory Mass violated Art. 32 on freedom of religion belief and opinion as well as art. 53. They sought for a declaration that the 1st petitioner's expulsion for her religious beliefs unconstitutional, be awarded damages, invalidate mandatory Mass as indirectly discriminatory, and order the education authorities to issue guidelines on freedom of religion in schools. The 1st respondents argued that the students had ample knowledge of the Mass, while the 2nd and 3rd respondents agreed adding that the petitioners refuse to participate in other co-curricular activities. The Judge held in favor of the 1st respondent.

Thereafter, an appeal was filed on whether the High Court erred in fact-finding, failed to uphold the Jehovah's Witnesses' beliefs, ignored Art. 24 test on limiting rights, and disregarded binding precedent from *Seventh Day Adventist Church (East Africa) Limited v Minister for Education [2017] eKLR*. The Court of Appeal unequivocally held that compelling students to participate in interfaith activities that contradict their faith is a direct violation of their freedom of religion under Article 32 of the Kenyan Constitution.¹⁴

The judgment sends a resounding message that the rights and beliefs of all individuals, including children and young people, must be respected and protected.¹⁵

13 **Phillip Okoth & Law Society of Kenya v Board of Management, St Anne's Primary School, Ahero (Civil Appeal No 173 of 2020) [2023] KECA (Court of Appeal Kisumu) <https://ohrh.law.ox.ac.uk/a-landmark-victory-for-freedom-of-religion-in-kenya-the-court-of-appeals-judgment-in-phillip-okoth-and-lsk-v-bom-st-annes-primary-ahero/>**

14 **Ibid.**

15 **Ibid.**

c. *Fugicha v Methodist Church in Kenya (Suing Through its Registered Trustees) & 3 others [2016] KECA 273 (KLR)*

Another example of the infringement of the freedom of religion is in this aforementioned case where a Sponsor (1st respondent) of St. Paul's Kiwanjani Day Mixed Secondary School admitted students from diverse religious backgrounds. The appellant was a parent to three Muslim students. Herein, the Deputy Governor informally requested during an AGM that Muslim girls be allowed to wear hijabs and white trousers. A week later, unknown persons brought the items to school which caused tension among students and conflict with management. Attempts were made to resolve the issue as the County director of education met with the school stakeholders, who voted to maintain existing uniform policy. Despite this, the director ordered that the Muslim girls could wear hijabs and trousers and he also transferred the school principal.

The sponsor challenged the director's actions in High Court claiming that they were discriminatory, unlawful, and contrary to school rules. Thus, the High court upheld the challenge to uniform changes declaring the deviation discriminatory and unconstitutional. An injunction was ordered preventing the respondents from allowing Muslim students to wear hijabs contrary to the school rules and regulations.

This meant they were to maintain the standard uniform. The appellant thereafter appealed against the High Court's decision in which ruled that Muslim students were free to wear hijabs as part of their school uniform.¹⁶ The Appeal Court ordered the education directorate of the country to ensure the creation of new rules on school uniforms and not to discriminate against students based on religion.¹⁷ However, the Supreme Court overturned the Court of Appeal ruling, in a majority decision, that every school has the right to determine its own rules.¹⁸

ANALYSIS OF THE CASES

The cases discussed reflect the progressive judicial interpretation of Article 32, COK 2010, which protects the rights of minority faiths within faith-based institutions. However, the *Fugicha* case, specifically in the Supreme Court's decision, exposes the fragile nature of said protection.

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- 16 'Kenya's Supreme Court Reverses Appeals Court Decision on Hijab in Non-Muslim Schools' Mwakilishi (24 January 2019) <https://mwakilishi.com/article/lifestyle-news/2019-01-24/kenyas-supreme-court-reverses-appeals-court-decision>
- 17 'Kenya Apex Court Reverses Right to Hijab in Non-Muslim Schools' Africanews (25 January 2019) <https://www.africanews.com/2019/01/25/kenya-apex-court-reverses-right-to-hijab-in-non-muslim-schools/>
- 18 'Kenya's Supreme Court Reverses Appeals Court Decision on Hijab in Non-Muslim Schools' Mwakilishi (24 January 2019) <https://mwakilishi.com/article/lifestyle-news/2019-01-24/kenyas-supreme-court-reverses-appeals-court-decision>

These cases give a glimpse as to the infringement on the freedom of religion in religious institutions where they prioritize the rules and regulations over the said right. They have also shown the effective judicial processes that safeguard individual freedoms; however, the inconsistent outcomes as seen in the *Fugicha's* Supreme Court ruling and the dismissed claims in High Court, continually prove that there is much more ground to cover. Thus, reforms and relevant suggestions will be made in this regard by briefly looking at the worldwide scope and thereafter recommending the necessary steps

GLOBAL COMPARISON AND REFORM PROPOSALS

Though the tension between religious institutions and personal belief appears to be rampant in Kenya, other jurisdictions have grappled with the strategic balance between the autonomy of religious schools with students' right to freedom of belief. For example in Canada, in the case of *Multani v. Commission scolaire Marguerite-Bourgeoys* the Supreme Court struck down an order of a Quebec school authority that prohibited a Sikh child from wearing a kirpan to school, as a violation of freedom of religion under section 2(a) of the Canadian Charter of Rights and Freedoms.¹⁹

Another case is seen in the United Kingdom in *R (Playfoot) v Millais School Governing Body [2007]* where a school pupil insisted that wearing a purity ring at school was a manifestation of her religious beliefs. The Judge ruled that not only is wearing a ring not part of the Christian faith, it was not linked to a belief in chastity before marriage. These are but a few cases showing the dilemma in which courts of different jurisdictions have in handling the tensions and unclear root between the freedom of religion and the rules established by religious institutions.

To provide a narrow but clear guide in the Kenyan jurisdiction, especially in regards to the balance of freedoms and rules, the following reforms would suffice.

1. Create Comprehensive National/County Policies

The Ministry of Education, specifically the County Education Boards, should develop a religious accommodation policy, clarifying how to accommodate diverse religious groups in any school, especially religious school.

This is well seen in Canada where the Waterloo Region District School Board have formal "Religious and Creed Accommodation" policies stating how to accommodate prayer, dietary restrictions, dressing, and holy days.²⁰

19 **British Columbia Civil Liberties Association, *Multani v Commission scolaire Marguerite-Bourgeoys: Summary for Charter Activity (August 2023)*** <https://bccla.org/wp-content/uploads/2023/08/Multani-Summary-for-Charter-Activity.pdf>

20 **Waterloo Region District School Board, Board Policy 1012: Religious and Creed Accommodations (Revised 11 January 2020)** <https://www.wrdsb.ca/about-the-wrdsb/policiesprocedures/policies/board-policy-1012/>

2. Maintain Dialogue and Strengthen Oversight Mechanisms

The BoMs should maintain dialogue with students and parents in a formal and manageable manner that seeks to take steps in reducing conflicts. Additionally, give specific and progressive roles to every level from the Directors to the teachers to monitor and implement accommodations.

A good framework to follow is the York Region District School Board which has embedded religious inclusion into their policy framework. Additionally, they also included the role each stakeholder has on the accommodating requests and ensuring ample communicates guidelines are given.²¹

3. Training on Religious Diversity and Accommodation

The Education Standards and Quality Assurance Council could provide a standardized training program for teachers and the necessary stakeholders to equip those handling any requests for accommodation the skills needed to correctly handle the matter before it escalates.

Conclusion

Religious schools in Kenya have an important role in providing education and instilling a shared belief, especially for the majority in the same faith. However, it has been brought to light that the minority religions in said schools have been forcefully inclined to adhere to the rules and regulations of the school and institutions, while infringing on their right to freedom of conscience, religion, belief, and opinion under Article 32 of the COK, 2010.

This commentary has shown the complexities of such cases by looking at local judgement and also outside jurisdictions. Based on the said, it has recommended actionable points on policies on religious accommodation, strengthening of oversight mechanisms, and targeted training on religious diversity to all education stakeholders. These measures prove to mitigate conflicts, protect the constitutional rights of students and foster a conducive environment that respect both institutional requirements and individual freedoms.

21 York Region District School Board, Policy #261.0: Equity and Inclusivity (approved April 2013)
<https://www2.yrdsb.ca/pol-261-EquityandInclusivity>

THE COMPETENCY-BASED CURRICULUM IN KENYA: A STEP FORWARD OR BACKWARD IN REALIZING THE RIGHT TO EDUCATION? – KEISHA GONAH



Abstract

This commentary critically examines the Competency Based Curriculum (CBC) in Kenya, focusing on its effectiveness in advancing the constitutional right to access education in Kenya. Framed as a transformative departure from the 844 system, CBC was introduced to promote competency-based skills relevant for the 21st Century. By providing a holistic approach to education, CBC seeks to do away with the rote memorization that plagued the 844 system. However, the practical implementation of this new curriculum has been faced with numerous challenges that raise key concerns on accessibility and equality in education.

This commentary argues that instead of expanding access to education, the CBC has widened educational inequalities. The CBC implementation is painted with a heavy financial burden on parents, inadequate teacher training for the new subject areas and teaching methods, as well as ambiguous and haphazard implementation policies. This has created a system that disadvantages learners from marginalized and low-income areas. CBC therefore risks undermining the very right it seeks to uphold.

This commentary weighs the policies and implementation of CBC against the constitutional right to education. Is it as progressive as it claims to be, and is it a step forward or backward in realizing the right to education in Kenya. CBC implementation must be taken seriously and must address these challenges, otherwise it risks undermining its own objectives and creating barriers to inclusive education in Kenya. To ensure that CBC is consistent with the fundamental right to education, targeted legal policies and administrative changes are required.

Introduction

In 2017, Kenya ambitiously reformed its education system by introducing the Competency Based Curriculum(CBC) to replace the 844 curriculum. The core objective of the CBC curriculum is to equip learners with practical skills and knowledge relevant to the 21st century²², contrary to the 844 curriculum which was heavily criticized for promoting memorization and impracticality²³. However, despite its praises of nurturing learner's talents and critical thinking, the implementation of CBC has been faced with numerous challenges which raises critical questions on the constitutional right to education. Is CBC in its current form truly promoting the constitutional right to free and accessible basic education, or is it simply widening the gap of inequality among learners? This research paper evaluates the new curriculum, analyzing whether it advances or undermines the right to education as entrenched in the constitution.

KENYA'S LEGAL FRAMEWORK ON EDUCATION

Kenya's educational legal framework is anchored in the constitution of Kenya as well as other acts of parliament. In the constitution, Article 43 (1)(f) states that every person has the right to access education²⁴. Further, in Article 53 (1)(b) the constitution provides that every child has the right to free and compulsory basic education²⁵. Acts of parliament such as the Basic Education Act of 2013, PART IV, guarantee free and compulsory basic education, and requires the Cabinet Secretary to implement the right of every child to free and compulsory basic education²⁶. The Constitution also ensures accessibility by providing that the State should take measures such as affirmative action programmes to make sure that the youth access relevant education and training²⁷, and ensure access to education for persons with disabilities²⁸. Following this, Kenya has adopted policies on education. For example, the second Medium Plan Term of Vision 2030²⁹ and the Policy Framework for Education and Training (2012)³⁰. Kenya therefore utilizes a thorough legal framework that recognizes the value of the right to education for every child. As a progressive realization right, Kenya is required to work towards its full realization, using the maximum available resources to take concrete steps towards its realization³¹. In the context of the CBC curriculum, it is expected that its implementation should be progressive. This paper will examine whether this expectation is being met in practice by evaluating various aspects of CBC's implementation and its impact on accessibility and affordability of education.

22 **Betty Cheruiyot, 'Challenges Faced in the Implementation of Competency-Based Curriculum (CBC) in Junior Schools in Kenya' (2024) 7(3) East African Journal of Education Studies <https://doi.org/10.37284/2707-3947>**

23 **ibid**

24 **Constitution Of Kenya 2010, Article 43(1)(f)**

25 **ibid, Art 53(1)(b)**

26 **Basic Education Act, 2013, s28**

27 **n(3), Article 55**

28 **n(3), Article 54**

29 **Medium Plan Term of Vision 2030, (2013)**

30 **Policy Framework for Education and Training (2012)**

31 **Office of the High Commissioner for Human Rights (OHCHR), 'Economic, Social and Cultural Rights' (United Nations Human Rights) <https://www.ohchr.org/en/human-rights/economic-social-cultural-rights> accessed 2 July 2025**

COMPETENCY BASED CURRICULUM

Globally, there has been a shift towards Competency Based Education, with countries such as Canada and Singapore being at the forefront³². The shift towards this curriculum has been driven by the need to align educational processes with the demands of the 21st century.³³ The 21st century has seen a demand of more practical skills, hence the need for educational systems that prioritize skills and competencies over memorization and passing of examinations³⁴.

Kenya introduced CBC in 2017 and this was a major shift from the 844 system to the 2-6-3-3 system. The purpose of CBC was to address the shortcomings of the 8-4-4 system by focusing on learner's abilities to apply knowledge and skills as well as nurture their talents and abilities³⁵. The Vision of Kenya's Competency-Based Curriculum is "Engaged, empowered and ethical citizen", and its mission is "Nurturing every learner's potential"³⁶.

It is founded on three major components: Competencies, Character and Creativity³⁷. The CBC curriculum aims to produce learners with relevant skills and competencies to thrive in the 21st Century, learners of good character, and learners who are able to creatively solve problems facing the country³⁸. The major differences between the 844 and the CBC Curriculum are the subjects taught to students, the mode of teaching and learning, and the mode of examination³⁹. The CBC includes a range of subjects across different learning levels. Core subjects include English, Mathematics, Kiswahili, and Religious Education. Other subjects include Science and Technology, Agriculture and Nutrition, Social Studies, and Creative Arts. Learners also select one of three pathways in senior school: STEM, Social Sciences, or Sports and Performing Arts⁴⁰. These subjects offer practical learning experiences and seek to enhance a variety of skills in learners. Furthermore, CBC relies more on continuous assessments rather than on end of term examinations⁴¹. Unlike the traditional knowledge-based curriculum, CBC emphasizes the development of competencies such as critical thinking, problem solving, creativity, and collaboration. However, the implementation of CBC in junior schools has encountered several challenges that threaten the right to education.

32 n(1)

33 *ibid*

34 *ibid*

35 *ibid*

36 Cardinal Elementary, 'Demystifying CBC' (Cardinal Elementary, 10 February 2023) <https://cardinalelementary.com/demystifying-cbc/> accessed 2 July 2025

37 *ibid*

38 *ibid*

39 *ibid*

40 *ibid*

41 WL Komba and M Mwandaji, 'Reflections on the Implementation of Competence-Based Curriculum in Tanzanian Secondary Schools' (2015) 6(5) *Journal of Education and Practice* 51.

1. CBC's Undermining of the Right to Education

CBC was designed to advance the right to education by promoting learner-centered approaches and equipping students with relevant 21st century life skills. However, in practice, its implementation has introduced challenges that threaten to undermine the very right it seeks to uphold. The right to education encompasses quality, accessibility and affordability of education, and this is the lens through which the CBC curriculum should be analyzed. The various challenges of CBC have an effect on these three aspects of education as analysed below.

1.1 Inadequacy of trained teachers

A prominent challenge facing the Competency Based Curriculum in Kenya is the shortage of adequately trained teachers. The CBC curriculum has new subjects and new teaching styles which differ from the 844 system. Teachers need to be trained in order to adapt to this curriculum, and thus deliver quality education to students. Although the Ministry of Education has launched some training programs, teachers themselves still report feeling unprepared and not well equipped⁴². In addition to this, teachers in rural schools may not experience the same access to training opportunities like those in urban schools. This widens the gap on education⁴³. This challenge of untrained teachers is a major challenge of the curriculum as teachers are the direct point of interaction with the students.

1.2 Unavailability of infrastructure

The infrastructure requirements of CBC have been a major challenge of its implementation across the country, especially in public and rural schools⁴⁴. Numerous schools in rural areas and marginalized regions already lacked sufficient resources, and CBC has increased the burden. Many schools lack the necessary laboratories and digital resources to properly implement the new learning methods⁴⁵. Also, schools in rural areas may not be able to offer the same subjects as those in urban areas since they don't have the same level of infrastructure. The requirement for schools to have extra facilities such as extra classrooms and labs may also be a difficult task for some schools⁴⁶. This is the responsibility of the government. In 2024, the government had announced they will build 2600 laboratories in

⁴² <https://scholarmedia.africa/featured/kenyas-cbc-at-5-years-a-transformational-education-approach-with-implementation-challenges-to-overcome/>

⁴³ *ibid*

⁴⁴ Richard Kitheka Mbindyo, *'The Promise of Kenya's CBC Education'* (Business Daily, 16 April 2024) <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/the-promise-of-kenya-s-cbc-education-4895652> accessed 2 July 2025

⁴⁵ Betty Cheruiyot, *'Challenges Faced in the Implementation of Competency-Based Curriculum (CBC) in Junior Schools in Kenya'* (2024) 7(3) East African Journal of Education Studies <https://doi.org/10.37284/2707-3947>

⁴⁶ Republic of Kenya, Ministry of Education, *Guidelines for Implementation of Junior Secondary Education* (State Department for Basic Education, January 2023)

2025⁴⁷, and recently in February 2025 announced that they will build 1600 labs⁴⁸. There is barely any progress towards that, and without the labs, students cannot fully experience the CBC curriculum. The requirement given by the Ministry of Education should be accompanied with implementation plans as well as funding to make it effective and accessible.

1.3 Lack of accessibility of Learning Materials

CBC places emphasis on hands-on learning activities through subjects such as Science, technology, Creative Arts, and Agriculture which require various learning materials, from books to art supplies and digital tools⁴⁹. Access to these resources in rural and marginalized areas is minimal, with most of these schools already lacking electricity, access to internet, printing devices to print course material and exams, and the new books for the curriculum⁵⁰. The government has not adequately supplied these materials, leaving the burden to the schools and the parents, who often cannot afford. This disparity creates a barrier to access to education, and violates equity and quality education.

1.4 Financial Burden on Parents

CBC, being a hands-on curriculum, constitutes a lot of take home assignments, projects and creative tasks⁵¹. Most of the items required for these projects are not provided by schools which then requires the parents to purchase them, giving them an additional financial burden. This creates hidden costs, and will make education less accessible since not all parents will be able to afford, or some schools choosing not to do the activities at all, which is unfair⁵².

1.5 Pathway System in Senior Secondary School

Under the Competency-Based Curriculum (CBC), students must choose between three specialised pathways at the senior high school level: Science, Technology, Engineering, and Mathematics (STEM), Arts and Sports Science, or Social Sciences⁵³. Although this is intended to foster individual abilities and match education with the demands of the global labour market, the reality is it severely restricts students' access to comprehensive education.

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- 47 Government of Kenya, 'Government to construct 2,600 labs in secondary schools starting January 2025' (Kenya News Agency, 30 June 2025)
- 48 Purity Wangui, 'Kindiki: State to build science labs for 1,600 schools' (The Star, 1 February 2025)
- 49 Cardinal Elementary, 'Demystifying CBC' (Cardinal Elementary, 10 February 2023) <https://cardinalelementary.com/demystifying-cbc/> accessed 2 July 2025
- 50 Betty Cheruiyot, 'Challenges Faced in the Implementation of Competency-Based Curriculum (CBC) in Junior Schools in Kenya' (2024) 7(3) East African Journal of Education Studies <https://doi.org/10.37284/2707-3947>
- 51 Cardinal Elementary, 'Demystifying CBC' (Cardinal Elementary, 10 February 2023)
- 52 <https://scholarmedia.africa/featured/kenyas-cbc-at-5-years-a-transformational-education-approach-with-implementation-challenges-to-overcome/>
- 53 Pathways and Subjects in Senior School – Kenya Competency-Based Curriculum (The Cardinal Education Network) <https://cardinalelementary.com/pathways-andsubjects-in-senior-school-kenya-competency-based-curriculum/> accessed 3 July 2025.

The unequal allocation of resources among schools is the first significant limitation. It takes a significant investment in specialised infrastructure, including research labs, sports facilities, art studios, and subject-specific teachers with the necessary training, to offer any of these courses at the Senior High level⁵⁴. The majority of public schools, especially those in underserved or rural areas, lack the resources and infrastructure necessary to offer all three, or even just one. Students thus may have limited options, and end up pursuing whatever is available instead of what they are interested in.

Moreover, students living in areas that cannot afford to offer any of the subjects at JSS level may be forced to drop out. This would lead to many students stopping their learning process at the high school level due to the lack of accessibility caused by the curriculum.

CBC'S ADVANCEMENT OF RIGHT TO EDUCATION

Despite the difficulties and challenges of CBC, it has the potential to significantly enhance the right to education. The 844-system placed emphasis on KCPE and KCSE forcing students to cram before exams without truly understanding the content. However, CBC has changed this. It is set up in a manner that gives students more practical knowledge, and increases their problem solving and critical thinking skills⁵⁵. Also, with the new creative subjects, it also promotes creativity⁵⁶. This is in contrast to the 844 system which promoted memorization⁵⁷. By giving students practical skills, this improves the relevance and quality of education.

RECOMMENDATIONS

To ensure that CBC actually promotes the right to education, legal policies and administrative changes should be implemented.

First, the lack of a clear CBC implementation act should be dealt with. The government needs to implement proper frameworks for implementation, and accountability in enforcing this curriculum. For example, an act that can be read with the TSC Act and create policies and plans for training of teachers would be very relevant and effective. This can assist the TSC in supporting and pushing for training of the teachers to equip them adequately for teaching CBC.

54 Kenya Institute of Curriculum Development, *Curriculum Development for Senior School: A Skilled and Ethical Society* (KICD, 2025).

