

Realising the right of access to basic education in Nigeria: Beyond the rhetoric

by

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DECLARATION

I declare that this thesis, which I hereby submit for the degree Doctor Legum (LLD) at the University of Pretoria, is my work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Onuora-Oguno Azubike Chinwuba

ABBREVIATIONS AND ACRONYMS

ABEK	Alternative Basic Education for the Karamoja
ACHPR	African Charter on Human and Peoples' Rights'
ACRWC	African Charter on the Rights and Welfare of the Child
ADMHCDS	Anglican Diocese of Mbamili Health and Community Development Services
AI	Amnesty International
AIE	Alternative and Innovative Education
APRM	African Peer Review Mechanism
BEA	British Education Act
BH	Boko Haram
CC	Constitutional Court
CESA	Centre for the Study of Economies in Africa
CFRN	Constitution of the Federal Republic of Nigeria
CLE	Continuing Legal Education
CLU	Clinical Law Units
COE	Colleges of Education
CRA	Child Rights Act
CRC	Convention on the Rights of a Child
CRM	Country Review Mechanism
CRPD	Convention on the Rights of People with Disabilities
CSO	Civil Society Organisation
CWD	Children with Disabilities
DFID	Department for International Development
DRR	Disaster Risk Reduction
ECHR	European Convention of Human Right

EFA	Education for All
EGS	Education Guarantee Scheme
ESCR	Economic, Social and Cultural Rights
FCT	Federal Capital Territory
FG	Federal Government
FME	Federal Ministry of Education
GAJE	Global Alliance for Justice Education
GC	General Comments
GDR	German Democratic Republic
HOD	Head of Department
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPC	Independent Corrupt Practices Commission
IEA	India Education Act
IHRC	India Human Rights Commission
KHRC	Kenyan Human Rights Commission
LDC	Language Development Centre
LEGA	Local Government Education Authority
MDG	Millennium Development Goals
MEC	Member of Executive Council
MoE	Ministry of Education
NBA	Nigerian Bar Association
NCE	National Certificate of Education
NEDS	National Education Data Survey
NEMA	National Emergency Management Agency

NERDC	National Education Research and Development Council
NGO	Non-governmental organisation
NHRC	National Human Rights Commission
NLS	Nigeria Law School
NHRC	Nigeria National Human Rights Commission
NOUN	National Open University of Nigeria
NPE	National Policy on Education
NPEC	National Primary Education Commission
NPEF	National Primary Education Fund
NTI	National Teachers Institute
NUC	National University Commission
NUT	Nigerian Union of Teachers
NYSC	National Youth Service Commission
OAU	Organisation of African Unity
PAJA	Promotion of Administrative Justice Act
PIL	Public Interest Litigation
PLWD	Persons Living With Disabilities
PTA	Parents' Teachers Association
RTE	Right to Education
SACC	South African Constitutional Court
SAHRC	South African Human Rights Commission
SAN	Senior Advocate of Nigeria
SAP	Structural Adjustment Programme
SEN	Special Education Needs
SERAP	Socio-Economic Rights and Accountability Projects

SGB	School Governing Board
SMoE	State Ministry of Education
SPEB	State Primary Education Board
SUBEB	State Universal Basic Education Board
TEP	The Education Partnership
TMLI	Thabo Mbeki Leadership Institute
TRCN	Teachers' Registration Council of Nigeria
UBE	Universal Basic Education
UBEA	Universal Basic Education Act
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Education Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UPE	Universal Primary Education

DEDICATION

To every child seeking the benefits of basic education in Nigeria, especially children of the
Anambra West Local Government area;

To the missing girls kidnapped by Boko Haram in Chibok in their quest for basic education;

To God Almighty;

To Blessing, Ifunanya, Onyedika and Ebube.

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SUMMARY

The state of access to basic education in Nigeria has been abysmal and worrisome in recent times. Close to 10 million children are said to be out of school in Nigeria out of the over 50 million of the world's out of school children. Several factors contribute to these non-encouraging statistics. Increasing attacks on children in school areas and the apparent rejection of the style of education make the situation of basic education in Nigeria pathetic. Despite the gloom, successive governments in Nigeria all claim to be making a substantial input into reversing the state of basic education, with all efforts appearing to be mere rhetoric.

On this basis, the thesis advances the recognition of basic education as a fundamental right in Nigeria as a necessary shift from the present situation of its recognition as a mere directive objective of state principle. It examines the role that national and international laws can play in aiding the enhancement of access to quality basic education. In addition, it examines both legal and non-legal institutions that are able to assist in the quest for enhancing access to basic education. To achieve this, the thesis traces the history and philosophy of education, generally, and particularly in Nigeria. It examines the development of both law and policy from the pre-colonial, colonial and post-colonial eras. Besides the challenges of policy and law, cultural, ethical and corruption pitfalls are identified and discussed as major inhibitors of access to basic education. The thesis further analyses the budgetary challenges and argues for enhanced funding of the education sector, with the attendant political will to curb corruption.

The thesis is grounded in the triad of theories, namely, the classical, deliberative and struggle theories, to advance the need for the fundamental nature of basic education and the need to keep the discourse within the judicial sphere. The theories are further grounded on the assumption, among others, that the court and strengthened institutions can aid the realisation of access to basic education. Furthermore, the thesis looks, beyond the horizon of Nigeria

particularly to South Africa and India, with the aim of identifying how the judiciary and national human rights commissions have approached the issue of basic education. In discussing basic education, vulnerable groups, such as the girl child and physically-challenged child, are also examined.

In conclusion, the thesis found that the law is a valid tool in the quest for eliminating challenges that have kept access to basic education in Nigeria mere rhetoric. It therefore recommends that there is a need to review the legal framework of institutions such as the Universal Basic Education Commission, the Teachers' Registration Council of Nigeria, the National Human Rights Commission of Nigeria and the judiciary, among several other institutions. It encourages further co-operation and synergy among institutions, particularly between non-governmental organisations, represented by the Nigerian Bar Association.

Keywords: Basic education; human rights; policy; institutions; corruption; access; availability; acceptability; affordability; judicial; disability; girl; child

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Chapter 1

Introduction and background to study

1.1 Introduction

The level of illiteracy in Nigeria has reached an alarming rate and has consequently jostled all spheres of the national existence. The present national woes are possibly hinged on the paucity of access to basic education of the Nigerian child. The population of Nigeria is not certain, as the figure fluctuates between 150 million and 180 million,¹ but it is estimated that close to 10 million children are out of school and almost the same number are forced to drop out of school because of an inability to sustain the requirements of the basic education system, most often occasioned by poverty and the cultural and religious affiliations of parents.²

This situation is all the more disturbing as the government continues with political rhetoric: mainly insincere and pretentious commitments to curbing poor access to basic education. In the human rights discourse today, the role of education is important as it forms the basis on which other rights are built.

The government is required by national legislation and international law to protect, promote and fulfil human rights. The Nigerian government is therefore under an obligation to ensure the elimination of all challenges capable of depriving the Nigerian child access to basic education. Consequently, it is important to take the discourse of access to basic education beyond rhetoric and to seek a legal means of enhancing the prospects and eliminating the challenges.

¹ <http://www.population.gov.ng/images/Priority%20Tables%20Volume%20I-update.pdf> (accessed 7 May 2015).

² See generally statistics on state of education available at <http://data.uis.unesco.org/Index.aspx?queryid=120> (accessed 30 April 2015); <http://data.worldbank.org/topic/education> (accessed 1 May 2015).

Education in Nigeria is provided for in the concurrent legislative list of the 1999 Constitution of the Federal Republic of Nigeria (CFRN), as amended.³ The implication is that both the state and federal governments can legislate on issues concerning education. It could be assumed that the CFRN places more responsibility for basic education on both the local governments and state governments based on the wording of the CFRN. This position is, however, not acceptable for purposes of this thesis. While it seems that the above position may hold ground, it is argued that a reading of other sections of the concurrent legislative list places higher responsibilities on national assemblies to oversee the functioning of national policies over and above the policies of the various states of the federation. Consequently, no matter what policy is put in place, it is expected that such a policy must conform to the basic obligation of Nigeria towards ensuring the protection of the right to access basic education. This position is supported by Onyukwu, when reiterating the position that ‘[e]ducation in Nigeria is the shared responsibility of the federal, state and local governments; the Federal Ministry of Education plays a dominant role in regulating the education sector, engaging in policy formation and ensuring quality control’.⁴

Nigeria has adopted several policies of education, such as the 6-3-3-4 and, currently, the 9-3-4 system.⁵ Thus, taking into consideration Nigeria’s obligation to basic education, as currently represented in the Universal Basic Education (UBE) law,⁶ and her obligations under global and regional human rights laws, the standard of basic education in the country remains poor. Issues of access, acceptability and quality today confront the education industry in

³ CFRN 1999, Part II, Concurrent Legislative List, secs 29-30.

⁴ J Onyukwu ‘The education system of Nigeria’ available at <http://www.wes.org/ewenr/11aug/practical.htm> (accessed 10 March 2013).

⁵ “The 6-3-3-4 represented six years of primary education, three years of junior secondary, three years of senior secondary and four years of tertiary education. The 9-3-4, which is the current system, represents nine years of basic education, three years of senior secondary and four years of university education”. Consequently, it is assumed that the basic education level in Nigeria covers the first nine years of a child’s school life.

⁶ Universal Basic Education Act, 2004.

Nigeria, providing a basis for instability in the polity. For instance, the Country Review Mechanism (CRM) interactive session revealed:

On the whole, Nigerians believe their educational system is in a crisis. Stakeholders were unanimous in the view that, as a result of its *poor quality*, the sector has mostly failed the millions of Nigerians who cannot access expensive private education. During the interactive sessions (at the federal and state levels), the responses on education were contentious. They indicated the level of frustration felt by many Nigerians over the poor state of their education system.⁷

Consequently, the challenge facing basic education in Nigeria goes beyond the issue of access: also to that of quality. In addition, the non-justiciability stance against the right to education remains unchanged. Indeed, the non-justiciability of the right to education and other economic, social and cultural rights may have assumed a ‘settled’ status in Nigeria, as legal practitioners are even unwilling to embark on litigations on these issues. This challenge is premised on the fact that the right to education is not expressly guaranteed in the Nigerian Constitution. However, the UBE Act provides for compulsory access to basic education. It is within the purview of this research to analyse the UBE Act and to assess to what extent it can be used as a legal tool towards the realisation of the right of access to basic education. Besides policy, the recognition of education is also provided for under Chapter Two of the Constitution, which is considered to be non-justiciable.⁸ It is important to find a basis for the advancement of the right to basic education by an interrogation of legislative and judicial interpretations. Considering the notion that the provision of basic education does not stand as an isolated right, the rights in education are also of equal legal importance to this research. In this regard, the content and curriculum of basic education in Nigeria fall within the ambit of this thesis. The type and nature of education provided must be in the best interests of the

⁷ African Peer Review Mechanism Report (2008) No 8 para 1046 (my emphasis).

⁸ Sec 6(c) of the 1999 Constitution of Nigeria is interpreted to mean the non-justiciability of chapter 2 of the Constitution. It reads: ‘... s[h]all not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution’.

child, irrespective of whether or not they are challenged children, and must be in consonance with the provisions of various legal instruments seeking to protect the child. Locating a framework within global and regional human rights law on which the right to basic education can be pursued is germane. This research seeks to analyse global and regional human rights law with the aim of locating a legal basis for the advancement of the right to basic education, with particular reference to Nigeria. Issues of holding a state liable for a breach of its international law obligations will be part of the concern of this research.