55 Anastacia Gakuru and others, 'Merits and Demerits of the Competency Based Curriculum (CBC) in Relation to Learner Friendliness in Kenya' (2024) *International Journal of Research and Innovation in Social Science* (IJRISS) <https://dx.doi.org/10.47772/IJRISS.2024.8110134>

56 *ibid*

57 *ibid*

Second, the government should support the CBC implementation through funding. The extra costs, materials, and infrastructure should be catered to by the government. In order for CBC to properly promote the right to education, access to resources and infrastructure is valuable. Without the necessary resources and support from the government, schools will not be able to effectively deliver CBC content.

CONCLUSION

In conclusion, the Competency Based Curriculum is a bold and essential change to Kenya's educational framework. It has the potential to move the country closer to having a skill-driven and holistic educational system. However, instead of expanding access to education, the CBC has widened educational inequalities. The CBC implementation has a heavy financial burden on parents, poor teacher training for the new subject areas and teaching methods, as well as haphazard implementation policies. This has created a system that disadvantages learners from marginalized and low-income areas. CBC therefore risks undermining the very right it seeks to uphold.

THE RIGHT TO EDUCATION IN KENYA: A LEGAL ANALYSIS OF INEQUALITY BETWEEN PUBLIC AND PRIVATE INSTITUTIONS- KIMBERLY ESHIRERA



ABSTRACT

This commentary argues that despite strong constitutional and legal promises, Kenya's education system is effectively a two-tiered structure that perpetuates inequality. Through a legal analysis, we examine how the current framework fails to bridge the deep divide between public and private institutions, from primary schools to universities. Our core finding is that while the right to education is enshrined in law, its realization is heavily dictated by a student's socio-economic background, creating an uneven playing field.

*The commentary reveals a stark contrast: public institutions are consistently hampered by underfunding, leading to overcrowded classrooms, a lack of resources, and a decline in educational quality. Meanwhile, the private sector, though often better-resourced, operates with insufficient oversight, further entrenching the class divide. An examination of key cases, such as *Reverend Ndoria Stephen vs The Minister for Education*, shows that while the judiciary has affirmed the principle of equality, its power to mandate sweeping systemic change remains limited.*

In response to these challenges, this paper proposes a multi-faceted strategy centred on legal and policy reforms. This involves tightening regulations for private providers and, most critically, committing to a significant and equitable increase in funding for public education. In conclusion, that for Kenya to honour its commitment to every child's right to a quality education, it must pursue a holistic approach that ensures all institutions contribute to a single, unified system that is truly fair for all.

INTRODUCTION

As a law student, I see education not just as a mere privilege or luxury, but as a vital pillar shaping society. While Kenya's constitution upholds this principle with strong guarantees of the right to education,⁵⁸ the reality reveals stark educational disparities. This is most evident in the contrast between underfunded public schools at primary, secondary and university levels and their well-equipped private counterparts.⁵⁹ This divide highlights a socio-economic chasm that annually challenges the constitutional principle of equality and non-discrimination.⁶⁰ It is crucial to scrutinize this duality from basic education to higher learning as it sustains inequality and denies many children access to quality education.

Despite Kenya's strong constitutional guarantees of the right to education for everyone and the government's pledge to provide free and mandatory basic education,⁶¹ a significant issue remains: the increasing systemic inequality between public and private schools. This dual system has large gaps in funding, facilities, teacher quality, and student results, which undermines the core principles of fairness, access, and non-discrimination outlined in the constitution. As a result, many children are denied their constitutional right to quality education, worsening social and economic divides.

LEGAL FOUNDATIONS OF THE RIGHT TO EDUCATION IN KENYA

The right to education in Kenya is deeply embedded in a multi-layered legal framework, starting with its supreme law, the Constitution of Kenya, 2010,⁶² and extending to various statutory laws and international human rights treaties that Kenya has ratified. At its core, Article 43(1) (f) of the Constitution broadly guarantees the right to education as an economic and social right for every person.⁶³ This general provision is strongly supported by Article 53(1) (b), which clearly states that every child has the right to free and compulsory basic education.⁶⁴ This explicit language indicates a binding obligation on the government to ensure that basic education is not only accessible without cost but also mandatory, highlighting its essential role in a child's development. Furthermore, Article 27, which guarantees the right to equality and protection from discrimination, provides a fundamental foundation, requiring that education be delivered fairly and without discrimination across all segments of society, regardless of background.⁶⁵

The Basic Education Act of 2013 serves as the primary legal framework for implementing these constitutional mandates. It establishes the legal basis for governing basic education in Kenya,⁶⁶ other

58 **The Constitution of Kenya, 2010, arts 53(1) (b)**

59 **UNESCO, Global Education Monitoring Report 2021/2: Non state actors in education (2021) 135**

60 **The Constitution of Kenya, 2010, art 27.**

61 **The Constitution of Kenya, 2010 art 43(1) ((f)**

62 **The Constitution of Kenya, 2010.**

63 **Ibid art 43(1) (f)**

64 **Ibid art 53(1)(b)**

65 **Ibid art 27**

66 **Basic Education Act, No 14 of 2013**

laws such as the Universities Act, 2012 to regulate higher education.⁶⁷ Although the Act also addresses the creation and registration of private schools (Sections 49-52),⁶⁸ questions remain about its effectiveness in regulating these institutions to ensure equality in quality, access, and curriculum standards compared to public schools, amid persistent inequalities. Furthermore, the Children Act, 2022, reaffirms children's right to basic education, aligning with Article 53 of the Constitution and emphasizing the child's best interests.⁶⁹

Besides national laws, Kenya's dedication to the right to education is bolstered by ratification of significant international and regional human rights treaties. These treaties which are incorporated into Kenyan law under Articles 2(5) and 2(6) of the Constitution, impose binding duties on the state to progressively realize the right to education.⁷⁰ The UDHR, especially Article 26, first defined education as a fundamental right, while the ICESCR, in its Article 13, specifies state obligations for progressively expanding access to primary, secondary, and higher education.⁷¹ The General Comment No. 13 by the Committee on Economic, Social and Cultural Rights further clarifies this right through the "4 A's": Availability, Accessibility, Acceptability, and Adaptability.⁷² The CRC, in Article 28, affirms children's right to free and compulsory primary education and promotes accessible secondary education.⁷³ Similarly, the African Charter on Human and Peoples' Rights, through Article 17, recognizes the right to education.⁷⁴ These international and regional treaties influence domestic law and impose binding duties on Kenya to fully realize the right to education for all individuals.

DISPARITIES BETWEEN PUBLIC AND PRIVATE EDUCATION IN KENYA

Despite Kenya's constitutional commitment to equitable access to quality education, there remains a growing divide between public and private institutions. This significantly education, are primarily funded and managed by the government. They educate most Kenyan children but often suffer from chronic underfunding, leading to overcrowded classrooms, inadequate infrastructure, and severe teacher shortages.⁷⁵ In contrast, the private sector includes everything from high-end elite schools to informal clinics in slum areas, each with different levels of regulation and dependence on parental fees. These differences in operation are predominantly fee dependent, creating an immediate financial barrier to entry.⁷⁶

67 **Universities Act, no 42 of 2012**

68 **Ibid ss49-52**

69 **Children's Act, no 29 of 2022, s, 6**

70 **The constitution of Kenya (1) art 2(5). (6)**

71 **International covenant on economic, social and cultural rights**

72 **Committee on economic social and cultural rights, general comment no 13 (art 13)**

73 **Convention on the rights of the child (art 28)**

74 **African charter on human and peoples right (art 17)**

75 **World bank, service delivery indicators: education (report, 2019) 12-15**

76 **Oketch, moses, et al. Why are there proportionately more poor pupils enrolled in non-state schools urban Kenya? International journal of education development (2020)**

The biggest disparities are in access and quality of education. Although public primary and day secondary education are officially “free” hidden expenses such as uniforms, transportation, mandatory levies, and exam fees often make them unaffordable for disadvantaged families, effectively undermining the “free” promise in Article 53(1) (b) of the Constitution for many. Private schools, by their nature, commodify education explicitly limiting access to those who can pay thereby institutionalizing socio-economic segregation from a young age.⁷⁷

The difference in quality of education is equally alarming. Private schools tend to have better infrastructure, including modern classrooms, well-stocked libraries, science labs, and ICT facilities, whereas many public institutions are characterized by dilapidated buildings, poor sanitation, and limited learning resources.⁷⁸ A critical differentiator is teacher management. Public schools grapple with high pupil teacher ratios, inequitable deployment by the Teachers Service Commission particularly in the arid and remote areas, has challenges with teacher morale and absenteeism.⁷⁹ While the private schools may hire teachers with less formal training, they often maintain lower class sizes and can offer competitive remuneration, which frequently translates into better academic outcomes.⁸⁰

This performance gap is consistently evidenced in national examinations like the Kenya Certificate of Primary Education (KCPE) and the Kenya Certificate of Secondary Education (KCSE), where private school students historically dominate top ranks and consequently, admissions to elite national schools and public universities.⁸¹ This outcome is not merely an academic statistic; it is a powerful driver of social inequality. It ensures that privilege is perpetuated, as children from wealthier backgrounds access the pathways to higher education and prestigious careers, while those from poor backgrounds are left behind, thus reinforcing intergenerational cycles of poverty and contravening the state’s duty to ensure equality of opportunity.⁸²

These disparities are exacerbated by two critical failures: inadequate regulation of private providers and insufficient investment in public education. While the Basic Education Act (2013) provides for the registration of private schools, its regulatory framework is notably weak, failing to effectively standardize quality, control fee structures, or ensure adherence to equitable admission policies.⁸³ This lax oversight allows for vast quality variations within the private sector and absolves private actors from upholding the same constitutional imperatives of equity and non-discrimination that bind the state. Concurrently, the chronic underfunding of public schools raises serious questions about the government’s commitment to using the ‘maximum available resources’ to realize the right to education,

77 **Global education monitoring report 2021 non-state actors in education (2021) 135**

78 **Kenya national bureau of statistics, economic survey 2022(2022) chapter 10**

79 **Teacher service commission, annual report and financial statements for the year ended 30 June 2021**
24 Uganda, Betty and Wambui Karanja. **Teacher factors influencing academic performance in Public and private primary schools in Nairobi County, Kenya journal of education practice (2016).**

80 **Kenya national examination council, 2021 KCSE Examination report (2022)**

81 **Kenya national examination council, 2021 KCSE Examination report (2022)**

Kenya national examination council, 2021 KCSE Examination report (2022)

82 **The constitution of Kenya 2010, art 43(1) (f)**

83 **Basic education act no 14 of 2013, ss 49-52**

as mandated by international law. Despite education receiving a sizable portion of the national budget, the allocation remains insufficient to bridge the glaring gaps in infrastructure, staffing, and learning resources. This failure to prioritize and adequately fund public education lies at the heart of the systemic inequality that currently defines the Kenyan educational landscape.

ANALYSIS OF INEQUALITY IN THE UNIVERSITY SECTOR

The deeply entrenched two-tiered structure of Kenya's education system does not culminate at the secondary level; it extends forcefully into the realm of higher education, replicating and often exacerbating patterns of inequality. The university sector, which should serve as a great equalizer and engine of social mobility, instead reflects and reinforces the socio-economic divisions cultivated in earlier schooling. Public universities, once the proud and exclusive bastions of higher learning, are in a state of palpable strain. Crippled by chronic underfunding and the weight of massified enrolment, they grapple with decaying physical infrastructure, severely overcrowded lecture halls, and alarmingly high student-to-lecturer ratios.⁸⁴ These conditions inevitably compromise the quality of teaching, limit meaningful student-lecturer interaction, and stifle the research environment, undermining their core academic mission.⁸⁵

In contrast, private universities often present a façade of order and quality. They typically boast more modern facilities, better-maintained amenities, and crucially, smaller class sizes that foster a more conducive learning environment.⁸⁶ However, this comes at a significant cost. Their heavy reliance on student tuition fees inherently restricts access to those from affluent backgrounds, transforming the right to education into a privilege purchasable by wealth.⁸⁷

Perhaps the most telling illustration of this systemic contradiction is the phenomenon of Module II or parallel degree programmes within public universities themselves. Originally conceived as a revenue-generating mechanism to offset inadequate state funding, these programmes allow students who did not qualify through the competitive Kenya Universities and Colleges Central Placement Service (KUCCPS) process to gain admission—provided they can pay significantly higher, commercial-rate fees.⁸⁸ This creates a stark 'pay-to-play' system within public institutions, where two students in the same lecture theatre may have gained admission under vastly different criteria: one purely on merit, and the other on a combination of merit and ability to pay. This practice fundamentally corrodes the principle of meritocracy and makes a mockery of the constitutional guarantee of equality and equity, as it privileges wealth over academic potential even within state-funded institutions.⁸⁹

84 **Munyua, A. The impact of Massification on Quality of Education in Public Universities in Kenya (PhD Thesis, University of Nairobi, 2019) 45-60**

85 **Otieno, W. Crisis in Kenyan Public Universities: A review of funding and Quality challenges Journal of Higher education in Africa (2018) 16(1) 87-105**

86 **Association of Private Universities in Kenya, State of Private University Education in Kenya Report (2021) 12**

87 **Wangenge Ouma, G. Tuition fees and the challenge of making higher education a Socially Realistic Commodity in Kenya Journal of Higher Education Policy Management (2012) 34(2) 45-58**

88 **Otieno, W. Dual track Tuition Policy in Kenyan Public Universities: implication for Equity and Quality international journal of Educational Development (2020) 78**

89 **The Constitution of Kenya, art 27**

The consequence of this system is a higher education landscape that sorts students not by their ambition or intellect, but by their parents' bank accounts. It ensures that the advantages accrued from attending well-resourced private primary and secondary schools are cemented through preferential access to better-resourced university experiences, whether in private institutions or through parallel programmes. This perpetuates a cycle where higher education, instead of breaking down class barriers, functions to solidify them, contravening the state's obligation to ensure the progressive realization of the right to education for all on the basis of equal opportunity.⁹⁰

LEGAL AND POLICY GAPS/FAILURES CONTRIBUTING TO INEQUALITY

Critical examination reveals that Kenya's legal framework is undermined by significant gaps and implementation failures in both law and policy. These shortcomings actively perpetuate and exacerbate the educational disparities between public and private institutions, effectively creating and sustaining the two-tiered system this paper critiques.

A primary failure lies in the inadequate regulatory oversight of private education providers. While the Basic Education Act (2013) mandates the registration of private schools, its provisions for ongoing monitoring and enforcement of quality are notably feeble and inconsistently applied.⁹¹ This regulatory allows a wide spectrum of private institutions from elite academies to substandard, low-cost schools in informal settlements to operate with minimal accountability to broader national equity goals. The legislation focuses disproportionately on entry requirements rather than ensuring sustained adherence to standards related to infrastructure, teacher welfare, and curricular equity, often prioritizing profit over pedagogical integrity.⁹² This regulatory vacuum extends to higher education, where the Commission for University Education (CUE) struggles to effectively balance its mandate of quality assurance against the pressures of rapid, often commercially-driven, expansion in the private university sector.⁹³

These regulatory shortcomings are powerfully compounded by the persistent underfunding and misallocation of resources within public education. Despite education consistently commanding a large share of the national budget, the allocation is insufficient to meet the escalating demands of a growing student population and to reverse decades of systemic neglect. The crisis is acutely felt in public universities, where insufficient state capitation has forced institutions to become entrepreneurial, relying on revenue from fee-paying Module II programmes. This strategy, while fiscally expedient, legitimizes a pay-to-play model within state institutions, thereby instrumentalizing public assets to entrench the very inequalities they are constitutionally mandated to dismantle.⁹⁴

90 **International covenant on economic, social and cultural rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 13 (2)(c)**

91 **Basic Education Act No 14 Of 2013, Ss 49-52**

92 **UNESCO, Global Education Monitoring Report 2021/2: Non state actors in education; Who chooses? Who loses? (2021) 175**

93 **Munyua, A. regulatory Dilemmas in Kenya Higher Education Expansion; Balancing Quality and Quantity Journal of African law (2020) 64(2), 245- 262**

94 **Wangenge Ouma, G & Lutomiah, A. Responding to the funding Crisis in Kenyan Public Universities: The Dilemmatic Rise of Private Revenue Streams Studies in Higher Education (2021)**

Furthermore, the existence of a dual system, where the quality of a child's education is a function of parental wealth, constitutes de facto discrimination, even if the laws are de jure neutral. Current policy has proven ineffective in compelling private actors to function as partners in achieving equity, for instance, through inclusion policies or cross-subsidization models. The absence of a clear, legally enforceable definition of "quality education" that applies uniformly across all sectors creates a nebulous standard, making it nearly impossible to hold any provider, public or private, fully accountable for delivering on the right to education in its fullest sense.⁹⁵ Consequently, disparities in learning outcomes are not merely tolerated but are effectively baked into the system, jeopardizing the life chances of those reliant on public education and making a mockery of the state's promise of equality of opportunity.

CASE LAW ANALYSIS

Kenyan courts have played a key role in interpreting and enforcing the constitutional right to education, often balancing the principle of progressive realization with immediate state obligations. A notable case that highlights the judiciary's engagement with educational inequalities is *Reverend Ndoria Stephen & 2 Others vs The Minister for Education & 2 Others* [2012] eKLR. The petitioner argued on behalf of children from marginalized regions, contending that they were denied equal access to quality education due to discriminatory policies and inadequate facilities.⁹⁶ A core part of the argument was that forcing children from these disadvantaged areas to sit for the same national examinations as those from more developed parts of the country was discriminatory. The petitioner further challenged the government's admission quota system for public universities and secondary schools, arguing that it was being exploited by parents from wealthier areas, thereby failing to benefit the marginalized children it was intended to serve.⁹⁷

The High Court, presided over by Justice Mumbi Ngugi, reaffirmed that the right to free and compulsory basic education under Article 53(1)(b) of the Constitution imposes immediate obligations on the State. The court stressed that while the progressive realization of socio-economic rights is recognized, the fundamental aspects of the right to education such as availability, accessibility, and non-discrimination and must be protected without delay.⁹⁸

However, the court ultimately found that the petitioner's arguments did not meet the legal definition of discrimination and was unable to declare that the State had failed in its obligations. It noted that while disparities in access to education were undisputed, the government had averred that various policies and grants were in place to address the issue. The court acknowledged that it had no way of verifying whether these government policies were being properly and fairly implemented, as it was limited by the evidence presented and the doctrine of separation of powers.⁹⁹ The court also rejected the petitioner's requests to abolish the national examinations.

⁹⁵ **Reverend Ndoria Stephen & 2 Others v The Minister for Education & 2 Other** [2012] EKLR.

⁹⁶ **Reverend Ndoria Stephen & 2 others v The Minister for Education & 2 others** [2012] eKLR, para 2-4

⁹⁷ **Ibid**, para 5

⁹⁸ **Ibid** para 48

⁹⁹ **Ibid** para 70

Despite these rulings, the case marks a vital judicial step toward demanding substantive, not just formal, equality in educational access. However, as the case review notes, the Kenyan judiciary missed an opportunity to adjudicate more probingly by not assessing the reasonableness and effectiveness of the government's measures, an approach taken by the Constitutional Court of South Africa in cases like *Grootboom*.¹⁰⁰ While courts can declare rights violations, their ability to directly compel the executive to undertake significant resource reallocation remains limited, which means that the responsibility for comprehensive systemic reforms to address public-private disparities primarily falls on the legislature and executive.

RECOMMENDATIONS: TOWARDS EQUITABLE EDUCATION

Bridging the deep chasm of inequality within Kenya's education system demands a bold, multi-pronged strategy that moves beyond mere formal recognition of the right to education to its substantive realization. This requires concerted legal reforms, deliberate policy shifts, and robust enforcement mechanisms across all educational levels.

Firstly, the current regulatory framework for private institutions, both in basic and higher education, is permissive to a fault. To ensure private providers operate as genuine partners in national development rather than drivers of stratification, the law must be fortified. The Basic Education Act and Universities Act should be amended to mandate regular, transparent, and independent quality assurance inspections against clear, legally enforceable standards for infrastructure, teacher welfare, curriculum delivery, and non-discriminatory admission practices. Furthermore, policy should introduce mechanisms to ensure the private sector contributes meaningfully to equity. This could be achieved by legally requiring private institutions to allocate a minimum percentage of their student population to need-based scholarships or by establishing a national education equity fund, financed through a levy on private school profits, to support learners from disadvantaged backgrounds.¹⁰¹

Secondly, the state must fulfil its constitutional and international obligation to dedicate the 'maximum available resources' to public education. This necessitates a legally binding commitment to a higher, constitutionally-justified percentage of the national budget, distributed through a needs-based formula that actively prioritizes marginalized regions to rectify historical deficits. This investment must directly target infrastructure decay, teacher shortages, and the provision of adequate learning materials. For public universities, enhanced capitation is critical to wean them off their dependency on the inequitable Module II programme revenue. Concurrently, policy must eliminate the 'hidden costs' that render 'free' primary education a myth for many, through state-provided essential learning packs, to ensure access is truly universal.¹⁰² Teacher policy must also be reformed to include binding incentives for deploying qualified teachers to remote areas and investing in their continuous professional development. access is truly universal.¹⁰³ Teacher policy must also be reformed to include binding incentives for deploying qualified teachers to remote areas and investing in their continuous professional development.

100 **Government of the republic of south Africa and others v Grootboom and others [200] ZACC 19.**

101 **UNESCO, Global Education Monitoring Report 2021/2: non state actors in education (021) 254-256.**

102 **Institute for social accountability & another [2017] eKLR**

103 **Institute for social accountability & another [2017] eKLR**

Lastly, rights without remedies are meaningless. The government should establish accessible legal channels, such as a dedicated Education Tribunal or Ombudsperson, to empower parents and students to seek redress for violations of the right to quality education.¹⁰⁴ Simultaneously, oversight bodies like the Ministry of Education's Quality Assurance and Standards Division and the Commission for University Education must be granted enhanced legal authority and provided with sufficient funding to effectively monitor compliance across all institutions, public and private, holding them accountable to a single, national standard of quality and equity.¹⁰⁵

CONCLUSION

This paper has demonstrated a fundamental contradiction between Kenya's strong legal framework for education and the reality of a two-tiered system that sorts students by socio-economic status. Chronic underfunding of public institutions and weak regulation of private providers have created stark disparities in quality and access, undermining constitutional guarantees of equality and the right to education. While the judiciary has affirmed state obligations, its capacity to mandate comprehensive reform is limited. Therefore, transformative change depends on decisive political action: strengthening regulatory oversight of private education, substantially increasing equitable funding for public institutions, and establishing robust accountability mechanisms. Only through such concerted legal and policy reforms can Kenya build a truly unified and equitable education system that fulfils its constitutional promise for every child.

104 Committee on economic social and cultural rights, general comment no 13 the right to education (art 13)

105 Republic of Kenya, sessional paper no 1 of 2019 on a policy framework for reforming education and training for sustainable development in Kenya (2019) 87

CORPORAL PUNISHMENT IN SCHOOLS IN KENYA

ROY MIANO



Abstract

This commentary examines the persistence of corporal punishment in Kenyan schools despite its clear prohibition under constitutional, statutory, and international law. Corporal punishment, which has its origins in colonial educational systems, was institutionalized as a means of control and discipline. Although the Constitution of Kenya 2010, the Children Act 2022, and the Basic Education Act 2013 outlaw the practice, enforcement gaps remain. Kenya's responsibilities to shield children from inhumane and degrading treatment are reinforced by international agreements like the African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of the Child.

*The commentary examines case law that upholds the illegality of corporal punishment while also pointing out institutional and evidentiary constraints, such as *CNK v. Emily Kulola* (2022) and *Mwai v. Teachers Service Commission* (2023). The Ministry of Education's positive discipline guidelines and the Teachers Service Commission's Code of Conduct are administrative responses that demonstrate state efforts to shift toward rehabilitative approaches. However, cultural resistance to giving up physical punishment, inadequate teacher preparation, subpar institutional mechanisms, and low student awareness all hinder the full implementation of these protections. Legal prohibition needs to be supported by constant enforcement, legal advocacy, and public education in order to result in meaningful change.*

This commentary ends with recommendations to harmonize legal frameworks, increase teacher training, encourage awareness campaigns, and bolster enforcement, among other things. In order to create safe, respectable, and child-friendly learning environments in Kenya, it is ultimately necessary to eradicate corporal punishment through both strong legislation and cultural change.

Introduction

*‘Spare the rod, spoil the child.’*¹⁰⁶ This is a clarion call that has echoed through the centuries. It is perhaps the most famous piece of parental advice in the world. In schools, especially in Kenya, it is never far from being uttered before some disciplinary action. It certainly has a simple functionality about it and it was a piece of advice given by one whom we associate as being one of the wisest of men¹⁰⁷. Its simplicity, however, as we will see is its flaw. It is a blanket instruction given with no qualifications. It leaves so many questions unanswered.

What exactly is sparing the ‘rod’? How far can we go in not ‘sparing the rod’? Does it always work to not ‘spoil the child’? When does ‘not sparing the rod’ become something much more sinister? In this essay we shall attempt to answer these questions in relation to the education sector in Kenya.

Corporal punishment is defined as:

*“Corporal punishment” means the use of physical force applied on a child by the use of any means, including a cane or other object, with the intention of inflicting pain or discomfort for the purpose of corrective discipline or punishment*¹⁰⁸”

Common forms include caning, slapping, kneeling, and forced manual labor. Corporal punishment was abolished in schools by the Ministry of Education and the repealed Children’s Act 2001¹⁰⁹. The practice was, later on, prohibited under the Constitution of Kenya 2010¹¹⁰ however, it remains prevalent in practice. This raises serious concerns about the effectiveness of law enforcement, the protection of children’s rights, and the role of cultural beliefs in education. Despite the state’s commitment to uphold human dignity and the rule of law, the persistence of corporal punishment highlights a critical disconnect between legal norms and social practices.

This essay critically examines Kenya’s institutional and legal frameworks governing corporal punishment. It looks at the history of the practice, the provisions and implementation of relevant laws and regulations, the responses of the government and judiciary, and the arguments for its continued use. The essay ends with suggestions for fostering a child-friendly learning environment and bridging the gap between law and practice.

HISTORICAL AND SOCIAL BACKGROUND

It is unclear whether corporal punishment was considered an essential part of child-rearing and discipline across many Kenyan communities in the pre-colonial era. However, as a means of control and discipline, particularly for African students, British authorities institutionalized corporal punishment in schools during the colonial era. This legacy was carried into the post-independence education system, where discipline was often enforced through physical means.¹¹¹

106 Proverbs 13:24 & 22:15 (King James Version) Bible Gateway <<https://www.biblegateway.com/>> accessed 18 July, 2025

107 ‘King Solomon’, Britannica (2025) <<https://www.britannica.com/biography/Solomon>> accessed 18 July, 2025

108 Section 2 Children Act CAP. 141 (2022)

109 Section 18, Children Act No. 8 of 2001 (Repealed)

110 Article 29 (e) Constitution of Kenya, 2010

111 Charles Chege, Joy M. Bustrum & Tonneka. M. Caddell, ‘Spoil the Rod and Spare the Child: Ex-

According to the 1999 Human Rights Watch report on Kenya, physical punishment in schools was described as arbitrary, routine, and often brutal, with students suffering severe physical injuries and psychological trauma. Punishments were sometimes administered for minor infractions such as tardiness or incomplete assignments. The report documented instances of broken limbs, bruises, and deep emotional scars resulting from unchecked and often excessive punishment. These patterns were not isolated but widespread across the country, suggesting a systemic issue rather than isolated cases of teacher misconduct.¹¹²

Corporal punishment is still ingrained in school culture despite reform initiatives, especially in informal and rural learning environments. There, it is often seen as a quick and effective method of enforcing discipline. Teachers, facing overcrowded classrooms, lack of guidance on alternative discipline, and high-stakes academic expectations, resort to familiar disciplinary practices. Cultural norms further legitimize this practice, as many parents and guardians not only condone but expect teachers to be firm, meaning being physical, with their children.¹¹³

LEGAL FRAMEWORK PROHIBITING CORPORAL PUNISHMENT

The Constitution of Kenya, 2010

The Constitution lays the foundation for the protection of human rights in Kenya. Article 29(e) explicitly prohibits corporal punishment.¹¹⁴ Furthermore, Article 53(1)(d) asserts every child's right to be protected from abuse, neglect, and all forms of violence, including inhuman treatment and punishment¹¹⁵. These articles firmly establish Kenya's legal position against corporal punishment and impose a constitutional obligation on all individuals and state organs to protect children's rights against it.

The Children Act, 2022

The enactment of the Children Act, 2022¹¹⁶ repealed the 2001 Children Act¹¹⁷ which had permitted "reasonable punishment."¹¹⁸ The new Act aligns domestic law with the Constitution and Kenya's international obligations. Section 25(3)(b)(c) of the Children Act 2022 criminalizes all forms of corporal punishment, and persons found culpable may be charged under the Prevention of Torture Act Cap. 88¹¹⁹. The Act defines corporal punishment broadly and emphasizes the use of rehabilitative and corrective discipline¹²⁰.

aming the Colonial and Missionary Implications of Corporal Punishment in Contemporary Kenya' (2022) Vol. 04, Issue 03 *African Journal of Clinical Psychology* <https://ajcp.daystar.ac.ke/download/26/1662536542_CHARLES.....JOY.pdf> accessed 18 July 2025

112 Global Initiative to End All Corporal Punishment of Children, *Country Report for Kenya* (Last updated: January 2025) <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Kenya.pdf>> accessed 18 July 2025

113 Adoo Maryam Osore, 'The Practice of Corporal Punishment in Rural Public Primary Schools in Ugunja Division of Siaya District' (MA Sociology project, University of Nairobi 2007) <https://erepository.uonbi.ac.ke/bitstream/handle/11295/20028/Adoo_Corporal%20punishment%2c%20primary%20schools%2c%20Siaya%20District.pdf?sequence=3&isAllowed=y> accessed 18 July 2025

114 Art. 29(e) (n.5)

115 Article 53(1)(d) Constitution of Kenya, 2010

116 Children Act CAP. 141 (2022)

117 Children Act No. 8 of 2001 (Repealed)

118 Section 127(5) Children Act No. 8 of 2001 (Repealed)

119 Section 25(3)(b) & (c) Children Act CAP. 141 (2022)

120 Section 2 (n.3)

The Basic Education Act, 2013

The Basic Education Act reinforces the constitutional prohibition by specifically outlawing corporal punishment in schools.

As seen in Section 36:

“(1) No pupil shall be subjected to torture and cruel, inhuman or degrading treatment or punishment, in any manner, whether physical or psychological.

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment not exceeding six months or both.¹²¹”

International Legal Instruments

Kenya is a signatory to several international human rights instruments that obligate it to prohibit and eliminate corporal punishment. These include the UN Convention on the Rights of the Child (UNCRC)¹²², the African Charter on the Rights and Welfare of the Child (ACRWC)¹²³, and the International Covenant on Civil and Political Rights (ICCPR)¹²⁴. These instruments emphasize the protection of children’s dignity and the adoption of non-violent forms of discipline. These instruments form part of Kenyan law by virtue of the Constitution of Kenya, 2010¹²⁵.

Judicial and Administrative Responses

Administratively, many changes have already been undertaken; the Ministry of Education developed the “Guidelines for Positive Discipline” which aim to replace corporal punishment with more constructive disciplinary methods. The Guidelines promote parental involvement, counselling, restorative practices, and student engagement. Furthermore, the Teachers Service Commission¹²⁶ incorporated child protection into its Code of Conduct as seen below¹²⁷.

Teacher’s Service Commission (Code of conduct and Ethics for Teachers) Regulations, 2015
Section 9(1):

“A teacher shall be entrusted with the duty of care of a child, including a child with special needs and shall take all reasonable steps to ensure the child is protected from abuse, neglect, harmful cultural practices, all forms of violence, discrimination, inhuman treatment, corporal punishment and exposure to hazardous or exploitative labour.¹²⁸”

121 Section 36 Basic Education Act No. 14 of 2013

122 United Nations, Convention on the Rights of the Child, UNTS 1577 (1989), art 37 <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>> accessed 18 July 2025

123 African Charter on the Rights and Welfare of the Child (adopted July 1990, entered into force 29 November 1999), African Union, art. 21 <https://au.int/sites/default/files/treaties/36804-treaty-african-charter_on_rights_welfare_of_the_child.pdf> accessed 18 July, 2025

124 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7 <<https://www.ohchr.org/sites/default/files/ccpr.pdf>> accessed 18 July 2025

125 Article 2(5) & (6) Constitution of Kenya, 2010

126 The Teachers Service Commission is established as an independent commission under the Constitution of Kenya 2010, art 237.

127 Global Initiative to End All Corporal Punishment of Children (n.7)

128 Section 9(1) Teacher’s Service Commission (Code of conduct and Ethics for Teachers) Regulations, 2015 <<https://www.tsc.go.ke/index.php/downloads-b/file/30-code-of-conduct-and-ethics-for-teach>

Nonetheless, enforcement remains inconsistent, particularly in schools in rural or informal settlements where the TSC has limited resources to adequately supervise school management¹²⁹.

Judicially, Kenyan courts have shown willingness to enforce children's rights under the Constitution. Below are two examples where the courts have dealt with cases of corporal punishment

CASE LAW:

1) ***CNK (Suing on behalf of P.K.N. (Minor) v Emily Kulola & 4 others* [2022]**¹³⁰

FACTS OF THE CASE

The petitioner, CNK, brought a constitutional petition on behalf of her son, P.K.N., a minor, alleging violations of his constitutional rights due to acts of corporal punishment at school. The minor, born with health complications (stomach volvulus), attended a private Christian school. Stomach or gastric volvulus is a rare condition where the stomach twists upon itself, potentially causing a blockage and restricting blood flow¹³¹.

The first Incident occurred in 2016. Emily Kulola (1st Respondent) allegedly used excessive force and pinched the child, causing physical injury. The teacher later issued a handwritten apology, and allegedly offered Kshs. 8,600 (though this is disputed).

The second incident occurred in 2017. The Anne Wanjiru (2nd Respondent) allegedly beat the child with a rubber pipe, causing physical injuries that required hospitalization. This led to a criminal case that was eventually withdrawn.

The petitioner claimed that these incidents caused trauma, worsened the child's health, and resulted in missed schooling and transfer to another institution. She claimed constitutional violations under Articles 27, 28, 29, 43, 53 and relevant sections of the Children Act and the Basic Education Act.

LEGAL ISSUES:

Whereas the case contained various legal disputes that had to be settled, we shall concentrate on those issues pertinent to the topic of this essay:

1. Whether the acts of the 1st and 2nd Respondents constituted corporal punishment and violated the child's rights under the Constitution.
2. Whether the Teachers Service Commission (5th Respondent) had oversight and was liable despite the school being private.

ers-2015> accessed 18 July 2025

129 Global Initiative to End All Corporal Punishment of Children (n.7)

130 CNK (Suing on behalf of P.K.N. (Minor) v Emily Kulola & 4 others (Petition No. 5 of 2018) [2022] eKLR

131 Peter P. Lopez & Rishi Megha, 'Gastric Volvulus' (National Library of Medicine, 7 November, 2022) <<https://www.ncbi.nlm.nih.gov/sites/books/NBK507886/#:~:text=Gastric%20volvulus%20is%20a%20rare,team%20in%20managing%20this%20condition.>> accessed 18 July 2025

DETERMINATION AND FINDINGS

1. On Corporal Punishment and Violation of Rights

The Court acknowledged corporal punishment is illegal in Kenya pursuant to article 29(e)&(f) of the Constitution, Section 36 of the Basic Education Act, and TSC Code of Conduct Regulation 9(1) among other legal provisions.

However, the burden of proof was on the petitioner under the Evidence Act to demonstrate the existence of the alleged assaults¹³², their link to the injuries, and that they violated the child's rights. The court found that the apology letter by the 1st Respondent did not amount to an admission of assault, nor was there medical or photographic evidence supporting the claim. Regarding the second incident, inconsistent medical records, conflicting dates, and unreliable discharge summaries undermined the petitioner's claims.

2. On the Teachers Service Commission's Liability

The TSC was not the employer of the teachers in question as the school was a private institution. Under Section 33 of the TSC Act¹³³, its disciplinary powers over private school teachers are limited to deregistration upon conviction, which had not occurred. The court found no basis to hold the TSC liable.

Analysis:

On Corporal Punishment:

The case reaffirmed the illegality of corporal punishment in both public and private schools in Kenya. The court relied on the definition of corporal punishment from the UN Committee on the Rights of the Child General Comment No. 8 (2006)¹³⁴:

"...any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light."

The court further noted that:

"Even if corporal punishment is banned, the allegation of its use must be proved on a balance of probabilities."

The court emphasized that to enforce this constitutional and statutory ban through litigation, credible evidence is essential. The case failed not due to lack of willingness of the courts to enforce a prohibition of corporal punishment but due to a considerable dearth of conclusive evidence. In any suit brought to court, as seen earlier with reference to the Evidence Act, it is trite law that he who alleges a claim must prove it. The petitioners simply were unable to do so¹³⁵.

132 Section 107 Evidence Act Cap. 80

133 Section 33 Teachers Service Commission Act Cap. 212

134 UN Committee on the Rights of the Child, General Comment No 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts 19, 28 para 2, and 37, inter alia), UN Doc CRC/C/GC/8 (2 March 2007) para. 11

135 Section 107 Evidence Act (n.27)

This case illustrates Kenya’s legal framework banning corporal punishment (Constitution, Basic Education Act, and Children Act). It also makes clear the limits of institutional liability, especially regarding private schools and TSC’s regulatory scope. The TSC can only deregister a teacher once found guilty of administering corporal punishment if the incident occurred in private schools¹³⁶. This shows the limitations of enforcement of the prohibition of corporal punishment by the regulatory agency, the TSC.

Outcome:

The petition was dismissed due to insufficient, contradictory, or unreliable evidence. No constitutional violations were found. While the court did sympathize with the minor’s medical condition, it went on to state:

“The court is obligated to base its decisions on evidence and the law.”

2) ***Mwai v Teachers Service Commission [2023]137***

Facts of the Case

The Petitioner, James Muriithi Mwai, was a mathematics teacher at Kangaru School. On 28 February 2019, he verbally cautioned three students (KFN, MMM, and DMN) for lateness. One of the students (KFN) later developed knee pain and eventually passed away on 11 March 2019, with the cause of death determined as severe pulmonary tuberculosis.

The student’s guardian accused the petitioner of causing the injury through corporal punishment. The matter was widely publicized in the media, and the Petitioner was arrested, investigated, and later interdicted by the Teachers Service Commission (TSC). Despite a postmortem finding no signs of trauma or assault, the TSC dismissed the Petitioner for using corporal punishment, citing breach of its internal Code of Conduct and Ethics (COCE)¹³⁸ and violation of Section 36(1) of the Basic Education Act¹³⁹.

Legal Issues

Various legal issues came up in this case but for the purposes of this essay we will restrict ourselves to the matter at hand:

Whether the Petitioner administered corporal punishment contrary to the law?

Determination

On Corporal Punishment

The court held that corporal punishment is absolutely prohibited under Section 36(1) of the Basic Education Act. The Code of Conduct and Ethics (COCE) reinforce this prohibition. The court found that even though the student died from unrelated natural causes (tuberculosis), the Petitioner did engage in corporal punishment by “tapping” students with a manila paper. While minor, this still constituted corporal punishment under the law.

136 Section 33 TSA Act (n.27)
137 Mwai v Teachers Service Commission (Petition E179 of 2021) [2023] KEELRC 1313 (KLR)
138 TSC Regulations (n.23)
139 Basic Education Act (n.16)

Therefore, the TSC's decision to discipline the Petitioner was lawful and justified, regardless of the death being unrelated.

The court declined to reinstate the Petitioner, reasoning that corporal punishment, even if slight, is a serious breach of duty given the teacher's *loco parentis* role.

'*In loco parentis*' is a Latin term meaning "in [the] place of a parent" or "instead of a parent." It is a common law doctrine which denotes the legal responsibility of some person or organization to perform some of the functions or responsibilities of a parent. For example: A teacher in a school¹⁴⁰.

Legal Significance on Corporal Punishment

The case reaffirms Kenya's zero-tolerance policy on corporal punishment in schools, regardless of the severity or intent. Even seemingly light or symbolic punishment can amount to a violation under COCE and Basic Education Act provisions. Teachers, by virtue of their role, are held to high standards and expected to uphold the best interests of the child as per Article 53 of the Constitution.

In terms of TSC as a regulatory body, this case demonstrates that administrative disciplinary action by a professional body can proceed independently of the criminal justice system, with different standards of proof and legal reasoning. The criminal case against the petitioner had no effect on the inner workings of the TSC disciplinary proceedings.

Conclusion

These rulings reaffirm that schools must function within the bounds of the constitution and the law and give judges clarity on the illegality of corporal punishment. Additionally, they provide a legal foundation for deterrence through administrative sanctions and civil liability, and they affirm the judiciary's role in protecting children's rights. These cases serve as further evidence that schools must function within the bounds of the law and the constitution. Additionally, they provide a legal foundation for deterrence through administrative sanctions and civil liability, and they affirm the judiciary's role in protecting children's rights.

ENFORCEMENT CHALLENGES

Cultural and Parental Attitudes

The continued use of corporal punishment is supported by cultural norms. Discipline is often associated with physical punishment in Kenyan communities. According to a 2019 study in Western Kenya, 70% of students had experienced caning, and both parents and teachers largely viewed it as a necessary corrective measure¹⁴¹. Cultural proverbs such as "spare the rod, spoil the child" are often invoked to justify the practice. The belief that corporal punishment builds resilience, character, and academic discipline remains deeply rooted¹⁴².

140 Cornell Law School's Legal Information Institute, 'In Loco Parentis' (Cornell Law School, January 2023) <https://www.law.cornell.edu/wex/in_loco_parentis> accessed 18 July 2025

141 Eunice K. Najoli, Tawanda Runhare, James B. Ouda, 'Attitudes of Stakeholders and the Use of Corporal Punishment as a Tool for Discipline in Public Secondary Schools, Western Region of Kenya', (2019) Vol. 7 *Open Journal of Social Sciences*, pgs 51-69

142 Werunga Khisa Stephen and Khisa Alfred Simiyu, 'Corporal Punishment in Secondary Schools in Ken-

Weak Institutional Mechanisms

Despite the legal and policy frameworks, enforcement is lacking. Institutions such as the TSC and Ministry of Education have limited capacity for regular monitoring or intervention in remote schools. In most cases, violations go unreported, and students are unaware of their rights or afraid to speak out.

An initiative known, as the 116 child helpline¹⁴³, is an initiative by Childline Kenya¹⁴⁴ in partnership with the Kenyan government to offer the only nationwide helpline service dedicated to children that runs 24 hours toll free. It is accessible by simply dialing 116. Although functional, it is underutilized due to lack of awareness, stigma, and poor follow-up on reported cases¹⁴⁵.

Inadequate Awareness and Training

Another major barrier is the lack of widespread training on positive discipline. Many teachers have not received training on alternative behavioral management methods and thus revert to what they know best: corporal punishment. A BBC investigation in 2023 revealed that teachers in several public schools still viewed caning as a last resort when students “cross the line”¹⁴⁶. Similarly, the absence of structured teacher support systems, especially for dealing with high-risk behavior or trauma, perpetuates reliance on punitive measures.

Comparative Perspective

A comparative analysis with South Africa offers valuable insights. In the landmark case *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* (2019)¹⁴⁷, South Africa’s Constitutional Court declared all forms of corporal punishment, including those in the home, unconstitutional. The Court emphasized the importance of upholding the dignity and bodily integrity of children.

In a unanimous judgment, the court reasoned that children may still be effectively disciplined without resorting to moderate or reasonable chastisement as there are other means to achieve discipline that do not unnecessarily restrict a child’s constitutional right to dignity.