If the right to basic education must therefore be achieved in Nigeria, looking at institutions that are likely to play a role in this regard is worth examining. Consequently, the importance of strengthening institutions, such as the National Human Rights Commission (NHRC), the judiciary, the Federal Ministry of Education (FME), the National Teachers' Institute (NTI) and non-governmental organisations (NGOs), particularly the Nigerian Bar Association (NBA), is germane. In this regard, the research will particularly examine the legal status of the NHRC with a view to repositioning it towards the realisation of its efficiency regarding the promotion, protection and fulfilment of the right to basic education in Nigeria. In addition, looking at the NTI as an institution will also provide us with an insight into the training of teachers, who are the vehicles of quality education, and their value for human rights in education.

Other concepts pivotal to the research in terms of quality, access and acceptability, affordability and availability are the issue of adaptability. This is premised on the fact that the concepts form the core components of rights to access basic education. Consequently, if quality education includes transmission, acceptability and accessibility, it is important to draw a nexus between religious culture, language and education. The link between education and language is premised on the role language plays in intellectual development. In the same

manner, culture relates to education since it enhances the validity of any form of education accessed by people.

With the above introduction, the work takes the issue of realising access to basic education beyond the present rhetoric by examining the prospects and challenges and proffering viable solutions. To achieve this, the thesis is divided into six chapters as set out in the chapter outlay.

1.2 Statement of problem

Despite Nigeria signing and ratifying all major international human rights instruments; enacting the UBE Act and the CRA that guarantee the right to basic education, access to and the acceptability of the right to basic education has remained elusive to children from poor homes. The poor access and poor completion of basic education remain a major challenge in Nigeria. Statistics show that, at present, access to basic education in Nigeria is poor, especially in the northern part of the country, with quality below an acceptable threshold in the nation as a whole.⁹ Besides the challenge of access, quality is also a major challenge in the education sector. With the non-enshrining of the right of access to basic education in the

⁹ A state-by-state literacy status compiled by the Commission covering 2008 to 2010 shows that very few states have done well. Most of the states in the north-east and north-west zones have not done well at literacy level. Borno State has only 14.5 per cent of literate population; Gombe has 39 per cent; Jigawa has 24 per cent, while Katsina has 21 per cent. Those doing well are Lagos with 92 per cent; Anambra has 75.1 per cent, Abia has 72.5 per cent while Ekiti has 74.7 per cent; FCT has 61.4 per cent. See <http://nigerianpilot.com/index.php/-other-section/-features/4085-the-challenges-of-mass-illiteracy-in-nigeria> (accessed February 2013). As already stated in the introduction, UNESCO statistics also show the poor state of out of school children in Nigeria. This position effectively forecloses the political argument on the basis for the reliance on the statistics of UNESCO as the dismal situation is captured in both national and international statistics. Furthermore to the UNESCO statistics, UNICEF in a separate research have also found that “Forty per cent of Nigerian children aged 6-11 do not attend any primary school with the Northern region recording the lowest school attendance rate in the country, particularly for girls. Despite a significant increase in net enrollment rates in recent years, it is estimated that about 4.7 million children of primary school age are still not in school...Even when children enrol in schools, many do not complete the primary cycle. According to current data, 30% of pupils drop out of primary school and only 54% transit to Junior Secondary Schools. Reasons for this low completion rate include child labour, economic hardship and early marriage for girls see generally http://www.unicef.org/nigeria/children_1937.html (accessed July 13, 2015). In 1998, UNESCO found the number of out of school children in Nigeria to be 7 million, the recent estimate of 10.5million further reiterate the depreciating turn of events in the basic education industry in Nigeria, see http://www.unesco.org/education/efa/global_co/policy_group/children_out_of_school.pdf (accessed July 13, 2015).

bill of rights, it is not possible to set out legally binding goals as constitutional imperative. Also, notwithstanding the fact that Nigeria has made a commitment to the realisation of the right to basic education in the Millennium Development Goals (MDGs), a large percentage of children are unable to access basic education.

Apart from the challenge of access, quality is another huge challenge in the realisation of basic education. The African Peer Review Mechanism (APRM) to Nigeria noted that, despite the legislative provisions and policies in place in Nigeria, the quality of education is substandard, with many schools ill-equipped and lacking qualified teachers.¹⁰ The APRM, in addition, noted the impact of corruption and poverty as challenges hampering access to quality education in Nigeria.¹¹

With the menace of corruption leading to a lack of access to and, consequently, the non-availability of basic education, the problem deepens. Cultural and religious undertones, coupled with the non-adaptability of the curriculum content of basic education in Nigeria, further leads to the rejection of education.¹² Consequently, problems of access, acceptability,

¹⁰ African Peer Review Mechanism (2008) Report No 8 para 347. In a UNESCO research, the state of literacy for Nigeria basic education was found to be below 50 %. It was found that “[T]he mean percent scores on the literacy, numeracy and life skills test were 40.8, 43.1 and 43.1 respectively for private schools; while the mean percentage scores for the public schools for literacy, numeracy and life skills tests were 22.2, 30.1 and 30.6 respectively” see generally R Aderinoye Literacy Assessment Practices (LAP) in selected developing countries Nigeria case study Discussion Document Prepared for ILI/UNESCO LAP 2nd Experts’ Meeting UNESCO Paris. 18. In buttressing the quality challenge the former Supervisory Minister of Education in Nigeria, lamented the poor state of teacher-pupil ratio in Nigeria. According to records it is put at “1 teacher to 350 Pupil” see generally Nigeria to address shortage of qualified English, Maths teachers available at <http://www.premiumtimesng.com/news/164561-nigeria-to-address-shortage-of-qualified-english-maths-teachers-wike.html> (accessed July 15 2015).

¹¹ This situation leaves yet unanswered the issue of acceptability. As stated in the case of the Anambra West local government area, the predominately fishermen and farmers sometimes decry the obstruction of their means of livelihood by having to let their children go to school. The situation in the north, where the Boko Haram has emerged, is also another case worth investigating. It is important, therefore, that the government must evolve a workable legal framework to take care of all interests to ensure that not only access is guaranteed but also acceptability.

¹² A new conundrum is the rise of the Boko Haram, a supposed Islamist group which in 2012 alone has ‘burnt down 14 schools in Maiduguri, the capital of Nigeria’s Borno state, forcing over 7 000 children out of formal education and pushing down enrolment rates in an already ill-educated region’. <http://www.protectingeducation.org/news/nigeria-school-attendance-down-after-boko-haram-attacks> (accessed 13 November 2012). This has led to a reduction in access to basic education in the region.

availability and affordability are major challenges to the realisation of basic education for the Nigerian child, whether suffering from some form of disability or not.

It is incontrovertible that Nigeria's basic education framework has failed to adapt to international human rights standards.¹³ In recognising the need for a better educational system in Nigeria, the Minister of State for Education insists that positive results must be achieved from the federal, to the states, down to the local councils, to reach out to Nigerians who are unable to access education through the existing school system.¹⁴ A former Military Head of State, Gen Babangida, has 'attributed the security and poverty challenges in Nigeria presently to the decline in the education sector and charged the present government to redirect its energy and resources to the sector'.¹⁵

Apart from issues of access, acceptability, availability and affordability, other underpinning challenges also abound on the realisation of the right to basic education in Nigeria. Poor policy framework and the execution of existing policies also loom large. The non-viability of several institutions with the potential of advancing the frontiers of the right to basic education remains a major problem. Institutions such as the National Human Rights Commission (NHRC) have to date not pursued the development of the jurisprudence, awareness and litigation on issues of the realisation of socio-economic rights in Nigeria, particularly with

¹³ This explains that the curriculum of education must be people-based, which in turn will lead to the acceptability and adaptability. As will be discussed later in this thesis, there is the possibility that a group may decline accessing formal education if the content tends to ignore the cultural or religious peculiarities.

¹⁴ The Minister for State for Education, Ezenwo Nyesom Wike, stated in a press conference that 'for the past three years, implementation of government policy on literacy has been dwindling at the state level. Of course, our responsibility at the national level is fundamental - formulation of policy documents, curriculum development, capacity building, developing programmes, and supplying teaching/learning materials. But the federal government cannot eradicate illiteracy alone; the state government has to be fully involved. Even then, there is a need for the private sector to come in: NGOs, faith-based organisations, development partners, corporate companies and individuals. All hands must be on deck.' See <http://www.vanguardngr.com/2012/04/building-a-literate-nigerian-community/> (accessed 13 November 2012).

¹⁵ National University Commission Bulletin, Vol 8 No 9 available at <http://www.nuc.edu.ng/nucsite/File/Monday%20Bulletin/MB%202013/11%20March.pdf> (accessed 11 March 2013).

regard to the right to access basic education. The Nigerian judiciary has not adopted an innovative interpretation of the much-acclaimed non-justiciable rights due to the poor attitude towards public interest litigations.

The enumerated challenges are major threats to the realisation of the right to basic education and will form the nucleus of interrogation of this thesis. It is, therefore, premised on the above challenges that this research is set out, with the aim of answering the research questions below.

1.3 Research questions

The central question of this research seeks to investigate:

- i. How can the right to access basic education in Nigeria be effectively realised?
 - a. What is the position on the right to access and acceptability of basic education under Nigerian law and education policies and does it conform to international human rights law?
 - b. How can victims of the lack of access to basic education use global and regional human rights laws to enhance access to basic education?
 - c. How can institutions be effectively strengthened and resourced to enhance the right to access basic education in Nigeria?

1.4 Assumptions of thesis

The thesis makes the following assumptions:

- i. The various laws and policies in Nigeria relating to basic education are in compliance with international human rights laws in Nigeria.

- ii. Realising the right to access basic education is possible by relying on international human rights regimes.
- iii. If the institutions are strengthened in Nigeria, they will enhance the realisation of the right to access basic education.

1.5 Literature review

Literature reviewed for the purposes of identifying gaps has been grouped into major areas dealing with previous works on institutions, culture, rights, language rights, education, justiciability of socio-economic rights, constitutionalism and people living with disabilities. The choice of the above areas builds on the underlying theories for the thesis and also forms a nexus on which the realisation of the right to basic education in Nigeria can be built on. Summarily, the gaps identified in the literature reviewed can be summed up into three major headings:

- i. None of the reviewed literature covers access to basic education, specifically from the Nigeria perspective.
- ii. None of the reviewed literature employed a similar methodological approach. While Taiwo relied mainly on desktop reviews in his analysis of education between Nigeria and South Africa, this thesis incorporates an interaction with major stakeholders in the policy and legal fronts, as shown in the methodological framework, using interactions, focus group discussions and field trips in ascertaining the level of access and acceptability of basic education in Nigeria and how the challenges can be resolved from a legal perspective.

- iii. The analysis of case law jurisprudence from India and South Africa is also another major novelty introduced by this thesis in investigating the possibilities of enhancing the realisation of the right to basic education in Nigeria.

The above is gleaned from several works discussed below. For instance, Smith¹⁶ and Heyns¹⁷ in several ways dealt with the role of institutions in realising rights *vis-à-vis* their relationship with the state. In this regard, Heyns projects the possibility of a struggle approach, which may arouse people towards realising their fundamental rights when the institutions fail to do their work. This thesis takes the argument further to address the role and *modus* by which access to rights such as access to basic education rights, may be upheld in a multicultural diversified entity such as Nigeria. It also examined not only the onus placed on government institutions, but also on the relationship and the onus placed on the actions of individuals in the sphere of the educational industry in Nigeria. Deschowitz¹⁸ discusses rights in general terms and does not focus on the specifics of the right to basic education. This research primarily provides a human rights perspective to the issue of basic education as a right and specifically from a Nigerian perspective.

Laure-Helene,¹⁹ while providing a rights-based insight into social protection, does not discuss issues of content that will ultimately lead to issues of access and acceptability of basic education. The work stops in the discussion of the mandate of the state to ensure the promotion, protection and fulfilment of rights. However, this research also interrogates the relationship between the state, the individual and international co-operation towards realising the right to access basic education.

¹⁶ J Smith 'Exploring connections between global integration and political mobilisation' in B Podobnik & TE Reifer (eds) (2004) 255 *Journal of World System Research* Vol X <http://www.jwsr.org/wp-content/uploads/2013/03/jwsr-v10n1.pdf> (accessed 10 March 2013).