- ya: Issues and Challenges’ (2022) 6(11) *International Journal of Research and Innovation in Social Science (IJRISS)* 625 <<https://www.rsisinternational.org/journals/ijriss/articles/corporal-punishment-in-secondary-schools-in-kenya-issues-and-challenges/>> accessed 18 July 2025
- 143 Child Helpline International, ‘Kenya: Childline Kenya’ (Child Helpline International, 2025) <<https://childhelplineinternational.org/kenya-childline-kenya/>> accessed 19 July 2025
- 144 Childline Kenya is a national child protection organisation that operates a 24-hour helpline and online services to respond to cases of child abuse, neglect, and exploitation across Kenya.¹ Child Helpline International, ‘Kenya: Childline Kenya’ (Child Helpline International, 2025) <<https://childhelplineinternational.org/kenya-childline-kenya/>> accessed 19 July 2025.
- 145 Global Initiative to End All Corporal Punishment of Children (no.7)
- 146 Tom Odula & Tamasin Ford, ‘Kenya’s school floggings: The children suffering from a hidden epidemic’ (BBC News, 30 October 2023) <<https://www.bbc.com/news/world-africa-67229601>> accessed 18 July 2025
- 147 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* (2019) Case Number: CCT320/17 South Africa

While Kenya has enacted a strong legal framework, it falls behind in implementation and cultural transformation. South Africa's experience shows that legal prohibition must be accompanied by consistent enforcement, judicial activism, widespread public education, and institutional reform. Kenya can draw lessons from this in future policy enactments on this subject¹⁴⁸.

RECOMMENDATIONS¹⁴⁹

I. Strengthen Enforcement Capacity:

The TSC and county education offices must be empowered with adequate resources and authority to investigate, sanction, and monitor cases of corporal punishment. Abuse may be discouraged by routine audits and unexpected inspections.

II. Enhance Teacher Training:

Pre-service and in-service teacher preparation programs ought to incorporate positive discipline into their curricula. Universities and teacher training institutions and the Ministry of Education should make sure that these courses are required and evaluated.

III. National Sensitization Campaigns:

The government, civil society, and media should partner in designing and implementing awareness campaigns on children's rights and the harmful effects of corporal punishment. These should be tailored for different audiences: teachers, parents, students, and community elders.

IV. Legal Harmonization and Clarity:

All laws pertaining to education and children must be consistent with the Children Act and the Constitution. To prevent legal gaps, ambiguities or contradictions must be eliminated, particularly in older regulations.

V. Establish School-Based Accountability Mechanisms:

A separate disciplinary and safety committee with student representation ought to exist in every school. There should be clear protocols in place for reporting abuse, protecting whistleblowers, and taking corrective action.

VI. Empower Students:

Incorporate conflict resolution and children's rights into the national curriculum. Pupils need to be given the resources they need to recognize and exercise their rights without worrying about reprisals.

¹⁴⁸ **Global Initiative to End All Corporal Punishment of Children (no.7) & Global Initiative to End All Corporal Punishment of Children, 'Children Act 2022: Kenya confirms constitutional prohibition of corporal punishment of children' (End Corporal Punishment, 28 July 2022) <<https://endcorporal-punishment.org/kenya-children-act-confirms-prohibition/>> accessed 18 July 2025**

¹⁴⁹ **Global Initiative to End All Corporal Punishment of Children (no.7) pg. 3-5**

CONCLUSION

When it comes to corporal punishment in schools, Kenya's legal framework provides robust protection for children; however enforcement gaps and cultural acceptance continue to undermine its impact. Not only is the persistent use of corporal punishment a violation of children's dignity, it also impedes their academic and emotional development, and is contrary to Kenya's constitutional and international obligations.

A multifaceted strategy is needed to close the gap between legal ideals and actual conditions on the ground. This entails engaging children as holders of rights, empowering teachers with alternative skills, changing public perceptions, and bolstering institutional enforcement.

Legal prohibition is just the beginning; true change necessitates a shift in the way society perceives discipline, education, and children. Every child's right to safety, dignity, and education can be respected and upheld in Kenyan schools with political will, community involvement, and consistent dedication.

HOW SHOULD KENYA'S LEGAL FRAMEWORK EVOLVE TO ADDRESS THE CHALLENGES AND OPPORTUNITIES OF AI IN EDUCATION? -

NASSIR MASUD



Abstract

The integration of Artificial Intelligence (AI) into education presents both transformative opportunities and profound risks. In Kenya, AI is increasingly deployed in classrooms and universities to enhance personalisation, efficiency, and access. However, the speed of adoption has outweighed the development of legal safeguards, exposing gaps in the existing statutes such as the Data Protection Act (2019), the Consumer Protection Act (2012), and the Copyright Act (2001). These frameworks, while obviously significant, were not crafted with autonomous decision-making systems in mind, leaving unresolved questions of data protection, algorithmic bias, accountability, intellectual property, and the right to education under Articles 27, 43, and 53 of the Constitution of Kenya.

This commentary interrogates the legal and ethical challenges of AI in education, drawing on comparative insights from UNESCO's Ethical Guidelines on AI, the African Union's AI Strategy, the European Union's AI Act, and data protection frameworks such as South Africa's POPIA and the U.S. FERPA regime. It argues that Kenya's legal framework must evolve towards a principled, risk-based model that both safeguards constitutional rights and promotes innovation. Specifically, the paper recommends independent audits of AI systems, localized AI solutions that reflect Kenya's socio-cultural realities, stronger enforcement of data protection obligations in schools, and capacity building for educators on AI ethics and digital rights.

Introduction

The integration of Artificial Intelligence (AI) into education is no longer a futuristic aspiration but rather a lived reality that is shaping teaching and learning worldwide. In different jurisdictions, platforms powered by AI are being deployed to personalize instruction, automate administrative processes, and even extend educational opportunities to underserved populations. The promise of AI therefore lies in its ability to reduce teacher shortages, enhance inclusivity for learners with disabilities, and also bridge geographical barriers to access. However, these very opportunities come paired with profound risks such as opaque algorithmic decision-making, bias against marginalized groups, intrusive data collection, and the erosion of teacher autonomy.¹⁵⁰

Kenya's education sector is not shielded from these developments. Initiatives such as *M-Shule* and *Eneza Education* already employ AI-driven platforms to deliver learning content through mobile technology, particularly in low-resource schools.¹⁵¹ Universities are also experimenting with AI applications in grading, admissions, and student support. These developments are well in line with Kenya's Vision 2030 and the Digital Economy Blueprint (2019), which identify digital transformation as a cornerstone of national development.¹⁵² However, the legal and ethical implications of embedding AI into education remain under-examined. The speed of adoption has far outweighed the evolution of legal safeguards, creating regulatory blind spots in areas such as data protection, liability, intellectual property, and equality of access.

Existing statutory frameworks provide only partial guidance. The Data Protection Act 2019 for example establishes safeguards for personal data processing but does not specifically address automated decision-making or the unique vulnerabilities of learners. The Consumer Protection Act 2012 on the other hand offers remedies for defective digital services, yet it was not crafted with autonomous AI systems in mind. Similarly, the Copyright Act 2001 protects human authorship but is silent on AI-generated works, raising questions about ownership of machine-produced educational content. These gaps raise constitutional concerns, particularly in relation to the right to equality under Article 27, the right to education under Article 43(1)(f), and children's rights under Article 53 of the Constitution of Kenya.

Globally, legal systems are moving toward more deliberate regulation of AI. The European Union's proposed AI Act adopts a risk-based framework that categorizes educational AI as "high risk," requiring heightened transparency and accountability.¹⁵³ UNESCO has issued ethical guidelines emphasizing fairness, inclusivity, and human oversight in AI deployment.¹⁵⁴ At the continental level, the African

150 See Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 *International Data Privacy Law* 76.

151 See M-Shule, 'How It Works' <https://m-shule.com> accessed 14 September 2025; Eneza Education, 'About Us' <https://enezaeducation.com> accessed 14 September 2025.

152 Government of Kenya, Kenya Digital Economy Blueprint (2019) <https://ict.go.ke> accessed 14 September 2025.

153 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) COM (2021) 206 final.

154 UNESCO, Ethical Guidelines on Artificial Intelligence (2021).

Union's AI Strategy (2023) articulates principles of transparency, equity, and human rights alignment, although it remains non-binding.¹⁵⁵ By contrast, then, Kenya lacks a dedicated legal or policy framework for AI in education, relying instead on fragmented statutes and ad hoc institutional practices.

This paper therefore interrogates the research question: *how should Kenya's legal framework evolve to address the challenges and opportunities of AI in education?* It adopts a doctrinal and comparative methodology, drawing on Kenyan constitutional and statutory law, as well as regional and international frameworks. The paper argues that Kenya requires a principled, rights-based, and risk-sensitive approach to AI in education which ensures innovation does not come at the expense of justice, dignity, or equity.

1.2 The Promise and Perils of AI in Education

Artificial Intelligence (AI) refers to computer systems capable of performing tasks that typically require human intelligence, such as decision-making, pattern recognition, natural language processing, and problem-solving.¹⁵⁶ Within the educational context, AI applications range from intelligent tutoring systems and automated grading tools to adaptive learning platforms and virtual teaching assistants. These technologies are increasingly present even in Kenya, where digital education platforms such as Eneza Education, eLimu, and M-Shule have introduced AI-like features to personalize learning, track performance, and bridge gaps in teacher-student ratios.

2.1 THE PROMISE OF AI IN EDUCATION

The appeal of AI in education lies in its potential to transform access, efficiency, and equity. First, AI enables personalized learning by adapting content to a learner's pace, strengths, and weaknesses. In classrooms with high student-to-teacher ratios which is common in Kenyan public schools where one teacher may handle over 50 students, AI platforms can deliver tailored instruction that would otherwise be impracticable.¹⁵⁷

Second, AI has the potential to mitigate teacher shortages, particularly in rural and underserved counties. AI-powered chatbots and virtual teaching assistants can supplement instruction, offer real-time feedback, and support administrative tasks, allowing teachers to devote more time to pedagogy and student engagement. A pilot study by M-Shule demonstrated that learners using its AI-based SMS platform recorded measurable improvements in mathematics and English scores, particularly among low-income households.¹⁵⁸

Third, AI can promote inclusion for learners with disabilities. Text-to-speech, speech-to-text, captioning, and real-time translation technologies can integrate learners with hearing, visual, or linguistic challenges into mainstream classrooms. This is especially significant in light of Kenya's 2018 Basic Education Statistical Booklet, which recorded that fewer than 5 per cent of children with disabilities complete

155 African Union, *Artificial Intelligence Strategy for Africa* (2023).

156 Stuart Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach* (4th edn, Pearson 2021).

157 UNICEF, *Kenya: Education Fact Sheet* (2022) <https://www.unicef.org/kenya> accessed 14 September 2025.

158 M-Shule, 'Impact Study Report' (2019) <https://m-shule.com/research> accessed 14 September 2025.

primary education.¹⁵⁹ By embedding inclusive technologies, AI can facilitate the progressive realization of the right to education under Article 43(1)(f) of the Constitution.

Finally, AI enhances administrative efficiency by streamlining repetitive tasks such as attendance, grading, and timetable management. In higher education, AI systems are already being piloted for admissions, plagiarism detection, and even mental health support.¹⁶⁰ These efficiencies can reduce institutional backlogs and errors, ultimately improving educational governance.

2.2 THE PERILS OF AI IN EDUCATION

Despite these opportunities, the perils of AI adoption are equally significant. One key concern is algorithmic bias. Many AI systems are developed and trained on datasets from Western contexts, which may not reflect Kenya's socio-cultural and linguistic diversity. An AI grading system calibrated to American English, for example, may unfairly penalize Kenyan learners, resulting in discriminatory outcomes in violation of Article 27 of the Constitution.¹⁶¹

A second peril lies in opaque decision-making. AI systems often operate as “black boxes,” making it difficult to trace how specific conclusions such as a student being flagged as “at risk” are reached. This lack of transparency undermines accountability and poses risks to learners' rights, particularly when automated decisions affect progression, placement, or disciplinary measures.

Third, AI raises questions of academic integrity. Generative AI tools such as ChatGPT, Quillbot, and Gemini now allow students to produce entire essays or solve exam questions undetectably. While plagiarism-detection software exists, much AI-generated content evades traditional checks, making it difficult for educators to distinguish between genuine student work and machine-produced material. This undermines the integrity of continuous assessment tests (CATs), national examinations, and ultimately the credibility of academic qualifications.¹⁶²

Finally, the digital divide remains a persistent challenge. AI adoption presupposes access to reliable internet, electricity, and devices. Yet rural learners, urban informal settlements, and low-income households are disproportionately excluded from such access. Even when connectivity is available, disparities in digital literacy and parental support mean that students from privileged backgrounds engage with AI more effectively than their disadvantaged peers. This creates a façade of parity while entrenching deeper inequities, contrary to the constitutional guarantee of equal access to education.¹⁶³

159 Government of Kenya, *Basic Education Statistical Booklet (2018)* Ministry of Education.

160 EdTech Magazine, ‘How AI Supports Students Mental Health In Higher Education’ (2025) <https://edtechmagazine.com/higher/how-ai-supports-student-mental-health-in-higher-education-performance#:~:text=Universities%20could%20potentially%20use%20the,may%20develop%20anxiety%20or%20depression>. accessed 14 September 2025.

161 Constitution of Kenya 2010, art 27.

162 University of Texas at Austin, ‘AI and Academic Integrity Policy’ (2023).

163 African Development Bank, *Digital Transformation Action Plan 2024-2028* https://vcda.afdb.org/en/system/files/report/DTAP_Detailed%20Version.pdf accessed 17 September 2025

2.3 Striking a Balance

The promise and perils of AI in education reveal a dual reality: AI can either advance Kenya's educational objectives or exacerbate existing inequities. The challenge for the legal system is therefore to craft a framework that maximizes the benefits of AI while mitigating its risks. The next section will interrogate how Kenya's current legal framework addresses, or fails to address, these challenges.

LEGAL IMPLICATIONS OF AI IN KENYA'S EDUCATION SECTOR

The increasing integration of AI into Kenya's education system raises profound legal questions that existing statutory frameworks only partially address. While statutes such as the Data Protection Act 2019, the Consumer Protection Act 2012, and the Copyright Act 2001 provide some guidance, they were not designed with autonomous or self-learning systems in mind. The result is a fragmented and underdeveloped legal environment that risks undermining constitutional rights under Articles 27, 43, and 53 of the Constitution of Kenya.

3.1 Data Protection and Privacy

AI systems in education rely on extensive datasets, often including sensitive information such as students' learning patterns, biometric identifiers, and behavioural data. The Data Protection Act 2019 under Section 25 establishes principles of lawfulness, transparency, and purpose limitation and requires institutions processing personal data to guarantee the privacy of data subjects.¹⁶⁴ However, several gaps exist.

First, many AI-powered educational platforms are developed by foreign vendors, with data often processed or stored outside Kenya. This raises concerns under section 48 of the Act, which restricts cross-border data transfers unless adequate safeguards are in place.¹⁶⁵ In practice, compliance is minimal: few schools conduct Data Protection Impact Assessments (DPIAs) or appoint Data Protection Officers, despite these being mandatory for high-risk processing.¹⁶⁶

Comparatively, the EU's General Data Protection Regulation (GDPR), under Article 22, explicitly regulates automated decision-making granting individuals the right not to be subject to decisions based solely on automated processing with significant effects.¹⁶⁷ Kenya's Act lacks such a safeguard, leaving learners vulnerable to opaque algorithmic profiling without effective recourse. Similarly, South Africa's Protection of Personal Information Act (POPIA) under Section 34 requires explicit consent for processing children's data a higher standard than Kenya's general consent provisions.¹⁶⁸

¹⁶⁴ **Data Protection Act 2019, s 25.**

¹⁶⁵ **ibid, s 48.**

¹⁶⁶ **Office of the Data Protection Commissioner, 'Guidance on Data Protection Impact Assessments' (2021).**

¹⁶⁷ **Regulation (EU) 2016/679 (General Data Protection Regulation) art 22.**

¹⁶⁸ **Protection of Personal Information Act 2013 (South Africa) s 34.**

The absence of AI-specific data protection rules in Kenya's education sector therefore risks exposing students to surveillance, profiling, and breaches of informational privacy, contrary to the constitutional right to privacy under Article 31.

3.2 Algorithmic Bias and Discrimination

AI systems trained on datasets from Western contexts may misinterpret the performance or communication of Kenyan learners, resulting in discriminatory outcomes. Such bias conflicts with Article 27 of the Constitution, which guarantees equality and non-discrimination. While there exist very few Kenyan case law exists on AI-driven discrimination, comparative jurisprudence demonstrates the risks.

Comparatively, the EU's draft AI Act classifies educational AI as "high-risk," requiring providers to ensure datasets are sufficiently representative to avoid discriminatory outcomes.¹⁶⁹ The U.S., though lacking federal AI regulation, has seen litigation around algorithmic bias in employment¹⁷⁰, *Loomis v Wisconsin* 881 N.W.2d 749 (Wis 2016) which, though not in education, explains judicial discomfort with opaque algorithms in rights-sensitive contexts.

Kenya's lack of statutory or judicial guidance leaves uncertainty as to how discrimination claims arising from AI in education would be adjudicated. This exposes learners to risks of exclusion or unfair assessment without clear remedies.

3.3 Accountability and Liability

Another pressing issue is determining liability when AI systems malfunction or produce harmful outcomes. Suppose an AI platform wrongly categorises a student as underperforming, leading to expulsion or psychological harm. Who then bears legal responsibility? Is it the school, the vendor, or the State?

The Consumer Protection Act 2012, Section 2, provides remedies for defective goods and services, including digital products (s 2). However, its provisions are inadequate for AI, which often evolves autonomously and operates beyond the direct control of vendors. The Act presumes a clear producer-consumer relationship, but AI complicates this chain of accountability.

Comparatively, the EU's draft AI Liability Directive proposes strict liability for high-risk AI providers, shifting the burden away from end-users.¹⁷¹ Kenya has no equivalent. In South Africa, the common law of delict may provide remedies for harm caused by negligent AI deployment, but Kenyan courts have yet to confront such questions.

169 EU AI Act (n4)

170 *Loomis v. Wisconsin*, 881 N.W.2d 749 (Wis. 2016)

171 Proposal for a Directive on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence COM (2022) 496 final.

Without clear allocation of liability, victims of AI-induced harm in education face uncertain prospects of redress. This undermines constitutional protections of human dignity and access to justice under Article 28 and 48 respectively.

3.4 Intellectual Property Rights

AI's ability to generate essays, lesson plans, and even textbooks raises questions of ownership. The Copyright Act 2001 protects works of "authors," defined as natural persons (s 2).¹⁷² It does not recognise AI as a legal author. This creates ambiguity where a teacher uses an AI tool to generate materials: does authorship rest with the teacher, the AI developer, or is the content unprotected?

Globally, jurisdictions diverge. The UK Copyright, Designs and Patents Act 1988 attributes authorship of computer-generated works to the "person by whom the arrangements necessary for the creation of the work are undertaken."¹⁷³ In the U.S., the Copyright Office has rejected copyright claims for AI-generated works lacking human authorship.¹⁷⁴ Kenya has addressed this in the case of ¹⁷⁵*Aryeh Movement Limited v Cynthia Beldina Akoth*, however, as reiterated, the Copyright Act does not provide for such leaving uncertainty for educators and institutions relying on AI-produced content.

This vacuum may discourage innovation or, conversely, encourage misuse where unprotected works are freely copied without attribution. The issue is particularly pressing in academia, where intellectual labour and originality are highly valued.

3.5 The Right to Education

Finally, the deployment of AI in education must be examined against the constitutional guarantee of the right to education under Article 43(1)(f) and the special protections for children under Article 53. While AI can enhance access and inclusivity, its uneven rollout risks excluding disadvantaged groups. Learners in rural areas without reliable internet or electricity may be disproportionately left behind, amounting to indirect discrimination.

Comparatively, UNESCO has emphasised that AI in education must align with the principle of "inclusive, equitable, and quality education" under Sustainable Development Goal 4.¹⁷⁶ The African Charter on the Rights and Welfare of the Child, Article 11, further obligates States to ensure education policies are directed toward the equal opportunity of every child.

Kenya's legal framework, however, lacks mechanisms to ensure that AI deployment in education aligns with these obligations. Without deliberate safeguards, the adoption of AI may entrench rather than reduce structural inequities in education.

172 **Copyright Act 2001 (Kenya), s 2.**

173 **Copyright, Designs and Patents Act 1988 (UK), s 9(3).**

174 **US Copyright Office, Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence (2023).**

175 ***Aryeh Movement Limited v Cynthia Beldina Akoth***

176 **UNESCO (n 5)**

ETHICAL CHALLENGES OF AI IN EDUCATION

The deployment of Artificial Intelligence (AI) in education does not merely raise legal questions but also engages fundamental ethical dilemmas that strike at the heart of Kenya's constitutional values and international human rights obligations. The Constitution of Kenya, 2010, emphasises human dignity, equality and non-discrimination, the right to education, and the best interests of the child. Similarly, Kenya is bound by international treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), which obliges States to ensure progressively accessible and equitable education, Article 13, and the Convention on the Rights of the Child (CRC), which protects children from harmful practices, Article 28. Still, the ethical consequences of AI adoption in education remain underexplored in Kenyan discourse.

4.1 Teacher Autonomy and Professional Respect

A central ethical concern is the gradual erosion of teacher autonomy. As AI platforms assume greater roles in lesson planning, grading, and feedback, educators risk being reduced to facilitators of machine-driven content rather than professionals exercising judgment and creativity. This trend undermines the constitutional value of human dignity and contradicts the ethical principle of professional respect.

Educational theorists such as Paulo Freire warned against the “banking model” of education, where learners are treated as passive recipients of knowledge.¹⁷⁷ AI risks reviving this model in digital form, privileging standardised machine-driven processes over dialogical and context-sensitive teaching. In Kenya, teachers already struggle with large class sizes and rigid examination systems, surrendering more authority to AI could further disempower them and weaken the teacher-student relationship.