¹⁷ CH Heyns & K Stefiszyn (eds) (2006) *Human rights, justice and peace in Africa: A reader*.

¹⁸ A Deshowitz (2005) *Rights from wrongs- A secular theory of origins*.

¹⁹ PLauré-Helene 'Rights-Based approaches to social protection' available at <http://www.gsdr.org/go/display/document/legacyid/1617> (accessed 10 March 2013).

Education as a cultural right requires an understanding of the concept of culture. Thio,²⁰ in exploring the concept of culture, does so as a 'stand-alone' concept and does not draw a direct link with the relationship between culture and education. Consequently, this is done with specific consideration of the unique multicultural nature of a society like Nigeria and also taking into consideration the consistent tension between respecting the needs of minority and majority rights. In filling this gap, the thesis draws a nexus between religious *cum* cultural beliefs and laws regulating education as a joint concept internationally and nationally.

In addition, the acceptability of any form of education must attain the threshold of being culturally legitimate. Building on this proposition, the work of Kaime is pivotal. Kaime associates the need for cultural legitimacy as a means of 'enhancing and motivating individuals and communities to take action in favour of the rights and welfare of the child as this is now viewed as a legitimate goal or interest'.²¹ Consequently, it is observed that the development of 'language in a child is gradual and phased during the course of education suggesting why all advanced nations avoid getting their children to learn in borrowed or imposed languages'.²² The concept of the legitimacy of cultural content is limited to only children in the view of Kaime, without specifically assessing its impact in the quest for the realisation of education.²³ However, the thesis extends the search for legitimacy to cover the content of basic education.

²⁰ L Thio (2007) 'The implementation of minority rights within the United Nations Human Rights Regime in *Managing Babel: The international legal protection of minorities in the twentieth century*. E Stamatopoulou 'What are cultural rights? The normative content of the right to participate in cultural life' in *Cultural rights in international law. Article 27 of the Universal Declaration of Human Rights and beyond* 113.

²¹ T Kaime *The African Charter on the Rights and Welfare of the Child - A socio-legal perspective* (2009) 39.

²² BO Stephen 'Reforming the mother tongue content of Nigerian education for sustainable national empowerment' in AR Lawal *et al* (eds) (2011) 40 *Education reforms in Nigeria - Past, present and future*.

²³ Kaime (n 21 above).

Dei and Asgharzadeh and Prott,²⁴ in discussing the concept of language and culture, do not cover the scope of the direct impact of culture and language on issues of access to basic education. In the same vein, in analysing Weber's contribution to the sociology of education Zymek provides an inspiration in investigating the possibilities of violence occasioned by oppression in the education structure, but it left the question of policy out. Policies are important to ensure that the relationship between the various concepts discussed above are efficiently employed. Thus, this research work fills the gap by looking at issues of best practices (in terms of laws and policy) in a bid to suggest ways of enhancing access and acceptability to basic education in Nigeria.

Nanda explains that language remains

a major vehicle through which values are communicated from one generation to another ... one of the most important aspects of human adaptation is language capabilities ... language makes possible the exchange of abstract and highly complex thoughts which play a crucial role in the maintenance of many social relationships within human societies.²⁵

Furthermore, '[w]ithout language it would be impossible to socialise children into the intricate workings of their cultures to teach others how to make simple tools, pass on tradition, myths, religion, beliefs that instil a sense of group identity and maintain social order with human societies'.²⁶ The discussion by Nanda and Fodor,²⁷ that everyone thinks in a particular medium and that medium is language,²⁸ is enhanced by examining inclusive education in the provision of basic education in Nigeria with particular shortfalls in sign language education. De Varennes²⁹ argues that the denial of language rights requirements

²⁴ T Lindholm 'Coming to terms with traditions' in H Hoibraden & I Gullvag (eds) *Essays in pragmatic philosophy* (1985).

²⁵ S Nanda & R Warms *Cultural anthropology* (2010) 115.

²⁶ As above.

²⁷ JA Fodor *The language of thought* (1975).

²⁸ As above.

²⁹ F de Varennes 'Equality and non-discrimination: Fundamental principles of minority language rights' in J Castellino (ed) *Global minority rights* (2012) 447 (my emphasis).

remains perhaps the most prevalent and pernicious method to exclude or disadvantage minorities from effective political participation. His main argument hinges on the need to enhance the principles of coexistence, tolerance and participation in both a linguistic and cultural community as well as in life in the wider society. The main focus of his propositions is on discrimination and democracy and not on the right to basic education. This research, therefore, examines issues of language beyond the scope of his work to include education as a means of sustainable development and resolution of conflicts.

Tomasevski³⁰ opines that ‘education traditionally must treat children as objects of education specifying the rights of parents, teachers and the state’. She contends that ‘the affirmation of the rights of the child in most countries is not yet accomplished’.³¹ This is more so because the system of schools reflects societies and legal rules which view children as subordinates.³² This view makes the form of access to education an important issue. An import from the views of Tomasevski is important, especially when the curricula content and language of communication of educational values in a multicultural society such as Nigeria are taken into account.³³ Closely related to the ideas of Tomasevski is the issue of also promoting access to education of children with disabilities in Nigeria. In this regard, education must be provided with the child’s interests in mind. Wakefield and Murungi³⁴ discuss the issue of inclusive education, but only from the perspective of South African and Kenyan laws. However, this thesis, while borrowing the analysis of the laws in their work, advances a position for Nigeria

³⁰ K Tomasevski *Human rights report* 2009/9, E/CN.4/2001/52.

³¹ K Tomasevski *Removing obstacles in the way of the right to education Primers No 1* (2001) 44.

³² See generally C Shilling ‘Social space, gender inequalities and educational differentiation (1991) 23 *British Journal of Sociology of Education* 12.

³³ This theory seems to buttress the need to re-introduce indigenous education into the curriculum content of education in Nigeria. It is therefore important to examine the paradigm on which indigenous knowledge would be pivotal in advancing the level of access and acceptability of education. FOC Nwonwu *Indigenous knowledge systems in Igbo traditional agriculture* (2011).

³⁴ L Wakefield & N Murungi ‘Domesticating international standards of education for children with intellectual disabilities: A case study of Kenya and South Africa’ in I Grobbelaar-Du Plessis & T Reese (eds) *Aspects of disability law in Africa* (2011) 133.

in filling the gap in access to basic education for all children, irrespective of whether they are living with disabilities or not.

McLean and Mbazira³⁵ explore the issues of litigating socio-economic rights, but from a South African perspective. Also, McLean does not examine the right to basic education specifically. To this end, this research is dedicated to how legal institutions and non-governmental organisations in Nigeria can enhance the right to access basic education in Nigeria via public interest litigation. This is to be achieved by engaging both the Nigerian Bar Association and the judiciary. In addition, Olowu³⁶ deals with the issues of justiciability of socio-economic rights and human development in Africa. However, this research deals specifically with the issue of the right to access basic education in Nigeria and particularly from an access and acceptability point of view. Furthermore, this work critically examines cases from Nigerian jurisprudence related to the achievement of the right to access basic education specifically.

Woolman and Fleisch³⁷ provide insight into law and education, but dealing solely with legal frameworks, whereas this research focuses on Nigeria, analysing Nigerian law and policy. It also brings into question other multidisciplinary concepts aimed at helping the realisation of the right to access basic education in Nigeria.

In his work, Taiwo³⁸ investigates the implementation of the right to education in South Africa and Nigeria. However, the scope of the work does not cover the socio-cultural perspective of basic education in Nigeria. Furthermore, this research discusses inclusive education in basic

³⁵ C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009).

³⁶ D Olowu *An integrative rights-based approach to human development in Africa* (2009).

³⁷ S Woolman & B Fleisch *The constitution in the classroom: Law and education in South Africa, 1994-2008* (2009).

³⁸ AT Elijah 'Implementation of the right to education in South Africa and Nigeria' unpublished LLD thesis, Faculty of Law, Nelson Mandela Metropolitan University available at <http://dspace.nmmu.ac.za:8080/jspui/bitstream/10948/1392/1/ELIJAH%20ADEWALE%20TAIWO.pdf> (accessed 10 March 2013).

education and also examines the case law jurisprudence from other jurisdictions in order to proffer solutions towards the realisation of the right to access basic education in Nigeria.

The theories relied on in this research are hinged on the relationship between the national and international legal provisions which promote the globalisation of education *vis-à-vis* the ‘4A model of accessibility, affordability, availability and acceptability’.³⁹ The functional and institutional theories of education are part of the background of this research.⁴⁰ Meyer and Ramirez expound the two theories as being either influenced by ‘distinctive national needs and interests’ or, in the case of the former, ‘seeing education as part of a universalistic and global model’.⁴¹ An expansion of the theories above brings to the fore the compliance level of Nigeria to the obligations of providing basic education and also examines the influence international human rights law has on the realisation of Nigeria’s obligation under global and regional laws. Thus, no matter which concept or theory is adhered to, this thesis propounds that it should meet the minimum core of achieving access, availability, affordability and acceptability of basic education.

Another major theory instrumental in this work is the deliberative theory of Fisher: the deliberative theory of education.⁴² The argument is hinged on the basis that basic education should be deliberately agreed upon by both the state and the parent. This theory, from my analysis, if extended includes the vertical and horizontal relationship that must exist between government public schools and private individual schools. However, this theory is not to be wholly accepted in this thesis, as it is argued that the enormity of the challenges that it

³⁹ K Tomaševski *Free and compulsory education for all children: The gap between promise and performance* Right to Education Primers No 2 (2001) 8, available at http://www.campanaderechoeducacion.org/justiciabilidad/downloads/documentosCLAVE/documentosanaliticos/free_and_compulsory_education_tomasevski.pdf (accessed 10 October 2014).

⁴⁰ JW Meyer & FO Ramirez ‘The world institutionalisation of education’ in J Schriewer (ed) *Discourse formation in comparative education* (2000) 111.

⁴¹ Meyer & FO Ramirez (n 40 above) 113.

⁴² A Fisher *The content of the right to education - Theoretical foundations* (2004) Centre for Human Rights and Global Justice Working Paper Economic, Social and Cultural Rights Series No 4.

portends may not be easily reconcilable considering the issues of ethnicity and the multi-ethnic nature of the Nigerian State. However, it is proposed that, if education must be treated as a human right, it must be approached from a classical perspective.⁴³ This position is adopted because education is basically an inherent right of any individual, especially if the individual must play a positive role in society.⁴⁴

1.6 Limitations

The limitations of this research are the following:

- i. The study focuses only on primary education and not the other arms of the education structure of Nigeria, namely, secondary and tertiary institutions. However, an examination of the jurisprudence of Nigerian courts is limited because there is a dearth of case law on primary education.
- ii. The study examines national laws and policy with a view to ascertaining compliance with global and regional human rights laws. However, occasioned by challenges of security and the activities of the *Boko Haram*, a visit to the northern region of Nigeria was not possible.
- iii. In considering other jurisdictions from which Nigeria can learn, South Africa and India are examined primarily because of the existing case law jurisprudence in the two countries.

⁴³ For further reading on human rights theories, see A Sen 'Elements of a theory of human rights' available at <http://humanright-ias.com/cmslogin/news/file1/file1-1311.pdf> (accessed 10 March 2013); 'Human Rights Theories, Classical Perspectives: Aristotle' available at <http://www.mtholyoke.edu/~gerla22f/classweb/Human%20Rights%20Theories%20-%20Classic%20Perspectives.html> (accessed 10 March 2013); H Andrew 'Human rights: Chimeras in sheep's clothing' available at <http://www.sfu.ca/~aheard/intro.html> (accessed 10 March 2013).

⁴⁴ This argument is further based on the inter-dependence and inter-relatedness of rights. For instance, an individual needs basic education to access a right to health or even shelter which guarantees the individual's right to life. See, generally, P Laure-Helene 'Rights-based approaches to social protection' available at <http://www.gsdr.org/go/display/document/legacyid/1617> (accessed 10 March 2013).