4.2 Cultural Values and Pedagogical Integrity

Many AI systems are designed on Eurocentric assumptions of individualism, standardisation, and competitiveness. In contrast, Kenyan and African pedagogical traditions often emphasise communal learning, oral traditions, and social responsibility. Importing unmodified AI systems therefore risks eroding these values, raising questions about cultural self-determination.

The Constitution underscores national values such as inclusivity, equity, and cultural integrity. Introducing AI tools that redefine “success” and “intelligence” in foreign terms may subtly displace local epistemologies, creating cultural misalignment. From an ethical standpoint, AI deployment should be “culturally localised,” ensuring that innovation aligns with Kenya's values and educational philosophy.

177 Ibid 26

4.3 Academic Integrity and the Challenge of Generative AI

The rise of generative AI tools such as ChatGPT, Gemini, and Quillbot introduces new dimensions of academic dishonesty. Learners may use these systems to generate essays, answer examinations, or paraphrase material in ways undetectable by conventional plagiarism tools. While students may rationalise this as “academic assistance,” it undermines the ethical foundations of education: intellectual honesty and personal effort.

This challenge is particularly evident in Kenya, where national examinations such as the KCPE and KCSE determine access to secondary and higher education. If left unchecked, AI-assisted cheating could erode public trust in academic qualifications and perpetuate inequality, as resourceful learners with access to technology gain unfair advantages. Ethically, this contravenes the constitutional principle of equality and the CRC’s emphasis on fair and merit-based access to education.

4.4 Emotional Privacy and Psychological Development

AI tools are increasingly capable of monitoring learners’ facial expressions, tones of voice, and even biometric signals to infer engagement or emotional states. While marketed as supportive, such technologies raise ethical questions of surveillance and autonomy. They risk pathologising learners who express themselves differently due to cultural or neurodiverse factors.

From a constitutional perspective, such surveillance implicates the right to dignity and privacy. Internationally, the UN Committee on the Rights of the Child has cautioned against technologies that intrude into children’s emotional lives without adequate safeguards.¹⁷⁸ Ethically, education should nurture self-confidence and growth, not just confine students within machine-generated judgments of their psychological worth.

4.5 The Digital Divide and Hidden Inequities

The adoption of AI in education risks deepening existing socio-economic inequalities. Even where access is formally available, the quality of engagement differs, for example a student using AI in a well-connected environment in Nairobi may benefit far more than a peer in Turkana with unreliable electricity and minimal digital literacy support. This creates a veneer of equality while entrenching inequities beneath the surface.

Such disparities violate the principle of substantive equality under Article 27 and run contrary to Article 43(1)(f), which obliges the State to progressively realise the right to education for all. Internationally, the African Charter on the Rights and Welfare of the Child (art 11) underscores that States must ensure equal educational opportunity. Unless Kenya addresses the hidden inequities of AI adoption, technology may reproduce patterns of exclusion rather than dismantle them.

178 UN Committee on the Rights of the Child, *General Comment No 25 on Children’s Rights in Relation to the Digital Environment (CRC/C/GC/25, 2021)*.

4.6 Balancing Innovation with Ethics

The ethical dilemmas posed by AI in education are not arguments for rejecting innovation but for guiding it responsibly. Constitutional values and international human rights norms provide a framework for this balance: human dignity must not be compromised, equality must be upheld, and education must remain a space for holistic development rather than mechanical optimisation.

Kenya's challenge, therefore, is to embed ethical reflection into law and policy, ensuring that AI serves as a tool for empowerment rather than exploitation.

COMPARATIVE AND POLICY PERSPECTIVES

The legal and ethical dilemmas posed by Artificial Intelligence (AI) in education are not unique to Kenya. Across the globe, policymakers are grappling with similar questions of data protection, bias, accountability, and academic integrity. Although domestic jurisprudence on AI in education remains absent, comparative and policy frameworks provide valuable lessons.

5.1 UNESCO Ethical Guidelines on AI

In 2021, UNESCO adopted the Recommendation on the Ethics of Artificial Intelligence, the first global standard-setting instrument in this field.¹⁷⁹ The guidelines emphasise transparency, accountability, fairness, and human oversight as non-negotiable principles in AI deployment. Within education, UNESCO urges States to ensure that AI fosters inclusion, respects cultural diversity, and enhances human agency rather than replacing it.

For Kenya, UNESCO's framework highlights the importance of embedding human-centred values into AI governance. However, its non-binding character means that incorporation into domestic law is voluntary. Without legislative uptake, Kenya risks rhetorical alignment without substantive protections.

5.2 African Union AI Strategy

The African Union's Artificial Intelligence Strategy for Africa (2023) provides a continental vision for responsible AI adoption.¹⁸⁰ It stresses the principles of equity, transparency, and alignment with human rights. Notably, the strategy encourages indigenous innovation to avoid overreliance on imported technologies that may embed foreign biases.

While laudable, the AU framework remains aspirational and lacks binding force. For Kenya, the key lesson is the need to localise AI solutions: educational technologies should be linguistically and culturally relevant, reflecting Kenya's diversity rather than replicating Eurocentric or Americanised models.

179 UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (2021).

180 AU AI Strategy (n 6)

5.3 European Union AI Act

The European Union has taken the most ambitious step toward regulating AI through its proposed Artificial Intelligence Act.¹⁸¹ The Act adopts a risk-based approach, classifying AI systems into unacceptable risk, high risk, and minimal risk categories. Importantly, AI used in education for example in grading or student profiling, is designated as “high risk.” Providers of such systems must meet stringent requirements, including dataset quality, transparency, and human oversight.

This model offers Kenya valuable insights. Classifying educational AI as “high risk” would compel providers to justify their systems, ensure bias mitigation, and subject their platforms to independent audits. However, Kenya must adapt this model to its own context: unlike the EU, Kenya lacks extensive regulatory capacity and may need phased or scaled-down implementation.

5.4 South Africa's POPIA

South Africa's Protection of Personal Information Act 2013 (POPIA) offers one of the most relevant African comparators. Section 34 requires explicit consent for processing children's personal data, a stronger safeguard than Kenya's general consent provisions under the Data Protection Act.¹⁸² POPIA also mandates responsible parties to implement adequate security measures and conduct risk assessments before processing personal data.

For Kenya, POPIA illustrates how African States can tailor data protection frameworks to children's vulnerabilities in education. A similar amendment to Kenya's Data Protection Act could strengthen protections for learners exposed to AI-driven surveillance and profiling.

5.5 United States FERPA

In the United States, the Family Educational Rights and Privacy Act (FERPA) regulates access to student educational records.¹⁸³ While enacted long before AI, FERPA remains relevant because it restricts unauthorised disclosure of student data by schools and universities. Some U.S. states, such as California, have supplemented FERPA with AI- or EdTech-specific guidelines to ensure data is not misused by third-party vendors.

Kenya can draw two key lessons from FERPA. First, sector-specific legislation on education data may be necessary to supplement the Data Protection Act. Second, parental and student consent should be clearly required before schools adopt third-party AI systems that process sensitive data.

181 EU AI Act (n 4)

182 POPIA (N 19)

183 Family Educational Rights and Privacy Act 1974 (US), 20 USC § 1232g.

RECOMMENDATIONS FOR KENYA’S LEGAL AND POLICY FRAMEWORK

The absence of a dedicated legal framework for Artificial Intelligence (AI) in education leaves Kenya vulnerable to risks of privacy breaches, discrimination, lack of accountability, and inequitable access. While existing statutes provide partial safeguards, they are insufficient to address the unique challenges of autonomous and opaque decision-making systems. Drawing from constitutional imperatives and comparative insights, several reforms are necessary to ensure that AI advances, rather than undermines, educational justice.

6.1 Adopt a Risk-Based Regulatory Model

Kenya should adopt a regulatory framework that classifies AI systems according to their risk levels, as exemplified by the European Union’s AI Act.¹⁸⁴ Educational AI systems particularly those used in grading, student profiling, or admissions, should be categorised as “high risk.” Such systems must undergo independent audits, demonstrate dataset representativeness, and provide transparency on their decision-making processes.

This would align with constitutional values of equality and non-discrimination (art 27), ensuring that algorithmic tools do not entrench bias or inequity.

6.2 Strengthen Data Protection in Education

The Data Protection Act 2019 should be amended to explicitly regulate automated decision-making and to establish heightened safeguards for children’s data, following the example of South Africa’s POPIA.¹⁸⁵ Schools should be required to conduct Data Protection Impact Assessments (DPIAs) before adopting AI systems, and to obtain clear, informed consent from parents and learners.

The Office of the Data Protection Commissioner should issue sector-specific guidance for educational institutions, recognising the heightened vulnerabilities of minors in digital environments.

6.3 Clarify Accountability and Liability

Kenya’s legal framework should clearly allocate liability for harms caused by AI in education. At present, victims of algorithmic mislabelling, discrimination, or exclusion face uncertain avenues for redress. Drawing from the EU’s proposed AI Liability Directive,¹⁸⁶ responsibility should rest primarily with AI providers and vendors, while schools should be required to exercise due diligence in procurement.

This approach would operationalise the constitutional guarantee of access to justice under Article 48 by providing clear remedies for students harmed by AI.

184 EU AI Act (n 4)

185 POPIA (n 19)

186 (n 22)

6.4 Address Intellectual Property Gaps

The Copyright Act 2001 should be amended to clarify ownership of AI-generated works in educational settings. A workable model may be the UK approach, which attributes authorship of computer-generated works to the person making the necessary arrangements.¹⁸⁷ This would provide certainty for teachers and institutions using AI to generate learning materials, while discouraging misappropriation.

6.5 Localise AI Solutions

Kenya should prioritise the development and adoption of AI systems tailored to its linguistic and cultural context. This would mitigate the risks of importing Eurocentric epistemologies that undermine local pedagogical traditions. Localisation aligns with national values under Article 10 of the Constitution and the African Union's emphasis on indigenous innovation in its AI Strategy for Africa (2023).¹⁸⁸

The State should incentivise local EdTech innovators through grants, partnerships, and open data initiatives, ensuring that Kenyan learners benefit from context-appropriate technologies.

6.6 Build Capacity Among Educators

The Teachers Service Commission (TSC) and the Kenya Institute of Curriculum Development (KICD) should incorporate AI literacy, digital rights, and ethical training into teacher education and professional development programmes. Without adequate training, teachers may be sidelined or disempowered by AI systems, undermining both their autonomy and effectiveness.

Embedding AI ethics into teacher training would uphold the constitutional principle of human dignity (art 28) and ensure that educators remain central to the learning process.

6.7 Ensure Equity in Access

Finally, the State must ensure that AI adoption does not widen the digital divide. Public investment in infrastructure that is electricity, internet connectivity, and devices remain essential to prevent exclusion of rural and marginalised learners. Policies should also address the hidden inequities of engagement, recognising that even when devices are available, socio-economic disparities affect the quality of use.

This then aligns with the State's obligation to progressively realise the right to education under Article 43(1)(f) of the Constitution, as well as international commitments under the ICESCR and SDG 4.

187 Copyright, Designs and Patents Act 1988 (UK) (n 24) s 9(3).

188 AU AI Strategy (n6)

CONCLUSION

Artificial Intelligence in education there is at the intersection of promise and risk. For Kenya, the question is not whether AI will enter classrooms, but whether its adoption will deepen inequalities or promote justice. The current legal framework, while significant, was never designed with autonomous technologies in mind, leaving critical gaps in privacy, accountability, intellectual property, and equality.

This commentary has argued that Kenya must evolve its legal framework toward a principled, risk-based approach that centres constitutional values of dignity, equality, and the right to education. Lessons from the EU, South Africa, and global policy frameworks show that regulation need not stifle innovation but can instead guide it responsibly. What remains is for Kenya to act deliberately through legislation, policy, and investment so as to ensure that AI in education becomes a tool for inclusion rather than exclusion

Ultimately, education is not simply about efficiency or automation but trickles down to nurturing human potential. AI can assist in that mission, but it cannot replace the values at the heart of learning. A future where AI strengthens, rather than undermines, Kenya's educational and constitutional commitments is possible, but it will fully depend on choices made today.

**USE OF ARTIFICIAL INTELLIGENCE (AI) IN EDUCATION:
LEGAL AND ETHICAL IMPLICATIONS
THOMAS OGILA**



ABSTRACT

Artificial Intelligence (AI), once largely a concept of science fiction, is now a pervasive force, rapidly transforming nearly every sector of society, and the realm of education stands as no exception to this profound shift.¹⁸⁹ The integration of AI into educational paradigms, manifesting in forms from sophisticated AI-powered adaptive tutors and personalized learning platforms that cater to individual student paces, to intelligent content generation tools and automated administrative processes, has been widely lauded as ushering in a veritable revolution in teaching and learning methodologies.¹⁹⁰ This technological influx promises unprecedented efficiencies and tailored educational experiences. However, concurrently with this significant promise, the pervasive adoption of AI also foregrounds a series of intricate and often profound legal and ethical concerns.¹⁹¹ These challenges are multifaceted, primarily revolving around critical issues such as the robust protection of sensitive student data, the potential for insidious algorithmic bias to perpetuate or exacerbate inequalities, the safeguarding of academic integrity amidst new forms of digital assistance, ensuring equitable access to technology, preserving student autonomy, and addressing the considerable gaps in existing regulatory frameworks.¹⁹² For jurisdictions like Kenya, which are currently experiencing an accelerated pace of digital transformation and grappling with unique socio-economic contexts, the conscientious and sustainable integration of AI into its education system necessitates urgent attention and must be meticulously guided by comprehensive legal frameworks and robust ethical safeguards.¹⁹³

This commentary delves into a detailed exploration of both the compelling benefits and the formidable challenges presented by the integration of AI in education. It critically investigates the multifaceted legal and ethical implications arising from this technological shift. Ultimately, it concludes with a reasoned and comprehensive opinion on the responsible, sustainable, and rights-respecting use of AI within academic institutions, particularly emphasizing the context of evolving digital societies.

189 UNESCO, 'AI and Education: Guidance for Policy-makers' (2021).

190 Carnegie Learning, 'How AI Is Revolutionizing Education' (accessed 10 July 2025).

191 Ruth N Mutuku, 'Ethical and Legal Issues in AI Deployment in Kenyan Schools' (2023) 5(1) *Journal of African Law and Ethics

192 European Commission, 'Proposal for a Regulation on Artificial Intelligence' COM (2021) 206 final.

193 Ministry of ICT, Innovation and Youth Affairs, 'National Digital Master Plan 2022–2032'.

BENEFITS OF AI IN EDUCATION

1. Personalized Learning

At its core, AI's capacity for personalized learning revolutionizes traditional one-size-fits-all instruction. By leveraging sophisticated machine learning algorithms, AI platforms can meticulously analyse vast quantities of individual student data – including learning styles, historical performance, areas of difficulty, and engagement patterns.¹⁹⁴ This granular analysis allows AI to dynamically adapt instructional content, difficulty levels, and pacing to each student's unique needs in real-time. Students are no longer constrained by rigid curriculum timelines; instead, they can progress at their optimal pace, receiving instant, targeted feedback on their strengths and weaknesses.¹⁹⁵ This individualized approach not only significantly enhances comprehension and knowledge retention but also fosters a more engaging and less frustrating learning experience, ultimately leading to demonstrably improved academic outcomes.¹⁹⁶ Leading adaptive learning platforms, such as those offered by Carnegie Learning and Century Tech, exemplify this transformative potential, consistently reporting enhanced student engagement and superior academic performance.¹⁹⁷

2. Enhancing Accessibility and Inclusion

AI technologies serve as powerful catalysts for enhancing accessibility and fostering greater inclusion within educational settings.¹⁹⁸ Beyond supporting students with recognized disabilities, AI tools can break down barriers for diverse learners. For instance, advanced speech-to-text functionalities enable students with motor impairments or dyslexia to articulate thoughts effortlessly, while predictive text and intelligent grammar checkers aid those with learning differences.¹⁹⁹ Screen readers and AI-driven image descriptions provide crucial access for students with visual impairments. Furthermore, AI-powered translation tools can bridge language barriers for non-native speakers, ensuring equitable access to educational content.²⁰⁰ Microsoft's Immersive Reader, for example, has garnered significant acclaim for demonstrably improving literacy rates among students with dyslexia and other reading difficulties by simplifying text and enhancing focus.²⁰¹ Such innovations are pivotal in creating genuinely equitable and inclusive learning environments where every student, regardless of their challenges, can fully participate and succeed.²⁰²

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- 194 Wayne Holmes et al., **Artificial Intelligence in Education: Promises and Implications for Teaching and Learning** (Centre for Curriculum Redesign, 2019).
195 Carnegie Learning (n 2).
196 Holmes et al. (n 6).
197 Ibid.
198 Microsoft, 'Education Tools with Immersive Reader' (accessed 10 July 2025).
199 UNESCO (n 1).
200 Microsoft (n 10).
201 Ibid.
202 Ben Williamson, **Big Data in Education: The Digital Future of Learning, Policy and Practice** (Sage, 2017).

3. Automating Administrative Tasks

One of AI's most immediate and tangible benefits lies in its capacity to significantly alleviate the administrative burden that often overwhelms educators, thereby freeing up valuable time for core pedagogical activities.²⁰³ AI-powered systems can automate a myriad of routine, time-consuming tasks, including the rapid and consistent grading of objective assignments, efficient timetabling and scheduling of classes, accurate attendance tracking, and streamlined record-keeping.²⁰⁴ Beyond these, intelligent AI chatbots can serve as 24/7 virtual assistants, providing instant answers to frequently asked student queries about assignments, deadlines, or institutional policies, reducing the need for direct educator intervention.²⁰⁵ This automation not only enhances operational efficiency within educational institutions but critically allows educators to reallocate their energy and focus from mundane administrative chores to higher-value activities such as designing engaging lessons, providing individualized student support, critical thinking development, and fostering deeper student-teacher relationships.²⁰⁶

4. Improved Research and Data Analytics

AI's analytical prowess offers unprecedented opportunities for improving educational research, informing policy-making, and optimizing institutional strategies.²⁰⁷ By rapidly processing and interpreting vast datasets, AI tools can identify complex patterns and correlations that would be imperceptible to human analysis.²⁰⁸ This capability facilitates deep insights into student learning trends, curriculum effectiveness, teaching methodologies, and resource allocation.²⁰⁹ Crucially, AI-driven predictive analytics can identify students at risk of academic failure or dropping out with remarkable accuracy, based on early warning indicators like attendance, performance dips, or engagement levels.²¹⁰ Such proactive identification enables timely, targeted interventions by educators and counsellors, significantly improving retention rates and overall student outcomes.²¹¹ Furthermore, AI can aid in the development of evidence-based educational policies, ensuring that decisions are rooted in robust data rather than mere intuition, thus enhancing the overall efficacy and equity of the education system.²¹²

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- 203 House of Lords Select Committee on Artificial Intelligence, 'AI in the UK: Ready, Willing and Able?' (2018).
204 Ibid
205 Williamson (n 14).
206 UNESCO (n 1).
207 Karen Hao, 'AI Is Biased. Here's How Scientists Are Trying to Fix It' (MIT Technology Review, 2019).
208 Timnit Gebru et al., 'Datasheets for Datasets (2021) 3(2) *Communications of the ACM*.
209 Hao (n 19).
210 Gebru et al. (n 20).
211 Ibid
212 UNESCO (n 1).