1.7 Scope of study

The scope of the research is based on the right to basic education in Nigeria with particular reference to issues of accessibility, acceptability, availability and affordability. The research interrogates issues of law, policy, corruption and discrimination as inhibitors to the realisation of the right to access basic education. The analysis of both the institutional framework and legislation provides a veritable basis for possible recommendations which should improve the state of basic education in Nigeria.

1.8 Methodology

The methodology adopted in this research consists of library-based analyses of existing legislation, policy and legal frameworks in texts, adopting a critical approach of both domestic and international laws. All major national policies and legal instruments were analysed in the course of the research. Data on Nigeria's education budget was analysed and the graphic analysis conducted by Mr Orelesi Adewale, a Nigerian statistician.

The quality of the thesis is enhanced by attending a conference in December 2013 in India, where the opportunity to interact with individuals and NGOs on the pivotal role of the law as a tool aiding the advancing basic education was utilised.

Furthermore, in August 2014 the author attended the National Conference of the Nigerian Bar Association and also had a research visit to Nigeria. During the course of the conference and research visit to Nigeria, there were interactions with Mr Tony Ojukwu, the director monitoring of the National Human Rights Commission of Nigeria. Further, interaction with several members of the NBA, the judiciary and NGOs aided the author to gather information for the research. Some of the persons interacted with include, but are not limited to, The Hon

Justice Pete Obiora of the Anambra State Judiciary; Dr Kayode Olatoke, Senior Advocate of Nigeria (SAN); and Chief Nnamdi Ibegebu (SAN).

Interaction with other stakeholders in the education field was also possible during a focus group discussion organised to discuss the relationship between the law and other institutions. The focus group participants include, but are not limited to, Egbewole Qasim (NBA); Obiudu Mable (NBA); Ewunonwu Nkechi (lecturer, Alvan Ikoku Federal College of Education, Owerri); Dr Jude Manu Opara (National Association for Childhood Education); Mr Godwin Odo (Component manager, Cross Sector Co-ordination, Justice for All Programme of DFID in Nigeria); and Dr MU Ajoku (Faculty of Education Psychology, Abia State University).

Furthermore, in ascertaining the orientation of the NBA towards litigating matters bordering on socio-economic rights, such as the right to basic education, the author interacted with Mr Francis Ekwere (Vice-President, NBA); Mr Adetokunbo Mumuni, Executive Director Socio-Economic Rights and Accountability Projects (SERAP); and Dr (Mrs) Mo Olateju, Executive Director, The Education Partnership (TEP). Further interaction via e-mail and telephone conversations was had with Ms Boma Ozobia (Sterling Law Partnership); Prof Omari Omaka (Dean, Faculty of Law, Eboyin State University); and Mr Kola Ibrahim (newspaper columnist).

A documentary on education facilities in Anambra West Local Government was also conducted in partnership with the Anglican Diocese of Mbamili Health and Community Development Services (ADMHCDS) to show the state of facilities and also to interact with children and parents.

Finally, during the course of writing this thesis, the central themes were tested in conferences such as the Thabo Mbeki Leadership Institute Conference on Africa Solutions to African Problems (South Africa 2013); Global Alliance for Justice Education (India 2013); World

Conference on Constitutional Law (Oslo 2014); the National Conference of Associations of Childhood Education in Nigeria (2014); the American Society of International Law (109 Annual Meeting, Washington DC 2015); and Law and Society of America (Seattle 2015). Suggestions received were appropriately incorporated.

1.9 Overview of chapters

Chapter 1 provides the context in which the study is set. It outlines the basis and structure of the study, lays the background to the research, enumerates the aims and objectives of the study and outlines the methodology and detailed analyses of reviewed literature.

Chapter 2 examines the position of international human rights and policy on access to basic education. This is analysed from the platform of global to regional human rights instruments, with particular attention to the General Comments of Education and the African regional human rights system.

Chapter 3 examines the challenges facing basic education in Nigeria. Issues of access, acceptability, availability and affordability are discussed. In addition, factors like corruption, religious philosophies, discrimination and cultural affiliation and their impact on choice of educational models are also discussed.

Chapter 4 focuses on various education laws and policies and investigates their compliance or otherwise with human rights laws. The chapter is divided into three sections, considering the pre-colonial, colonial and post-colonial eras in the Nigerian education landscape. The situation of access to basic education in Nigeria during the military era is also analysed.

Chapter 5 examines various legal frameworks and policies from select jurisdictions. This is aimed at suggesting a possible ideological shift *cum* borrowing on how basic education in Nigeria will be improved by leveraging on the workings from the analysed jurisdictions,

which will also be considered as a benchmark for improving access to education in Nigeria. This chapter deals extensively with case law analysis from other jurisdictions.

Chapter 6 concentrates on how the institutional framework in Nigeria can be strengthened so as to initiate change and make progress towards the realisation of the right to access basic education in Nigeria. The institutions to be looked at include, but are not limited to, the judiciary, the legislature, the National Human Rights Commission, the Nigerian Teachers' Institution, and the Ministry of Education.

Chapter 7 is the concluding chapter of the research, containing recommendations. It provides a veritable framework that will take the issue of the realisation of the right to access basic education in Nigeria beyond rhetoric. It also provides recommendations on suggested inputs on the review of the Constitution, the UBE Act, the NHRC and the NTI.

Chapter 2

Theoretical frameworks and benefits of access to basic education

2.1 Introduction

This chapter discusses theories and concepts of basic education in light of various human rights laws. It seeks to establish the place of international human rights law and its meeting point with the right to access basic education. The chapter sets forth to discuss the theoretical basis of education and rights. In the following subsections the meaning of education, with particular reference to an African perspective and various global and regional human rights law regimes dealing with education, is discussed. The particular focus is on deciphering the scope and content of basic education as a human right. In establishing the core content of the right to education, it is noted, according to Coomans, that the term ‘core content’ should be regarded as an aid to identification though not without challenges. However, he identifies that:

With respect to the right to education as laid down in international documents, two aspects can be distinguished. On the one hand, realisation of the right to education demands an effort on the part of the state to make education available and accessible. It implies positive state obligations. This is the social aspect. On the other hand, there is the personal freedom of individuals to choose between state-organised and private education, which can be translated, for example, in parents' freedom to ensure their children's moral and religious education according to their own beliefs.¹

The purport of the chapter's analysis of the relevant provisions is to ground the arguments in support of a strong link between basic education as a human right and its fundamental human rights nature as opposed to a mere social obligation or human capital development

¹ F Coomans Clarifying the core elements of the right to education 3 available at <http://www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgelerdheid/organisatie/onderdelen/studieeninformatiecentrummensenenrechten/publicaties/simspecials/18/Documents/18-03.pdf> (accessed 27 May 2013).

component. The position of Coomans provides an insight into the obligation of both the state and then the individual as the subject of basic education.

2.2 Conceptual analysis of education - An African perspective

Education has different connotations for different groups of persons, either varying according to their religious, social or cultural perspectives. Education is a broad concept and can be viewed as a cycle which makes it an unending process in life. The claims of the advent of education acknowledge the Jewish, Greek and Roman origins, with little or no recognition of the African perspective of education. However, these positions may not be correct, as Africa also lays claim to its own concept of education. Despite the claim by some scholars that the African style of education was on a different paradigm from the style of education brought by colonialism in Africa; literature shows that the African concept of education was one that was acceptable and adaptable to the people,; slowly but gradually leading to its emancipation.² On a generalised basis, the education cycle should be one in which everyone has a role to play: ‘The child, parents, teachers and government must get involved so as to ensure that education achieves its set out aims and objectives.’³

The African concept of education describes ‘education as a life-giving principle ... which resurrected from the ancient Nile valley cultures centred on *ma’at*, which means not only justice, but also truth, righteousness, order, harmony, reciprocity and balance’.⁴ In Nduka’s analysis, education is all about expressing, conveying and receiving of information and ideas. In this regard, no one must be stopped from expressing views and opinions. Education

² M Hansungule & AC Onuora-Oguno ‘African perspective of education: A catalyst for the desired Africa of tomorrow?’ Paper presented at the Thabo Mbeki Leadership Institute Symposium on Finding Solutions to Africa’s Development, University of South Africa, August 2013.

³ J Bowen & PR Hobson *Theories of education studies of significant innovation in Western education thoughts* (1974) 8.

⁴ H Uhuru ‘An overview of the African centred perspective in education’ available at <http://www.zimbio.com/RBG+Afrikan-+Centered+Cultural+Development+and+Education/articles/263/Overview+African+Centered+Perspective+Education> (accessed 12 November 2012).

represents a process of cultural transmission in three tiers. This includes inheriting a culture, changing the culture for better or for worse, and passing it on to the younger generation.⁵

Uhuru suggests that the African perspective on education entailed two primary realities: that of African cultural traditions and political/economic environments.⁶ Ayodele and Adedokun are of the opinion that ‘education is not only a social service but a transformative act which is fundamental to social and personal development because when there is access to education, there is an increase in social and political awareness and heightened aspirations, self-assurance and self-assertiveness’.⁷ The purport of this perspective leads to a generalisation that education encompasses a whole lot that deals generally with the well-being of people and how they can be better entities to both society and themselves as individuals.

According to Kwame Nkrumah, ‘human history has been dominated by the quest for bread and human rights’.⁸ The analysis of human rights in this sense includes the various attempts to lay claim to ways of life of African people prior to colonial experiences. Various philosophies and attributes of the African society were lost in the distorted historical perspectives that have graced the academic circles on various issues like education, medicine, and so forth.

Kolawole describes education in Nigeria ‘not just as a medium for cultural transmission, but also as the main vehicle for ensuring individual, community and national development

⁵ O Nduka *Western education and the Nigerian cultural background* (1975) 12.

⁶ Uhuru (4 above). In Bowen and Hobson’s commentary on the biography of Plato, it is stated: ‘The cycle of educational development as shown in Plato’s view was not well developed in the late 5th century BC and that generally the privileged boy only went to school with the girl not given any schooling.’ The view of training only the ‘guardians’ of the state represents another discriminatory stance of early education styles absolving African traditional society of the blame of not educating the girl child.

⁷ JB Ayodele & MO Adedokun ‘Towards achieving functional adult literacy in Nigeria’ (2012) 1 *European Scientific Journal* 8:5.

⁸ Kwame Nkrumah’s address on education and nationalism cited in A Biny *The political and social thoughts of Kwame Nkrumah* (2011) 22.

towards its survival and sustenance’.⁹ The multicultural characteristic of Nigeria must, therefore, be considered in ensuring that some of the already highlighted benefits of education are realisable in Nigeria, and this can only be achieved by adapting an acceptable style of multicultural education at the basic education level. Nelson describes multicultural education as a process that takes place in schools and other educational institutions and informs all academic disciplines and other aspects of the curriculum.¹⁰ Therefore, in a multicultural domain like Nigeria and, indeed, any society, it is important that the views of Tomasevski be taken into consideration. Tomasevski opines that ‘education traditionally must treat children as objects of education specifying the rights of parents, teachers and the state’.¹¹ Tomasevski’s perception draws the trilogy of the key stakeholders in education. The state therefore has a vital role to play in ensuring that education is advanced, while acknowledging the role of the parents and the best interests of the child. It is pertinent then to include the views of parents and communities in an attempt to draft the curriculum and to determine the scope of the type of education that must be delivered to learners.¹² This is advanced as it is the only premise which will promote the acceptance and adaptability of basic education in Nigeria.

The above perspective brings to the fore the central place of education in enhancing the capacity of an individual and aiding the individual to realise his full potential while playing a definite and defined role in the society. Besides the African description of education, other descriptions of education also exist. For instance, according to the Latin jurisprudence, the word ‘education’ was derived from the Latin word *educare*, meaning ‘to bring up, to lead out,

⁹ K Kolawole ‘Redressing the growing of concern of the education sector in Nigeria’ (2010) 41 *Edo Journal of Counselling* 3:1.

¹⁰ CL Nelson & KA Wilson (eds) *Seeding the process of multicultural education - An Anthology* (1998) 190.

¹¹ K Tomaševski *Removing obstacles in the way of the right to education. Primers No 1* (2001) 44.

¹² W Bray ‘Human rights in education’ (2008) 59 *Centre for Education Law and Policy*.

to raise up and to educate... in its original sense, to educate means acting in order to lead out fully all the potential of individuals'.¹³

In his analysis of the African and European perspectives of education, Kenyatta found that 'the striking thing in the ... education and the feature which most sharply distinguishes it from the European system of education, is the primary place given to personal relations'.¹⁴ In addition, Kenyatta opines that '[t]o the European individuality is the ideal of life, to the Africans the ideal is the right relations with, and behavior to, other people'.¹⁵ Africans were educated in the 'way thought fit, a policy that has been carried out without due regard for the ideals and aspirations of the people concerned'.¹⁶ 'The fundamental nature of personal relationships in the scheme of education shows clearly how these things are valued ... prosperity depends on the joint activities of all the members of the society.'¹⁷

In addition, the 'first and most obvious principle of educational value which we see ... is that the instruction is always applied to an individual concrete situation ... the child is left free to develop his own initiative by experiments and through trial and error to acquire proficiency'.¹⁸

The main purport of advancing the fact that Africa had a concept of education does not proceed on the footing to discredit Western education wholly, but to underscore the importance of inculcating the African perspective of education. An application of this will ensure that proper education planning in line with the ideological leaning of various

¹³ AA Jekayinfa & DO Kolawole 'Conceptual background to education in Nigeria' in JOO Abiri & AA Jekayinfa (eds) *Perspective on the history of education in Nigeria* (2010) 3.

¹⁴ J Kenyatta *Facing Mount Kenya. The traditional life of the Gikuyu* (1979) 121.

¹⁵ Kenyatta (n 14 above) 122.

¹⁶ Kenyatta 126.

¹⁷ Kenyatta 113.

¹⁸ Kenyatta 121.

communities in Africa will lead to a more acceptable notion of education and assist in eliminating cultural and religious obstacles to the realisation of the right to basic education.¹⁹

2.2.1 Various perspectives on education

Plato opines that education is no less than a ‘philosophical assumption linking the cosmos and the operation in nature of harmony and balance’.²⁰ Plato’s view insinuates the relevance of education in ensuring that the likelihood of achieving harmony in the world will be achieved with the proper style of education. It is on this premise that Plato canvassed for the education of the guardians in his era, stressing the importance of a quality curriculum.²¹ This position of Plato is not acceptable in this thesis, because it could possibly form the basis of discrimination in society. It is argued that each individual has the right to be educated, irrespective of a perceived intellectual disability. Plato’s position is:²²

Little can be done for the lower levels of society beyond seeing that their lives are reasonably comfortable and secure ... lacking the capacity for high level of intellectual life the laboring masses should be protected from disturbing ideas by having their myths and legends maintained; shielded from intellectual challenges because lacking the ability to solve them, they can only become disturbed and frightened and perhaps liable to stampede ... they should be helped to pursue their daily activities by being provided with vocational skills, learned by community involvement and the traditional method of direct apprenticeship.

The above position is faulted in this thesis. This is because a criterion for the selection of different curricula for different groups on the basis of perceived intellectual ability is discriminatory. While the thesis argues on the need for the adaptability of education curricula, it is not advanced because of the reliance on the basis of perceived intelligence, but

¹⁹ See generally M Hansungule & AC Onuora-Oguno ‘African perspective of education: A catalyst for the desired Africa of tomorrow?’ Paper presented at the Thabo Mbeki Leadership Institute Symposium on Finding Solutions to Africa’s Development, University of South Africa, August 2013.

²⁰ J Bowen & PR Hobson *Theories of education studies of significant innovation in Western education thoughts* (1974) 27.

²¹ Bowen & Hobson (n 20 above) 65-67.

²² Bowen & Hobson 28.

on the basis of choice and relevance to suit the specific needs of groups and individuals. As will also be advanced later in the thesis, it is important that education is inclusive.²³ Consequently, education must be provided not only for the perceived ‘guardians’ of the state, but also for every individual irrespective of the learning capabilities of the individual.

As accounted by Bowen and Hobson, Ivan Illich opines that ‘[e]ducation involves essentially a process which intentionally transmits what is valuable in an intelligible and voluntary manner which creates in the learner a desire to achieve it’.²⁴ As opposed to Plato’s ‘discriminatory selective’ criteria, the process of education, since it involves several stakeholders, should be a democratic one with all the stakeholders playing a role, having the resolution of issues as its end point.²⁵ Thus, for an act to be described as education, it must fulfil certain basic functions from the interdependence of all stakeholders. According to Bowels and Gintis:²⁶

These functions are broadly classified as integrative, egalitarian, and developmental. To be integrative, education must help organise youths into various occupational, political, economic and stable polities. To be egalitarian education must ensure that each individual gets an opportunity to escape from the limitations of social groups in which he was born and to come into living contact within a broader environment. To be developmental, education must act as a major instrument in the psychic and moral development of the individual.

One important characteristic of any style of education that may be advanced is the underlying factor that education is important for emancipation and the enjoyment of life. The concept of education, when used, is linked to various activities that take place through several

²³ The use of the term ‘inclusive’ in the thesis relates to education of the children with disability discussed later in chapter four.

²⁴ Bowen & Hobson (n 20 above) 398.

²⁵ Bowen & Hobson 170.

²⁶ S Bowels & H Gintis ‘Broken promises: School reform in retrospect’ in SF Semel (ed) *Foundations of education: The essential texts* (2010) 61-65.

institutions: formal, non-formal and informal existing in the social strata.²⁷ For the purpose of this thesis, more attention is paid to education at the basic level which, to a large extent, excludes colleges and universities. Education can also be seen as the acquisition of knowledge, attitudes, beliefs and values learned by getting involved with society in general.²⁸ The link between education and development cannot be separated as the ‘education process is one of continual reorganising, reconstruction and transforming’.²⁹

According to Peter, as stated in Bowen and Hobson, whatever the style or concept of education that is advanced, it is important that it leads to some material or tangible benefits.³⁰ He sets the tangible benefits as beneficial to both the individual and society, therefore, someone cannot be said to be educated when he learns how to steal and cause harm to society in general. To him, education is not the name of a process, but rather ‘something of value; manner in which learning and teaching takes place and the outcome’.³¹

Makarenko sees education as a process where every individual, from the earliest years of life, builds a value for learning and labour, stating that it comes with the reality of a good society emanating from every individual’s ability to achieve education.³² To him, education must enhance the subordination of the individual for the collective common good of the society at large. To achieve this, all institutions of society must be construed as having the potential to educate, as the ultimate goal of an educational process emanates from the ultimate goals of society.³³ The position of Makarenko goes some way towards validating the African style of education that was more people-centred, as opposed to the Western education concept that was more individualistic.

²⁷ Some of the formal institutions created by the society include primary/basic, secondary and tertiary institutions. Formal education is presently the centre of any discussion of the education cycle.

²⁸ Bowen & Hobson (n 20 above) 1-3.

²⁹ Bowen & Hobson 18.

³⁰ Bowen & Hobson 348.

³¹ Bowen & Hobson 349-350.

³² Bowen & Hobson 29.

³³ Bowen & Hobson 223-224.

Irrespective of the school of thought one may align with an underlining premise is the fact that education is a core basis for the realisation of social and economic proficiency of an individual and also a nation.

Apart from the various concepts of education advanced above, it is reiterated that certain contents or thresholds must be met for education to achieve the above-mentioned criteria. Issues of quality of education, dignity and elimination of discrimination are all very important concepts that must be core aspects of education. It was in this respect that Nkrumah is quoted as having urged that ‘Western education be embraced by the people of the Gold Coast, but with a *caveat* of ensuring that cultures and personalities are not forgotten’.³⁴

If education, as already mentioned, possesses latent transformative potential, then getting education right at the basic level is paramount. This is because, as opined by Socrates, ‘[s]ince character is formed at an early age, the education of guardians must begin in the earliest years’.³⁵ The importance attached to the role of basic education, realising this obligation, is hinged on the premise that it is the start-off point in the building block of self-sufficiency, therefore requiring attention and input of all stakeholders to ensure that its quality is well guaranteed. Consequently, when quality is guaranteed at a basic education level, then the socio-economic development of a nation is highly guaranteed.³⁶

Also, an important basis for education must be respect for the dignity of the individual. There is a need to advance the importance of education in respecting the worth and dignity of each individual by encouraging freedom of inquiry and expression. It is posited that the style of

³⁴ A Biny *The political and social thoughts of Kwame Nkrumah* (2011) 22.

³⁵ As narrated in GMA Grube *The Cleitophon of Plato, classical philology* (1931) 302-308, 26: 3; Bowen & Hobson (n 20 above) 33.

³⁶ DA Olaniyan & EO Olabanji ‘A critical review of management of primary education in Nigeria’ (2008) 9 *International Journal of African and African American Studies* VII: 1.

education in every society determines to a great extent the type of society that is built.

According to Ravitch:³⁷

Nations that rule by coercion require citizens who have been educated to accept coercion. A free Society, Committed to popular rule, must provide an education that prepares people to think for themselves and to function as a free citizen.

With the above proposition, the perspective and the nature of education in Nigeria is important as it is central to this thesis. With its multi-ethnic and lingual framework, fashioning out an acceptable style of basic education and ensuring its realisation is quite a daunting task. However, it is the position of the thesis that, as a fundamental right, there is no acceptable basis for the violation of the right to access basic education. With the foregoing, it is imperative that an overview of the concept of rights is attempted, as it will provide a strong basis on which basic education can be fully understood as a fundamental human right.

2.3 The theories of rights: An overview

The existence of rights has been questioned by authors like Cranstone.³⁸ Cranstone brings to the fore the challenges confronting the concepts of the rights of man, which is perceived as largely political. This division, to some extent, brings to the fore the various perspectives of rights from the various generations. The first generation of rights are generally perceived as traditional rights which are civil and political rights; the second generation represents the economic, social and cultural rights within which the right to access basic education falls; and the third are the solidarity rights which are also seen as group rights.³⁹ However, despite this seeming division of rights, human rights are generally today perceived as indivisible and universal. As shown from the concept of education above, the purpose and benefit of

³⁷ D Ravitch 'The democratic-liberal tradition under attack' in SF Semel (ed) *Foundations of education: The essential texts* (2010) 101.

³⁸ M Cranstone 'Are there any human rights?' (1983) 1-17 *Daedalus* 4.

³⁹ See generally SP Marks 'Emerging human rights: A new generation for the 1980s' (1980) 33 *Rutgers Law Review* 435.

education spans across all societies. Consequently, this thesis perceives the concept of rights from that perspective of interdependence and interwoven.⁴⁰

It is noted that the concept of rights remains an unsettled one. However, it is the assumption of this thesis that the question of rights implies that an individual is entitled to a particular obligation, which another has a positive responsibility to ensure its realisation.⁴¹ Conceptualising rights is, however, not as simple, as stated above. Its scope and understanding vary from one jurisprudential school of thought to another.

Dembour groups the concepts of rights into four broad categories, namely, natural, protest, deliberative and discourse.⁴² Each of Dembour's groupings of rights could be aligned with early jurisprudence on the concept of the meaning of law and rights. From early writers, such as Hobbes, Locke and Holmes, the issue of rights have deferred in its meaning.⁴³ It is necessary to state, albeit briefly, the incline of the schools of thought.