LEGAL AND ETHICAL CHALLENGES

1. Data Privacy and Protection

One of the most profound and critical legal issues arising from the widespread adoption of AI in education is the imperative of robust data privacy and protection.²¹³ AI-powered educational systems, by their very design, necessitate the collection and processing of vast volumes of highly sensitive personal data. This includes not only basic personal identifiers but also granular academic histories, behavioural logs, interaction patterns within platforms, biometric data (e.g., for proctoring or attendance), and even emotional responses inferred through AI.²¹⁴ The aggregation of such data creates a rich profile of each student, making it highly attractive for misuse, commercial exploitation, or vulnerability to cyber-attacks.²¹⁵ In Kenya, the Data Protection Act 2019 provides a foundational legal framework, aligning with key principles derived from the European Union's General Data Protection Regulation (GDPR), such as lawful processing, strict purpose limitation, and data minimization.²¹⁶ However, a significant practical challenge persists: many educational institutions, particularly in resource-constrained environments, frequently lack the requisite technical infrastructure, institutional policies, or human capacity to effectively implement these critical protections.²¹⁷ Furthermore, mechanisms for obtaining truly informed, explicit, and freely given consent from students (or their guardians) for the collection and processing of their data are often perfunctory, ambiguous, or entirely absent, leading to significant legal exposure and potential violations of fundamental rights.²¹⁸ The Kenyan High Court's ruling in *Okoiti v Director of Public Prosecutions* powerfully underscored the non-negotiable importance of informed consent as a cornerstone of legitimate personal data processing, a principle that must be rigorously applied in the educational AI context.²¹⁹

2. Algorithmic Bias and Discrimination

Algorithmic bias represents a deeply troubling ethical and potentially legal challenge, as AI systems inherently reflect and often amplify the biases present in the datasets upon which they are trained.²²⁰ If historical educational data contains systemic biases – be it due to race, gender, socio-economic status, or learning disabilities – the AI system will learn and perpetuate these discriminatory patterns.²²¹ For instance, an AI designed to assess student aptitude might unknowingly disadvantage students from certain demographic groups if its training data predominantly features examples from a privileged background.²²² This is particularly perilous in education, where AI could significantly influence critical decisions such as grading, eligibility for advanced courses, access to scholarship opportunities, or even identification for intervention

213 **Data Protection Act (No. 24 of 2019).**

214 **Julia Angwin et al., 'Machine Bias' (ProPublica, 2016).**

215 **Okoiti v Director of Public Prosecutions [2021] eKLR**

216 **Data Protection Act (n 25).**

217 **Mutuku (n 3).**

218 **Angwin et al. (n 26).**

219 **Okoiti (n 27).**

220 **Timnit Gebru & Joy Buolamwini, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' (2018) 81.**

221 **Gebru et al. (n 20).**

222 **Angwin et al. (n 26).**

programs.²²³ The stark illustration from the UK, where an AI system used to predict A-Level results during the COVID-19 pandemic disproportionately downgraded students from disadvantaged backgrounds, serves as a potent warning.²²⁴ This incident highlighted how seemingly neutral algorithms can exacerbate existing societal inequalities.²²⁵ In the Kenyan context, the absence of specific, enforceable laws mandating algorithmic accountability, transparency, or regular audits creates a precarious situation.²²⁶ Without clear legislative requirements for explainability and ongoing monitoring, it becomes exceedingly difficult for institutions to detect, mitigate, or rectify embedded biases, thereby jeopardizing fairness and equity in educational outcomes.²²⁷

3. Academic Integrity and Plagiarism

The advent of sophisticated generative AI tools, such as ChatGPT and similar large language models, has unleashed unprecedented challenges to the bedrock principle of academic integrity.²²⁸ These powerful tools can produce highly coherent, contextually relevant, and even stylistically varied essays, compose research papers, solve complex mathematical problems, and mimic original student work with remarkable fidelity.²²⁹ While these tools can undeniably serve as powerful aids for brainstorming or refining initial drafts, their misuse fundamentally facilitates plagiarism and various forms of cheating on an unprecedented scale, making detection exceedingly difficult with traditional methods.²³⁰ The ethical dilemma lies in distinguishing between legitimate AI assistance for learning and outright academic dishonesty, which undermines the very purpose of education – the development of critical thinking, analytical skills, and independent thought.²³¹ The current legal framework in Kenya, like that of many nations, remains largely silent and unprepared for the nuances of generative AI's permissible use in educational contexts.²³² This regulatory vacuum renders the enforcement of existing academic policies challenging and inconsistent, potentially eroding trust in assessment processes and the long-term value of academic qualifications.²³³

4. Surveillance and Autonomy

The deployment of AI tools for monitoring student activity, such as facial recognition for automated class attendance, keystroke logging, or remote proctoring software during online examinations, introduces profound ethical dilemmas concerning privacy and student autonomy.²³⁴ While ostensibly implemented to enhance security, ensure accountability, or prevent cheating, these pervasive surveillance technologies can create a highly intrusive learning environment.²³⁵ Constant monitoring can induce undue stress, foster a sense of distrust, and potentially stifle genuine intellectual exploration and expression, leading to a 'chilling effect' on

223 **Gebru & Buolamwini (n 32).**
224 **House of Lords (n 15).**
225 **Ibid.**
226 **National Digital Master Plan (n 5).**
227 **Mutuku (n 3).**
228 **Sarah Elaine Eaton, *Plagiarism in Higher Education: Tackling Tough Topics in Academic Integrity* (ABC-CLIO, 2021).**
229 **Eaton (n 40).**
230 **Tracey Bretag (ed), *Handbook of Academic Integrity* (Springer, 2016).**
231 **Ibid.**
232 **Data Protection Act (n 25).**
233 **Eaton (n 40).**
234 **Shoshana Zuboff, *The Age of Surveillance Capitalism* (PublicAffairs, 2019).**
235 **Zuboff (n 46).**

student engagement.²³⁶ Article 31 of the Constitution of Kenya unequivocally guarantees the right to privacy, encompassing protection from unwarranted searches and the disclosure of personal information, which implicitly extends to protection from excessive digital surveillance.²³⁷ The ethical concern here extends beyond mere data collection to the fundamental right of individuals to control their own digital footprint and make independent choices without disproportionate oversight.²³⁸ Excessive monitoring, especially when implemented without clear justification, transparent policies, or meaningful informed consent from students (or guardians), represents a direct infringement on student autonomy and their inherent right to a private sphere, even within an educational setting.²³⁹

5. Regulatory and Policy Gaps

A significant overarching challenge lies in the profound regulatory and policy vacuum regarding the specific application of AI in education.²⁴⁰ Globally, there is no comprehensive or universally adopted legal framework dedicated solely to governing the nuances of AI use within learning environments.²⁴¹ While the European Union has made pioneering strides with its proposed risk-based Artificial Intelligence Act, which classifies AI uses and establishes robust safeguards based on perceived risk levels, many nations, including Kenya, lag significantly.²⁴² Kenya's National Digital Master Plan 2022–2032 laudably identifies AI as a crucial driver for national development; however, it conspicuously lacks a detailed, actionable framework or specific guidelines for its ethical and legal deployment within the education sector.²⁴³ This absence of clear, centralized guidance leaves individual educational institutions to formulate their own policies, often resulting in fragmented, inconsistent, and sometimes rights-violating practices.²⁴⁴ Such a patchwork approach creates legal uncertainty, potential for inequity, and leaves students and educators vulnerable to the unregulated deployment of powerful AI technologies.²⁴⁵

OPINION

My reasoned opinion holds that while Artificial Intelligence undeniably represents a monumental stride forward with the potential to democratize access to quality education, significantly support inclusion for diverse learners, and profoundly enhance learning outcomes, its integration must be approached with profound caution and strategic foresight.²⁴⁶ Without stringent regulation and ethical deliberation, the very promise of AI could inadvertently widen existing inequalities, systematically violate fundamental privacy rights, and ultimately compromise the foundational integrity and humanistic essence of education systems.²⁴⁷ Therefore, Kenya must proactively adopt a comprehensive, rights-based approach to AI in education, anchored by several critical pillars:

- 236 **Constitution of Kenya, 2010.**
- 237 **Art 31, Constitution of Kenya.**
- 238 **Zuboff (n 46).**
- 239 **Okoti* (n 27).**
- 240 **European Commission (n 4).**
- 241 **Ibid.**
- 242 **Artificial Intelligence Act (Proposed EU Regulation, 2021).**
- 243 **National Digital Master Plan (n 5).**
- 244 **Mutuku (n 3).**
- 245 **European Commission (n 4).**
- 246 **UNESCO (n 1).**
- 247 **Cathy O'Neil, *Weapons of Math Destruction* (Penguin, 2016).**

- **Enacting Specific Regulations:** Developing a tailored legal framework that explicitly governs the design, deployment, and oversight of AI tools in educational settings, classifying their uses based on risk and mandating accountability.²⁴⁸
- **Strengthening Data Protection and Consent Laws:** Fortifying existing data protection laws with specific provisions for student data, ensuring robust mechanisms for informed, explicit, and revocable consent are in place for all AI applications involving personal information.²⁴⁹
- **Auditing AI Tools for Fairness and Bias:** Implementing mandatory, independent audits of AI algorithms and their training datasets to detect and mitigate biases, ensuring equitable outcomes for all students regardless of background.²⁵⁰
- **Training Educators and Students in Ethical AI Usage:** Investing in comprehensive capacity building programs for teachers, administrators, and students, fostering digital literacy, critical thinking about AI outputs, and an understanding of ethical AI principles and responsible use.²⁵¹
- **Encouraging Robust Public Discourse:** Facilitating broad, inclusive public conversations involving parents, students, educators, policymakers, and technology developers to shape a shared vision for AI's role in education that aligns with societal values.²⁵²

Crucially, it is paramount that AI is conceptualized and deployed as a powerful *augmentative* tool, designed to enhance the capabilities of human educators, rather than as a substitute for them.²⁵³ The irreplaceable human connection, the nuanced empathy, the contextual understanding, and the inspiration fostered by dedicated teachers remain the very heart of meaningful education, fostering critical thinking, creativity, and social-emotional development that no algorithm can replicate.²⁵⁴

CONCLUSION

In conclusion, Artificial Intelligence undeniably emerges as a profoundly transformative tool poised to reshape the landscape of education globally.²⁵⁵ However, its immense potential can only be fully and safely realized if its integration and application are rigorously governed by robust legal frameworks and unwavering ethical standards.²⁵⁶ Kenya, a nation actively pursuing digital advancement, finds itself at a pivotal juncture.²⁵⁷ By proactively developing a comprehensive and sound regulatory framework tailored to the unique challenges of AI in education, coupled with dedicated efforts toward capacity building among all stakeholders, Kenya can strategically harness AI's innovative power while simultaneously safeguarding the fundamental rights and well-being of its students.²⁵⁸ A deliberate, inclusive, and deeply ethical deployment of AI technology will be instrumental in ensuring that it serves as a powerful force for upliftment and enhancement, rather than becoming a source of systemic undermining, ultimately fostering a more equitable, personalized, and effective educational future for all.²⁵⁹

248 **Artificial Intelligence Act (n 54).**

249 **Data Protection Act (n 25).**

250 **Gebru & Buolamwini (n 32).**

251 **Holmes et al. (n 6).**

252 **Mutuku (n 3).**

253 **UNESCO (n 1).**

254 **O'Neil (n 59).**

255 **Holmes et al. (n 6).**

256 **UNESCO (n 1).**

257 **National Digital Master Plan (n 5).**

258 **Mutuku (n 3).**

259 **UNESCO (n 1).**

EVALUATING THE LEGAL AND POLICY FRAMEWORK GOVERNING UNIVERSITY FUNDING IN KENYA- IAN WAFULA



Abstract

This commentary analyses the legal and policy framework governing university funding in Kenya, with a focus on the Constitution of Kenya 2010 and international treaties, like the International Covenant on Economic, Social and Cultural Rights (ICESCR) which guarantee accessible and quality higher education. It investigates the evolution of funding models, from full government sponsorship for a limited number of students shortly after attaining independence, to the Differentiated Unit Cost (DUC) model, and eventually, the New Higher Education Funding Model (NHEFM) which became active as of 2023, and is currently the used university funding model in Kenya. The analysis examines the justifications of having an effective university funding model, while relying on the Constitution of Kenya 2010 (articles 10 and 55), statutory law (the Universities Act, 2012), and international provisions (ICESCR and UN Sustainable Development Goals). Despite a robust legal framework, implementation challenges in the university funding sector in Kenya persist across all the funding models, particularly with the NHEFM. This student-centric model faces issues with inadequate resources and miscategorisation of students into funding bands, undermining the accessibility to higher education for students in the country. The issue of insufficient funding, as noted by stakeholders, is consistent with the DUC model's shortcomings, which eventually led to its downfall. This paper suggests various reforms, with the main one being enhanced resource accountability mechanisms due to rampant corruption and mismanagement of resources in Kenya. Only after addressing these implementation gaps, can Kenya dream of achieving a sustainable, accessible and equitable university funding model, in line with its Vision 2030 development goals.

Introduction

Article 13 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of every person to education²⁶⁰ also provides for the access to quality higher education, which are provided for by various institutions in Kenya, including universities. From this, it is apparent that access to quality university education is of massive importance in Kenya. The high costs of university education coupled with factors like a large population, weak family financial positions and high costs of education in private universities have driven the Kenyan government to look for efficient ways of funding universities.

In Kenya, university funding models can be traced from back in the early post-independence era since the colonial government did not prioritize educating Kenyans at the time. In 1963, a federal university, called the University of East Africa was established.²⁶¹ Students who qualified to attend this university were fully sponsored by the government. In 1970, as a result of the dissolution of the University of East Africa, the Kenyan government formed Kenya's first national university, University of Nairobi. The government offered full sponsorship where students received free tuition, accommodation, meals, and a student loan upon establishment of the Higher Education Loans Board. Although university education was only available to a small class of citizens, this funding model was largely unsustainable.

For the years that followed, there were massive changes in university funding and universities in general, but the most significant change occurred in the 2017/2018 academic year, where the government introduced the Differentiated Unit Cost (DUC) funding model, which allocates resources based on students' enrolment figures and their preferred courses rather than providing uniform funding.²⁶² The funding model faced a lot of criticisms which were later proved right since challenges to do with transparency and unsustainability persisted.

The government, under President Ruto, introduced the New Higher Education Funding Model on May 3rd, 2023. It is designed to deal with challenges to do with vast enrollment and insufficient funding across public universities and Technical and Vocational Education (TVET) institutions by focusing on the student's financial needs.²⁶³ This model prioritizes the student's financial need by separating placement from funding, as a result, universities and TVET institutions no longer receive funding in the form of capitation, instead, funding for students is undertaken through loans, scholarships, and household contributions.²⁶⁴ While the funding model may look ideal on paper, implementation challenges are severely holding it back. Questions of fairness and sustainability have also arisen.

260 **International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 13.**

261 **JM Hyslop, 'The University of East Africa' (1964) 2 *Minerva* 3, 286 <http://www.jstor.org/stable/41821619> accessed 7 July 2025.**

262 **Wanjala Gidraf Joseph, Gori Mochama Justus and Stephen Rotich, 'Differentiated Unit Cost Funding Formula and Implementation of the Core Mandates of Public Universities in Kenya' (2023) 10(3) *TIJER – The International Journal of Education and Research* 157 <https://tjjer.org/tjjer/papers/TIJER2303150.pdf> accessed 7 July 2025.**

263 **Universities Fund, 'New Higher Education Funding Model' (Universities Fund, 3 May 2023) <https://www.universitiesfund.go.ke/new-higher-education-funding-model/> accessed 7 July 2025.**

264 **ibid**

This paper analyses the legal and policy framework governing university funding in Kenya while examining its compliance with globally recognized laws and the laws in Kenya including provisions under the Constitution of Kenya 2010 such as the right to education under Article 43, youth rights and empowerment under Article 55, and the national values and principles of governance under Article 10. The paper will also look at the institutional framework governing university funding in Kenya, reviewing their roles in education policies and challenges faced in implementation. I will then conclude by giving recommendations on improving the university funding model in Kenya.

LEGAL FRAMEWORK FOR UNIVERSITY FUNDING IN KENYA

The Constitution of Kenya 2010

The Constitution of Kenya 2010 has a plethora of provisions justifying university funding in Kenya, but I will only highlight the most important ones. Article 43 provides for economic and social rights. Article 43(1)(f) guarantees the right to education, which extends to university education, hence public university funding is a way of the government realizing this right.²⁶⁵

Article 55 is about youth empowerment. Specifically, article 55(a) mandates the state to take measures to ensure that the youth access relevant education and training.²⁶⁶ University funding models are direct manifestations of this constitutional provision since the various funding models all aim at ensuring the youth access relevant education and training.

Under article 10, national values like equity, inclusiveness, social justice, and sustainable development are contained.²⁶⁷ These values too are a justification for university funding. University funding brings about equity and inclusiveness since it offers higher education to those who may not be able to afford it. Social justice and sustainable development are also eventually attained as more citizens in the country acquire a higher level of education.

Statutory Laws

The universities act 2012 establishes the universities fund under section 53.²⁶⁸ The act further provides that the object and purpose of the fund shall be to provide funds for financing universities.²⁶⁹ This section of the act is the direct genesis of university funding in Kenya. Another important act in this sector is the Higher Education Loans Board (HELB) Act. HELB is a state agency, tasked with providing and managing resources to offer financial support to Kenyans undertaking Higher Education.²⁷⁰

265 Constitution of Kenya (2010), art 43(1)(f).

266 Constitution of Kenya (2010), art 55(a).

267 Constitution of Kenya (2010), art 10.

268 Universities Act (No 42 of 2012), s 53.

269 Universities Act (No 42 of 2012), s 53(2).

270 Higher Education Loans Board, 'Our Story' (HELB, 2024) <https://www.helb.co.ke/about-us/our-story/> accessed 8 July 2025.

Other functions of the board are provided for under section 6 of the HELB act.²⁷¹ HELB is a form of indirect university funding by the government as it enables students to acquire loans and bursaries which are often used to pay their tuition fees and upkeep in universities. Other important statutes worth mentioning are the education act 2013 and the public finance management act 2012, which governs the distribution of funds into the country's education sector.

International and Regional frameworks

It is essential to mention that international and regional treaties ratified by Kenya shall form part of the law of Kenya under the constitution.²⁷² This provision in the Kenyan constitution makes it paramount to go over the various treaties and agreements ratified by Kenya regarding universities. The first one is the International Covenant on Economic, Social and Cultural Rights (ICESCR). Kenya ratified this international treaty in 1972. Article 13 of the ICESCR affirms the right to education by providing inter alia that higher education shall be made equally accessible to everyone.²⁷³ This is where university funding by the government comes in. By funding universities, the Kenyan government is making strides in ensuring that university education is accessible to all as dictated in the treaty.

Another important international instrument is the universal declaration on human rights (UDHR). Although not legally binding, the declaration is persuasive. According to article 26(1) of the UDHR, everyone has a right to education.²⁷⁴ Similarly to the ICESCR, higher education shall be equally accessible to all. The United Nations Sustainable Development Goals (SDGs) are also not legally binding but persuasive. SDG 4 provides for inclusive and equitable quality education which the government of Kenya tries to replicate by funding universities.²⁷⁵ Some of the regional instruments that speak to the right to quality, accessible and inclusive education include the African Charter on Human and Peoples' Rights (Banjul Charter), the African Charter on the Rights and Welfare of the Child (ACRWC), and the agenda 2063 (African Union).

It is evident that Kenya does not struggle in the education sector due to a lack of legal framework. The law is adequate and clear when it comes to matters of higher education in Kenya. The question is why Kenya is still struggling to provide quality, inclusive and accessible higher education to its citizens despite all these laws and instruments catering for the same. The problem is clearly in implementation.

POLICY AND INSTITUTIONAL FRAMEWORK

Laws do not work alone; they need strong institutions and policies to effectively implement the various laws. In this section of the paper, I will review and briefly analyze the various policies and institutions involved with university funding in Kenya. This will enable us to see exactly where the problem of implementation arises from.

271 Higher Education Loans Board Act (Cap 213A) [Rev. 2012], s 6.

272 Constitution of Kenya (2010), art 2(6).

273 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 13.

274 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) art 26(1).

275 United Nations, 'Sustainable Development Goal 4: Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All' (UN Sustainable Development Goals, 2015) <https://sdgs.un.org/goals> accessed 8 July 2025.

I will look at the various policies in Kenya, beginning with the vision 2030. Kenya's vision 2030 is the long-term development blueprint for the country and is motivated by a collective aspiration for a better society by the year 2030.²⁷⁶ The policy is development oriented and puts education in the forefront. Kenya Vision 2030 prioritizes expanded access to university education, with an emphasis on inclusivity and maintaining quality standards. The policy also aims at integrating technology into education, strengthening teacher training, and strengthening university-industry linkages. One of the ways the Kenyan government hopes to achieve these objectives of the policy is by university funding.

Another important policy is the Sessional Paper No. 1 of 2019 on Education and Training. This paper talks about the government's plans to revise higher education funding methods. The paper acknowledges the flaws of the funding mechanism that was active at the time (Differentiated Unit Cost (DUC) model). It notes that the model could not cope with the rising population requiring higher education, making it unsustainable.²⁷⁷ The policy document recommended a funding system that was more efficient, sustainable and need based.

The report of the Presidential Working Party on Education Reform (2022–2023) is also influential when reviewing policies. The taskforce was appointed to review and recommend to Kenya's education system in totality. On matters to do with higher education, the taskforce recommended a shift from the previous DUC model to a needs-based funding system.²⁷⁸ As mentioned in the introduction segment, the new funding system is a student-centered approach that aims to address challenges faced by public universities and Technical and Vocational Education (TVET) institutions as a result of massive enrollment and inadequate funding.²⁷⁹ This new model aims to better target financial support and improve access for disadvantaged students while maintaining a sustainable aspect to it. When it comes to institutions, the paper has already expounded on the various institutions involved with university funding. For recap purposes, the institutions include HELB, the University Fund established by the universities act 2012, and the Ministry of Education.

ASSESSMENT OF THE UNIVERSITY FUNDING MODEL IN PRACTICE

As I had previously stated, in Kenya, the laws in place governing university funding are not the issue. On paper, the laws are contextually fitting and beyond reasonable. This section of the paper assesses the laws, institutions and policies governing university funding in Kenya in practice rather than just on paper. The section will focus (briefly due to space purposes) on the relatively new university funding model as opposed to the previous DUC model which as pointed out earlier, was unsustainable to say the least.

276 **Kenya Vision 2030, 'About Vision 2030' (Vision 2030, 2007) <https://vision2030.go.ke/about-vision-2030/> accessed 8 July 2025.**

277 **Ministry of Education, Sessional Paper No 1 of 2019 on a Policy Framework for Reforming Education and Training for Sustainable Development in Kenya (2019).**

278 **Government of Kenya, Report of the Presidential Working Party on Education Reform: Transforming Education, Training and Research for Sustainable Development in Kenya (7 July 2023)**

279 **Universities Fund, 'New Higher Education Funding Model' (Universities Fund, 3 May 2023) <https://www.universitiesfund.go.ke/new-higher-education-funding-model/> accessed 7 July 2025.**

The new funding model known as the New Higher Education Funding Model (NHEFM) is a student-oriented model that focuses on equity in funding, course-based funding and incentives tied to performance.²⁸⁰ Although the new model caters more for the student's needs, higher education stakeholders reckon that although the NHEFM was meant to ease financing challenges in higher education institutions, especially universities, in practice, it has not eased the financial burden of higher education, as students who were funded through this new model continue to struggle to make their academic ends meet.²⁸¹

This leads stakeholders to question whether this new model is at all any better than the previous one since no improvement has been seen since the state made the shift. On top of this, the resources being allocated to universities under this new model are still scarce. According to Dr. Gatama, "we recognize the resources coming from the government are limited. The truth is that the gap will keep growing over time. That means we will not be making any meaningful progress if there are no finance or other resources."²⁸²

Simply put, the new funding model is bound to fail if the resources allocated to it are insufficient. How can there exist a university funding model with no funds allocated to the model, this seems very ironical and a failure on the part of the government. Dr. Gatama when asked whether the new funding model is working, went on to further state that implementation faces challenges because the kitty has remained the same.²⁸³ In my opinion, this is a big failure on the government's part because a lack of resources is what prompted the abolition of the DUC model, yet instead of allocating more resources to this new model, it faces the same fate as its predecessor.