The natural school argues that rights are divine and thus God-given. The natural school places reliance on a super-natural being dictating what should constitute rights and what should not.⁴⁴ Austin in his positive approach differs by viewing the source of rights to be that

⁴⁰ For a detailed discourse on the debate on the interdependence of rights and their indivisibility, see generally JW Nickel 'Rethinking indivisibility: Towards a theory of supporting relations between human rights' (2008) *Human Rights Quarterly* 984-1001; LJ Laplante 'On the indivisibility of rights: Truth commissions, reparations, and the right to development' (2007) 141 *Yale Human Rights and Development Law Journal* 10.

⁴¹ JV Wilson 'No rights without remedies: Necessary conditions for abolishing child poverty' (2006) 317-320 *Eur J Soc Sec* 8, Content downloaded/printed from Hein Online (<http://heinonline.org>) Mon Mar 18 05:24:00 2013; for further commentaries on the various categories and philosophies of rights, see generally W Leif 'Rights' *The Stanford Encyclopaedia of Philosophy*; EN Zalta (ed) (2011) available at <<http://plato.stanford.edu/archives/fall2011/entries/rights/>> (accessed 21 May 2013).

⁴² MB Dembour 'What are human rights? Four schools of thought' (2010) 1-20 *Human Rights Quarterly* 32.

⁴³ For the various jurisprudential concerns of these writers, see generally the following: OW Holmes 'Natural law' (1918) 32 *Harvard Law Review* 40 <http://teachingamericanhistory.org/library/document/natural-law/> (accessed 21 May 2014); J Locke *Essays on the law of nature* (1954) available at <http://plato.stanford.edu/entries/locke-moral/> (accessed 31 May 2014); B Norberto Thomas *Hobbes and the natural law tradition* (1993); RP George 'Natural law' *Harvard Journal of Law and Public Policy* (2007) 31 available at http://inkonet.net/downloads/Natural_Law_Vol31_No1.pdf (accessed 31 May 2014).

⁴⁴ Aristotle and Thomas Aquinas remain the early advocates of the natural school of thought. For a generally reading on the natural school of thought, see PS Nair *Human rights in a changing world* (2011); CA Stumpf *The Grotian theology of international law* (2006).

which is codified and from laws made by the powerful.⁴⁵ The sociological school sees the concept as the influence of society on practices that have become structured and elevated as guiding norms and principles.⁴⁶ For the protest school, Heyns argues that rights may be realised by relying on a struggle approach. This is illustrated from the perspective that human beings ‘can claim their rights by resorting to violence if there is no reasonable alternative’.⁴⁷

In relying on the classical school thoughts, the thesis advances on the basis that the pivotal nature of education necessitates a comprehensive approach. In the first place, it is advanced that, to be a natural right, as shown in the thesis, the benefits of education encompass a natural process of improvement. However, the term ‘comprehensive’ is used to show the functional, sociological perspective to education and, also, the struggle approach depicts the present agitation and demand of basic education that best suit the needs of the people, especially in the north east of Nigeria with the activities of the *Boko Haram*. Consequently education is construed to encompass all the above theories of right, save the positive school especially under national laws in Nigeria.

The above concepts of rights do not suppose that Africans did not have an inherent concept or philosophy on what rights entail. As observed by Mbiti:⁴⁸

One of the difficulties in studying African religions and philosophy is that there are no sacred scriptures. Religion in African societies is written not on paper but in people’s hearts, minds, oral history, ritual and religious personages like the priests, rainmakers, officiating elders and kings.

⁴⁵ M Freeman & P Mindus (eds) *The legacy of John Austin’s jurisprudence* (2013); J Austin *The province of jurisprudence determined* (2012) The Law Book Exchange, first published (1832) Richard Taylor London.

⁴⁶ See generally A Podgorecki & CJ Whelan *Sociological approaches to law* (1981); E Ehrlich *Fundamental principles of the sociology of law* (2009).

⁴⁷ CH Heyns ‘A ‘struggle approach’ to human rights’ in Heyns & Stefiszyn (n 17 above) 15.

⁴⁸ JS Mbiti *African religions and philosophy* (1989) 3.

The import of the above is hinged on the lack of documentary nature of the various philosophies that guided the conduct of affairs in Africa.⁴⁹ However, the traditional African society had recognition for rights and punishments, which were seen as emanating from nature or the divine control of the universe.⁵⁰

An example of equality in Africa is captured in some proverbs. For example, among the Igbo and Yoruba tribes in Nigeria, it is said that *Apa kan o ga jukan lo, afi eyi toba g'ori ebe* (All sparrows are of the same height except the one that climbs a heap); *Nwoke tosia, ochelu ibe ya* (A man will grow and wait for others to grow too); *Igwe nile na eje n'uzoa* (All men have the same destination); *Ibi o ju ibi, bi a se bi eru, beeni a se bi omo* (The way a slave was born, so the child was born); *Egbe belle ugo belle, nke si ibe ya ebelle, uku kwa ya* (The eagle perches, also should the kite; any that does not allow the other to perch, may the wings break).

This is a philosophical undertone to represent the rejection of any form of discrimination, while stressing the equality of all humans and, by extended interpretation, rights. Mutual respect and harmony are also enshrined in the philosophy of *Emenyere nwaogugu emenyere nwanosike* (What is done for one must be done for the other).

Whatever position is adopted in the classification of rights, the issue of the supremacy of rights and which right should be respected more remains an unsettled debate.⁵¹ However, it is assumed that it is not right 'to arrange rights in a strict hierarchical order'.⁵² The central place

⁴⁹ For a detailed insight into African literature and the underpinning philosophies, see generally O Owomoyela *African literatures: An introduction* (1979).

⁵⁰ JS Mbiti *African religions and philosophy* (1989) 205.

⁵¹ The issue of dominance of civil and political rights, which are called first generation rights, being superior to economic and social rights, known as second generation rights, still remains. While the two rights are separated on the global level, the African Charter on Human and Peoples' Rights contains the two groups of rights. It is also noted that the two groups of rights depend on each other and, therefore, it is wrong to accord supremacy to any above the other.

⁵² W Bray *Human rights in education* (2008) 17.

of understanding the concept of rights is advanced by Piron, restating the importance of rights in ensuring the realisation of social concepts such as education.⁵³

Furthermore, in his discussion of the theory of rights, Wellman examines rights as having some link with legal duties, legal liberties and legal claims.⁵⁴ Thus, in his view, what must be termed as a right must find the basis of its claim under the law. If basic education, therefore, will be deemed as a right, its legal basis must be settled. Also, it must be determined that a duty to protect a legal right exists and, for the purposes of this thesis, this legal onus is argued to be on the state and also on individual actors or non-state actors in the education industry.

Rights are also seen as ‘the rights that human beings have simply because they are human beings and independent of their varying social circumstances and degrees of merit’.⁵⁵ Donnelly supports this line of thought when he restates that ‘[r]ights are seen to be rights and accrue to human beings because one is human ... they are held by all human beings, irrespective of any rights or duties one may or may not have as a citizen or member of families’.⁵⁶ From the above, education can be construed as a right in the sense that each individual is entitled to be educated about the environment, health and social sphere. This is advanced on the premise of education being emancipatory and a path to different ends, as desired by individuals.

Deschowitz, in advancing various definitions of rights, is of the opinion that

[r]ights are something that is due to a person by just claim, legal guarantee, moral principle ... A power, privilege, or immunity secured to a person by law ... A legally enforceable claim that another will do or will not do a given act; a

⁵³ LH Piron *Rights-based approaches to social protection* (2004) 3, Overseas Development Institute London, available at <http://www.sed.manchester.ac.uk/research/events/conferences/documents/Winner%20and%20Losers%20Papers/Piron.pdf> (accessed 21 May 2014).

⁵⁴ C Wellman *The theory of rights* (1985) 17.C

⁵⁵ JJ Shestack ‘The philosophy foundations of human rights: Concept and language of human rights and related ideas’ in Heyns & Stefiszyn (n 17 above) 3.

⁵⁶ J Donnelly *International human rights* (1993) 19.

recognised and protected interest, the violation of which is a wrong.⁵⁷

The above definition brings to the fore that, while rights could accrue to a person for being human, they also entails some form of protection by the law as well as attributing both positive and negative responsibilities. In this regard, providing education for an individual ought to be protected by law.

As already pointed out, despite the African society being described as one that lacks legal regulation in some quarters, it is penitent to note that the philosophical *cum* religious undertones in Africa had great respect for humanity and attendant repercussions when a breach of human rights occurred.⁵⁸

With the different meanings of the term ‘rights’ according to the various schools of thought examined above, it is conceded that the concept of rights is one that is unsettled, just as the case is with the social phenomenon. However, the working definition adopted by this research is that

[r]ights are those fundamental preferences that experience and history - especially of great injustices - have taught are so essential that the citizenry should be persuaded to entrench them and not make them subject to easy change of majorities.⁵⁹

The definition adopted above is instrumental in the sense that previous experiences of conflict and violence plaguing Nigerian society is traceable to issues of tensions occasioned by not upholding various rights.⁶⁰ This is important, as most basic rights should include a

⁵⁷ A Deshowitz *Rights from wrongs A secular theory of origins* (2004) 15.

⁵⁸ It is underscored that, while the African philosophy and practices maybe argued to inherently have respect for rights, some practices were in violation of human rights. For a good argument on some practices that negate human rights, see generally OM Ejidike ‘Human rights in the cultural traditions and social practice of the Igbo of South-Eastern Nigeria’ (1999) 71 *Journal of African Law* 43.

⁵⁹ A Deshowitz (n 57 above) 81.

⁶⁰ Nigeria has been through various phases of social conflict. The majority of the conflicts are traceable to issues of resource control, agitations and requests for certain benefits that are seen as a denial of entitlements (rights). Some of the conflicts have also been ethnic and religious. It is also argued in this thesis that the ethnic and religion-fuelled conflicts are hinged on the failure in education.

mixture of traditional negative socio-economic and positive political rights.⁶¹ It is advanced on the premise that rights work in part by taking ‘certain powers away from temporary majorities and vesting the capability to constrain these powers in those who lack traditional political influence or who are otherwise subject to discrimination or marginalisation’.⁶² This position also fits the underlining principle of the struggle approach, as canvassed by Heyns, when he opines that ‘a component of struggle or its potential emanates from the violation of human rights’.⁶³ In this regard, the move to fashion out specific education for a minority group like the Alternative Basic Education for the Karamoja (ABEK) in Uganda and, recently, the *Almajiri* model schools in Nigeria, is testimony to the position that rights are not just to be upheld for the majority but also positively for the minority.⁶⁴

In addition, upholding basic education as a right is also crucial as there is an inevitable relationship between political and socio-economic rights, grounding the need to ensure the justiciability of socio-economic rights, such as the right to education, in Nigeria. The line of argument here suggests that for the perfect enjoyment of traditional positive rights, such rights that are today regarded in Nigeria as not having positive obligations, must be viewed differently to ensure the realisation of a better society. This speaks to the importance of protecting individual rights even as against group rights, noting the interdependence of both economic and social rights on civil and political rights.⁶⁵

⁶¹ A Sen *Development as freedom* (1999) 152.

⁶² A Desowitz (n 57 above) 160.

⁶³ Heyns (n 47 above) 15.

⁶⁴ Part of the present Nigerian government’s initiative to educate minority groups aside the *Almajiri* Education Programme includes, but is not limited to; the Girl-Child Education Programme and the Special Vocational Programmer for Boy Traders in the South-South and South-East. The classification of the *Almajiri*’s as minority is based on the notion that they form a percentage which refuses to access education based on religious perception and inclination. However, it must also be noted that the *Almajiri* constitute a large percentage of the Nigerian out-of-school children statistics. Describing the *Almajiri* practice, it is to be noted that mainly boys are involved in this practice, in which they are loyal to an Islamic scholar teacher who serves as role model to them, teaching them the study of Quran education while they resort to street begging and menial means of survival.