Another predominant issue observed with the NHEFM is the miscategorisation of students. The funding model operates by categorizing students into groups referred to as 'bands' to ensure needy students get more help than the less needy. Under this grouping system, students are placed in categories depending on household income, where the lowest-income households qualify for the highest financial support, while those in higher income brackets receive less assistance.²⁸⁴

On paper, this categorization system is efficient as it ensures the students who need the most financial help are prioritized but sadly, this is not the case in practice. As Lucy Mumbi reports, many students from low-income families were erroneously placed in higher funding bands, leaving them unable to afford tuition fees or bearing substantial debts. ²⁸⁵ Miscategorisation is a colossal mistake as it defeats the whole purpose of categorizing students, leaving the less fortunate students in financial turmoil.

280 Ibid

281 African Population and Health Research Center (APHRC), *An Analysis of Kenya's New Higher Education Funding Model and its Implications on Equity, Quality, and Sustainability (Short Report)*, APHRC, 12 March 2025) <https://aphrc.org/wp-content/uploads/2025/03/An-Analysis-of-Kenyas-New-Higher-Education-Funding-Model-and-its-Implications-on-EquityQuality-and-Sustainability.pdf> accessed 9 July 2025.

282 Winnie Atieno, 'University council bosses vow to end mismanagement, disputes' (Daily Nation, 7 July 2025) <https://nation.africa/kenya/news/education/university-council-bosses-vow-to-end-mismanagement-disputes-5108904> accessed 9 July 2025.

283 *ibid*

284 Brian Nzomo, 'Inside New Universities Funding Model' (Kenyan Wall Street, 19 August 2024) <https://kenyanwallstreet.com/inside-new-universities-funding-model/> accessed 9 July 2025.

285 Lucy Mumbi, 'A reform gone wrong: How Ruto's university funding model failed students in 2024' (Eastleigh Voice, 2024) <https://eastleighvoice.co.ke/education/101900/a-reform-gone-wrong-how-rutos-university-funding-model-failed-students-in-2024> accessed 9 July 2025.

It is apparent from the brief analysis of the NHEFM that the main issues lie in the implementation of the model rather than the model itself being flawed. Simple mistakes in categorization that are quite simple to avoid have been detrimental to families, causing them unimaginable damage.

The other issue I highlighted was the lack of resources. This issue seems to be prevalent across all university funding models that have been adopted in Kenya. The lack of resources is also one of the main reasons, if not the main, that the DUC model was eventually put to an end, and it is still the same plague threatening the fate of the new funding model.

RECOMMENDED REFORMS

This section of the paper will briefly gloss over some suggestions that would improve the current state of university funding in Kenya, based on the two issues highlighted above. On the issue of lack of resources, the burden to remedy this lies primarily with the government. It is upon the government to ensure accountability of resources allocated to the funding model. Corruption is a deeply rooted vice in Kenya, and it would not be far-fetched to assume that it is the reason for the lack of resources. The only way to remedy this vice is by the government, through the Ethics and Anti-Corruption Commission intervening and holding perpetrators accountable.

The idea of categorizing students into 'bands' under the new funding model is not only excellent, but also ideal on paper, however, the execution has been mediocre. The remedies are quite simple since the mistakes made were technological errors. The first step would be to strengthen the verification mechanisms being used. Errors in classification stem from inaccurate or incomplete socio-economic data. Strengthening verification by cross-checking this data across other governmental records like NSSF and KRA would improve accuracy. Another solution would be to provide a mechanism in which students may appeal the categorization. Currently, there is no solution to students who have been miscategorized which is a big flaw in the system. Another solution would be to appoint an independent committee that would be responsible for overseeing the categorization process to promote transparency and accountability.

CONCLUSION

Due to issues involving space, I have very briefly looked at fewer issues than I would have hoped to but the issues I have reviewed and provided solutions for are the most substantive ones. Although the NHEFM looks like a significant improvement from the previous DUC model, in practice, there is little to no improvement. This paper has pointed out some of the flaws of the NHEFM as pointed out by various stakeholders. I would like to point out that not all hope is lost in achieving a sustainable and effective university model in Kenya, the government ought to take implementation more seriously or it risks another failed university funding model.

**BEYOND AUTOMATION; HUMAN JUDGEMENT IN THE
AGE OF AI LAW & LEGAL EDUCATION-
JOAN GALGALO**



Abstract

Artificial Intelligence (AI) is rapidly gaining traction in the modern age and is transforming the legal profession, offering unique tools for efficiency and data analysis. However, the nature of legal practice is deep seated on the emotional intelligence of key players in the legal field. Judges rely on qualities that are inherently human to render fair and just decisions while lawyers leverage emotional intelligence to build strong client relationships and advocate effectively in courts of law.

This commentary discusses the indispensable role of the human touch in light of the use of AI in law. It highlights human connection is important in fostering trust, ethical judgment and genuine connections. Drawing from the “Betty Crocker effect,” this discussion illustrates how human involvement adds authenticity and value. These are key principles that ensure the legal process remains relatable and trustworthy.²⁸⁶ Despite the various advancements and remarkable strides in the integration of AI, there are a number of human skills that remain necessary in the work environment. Such skills include creativity, emotional intelligence, leadership and relationship building - qualities that are beyond replication and substitution by machines.

The integration of AI into the legal world demands a balanced approach. This creates a much desired symbiotic relationship where the use of AI is collaborative and complementary rather than substitutive. Ultimately beyond automation; human judgement in the age of AI law & legal education offers a guide on how legal professionals can achieve a holistic approach that drives efficiency while safeguarding empathy and authenticity—qualities essential for justice and fairness in society.

286 Nudgeable Team, ‘The Betty Crocker Story and AI Communications’ (Nudgeable, 19 November 2024) <<https://www.nudgeable.ai/insights/betty-crocker-story-and-ai-communications>> accessed 21 July 2025.

Introduction

Artificial Intelligence is a technological breakthrough that has revolutionized multiple industries across the world essentially redefining how humans have for years interacted with technology. The scope of AI is vast incorporating nearly every aspect of human interactions from the work set up to various levels of education as well as the business sector. The use of artificial intelligence has driven change in legal education globally. Conventionally, legal education embodied intense manual research. In today's age, however, AI driven legal technologies are significantly changing how both law students and legal professionals understand and practice the law.

THE KENYAN CONTEXT

AI legal information systems in Kenya such as Wakili AI and M-Wakili AI, demonstrate pioneer AI legal platforms that are transforming the face of legal education in Kenya. They allow efficient navigation of comprehensive databases that hold Kenyan statutes, case laws, constitutional provisions and academic articles. These digital tools support drafting of legal documents, conducting case analysis and exam preparation ultimately developing a nuanced appreciation of the intricacies of Kenya's legal system.²⁸⁷

In contrast to generic global legal AI platforms that are designed to give a general overview of legal queries, Wakili AI is specifically customized to the Kenyan context.²⁸⁸ It facilitates the use of bilingual interaction where both Kiswahili and English seamlessly integrate with local laws and procedural systems. This localization enables contextual adaptation ensuring students interact with Kenyan jurisprudence and statutory frameworks effectively.

1.0 Enhancing Legal Research and Academic Efficiency

AI-powered platforms have drastically reduced the time consumed in research processes by the automation of routine functions such as keyword searches, case summarization and citation validation.²⁸⁹ This operational efficiency empowers learners to prioritize critical legal reasoning and the substantive application of legal principles rather than mere data gathering. Moreover, Legal databases deployed with natural language processing (NLP) and machine learning (ML) technologies enable students to explore case law relationships, precedential value and judicial trends with greater precision.²⁹⁰ Exposure to such insights cultivates and sharpens analytical capabilities bridging the theoretical aspect of law with pragmatic legal reasoning.

287 Mwakili, 'Wakili AI: A Game changer for Law Students in Kenya' (Mwakili Blog)

288 *ibid*

289 Wakili AI, 'Kenya's Legal AI' <https://wakili.org> accessed 21 July 2025

290 Mwakili, 'The Future of Legal Education: How Law Students in Nairobi Can Stay Ahead' (Mwakili Blog, 15 March 2024)

2.0 Integration of Technology and AI in the Legal Curriculum

The recognition of the profound impact of technology on law has driven Kenyan educational institutions to adopt technology law, AI ethics and legal tech skills into their curricula. Different courses encompassing cyber law, data privacy, electronic evidence, intellectual property in the digital age and AI governance are increasingly becoming standard components of legal education.²⁹¹ Upcoming lawyers are carving out a niche for themselves through the knowledge acquired from such courses interlinked with legal studies.

This curriculum transformation equips students for a dynamic legal market in which conventional advocacy converges with emerging technologically driven roles such as legal technologists, legal compliance officers for AI systems and cybersecurity lawyers. Through the integration of cross disciplinary skill set, institutions strive to close the professional competency divide ensuring law graduates are able to navigate the evolving future demands of the legal profession.²⁹²

While the use of AI in legal education has continued to offer immense transformation there are challenges in its full adaptation. One of the key issues is the absence of AI-specific legal frameworks. This gap complicates ethical AI use, data privacy and mitigation of algorithmic bias regulation. The existing Data Protection Act offers a foundation; however, structured and clear AI policies are yet to be developed.²⁹³

3.0 Legal Education Beyond Automation

The foundation of legal education goes way beyond the mere transmission of statutes, case law or procedural norms and frameworks. Despite various technological advancements that have without a doubt made legal education more accessible, the human touch remains completely essential and relevant in the field of law. The law is shaped by human dimensions that are tied to empathy, ethical judgment, interpersonal skills and learning through lived experiences. Such dimensions significantly structure how law is taught and understood improving its application to life in practical situations.

Legal education is a relationship driven process. It brings together students with diverse backgrounds, views, experiences and learning methods. To effectively teach the law, it demands more than a one-way flow of knowledge. It requires empathy that allows educators to gain an understanding of students all of whom are unique in their own way.²⁹⁴

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- 291 **Law Society of Kenya, Advocate Magazine: Annual Conference Edition August 2024 (Vol 1 Issue 16, 2024)**
- 292 **CR Advocates LLP, 'Artificial Intelligence & The Law Firm in Kenya'**
- 293 **A-Z, 'Artificial Intelligence in Legal Practice: Institutional and Economic Perspectives' (SSRN, 2023)**
- 294 **Kathleen Elliott-Farrelly, 'Fundamental Principles and Challenges of Humanizing Legal Education' (SSRN, 13 January 2009)**

The very purpose of legal education and training is to prepare future lawyers to perform complex human-centered roles ensuring they are able to navigate practical challenges such as ethical dilemmas. The study of law and its practical aspect is not simply about logical analysis and legal research, it involves counselling clients, negotiating disputes under alternative dispute resolution methods, litigation in courts and advising clients on legal matters. These professional responsibilities require emotional intelligence, empathy as well as interpersonal skills. Such qualities can only be genuinely exercised by human beings. Lawyer-client relationship is based on honest counsel and compassionate guidance, all of which highly depend on authentic human connections.²⁹⁵

The foundational teaching methodologies that have continued to guide legal education globally, emphasize on interactive and experiential learning methods. These methods include moot courts and pupillage programs all of which revolve around dialogue and mentorship. They promote legal education within real-life human contexts encouraging skills such as critical thinking and ethical reasoning.²⁹⁶ It is through this personal engagement that abstract legal rules are transformed into instruments of justice, accounting for human dignity and reflecting societal values. These approaches thrive on the relational dynamics between teachers and students and cannot be fully simulated by digital AI driven platforms. The ethical foundation of legal education makes the human element irreplaceable. The law is not simply a technical discipline and is far more than a system of rules. It is a reflection of moral values and social responsibilities.²⁹⁷ Legal educators do more than just impart knowledge they are ethical guides who cultivate a professional identity rooted in natural justice. Legal educators are essential in nurturing such qualities which AI lacks such as the moral consciousness necessary to embed these values meaningfully in learners. These relational and sensory aspects enable learners to master dispute resolution and advocacy skills.²⁹⁸

Human interaction through physical presence deepen understanding and retention way beyond what can be achieved through impersonal or virtual means. Solving legal problems requires the kind of contextual awareness and relational skill that are unique to humans. The human touch ensures that technology serves justice rather than replaces the human values at its foundation. So how then can we maintain human touch?

4.0 Maintaining Human Touch

The human touch can be described and understood as a friendly and pleasant way of treating other people embedded in emotional intelligence. Human touch is integral to general well-being and social interactions and is built on emotional intelligence fostering trust, empathy and genuine

295 'Legal Education & the Human Lawyer' (Educating Human Lawyers, 2025) <https://educatinghumanlawyers.com> accessed 21 July 2025.

296 Austine Ouma, 'Future of Legal Education in Kenya: Integrating Technology Law and Research' (Kenya Law, 31 January 2025)

297 Katheleen Elliott-Farrelly, 'Fundamental Principles and Challenges of Humanizing Legal Education' (n 10).

298 Frederic J. Bloom, 'Humanizing Legal Education' (SSRN, 16 November

connections which are difficult for AI to replicate.²⁹⁹ Although AI is highly capable of performing various tasks exceptionally well, it lacks the sophisticated comprehension of human emotions and social cues that define emotional intelligence. The need to maintain human touch is not merely desirable but essential, driven by the necessity to preserve human roles where empathy and compassion are paramount.³⁰⁰

In order to properly relay the importance of the need to maintain human touch it is significant to first establish the value of human touch. This can be illustrated from the famous story of Betty Crocker who introduced instant cake mixes in the 1950s. Bakers were required to only add in water and stir to bake the perfect sponge cake in minutes. Unexpectedly the instant cake mixes flopped and were not as successful. The brand sought the help of Ernest Ditcher, a consumer psychologist in bid to uncover the problem and potentially boost sales. Ernest Ditcher found that the cake mixes were so simple that people found them too easy and effortless making bakers feel disconnected from the process.³⁰¹ Determined to spur purchases, Betty Crocker changed the recipe adding a new step that required bakers to add in fresh eggs to the mixture. This was a subtle shift with a profound and transformative impact as sales soared and the instant cake mixes became a household staple. The extra step added a personal touch where people felt like they were contributing to the process.³⁰²

This phenomenon is known as the effort justification effect or the “Betty Crocker effect”. It shows that human beings value things more when they invest effort in them for instance a hand-written letter can be deemed more valuable as compared to an AI generated letter, this is because of the value that human touch creates. The story demonstrates the disinclination to forego the human effort and the counterintuitive desire to stay personally engaged in multiple work flows. The effort justification effect reveals that involvement creates value. We as humans naturally value things that require our personal touch whether partially or fully. Legal educators and law students should note that full automation is not always the best choice even if it is the easiest method to follow.

5.0 The Human Advantage

The global artificial intelligence market is rapidly growing. Statistics put out by Statista, a German database company, shows that the global AI market is expected to reach over 800 billion U.S. dollars by 2030.³⁰³ From task automation to data management it is evident that AI has freed up

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- 299 App B, de Kort YAW and IJsselsteijn WA, ‘Effects of mediated social touch on affective experiences and trust’ (PeerJ, 6 October 2015) <https://peerj.com/articles/1297/> accessed 21 July 2025.
- 300 Hertenstein MJ, Keltner D, App B, Bulleit BA and Jaskolka AR, ‘Touch Communicates Distinct Emotions’ (2006) <https://greatergood.berkeley.edu/dacherkeltner/docs/hertenstein.2006.pdf> accessed 21 July 2025.
- 301 Minnesota Historical Society, ‘Betty Crocker Cake Mix’ (MNopedia)
- 302 General Mills, ‘The Story of Betty Crocker’ (BettyCrocker.com) <https://www.bettycrocker.com/menus-holidays-parties/mhplibrary/parties-and-get-togethers/vintage-betty/story-of-betty-crocker> accessed 21 July 2025.
- 303 Statista, ‘Artificial intelligence (AI) worldwide - statistics & facts’ (Statista) <https://www.statista.com/topics/3104/artificial-intelligence-ai-worldwide/> accessed 21 July 2025.

humans by reducing the task load by far. Looking beyond this incredible output through the use of AI we shift focus to the human advantage which houses skills that AI cannot replicate. These skills are essential in legal education and practice.

Leadership is a skill defined as the ability of an individual, a group or an organization to guide or influence other individuals, groups or organizations. Leadership stems from human tendencies and human nature. A leader is one who has unique capabilities to command and control others effectively. Although AI can assist in the provision of different insights and data driven analysis it cannot inspire, encourage and foster trust the same way a human leader can. AI can provide data that informs the decision-making process, however, it is the human leaders such as educators who inspire their learners to overcome obstacles and setbacks motivating them to work towards achieving their goals.³⁰⁴

Similarly, the ability to build positive relationships with students, educators and colleagues while incorporating the use of AI at times becomes limited. In education for instance students may value lecture notes that a lecturer has taken time to write and present rather than instantly AI generated notes. Building genuine relations requires a deep understanding of human emotions and establishing connections that are intentional.

AI powered chatbots are also restructuring the face of legal service interactions across different firms globally. They are able to analyze large amounts of data at speeds that supersede human capabilities. Such automated features have helped law firms understand client behavior and optimize operations. However, when it comes to maintaining a positive relationship between clients and lawyers and also student and educators this heavily relies on human emotional intelligence. It is the ability to recognize and understand both your own emotions and the emotions of those around you. This fosters positive interactions and experiences. Key aspects include empathy, adaptability, conflict resolution and building trust which are human traits that are impossible to foster in machines.³⁰⁵

Decision making is a subjective area that humans have for years relied on instincts accumulated through years of lived experience. AI machines rely heavily and solely on data metrics alone making it difficult to adapt to sudden changes as it follows known patterns and scenarios. The insights that AI provides are valuable but the true worth of these insights lies in the human discernment that evaluates and implements them. The human touch becomes a necessity that cannot be done away with as artificial intelligence cannot modulate the decision-making process

304 International Institute for Management Development IMD, 'Keeping the human touch: Why people remain essential in the age of AI' (IMD Business School, 11 April 2024) <https://www.imd.org/ibyimd/artificial-intelligence/keeping-the-human-touch-why-people-remain-essential-in-the-age-of-ai/> accessed 21 July 2025.

305 Chris Chiancone, 'AI & human touch: Balancing technology & skills in the workplace' (LinkedIn) 2023 <https://www.linkedin.com/pulse/ai-human-touch-balancing-technology-skills-workplace-chris-chiancone/> accessed 21 July 2025.

to consider more intuitive influences nor can it access the subjective insights that humans hold. Think of it as machines following a straight, clear and defined path that is impossible to stray away from. They function according to the data fed into them unlike humans who are not bound by a straight trail of thought. Human beings can stray from this straight path and think outside the box fostering creativity which is a unique talent that AI machines are not capable of having. This subjectivity has been used by judges to solve many legal cases as guided by statute, presidents and experience.³⁰⁶

FINDING A BALANCE

The need to find a balance between artificial intelligence and human touch which is encompassed in emotional intelligence is crucial. Although the benefits of AI in legal education are high, it is essential to avoid over reliance. A healthy equilibrium can be achieved by using AI as a supportive tool to enhance education. Permitting AI to supersede essential human elements such as human mentorship and critical thinking can be detrimental as it risks reducing education to a merely transactional process. Educators and students should be selective in terms of the tasks they choose to assign to AI machines. This discernment should be guided by knowing the areas in which AI can augment value and efficiency where the risks of misapplication is low and the benefits of automation are high. Ideally the use of AI should be reserved for repetitive rule-based tasks where the need to analyze vast amount of data at high speeds is beyond human competences.

To achieve a meaningful balance educators and learners must first evaluate and review the unique contributions of their human work. This creates a focus on the insights, creativity and emotional intelligence only people can provide. It helps institutions recognize the values students bring that AI cannot replicate.

It is vital to ensure learners understand how their roles complement AI systems rather than compete with them. Addressing these considerations early provides an opportunity for educators and learners to create an environment where people feel valued and empowered despite the rapid integration of AI into legal spaces. Learners and educators need to be provided with sessions that teach them how to use AI tools effectively. This ensures adaptability to navigate the changes brought about by the use of AI. Such sessions not only preserve but also enhance the synergy between human skills and AI capabilities. A balance can also be met by allowing AI to be used collaboratively in tasks where the human touch is necessary. The use of artificial intelligence can be of great assistance in the analysis of data, however, the inclusion of human insights is important. Such insights ensure that the analyzed data is utilized in a manner that is meaningful and contextually correct. The maintenance of human oversight also ensures high quality output in legal research and education. The use of AI in legal education should aim to reflect a learning environment where educators leverage AI's potential but also embrace the unique capabilities of different learners.

306 Chika D Okonkwo and Comfort Mordi, 'The human touch in the age of artificial intelligence: A literature review on the interplay of emotional intelligence and AI' (2023) *Academia Letters*, Article 5924.

CONCLUSION

The integration of AI has undoubtedly created a shift in the legal world and especial in education and training through research and data analysis. It is however essential to keep in mind the short comings of the use of artificial intelligence as it continues to greatly influence human interactions. The human touch remains a fundamental element. It is unlikely that AI will fully be able to capture the wealth of knowledge that informs processes like decision making especially in the legal carrier. It is essential to combine AI with human expertise fostering a holistic approach that adds both qualitative and quantitative value in legal education and its broader aspects. This essentially creates a balance between the use of AI and the need to maintain human skills that ride on emotional intelligence.

The effort justification effect shows that there will always be a place for human contribution. This is the personal touch that many are not ready and willing to lose. We as human beings have the duty to ensure that technology does not take away the human touch. An article by nudgeable.ai uses the Betty Crocker effect to put across a challenge that asks us to think of AI as the base mix and our own personal input as the “egg” that makes it uniquely ours in bid to encourage authenticity that not only increases productivity but also strengthens connections.³⁰⁷

In conclusion, as Amit M. Joshi, professor of AI, eloquently stated: “Our world may be built on data, but some outcomes can only be reached through the application of emotional intelligence – a quality that even the most sophisticated AI has yet to develop.”³⁰⁸

307 Nudgeable.ai, ‘Betty Crocker Story and AI Communications’ (nudgeable.ai, 19 November 2024) <https://www.nudgeable.ai/insights/betty-crocker-story-and-ai-communications> accessed 21 July 2025

308 Amit M Joshi, ‘Keeping the human touch: Why people remain essential in the age of AI’ IMD (AI section, 11 April 2024) <https://www.imd.org/ibyimd/artificial-intelligence/keeping-the-human-touch-why-people-remain-essential-in-the-age-of-ai/> accessed 21 July 2025

AWAITING THE BAR: AN INTERROGATION OF ADMISSIONS AND PROGRESSION, ATP EXAMINATION EFFICACY, INSTITUTIONAL CAPACITY AT KSL, AND CURRICULAR RELEVANCE AND FUTURE KENYAN LEGAL EDUCATION- BOBBY DHIMAN



Abstract

This commentary presents a critical, student-led interrogation of the Kenyan legal education system, focusing on the pathway from undergraduate studies to admission to the bar through the Advocates Training Programme (ATP). Written from my unique perspective as a student “awaiting the bar,” this analysis bridges a gap in discourse traditionally dominated by practitioners by centering the voices of those most directly affected. I argue that meaningful reform must address both institutional bottlenecks and systemic inequities embedded within the system’s design.

Drawing on seminal reports like the Ojiambo and Muigai Taskforce findings, I identify and critique several core challenges. I examine the contradictory admission requirements between the Kenya School of Law Act and the Legal Education Act, which create systemic barriers and exclude non traditional candidates. I advocate for abolishing the redundant pre-Bar exam for foreign law graduates and I am in favour of standardized pre-university assessments to ensure quality at the point of entry. Furthermore, I critique the Kenya School of Law’s (KSL) monopoly over the ATP, highlighting severe capacity constraints and supporting recent judicial moves to decentralize training. Finally, I analyze flaws in the ATP’s examination system, including misalignment between curriculum and assessment and outdated methods that privilege memorization over practical legal skills. I conclude by calling for a holistic, practice-oriented curriculum that integrates practical skills and prepares adaptable, “practice-ready” lawyers for the 21st century.

Introduction

Legal education in Kenya serves as the foundational of the legal profession, yet its structures from admissions and progression to the rigor of the Advocates Training Programme (ATP) examinations remain deeply debated. As a student “awaiting the bar,” I occupy a unique middle point: neither fully outside the system nor yet absorbed into its practice. This position allows me to interrogate the system’s flaws not as a detached critic, but as one passing through its rigors firsthand.

The discourse on legal education reform in Kenya has largely been dominated by seasoned practitioners and policymakers, often sidelining the voices of those most affected: the students. This paper bridges that gap, offering a **critical, student led interrogation** of the system’s shortcomings and their implications for access to justice, professional diversity, and the quality of legal services in Kenya. Through this analysis, I argue that meaningful reform must address not only institutional bottlenecks but also the systemic inequities embedded in legal education’s design.

This research and analysis of this paper is largely developed through the lens of key official and seminal documents that have critically examined Kenya’s legal education. Chief among these is the **Report of the Working Committee on Legal Education Sector Reforms** chaired by **Ms. Christine Agimba**, which provided comprehensive proposals on restructuring legal education, enhancing quality, and streamlining regulation. Additionally, this paper draws from the **Task Force on the Review of Legal Education in Kenya**, commonly referred to as the **Ojiambo Report**, which assessed challenges in legal education and proposed wide-ranging reforms including curriculum alignment, institutional strengthening, and regulatory clarity. The research also incorporates insights from the **Report of the Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya**, widely known as the **Muigai Report**, chaired by **Prof. Githu Muigai**, which examined the historical and structural foundations of legal training in Kenya and offered key recommendations on quality assurance, standardization, and accreditation. Collectively, these reports inform the critical evaluation presented in this paper on the reform of legal education and training in Kenya.

ADMISSIONS AND PROGRESSIONS

The admission requirements for Kenya’s Advocates Training Programme (ATP) are troubled by **inconsistencies between the Kenya School of Law Act (KSL Act) and the Legal Education Act (LEA)**. The KSL Act mandates a minimum KCSE grade of B (plain) in English/Kiswahili and C+ (plus) overall, alongside an LLB from a recognised university and a pre-Bar exam pass.³⁰⁹ In contrast, the LEA’s invalidated 2016 regulations introduced alternative pathways (e.g., certificate/diploma programmes for KCSE C- candidates), which the Court of Appeal struck down in *Javan Kiche Otieno v CLE* (2018) for procedural irregularities³¹⁰ and reaffirmed in *KSL v Otene Richard Akomo & 41 Others* (2022), ruling that subsidiary legislation cannot override the KSL Act.³¹¹

309 Kenya School of Law Act, Second Schedule, paras 1–2.

310 *Javan Kiche Otieno & another v Council of Legal Education* [2018] eKLR (CA), para 23.

311 *Kenya School of Law v Otene Richard Akomo & 41 Others* [2022] eKLR (CA), para 4

These contradictions have created systemic inequities and litigation. The LEA empowers the Council of Legal Education (CLE) to set admission standards,³¹² yet the KSL Act's rigid academic thresholds remain enforceable, disproportionately excluding non-traditional candidates. The Ojiambo Taskforce rightly recommended harmonising both laws under the LEA to centralise authority in the CLE and delete the KSL Act's requirements.³¹³ However, its proposal to rely solely on CLE regulations risks replicating past conflicts unless anchored in primary legislation to prevent future judicial invalidation.

While harmonisation is urgent, the Taskforce's approach I argue, lacks safeguards. Consolidating admissions under the LEA would promote clarity, but merely deleting the KSL Act's provisions without explicit legislative replacement could invite ambiguity. A balanced amendment should codify inclusive pathways example in experiential learning directly in the LEA, ensuring accessibility while avoiding regulatory overreach. Also, I strongly believe that for this cohesion to be achieved the CLE's role should be operational not legislative, to prevent recurring conflicts between policy and practice and the legislative role to remain in Parliament, as the August house will legislate without the power struggle mentality the two institutions seem to have already adopted.

The **progression** pathway from diploma to LLB, to ATP in Kenya's legal education system reveals problems in education inclusivity and quality assurance. Pre-2012 regulations (LN 169/2009) and the LEA recognized academic progression, allowing diploma holders to advance to LLB and ATP,³¹⁴ while the second schedule of the KSL Act's stringent KCSE requirements now exclude these graduates. This inconsistency was judicially acknowledged in *Kevin Mwiti & Others v KSL* [2015],³¹⁵ yet it persists despite regional precedents like Uganda's Makerere University which accept diploma-to-LLB progression.³¹⁶ The Ojiambo Taskforce's dual-track diploma proposal academic and professional remains unimplemented,³¹⁷ leaving thousands of diploma to qualified LLB graduates in a limbo.

I strongly endorse the Legal Education Amendment Bill 2023's proposed harmonization of progression pathways,³¹⁸ but also caution that unchecked expansion may saturate the profession, necessitating innovative reforms. While aligning with global best practices and Kenya's medical/engineering sectors,³¹⁹ the Bill awaiting being passed I propose that it must incorporate CLE monitored diploma programs and standardized competency assessments akin to the pre-Bar exam for pre university LLB and pre-bar KSL. However, without stringent diploma to LLB program accreditation, mass ATP admissions risk eroding professional standards. This impending challenge demands urgent scholarly attention to rework legal education's structure and market relevance which this paper will subsequently explore.

312 **Legal Education Act, s 8(3)(a)**

313 **Ojiambo Taskforce Report, Recommendation 1(a)–(b)**

314 **Legal Notice 169 of 2009, reg 5(c)–(d)**

315 **Kevin Mwiti & Others v KSL** [2015] eKLR, para 24.

316 **Makerere University, 'LLB Admissions Requirements' (2024)** <https://law.mak.ac.ug> accessed 11 July 2025.

317 **Ojiambo Taskforce Report (2017), para 78.**

318 **Legal Education Amendment Bill 2023 (Kenya), cls 4–5 (proposing amendments to LEA, s 8).**

319 **Medical Practitioners and Dentists (Training) Rules 2016, reg 5(e).**

PRE-BAR EXAMINATION ISSUE AND THE IMPERATIVE FOR PRE-UNIVERSITY ASSESSMENTS IN KENYA

The controversy surrounding Kenya's pre-Bar examination revealed systemic inefficiencies in legal education quality control. While the Muigai Taskforce (2005) introduced the exam through Statute Law (Miscellaneous) Amendment Act 2014,³²⁰ the High Court in *Adrian Kamotho Njenga v Kenya School of Law*³²¹ correctly abolished it for local LLB graduates as redundant given the existing CLE accreditation standards. The Ojiambo Taskforce's recommendation to replace it with pre-university assessments is compelling, particularly its emphasis on evaluating character, analytical aptitude and ethical values at LLB admission stage, a practice successfully implemented in jurisdictions like Uganda's Makerere University and the United States' LSAT system.³²² This shift would address quality concerns at the optimal point before legal training commences rather than after its completion which I find befitting.

I fully endorse abolishing the pre-Bar exam for local graduates and strongly advocate for standardized pre-university assessments aligned with global best practices. The current system's fundamental flaw lies in assessing candidates after years of legal education rather than screening for foundational competencies at entry point. Comparative models demonstrate the effectiveness of such early evaluations: Makerere's rigorous admission tests assess critical thinking,³²³ while the LSAT's standardized format ensures objectivity in measuring law school readiness.³²⁴ Kenya should implement a similarly structured national assessment administered by CLE to maintain consistency across institutions. While the Ojiambo Taskforce rightly cautioned against subjective evaluations,³²⁵ a properly designed national test would eliminate this risk while fulfilling the dual purpose of quality control and equal opportunity that the pre-Bar exam failed to achieve.

CAPACITY AND ACCESS BARRIERS OF KSL IN OFFERING ATP

The Kenya School of Law (KSL) has long held a monopoly over the Advocates Training Programme (ATP), a position now challenged by capacity constraints and systemic inefficiencies. With over 1,500 students admitted annually, KSL struggles with inadequate facilities, faculty shortages, and inconsistent quality assurance, leading to a not expected performance in Bar Examinations.³²⁶ This congestion undermines the programme's effectiveness, as highlighted in *Florence Shako's* critique of Kenya's legal education system.³²⁷ The Court of Appeal's landmark 2025 ruling dismantled KSL's monopoly,

320 Statute Law (Miscellaneous) Amendment Act, 2014

321 *Adrian Kamotho Njenga v Kenya School of Law* [2017] eKLR (Petition No. 398 of 2017)

322 Ojiambo Taskforce Report (2017), paras 101-104

323 Makerere University School of Law, 'Pre-Entry Examinations' (2024) <https://law.mak.ac.ug> accessed 11 July 2025

324 Law School Admission Council, 'About the LSAT' (2024) <https://www.lsac.org> accessed 11 July 2025

325 Ojiambo Taskforce Report (2017), para 86

326 Kenya School of Law, Annual Admissions Report (2019).

327 Florence Shako, 'Need to Reform Legal Education in Kenya' *Daily Nation* (3 April 2018).

directing the Council of Legal Education (CLE) to license other institutions to offer the ATP.³²⁸ This decision aligns with the Legal Education Amendment Bill 2022, which proposed diversifying ATP training to accredited universities, a move poised to alleviate overcrowding and improve access.

Centralized training at KSL has created financial and logistical burdens on students, particularly those from universities outside Nairobi, such as Kisii University, who must relocate to attend in-person classes. Noteworthy, KSL's post-COVID-19 online learning initiative has improved accessibility, however, the requirement for physical attendance for Oral Tests and Assessments and the nine core papers remains a barrier to this method of learning. This hybrid model, though commendable, fails to fully address equity gaps, as marginalized students still face disproportionate costs and disruptions in attending these assessments. The Court of Appeal's ruling and the 2022 Bill's proposals recognize these challenges, advocating for a decentralized system that retains CLE oversight while expanding training venues. The Court of Appeal judgment rightly prioritizes accessibility and quality through regulated pluralism of the ATP. The Legal Education Amendment Bill's framework, which mandates CLE accreditation for participating institutions,³²⁹ mitigates risks of dilution by maintaining rigorous oversight. Notably, universities in Kenya already possess the faculty and infrastructure to deliver ATP training³³⁰, suggesting that decentralization need not compromise quality. The real test lies in CLE's capacity to enforce standards across multiple providers, a challenge requiring robust policy implementation.

The success of the CPA and CS programmes proves that decentralised training can work without compromising quality, provided there are strong coordinating mechanisms in place. On having universities' teach ATP, we need a clear structure on having a standardized curriculum that all training centres must follow without deviation, a structured liaison between those who teach the programme and those who set the exams to ensure perfect alignment, and ultimately, a single national examination that preserves uniform standards across all institutions. The Legal Education Amendment Bill's vision for diversifying ATP training could achieve similar success by embedding these safeguards, particularly the CPA programme's rigorous audits of training centres to verify compliance with the national curriculum. What makes these models work is their recognition that while training can be decentralised, standard setting and assessment must remain centralized under the professional body's authority, a lesson the legal sector and mostly the CLE would do well to emulate.

I agree with the Court of Appeal's 2025 ruling ending KSL's monopoly, as it balances quality assurance with equitable access. The Legal Education Amendment Bill 2022's proposal to diversify ATP training is also a pragmatic reform, provided CLE strengthens its accreditation mechanisms. Moving forward, Kenya should adopt a hybrid accreditation model, allowing universities to offer ATP training under CLE supervision. This approach would reduce costs for students, leverage existing institutional capacity, which is a critical step toward a more inclusive and efficient legal education system.

328 **Otinga v Cabinet Secretary, Ministry of Education & 3 others [2025] KECA 460 (KLR) (7 March 2025)**

329 **Legal Education Amendment Bill 2022 (Kenya)**

330 **Mumbi L, "End of an Era: Court Ruling Paves Way for More Institutions to Offer Training for Advocates" The Eastleigh Voice News (March 9, 2025) <<https://eastleighvoice.co.ke/education/124107/end-of-an-era-court-ruling-paves-way-for-more-institutions-to-offer-training-for-advocates>> accessed July 12, 2025**

EXAMINATIONS AND ASSESSMENT

The administration of Kenya’s Advocates Training Programme (ATP) examinations reveals coordination gaps between the Kenya School of Law (KSL) and the Council of Legal Education (CLE). Stakeholders report misalignment between taught content, curricula, and examinations, with the KIPPRA Report (2019) recommending periodic reviews to bridge these discrepancies³³¹. Transparency concerns, high examination fees, and delayed result releases further compound these challenges, undermining confidence in the assessment process. The Committee has emphasized the need for post-examination analysis to identify performance trends and implement corrective measures, yet structural issues persist.

Cohort	Examination Series	Registered Number	Candidates who passed all units on 1st sitting	%
2019/2020	November 2019	1622	554	34.2
2020/2021	June 2021	1856	923	49.7
2021/2022	April 2022	1546	919	59.4
2022/2023	March 2023	1453	743	51.1
2023/2024	November 2023	1619	664	41
2024/2025	November 2024	1790	716	40

Performance data from 2019–2024³³² highlights systemic weaknesses, with first-sitting pass rates consistently below 50%. Commercial Transactions, Conveyancing, and Legal Writing and Drafting emerge as the most frequently failed units, reflecting curricular shortcomings. Stakeholders attribute these outcomes to flawed assessment designs, particularly in oral examinations and project work, which lack clear guidelines and are excluded from resit calculations. While the KIPPRA Report advocates for standardized oral exam frameworks, the Ojiambo Report controversially proposes abolishing these components entirely, revealing divergent views on assessment reform.

Written examinations face similar criticism, including overly lengthy questions, limited access to past papers, and a congested schedule that strains student preparedness. Although the CLE has introduced a past-paper portal and streamlined question formats, broader issues remain unaddressed. The debate over open-book examinations exemplifies this stagnation: while Tanzania’s Law School permits research during exams³³³, Kenya’s CLE resists this practice despite its alignment with real world legal work. This resistance clearly demonstrates a broader disconnect between assessment methods and professional competencies.

331 KIPPRA Report (2019), para 348.

332 CLE, ATP Examination Performance Summary (2019–2024), Table 3: Report of the Working Committee on Legal Education Sector Reforms

333 Law School of Tanzania (Examination and Appeals) By-Laws, 2024

The ATP's examination places CLE between preserving traditional assessment and adapting to the demands of modern legal practice. The reluctance to adopt open-book formats despite their use in jurisdictions like Tanzania reflects an outdated privileging of memorization over analytical skill. Similarly, the exclusion of oral and project marks from resit³³⁴ calculations penalize incremental progress, while the lack of clear guidelines for orals creates a form of arbitrariness of this assessment. These flaws are symptomatic of a deeper institutional 'inertia' in the Kenya school of law, where reforms like the Ojiambo Report's recommendations are noted but not urgently implemented.

CLE needs to prioritize three reforms: aligning examinations with practice through open-book formats for procedural subjects, standardizing oral assessments via moot court simulations and other CLE-approved alternatives; and relooking the examination calendar to balance with student well-being. Without such changes, the ATP risks to always be a system that measures examination endurance more than legal analysis which is a disservice to both students and the profession which we seek to join.

Building on the paper presented by *Washington Odongo Ombis* in "*A Critique of the Assessment Methods Used at the Kenya School of Law*,"³³⁵ the paper makes valuable contributions to the ongoing conversation about legal education reform in Kenya. The author's examination of oral examinations raises important concerns about consistency and fairness, particularly regarding the potential for subjective evaluation and the inclusion of questions beyond the prescribed curriculum. The suggestion to introduce moot court simulations as an alternative assessment method shows particular insight, as it would maintain the developmental benefits of oral advocacy while introducing more structured evaluation criteria. Similarly, the proposal to incorporate practical technology exercises, such as e-filing training, demonstrates forward-thinking alignment with the evolving nature of legal practice.

While fully appreciating the paper's constructive recommendations, it may be worth considering dimensions of implementation. The well reasoned suggestion to make firm work optional for certain students, while ideal in principle, would require careful planning to ensure the school's administrative systems could support more individualized assessment approaches. The paper's strong case for practical assessments could be further strengthened by explicitly advocating for open book examinations in procedural law units, an approach that would mirror actual legal practice where referencing materials is standard. The paper's emphasis on developing practical competencies over theoretical knowledge is especially commendable and could perhaps be extended to advocate for more comprehensive integration of skill based assessments such as oral advocacy through moots in the curriculum. These thoughtful proposals collectively represent a significant step toward ensuring Kenya's legal education system produces truly "practice ready" advocates.

334 ATP Examination Regulations

335 W Ombis, 'A Critique of the Assessment Methods Used at the Kenya School of Law' (2024) 1(1) *Riara Law Journal* 11.

IN CONCLUSION REFORMING LEGAL EDUCATION FOR THE 21ST CENTURY ON CURRICULUM RELEVANCE AND THE FUTURE

The legal profession is undergoing significant transformation due to globalization, technological advancements, and evolving client expectations. As highlighted in *Lawyers of the 21st Century; Reforming Legal Education in Kenya*, the traditional centred approach, which emphasizes theoretical knowledge, is increasingly inadequate for preparing graduates to meet modern demands.³³⁶ Scholars argue that legal education must shift toward a skill-centred model, integrating practical competencies such as advocacy, negotiation, and client counselling alongside doctrinal learning. This shift is critical to producing «practice-ready graduates» who can adapt swiftly to the dynamic legal landscape.

A major critique of Kenya's current legal education system is its overreliance on theoretical instruction at the university level, with practical training deferred to the post-graduate Advocates Training Programme (ATP).³³⁷ As noted in *Curriculum and Future*, this disjointed approach leaves graduates ill-prepared for real-world practice, forcing law firms to invest additional resources in training newly admitted advocates.³³⁸ The paper argues that universities prioritise faculty convenience over student needs, continuing an unsustainable model. This gap demonstrates the urgency of codifying in the curricular clinical programmes, moot courts, legal aid and internships into undergraduate curricula to bridge theory and practice.

Comparative insights from South Africa and the U.S. offer valuable lessons. South Africa's Practical Legal Training Schools (PLTS) employ clerkship duration by equipping students with hands on skills early, while U.S. law schools employ the Socratic method and mandatory internships to foster analytical and practical abilities.³³⁹ Kenya's universities with the clinical approach, cannot single handedly address these systemic deficiencies. A hybrid model blending theoretical learning with simulated and real-life legal work in the learning is essential to enhance graduates' employability and competence.

The curriculum must also expand beyond traditional legal subjects to include interdisciplinary topics like accounting, office management, and digital literacy.³⁴⁰ As the *Lawyers of the 21st Century* paper argues, 21st-century lawyers must be versatile problem-solvers, capable of navigating complex transactions and leveraging technology. Neglecting these skills perpetuates a mismatch between graduate capabilities and market demands, as evidenced by employers' growing preference for «finished» work-ready candidates.

336 Bett Rickcard Kipruto, *Lawyers of the 21st Century; Reforming Legal Education in Kenya* (SSRN 2021) 1.

337 *Law School Curricula: Training Lawyers for the Future* (SSRN 2020) 16.

338 *ibid*

339 Kipruto n 28

340 n 29

Mentorship and exposure to current affairs are equally critical. The lack of structured mentorship programmes in Kenya, unlike the American Bar Association's initiatives, widens the rift between senior and young lawyers, reducing the professional growth. Furthermore, static curriculum fails to address emerging fields like blockchain and international trade law, leaving graduates outdated which calls for a need for elective units in universities to continue to adopt to the emerging areas of practice.

In conclusion, Kenya's legal education reform must prioritise a holistic, skill centred approach. By integrating practical training early, expanding curricular scope, and fostering mentorship, law schools can produce adaptable, innovative lawyers. As the *Curriculum and Future* document warns, clinging to outdated models risks rendering the profession as one which does not adopt. The call for reform is not merely academic; it is a pragmatic importance to align legal education with the realities of the 21st century.

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