⁶⁵ See generally R Howard ‘The full-belly thesis: Should economic rights take priority over civil and political rights? Evidence from sub-Saharan Africa’ in Heyns & Stefiszyn (n 17 above) 75.

From whatever prism or hierarchy rights are grouped or looked at, the right to education is a pivotal one. This is premised on the fact that no other right could be enjoyed if people do not get access to adequate information on how to maximise such rights. Education, as a basis for the realisation of health, life and civic responsibilities, should be regarded as a right *stricto sensu*. The right to education, therefore, can be inferred and read into every right.⁶⁶ In addition, construing education as a right places a responsibility on the state to ensure its protection, promotion and fulfilling. It is therefore imperative that establishing to what extent the state has the responsibility of ensuring that the right to basic education is realised is important for the emergence of a virile Nigerian nation.

2.4 Basic education and international human rights law

With an understanding of the importance of education, generally, it is important to analyse the meaning of basic education, which is an aspect of the entire concept of education and its relationship with international law.⁶⁷ Basic education is best described as education which is delivered to a child from the age of inception to the end of the basic education curriculum.⁶⁸

According to Skillbeck:

Basic education commences at birth and may be achieved through both formal or non-formal means and agencies. Competencies, skills and substantive learning's defined as

⁶⁶ Later in the thesis, analyses of jurisprudence from India show the inextricable link between education and life.

⁶⁷ For an in-depth discussion of education generally relating to secondary and university education internationally, the work of Beiter will be good reading; KD Beiter *The protection of the right to education by international law* (2006).

⁶⁸ Underscoring the importance of this phase in the life of a child, the Committee on the Rights of The Child has in General Comment 7 (CRC/C/GC/7/Rev.1 20 September 2006 (Implementing children's rights in early childhood) (para 4) opined that 'early childhood varies in different countries and regions, according to local traditions and the organisation of primary school systems. In some countries, the transition from preschool to school occurs soon after 4 years old. In other countries, this transition takes place at around 7 years old. In its consideration of rights in early childhood, the Committee wishes to include all young children: at birth and throughout infancy; during the preschool years; as well as transition to school. Accordingly, the Committee proposes as an appropriate working definition of early childhood the period below the age of 8 years; states parties should review their obligations towards young children in the context of this definition.' It is thus important that Nigeria pays attention to the phase of education development of the child.

basic, when provided for in schools and similar institutions, are usually cast in the form of a core curriculum which while it includes and builds on literacy includes numeracy, social and scientific knowledge, physical and health education and the arts and crafts.⁶⁹

According to the education structure in Nigeria, basic education is seen as the first nine years of education in the 9-3-4 education system currently in place in Nigeria.⁷⁰ A conceptualisation of basic education in Nigeria entails ‘the mastering of the skills of reading, writing and development of simple arithmetic skills; in addition, the ability to develop a good basis of conduct and behaviour; ability to appreciate basic skills and work’.⁷¹

Zukker opines that the right to basic education

is an unqualified right requiring the priority attention of the state, also in respect of budgetary allocations. The right requires the state to provide quality education to all children irrespective of whatever challenges that they may face.⁷²

Beiter underscores the importance of basic education by finding that ‘an education system, premised on false educational ideals, constituted a threat’.⁷³ Beiter further applauds the importance placed on basic education by the Committee on Economic, Social and Cultural Rights (ESCR Committee), when they obliged state parties to ensure that priority is paid to basic education and development of proper skills in reading and numeracy.⁷⁴

In the current structure of Western education that has been embraced by the majority of states, the school is pivotal to the concept of education and, therefore, advancing the argument for a right to basic education cannot be done without arguing for the importance of

⁶⁹ S Malcolm ‘Education for all - Global synthesis’ 16 available at <http://www.unesco.org/education/wef/en-docs/findings/globsynt.pdf> (accessed 21 May 2014).

⁷⁰ The Osun State of Nigeria has a different classification of its own structure; see generally <http://osun.gov.ng/education/delineation-of-schools/> (accessed 21 May 2014).

⁷¹ AB Fafunwa History of education in Nigeria (1974) 15.

⁷² MA Zuker *Education law* (2002) 281.

⁷³ Beiter (n 67 above) 483.

⁷⁴ Beiter 278.

schools.⁷⁵ This is so because schools provide ‘organisational mechanisms *cum* structure that an individual requires to meet his goals and life targets’.⁷⁶ Basic education, when provided, ensures that society enjoys peace and stability to a large extent and, therefore, the availability of schools is paramount in the discourse.⁷⁷

Furthermore, basic education also suggests the pivotal nature of the family. This is because ‘the family is the most permanent and immediate educational unit ... children learn the first social, economic and cultural skills in the home and then schools’.⁷⁸ Considering the idea that basic education takes root in early childhood education, the views of parents must be taken into consideration in determining the style and quality of education the child receives.⁷⁹ Consequently, a major premise of ensuring quality control besides government oversight is ensuring the involvement of parents. In this manner, the role of parents is highlighted in ensuring the sustenance of access to quality basic education.

Besides the responsibility of parents and the role they play, another important aspect is the oversight function of the state. There is an obligation on states to ensure that decisions taken to affect children must be done with consideration of the best interests of the child. This can only be achieved by the state, ensuring that an environment fit for this is achieved by the control of quality and curricula of education provided in both the public and private education environment.⁸⁰

⁷⁵ In this regard, the central focal point of school is important in determining the extent to which a state has been able to meet the responsibility of meeting its threshold access, to say the least. It is impossible, therefore, to talk about the right to basic education in the absence of school and the quality of such schools eventually.

⁷⁶ MA Olivas & GR Scheider (eds) *Education law stories* (2008) 1.

⁷⁷ W Bray *Human rights in education* (2008) 1.

⁷⁸ R Aldrich *An introduction to the history of education* (1982) 9-10.

⁷⁹ MA Zuker *Education law* (2002) 284.

⁸⁰ MG Flekkoy ‘A framework for children’s participation’ in E Verhellen (ed) *Understanding children’s rights* (1996) 224, collected papers presented at the first international interdisciplinary course on children’s rights.

In this light, one must interrogate the space within which children can determine the content of basic education delivered to them.

While it may be seen as a challenge to determine at what stage in a child's development a child is able to meaningfully contribute to decisions that affect the child, it is set out by law that any person taking such decisions must of necessity do so in the best interests of the child.⁸¹ Thus, in the provision of basic education, the child's inherent right is important to ensure that the child 'acquires skills and competencies that will prepare them for a wide variety of possible futures'.⁸²

In establishing what the content of the right to education entails, what must be taken into consideration is the free choice of education that is accessed.⁸³ Another important basis for ascertaining the content is also found in the premise of measuring the quality of education itself.⁸⁴ Tomasevski advances the obligation on the state to 'regulate education and its gains as an underpinning system on ensuring quality towards ascertaining content'.⁸⁵ In this regard, choice and quality speak to the concepts of the fact that basic education must be laden with an acceptable curriculum that is also adaptable to the individual. Consequently, the provision

⁸¹ Art 12 of the CRC specifically provides for the right of the child to be respected in the forming of opinion on issues that affect the child. In the same manner, both international and regional law instruments also protect the right of the child as a group member. It is therefore based on this reasoning that it is important that the content of basic education that a child receives is channelled after the child's cultural and religious affiliation. It is only in so doing that the level of acceptance of basic education will be on the increase. Wouter suggests that the 'best interests of a child can be looked at from two perspectives, one dealing with the objective of the state to ensure actions to be carried out in the best interests of the state and the other to ensure that nothing is done that will deny the realisation of issues concerning the best interest of the child'. See P Wouter 'International human rights law and its relation with national law: Monism, dualism and the self-executing character of human rights' in Verhellen (n 80 above). This will seem to suggest that the state has a responsibility to ensure that the provision of basic education within both the public and private sectors in Nigeria are well regulated. The state must therefore ensure that quality is not compromised and that the rights in education are also not violated and adequately punished when breached.

⁸² MG Flekkoy 'A framework for children's participation' in Verhellen (n 80 above).

⁸³ F Coomans 'Clarifying the core elements of the right to education' available at <http://www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgesleerdheid/organisatie/onderdelen/studieinformatiecentrummenserechten/publicaties/simspecials/18/Documents/18-03.pdf> (accessed 27 May 2013).

⁸⁴ Coomans (n 83 above).

⁸⁵ K Tomasevski 'The right to education mission to the United Kingdom' in A Fisher *The content of the right to education - Theoretical foundations* (2004) 8.

of a standard infrastructure which must be able to take care of the learning needs of pupils, irrespective of their religion, custom, gender and physical state, are core contents of the right.

In addition, the crucial place of the curriculum as a core component of the content of education cannot be overlooked.⁸⁶ In arriving at the need to ensure a proper curriculum base for a nation, it is germane to ensure that⁸⁷

[c]hildren's participation should be based on the evolving capacities of children, tempered by what is in the best interest of the child and aimed at developing participatory skills in the best possible way.

The core content of education must then be viewed from a broad perspective so as to be able to meet the desired human rights standard required. It requires a positive obligation from the state in its actions and policies towards meeting an international standard.⁸⁸ Thus, basic education involves not just the 'formal learning sector, but also the informal and non-formal and to meet the threshold of an international standard, basic education must prepare an individual for a better life ahead'.⁸⁹

From the foregoing, it is clear that basic education, to a large extent, requires that a state meets the obligation of protection, promotion and fulfilment of the provision of education by ensuring the availability of schools.⁹⁰ The provision is imperative if life must be enjoyed to its fullest. Basic education must therefore be treated as a right that is not qualified.⁹¹

⁸⁶ JW Meyer & FO Ramirez 'The World institutionalisation of education' in J Schriewer (ed) *Discourse formation in comparative education* (2000) 113.

⁸⁷ MG Flekkoy 'A framework for children's participation' in Verhellen (n 80 above).

⁸⁸ Coomans (n 83 above).

⁸⁹ See generally the Jomtien Declaration.

⁹⁰ As will be argued later, availability has more to it than the mere physical presence of school buildings.

⁹¹ The Nigerian Constitution qualifies the right to education as it is provided as a mere obligation of the state to ensure its realisation. In contrast, the South African Constitution of 1996 does not see the right to education in that light. It is provided in art 29(1) (a) that '[e]veryone has the right to basic and to further education'. This makes the right a core obligation of the government. Also, the Indian Constitution in art 45 provides for the right to education under its directive principles.

In short, it is the position of this research that ‘basic education means education up to a level of functional literacy, in other words, reading, writing, arithmetic and an elementary knowledge or awareness of economics, culture and politics’.⁹² In addition, it also entails that the government gives further support to ensure the ‘adequacy of schools, proficiency of educators and other incidental support to ensuring and guaranteeing quality’.⁹³

With the above overview of the concept of rights, education and an understanding of the core content of basic education, the international legal instruments that provide for the right to basic education are analysed in the following sections. This is done with a view to establishing further that basic education is a right that must be respected, promoted and protected by the state. The section commences with an analysis of global instruments before regional instruments.

2.4.1 The advent of recognising education as a right

The adoption of the Universal Declaration of Human Rights (UDHR)⁹⁴ remains an important landmark in the bid to realising human rights. The Declaration provides for several rights, among which is the right to education. Article 26 states:

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

⁹² W Bray *Human rights in education* (2008) 83.

⁹³ Bray (n 92 above) 84.

⁹⁴ 10 December 1948.

- (3) Parents have a prior right to choose the kind of education that shall be given to their children.

The wording of article 26 covers three major ambits in its scope. The starting point is to ascertain whether or not the Declaration envisaged basic education as a fundamental right. Although the UDHR does not provide in specific terms for ‘basic education’, mention of the terms ‘elementary’ and ‘fundamental’ stages of education can be construed to encompass the term ‘basic education’.⁹⁵ Consequently, it is argued that the concept of basic education is well enshrined in the ambit of the UDHR.

The second ambit covers the content of education, which goes beyond the basic level, but also to other tiers of education. In this respect, the content of education curricula must be designed in such a way as to meet the aspirations of the UDHR. For instance, the obligation to ensure that education is not used to create diversity or to foster inequality is an important aspect. As of necessity, the curriculum of education must promote tolerance, respect and the upholding of all other human rights.⁹⁶ The third ambit puts forward the role of parents in ensuring that the education given to their children is acceptable and conforms to their cultural and religious inclinations. It is important to note that, despite assuming that a free rein is given to parents in determining the type of education their children will receive, such education must be in conformity with the spirit of the second ambit discussed above.

In understanding the ambit of parental involvement in the education of the child, we rely on the European case of *Jeldsen, Busk Madsen & Pedersen v Denmark*.⁹⁷ The case was premised on the introduction of sex education in Denmark. The contention was on the propriety or otherwise of introducing sex education in Denmark. While the government argued that there were many private schools where the curriculum could reflect some individual views and

⁹⁵ D Hodgson *The human right to education* (1998) 11; Beiter goes a step further to construe education not just as a human right but a basic need. See generally Beiter (n 67 above).

⁹⁶ O Audrey ‘Universal Declaration of Human Rights and education’ in JA Banks (ed) *Encyclopaedia of diversity in education* (2012) 12.

⁹⁷ Application 5095/71; 5920/72; 5926/72.

beliefs, as opposed to public schools, were the Minister of Education influenced the curriculum content, the parents argued on the non-availability and insufficiency of private schools.⁹⁸ The government of Denmark argued that the underlying reason for starting sex education was the increase of unwanted pregnancies and the large number of applicants seeking help as unmarried singles schools. The applicants, however, argued that this was against their religious belief and therefore in contravention of their duty to protect their children in the ambit of the right to education and parental obligations. It was found by the judges, in an overwhelming decision of six votes to one, that there was no violation. The decision in the above case is instrumental as it underscores the importance of parental responsibility and its limits to ensure that children are not indoctrinated when useful information is passed on to them.⁹⁹

The above positions consequently draw a nexus of a horizontal as well as a vertical relationship. The state must ensure the promotion, protection and fulfilment of the right to education, and parents must ensure that it complies with the cultural, religious and other orientation of the family.¹⁰⁰ A contrast can be seen from the position, as reinforced by Beiter when he opines that ‘parents’ rights over the child’s education is an agency right ... the

⁹⁸ Private schools still have some form of obligation under law to ensure the general education of children. See para 34 which provides that ‘[a]lthough primary education in private schools must in principle cover all the topics obligatory at state schools (paragraph 18 above), sex education is an exception in this respect. Private schools are free to decide themselves to what extent they wish to align their teaching in this field with the rules applicable to state schools. However, they must include in the biology syllabus a course on the reproduction of man similar to that obligatory in state schools since 1960.’

⁹⁹ The basis of the applicant’s case was the alleged violation of art 2 of Protocol 1 of the European Convention for the Protection of Human rights and Fundamental Freedoms. The article provides that ‘[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’

¹⁰⁰ It is important also to note that in parental exercise of functions, such philosophical belief and religious tenants must not be contrary to the general objective of respect for the UN Charter that calls for respect and dignity of the human person. See generally the case of *Case of Campbell & Cosans v The United Kingdom* Application 7511/76; 7743/76.

moment they fail to act in the best interests of the child, states must in lieu of parents see to it that the child's best interests are promoted'.¹⁰¹

The main problem of education, whether basic or otherwise, is enshrined in the fact that the ultimate recipient is still treated as an object and not as a subject.¹⁰² For the full concept of education to be realised, it must be in the best interests of the child. While it may be a valid argument that the child at the level of basic education is unable to make sound judgments as a minor, it is reiterated that there exists scientifically-proven curriculum content that will protect the child's best interests.¹⁰³ Consequently, the parental role in upholding the obligation regarding a child's right to education is not one that is cast in stone, but the need exists to draw the link when there is an apparent encroaching of the various roles as defined by international law in Nigeria.

The UDHR further envisages the importance of access to education, and 'access to education is a precondition for the full realisation of the right to education. Without access, it is not possible to guarantee the right to education.'¹⁰⁴ Closely related to the issue of access is that of quality. In this respect, whatever education is provided must be structured in such a way as to ensure the total emancipation of the child from poverty and to enable the child to take part in community life and to realise all other human rights. Access is relevant to every human being, whether physically challenged or otherwise. Although the UDHR does not explicitly include education of people with learning challenges, this group is covered within the ambit of the right to education.

¹⁰¹ Beiter (n 67 above).

¹⁰² See generally K Tomaševski *Removing obstacles in the way of the right to education Primers No 1* (2001) 44.

¹⁰³ O Audrey 'Universal Declaration of Human Rights and education' in JA Banks (ed) *Encyclopaedia of diversity in education* (2012).

¹⁰⁴ 'Right to education: Human rights education associates' available at http://www.hrea.org/index.php?doc_id=402 (accessed 21 March 2013).

2.4.2 Masked or unmasked - The central role of education remains

With the debate around generations of rights, as discussed earlier, the inclusion of education in the two separate documents that enshrine fundamental rights provides another interesting perspective to education as a right. The first discussed is the International Covenant on Civil and Political Rights (ICCPR). Although the right to education is not expressly mentioned in the ICCPR, the thesis holds that the rights mentioned in the ICCPR require education to be realised. For instance, the rights to hold an opinion and to freedom of expression are both hinged on the level of literacy, which is a main result of quality basic education.

The first mention of education in the ICCPR is captured in relation to the promotion of religious and moral education. The Covenant provides:¹⁰⁵

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The provision in article 19, which provides for the right to hold an opinion, encompasses the major components of the concept of education.¹⁰⁶ The idea of the right to hold an opinion, to share ideas and to transmit these is a core aspect of education and thus it is assumed that the right to education is provided for. The right to education is also impliedly valid when taking into consideration the reservation made by the German Democratic Republic (GDR) during

¹⁰⁵ Art 18(4).

¹⁰⁶ M Verheyde *A commentary on the United Nations Convention on the Rights of the Child, Article 28 - Right to education* (2006) 8. Art 19 provides: ‘(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.’

the adoption of the Covenant, when it alluded to the fact that the GDR has ‘such fundamental human rights ... the right to education has been fully implemented in the GDR’.¹⁰⁷

The additional Protocol to the ICCPR¹⁰⁸ creates a channel through which individuals can bring complaints about the violation of their rights as contained in the Covenant. The use of such channels is hinged on the realisation of education and, as stated above, the role of education as an empowerment right is crucial and a lack thereof will defeat the purpose of the realisation of rights contained in the Covenant. This argument is further supported by the fact that education has ‘a double dimension both as a right in itself and an indispensable means of realising other human rights’.¹⁰⁹ Therefore, it is important that the obligation of state parties to the Covenant be respected by striving towards achieving the right to education. The purport of the articles cited above indicates that the right to education is one that must be treated individually as against the other economic, social and cultural rights. In this sense, as an intrinsic right, the majority of other rights are dependent on the right to education to function. An important inference that can be drawn from this is the fact that the provisions in the articles make the right to education a justiciable right, contrary to the arguments advanced in Nigeria.¹¹⁰

2.4.3 Unmasking basic education as a right

The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹¹ provides for the right to education in two articles.¹¹² States to the Covenant not only agree to recognise

¹⁰⁷ <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (accessed 21 March 2013).

¹⁰⁸ Optional Protocol to the International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200 (XXI) of 16 December 1966, available at <http://www.un-documents.net/iccpr-op.htm> (accessed 21 March 2013).

¹⁰⁹ Verheyde (n 106 above) 7.

¹¹⁰ The justiciability of the right to education will be treated in detail in ch 5 of the thesis when the strengthening of institutions to assist in the realisation of the right is discussed. See generally Beiter (n 67 above) 105-110.

¹¹¹ 16 December 1966.

¹¹² ICESCR, arts 13 & 14.

that education is a right which must be made accessible, but goes further to stipulate the end result of education. In this regard, education as a right must be able to ensure that every individual attains full development so as to be able to function and also maintain dignity.¹¹³ Article 13(2)(a) provides that '[p]rimary education shall be compulsory and available free to all' and the realisation of this obligation is to be done with particular reference to the 'liberty of parents, cultural and religious beliefs' in the best interests of the child.¹¹⁴ The urgency of realising this right is evident from the commitment that is required of every state party to ensure that the right to education is realised within a time frame by ensuring the 'progressive implementation' of policies and legal framework.¹¹⁵ In most circumstances, reliance on the phrase 'progressive realisation' has formed the basis for the majority of states to decline from the obligation that is expected of them as set out in the ICESCR. However, case law from the African human rights system has set out a clear jurisprudence towards the constructive approach to reliance on progressive realisation.¹¹⁶

In its Concluding Observations, The United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) identified challenges to the realisation of the right to education. It found:

Some groups have limited access to education, ranging from traditional attitudes preventing girls from attending school to the limited availability of schooling, including teachers, in rural areas. A further ground of exclusion represents the limited financial means of persons living in poverty, who frequently may also be members of minority or indigenous communities.¹¹⁷

¹¹³ ICESCR, art 13(1).

¹¹⁴ ICESCR, art 13(3).

¹¹⁵ ICESCR art 14.

¹¹⁶ *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

¹¹⁷ UNESCO: Inclusive Dimensions of the Right to Education: Normative Bases Concept Paper. Prepared for the Eighth and Ninth Meetings of the Joint Expert Group UNESCO (CR)/ECOSOC (CESCR) on the Monitoring of the Right to Education – 2008, 5.

In order to have a better understanding of the provisions of the ICESCR, it is important to peruse General Comment 13, which broadens the scope of understanding education as a right, its application and the extent to which it should be protected.

2.4.4 General Comment 13¹¹⁸

In the first paragraph, the importance of education, both as ‘a human right and indispensable means of realising other rights’, is reiterated. The General Comment (GC) sheds more insight into the interpretation of article 13 of the ICESCR, and reinforces the import of the purpose of UNESCO in ensuring that education is devoid of any form of exploitation and discrimination based on the grounds of religion, culture and other grounds.

In paragraph 6 of the GC, the concepts of availability, acceptability and adaptability are set out as minimum core content of the right to education. The components of access include the elimination of all forms of discrimination, ensuring physical access and also economic access. It is important to reiterate here that the content and quality of education are germane concepts that can be read into acceptability. Efforts made by a state party to ensure that the education accessed is of quality influences to a large extent the level of acceptability of such educational curriculum.

In the same vein, the adaptability of education to the cultural, religious and moral beliefs of people must seriously be taken into consideration to ensure that the education curriculum is in line with the lifestyle of people. As major agents in realising the right to education, the welfare of teachers is not overlooked. The GC recommends good conditions of service for teachers and a dedicated and consistent development of both institutions and infrastructures

¹¹⁸ ESCR Committee General Comment 13: The Right to Education (art 13) adopted at the 21st session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 (contained in Document E/C.12/1999/10).

in the realisation of the right to education.¹¹⁹ The question of progressively realising the right to education imposes certain obligations on a state party which the GC identifies, the obligation to guarantee as the first major task. It is, therefore, only when the guarantee is in place that the state is expected to pursue progressive realisation, which must show ‘deliberate, concrete and targeted’ steps towards the full realisation of the right to education.¹²⁰ To avoid misrepresentation of the concept of progressive realisation, the GC opines that:¹²¹

The realisation of the right to education over time, that is ‘progressively’, should not be interpreted as depriving States parties’ obligations of all meaningful content. Progressive realisation means that States parties have a specific and continuing obligation ‘to move as expeditiously and effectively as possible’ towards the full realisation of article 13.

As stated above, albeit briefly, the GC sets forth the concept of the 4A’s in an attempt to give further meaning to the content and scope of the right to education as provided for in the ICESCR. The starting point for the 4A’s concept of education is understanding the importance of ensuring the realisation of the right to education. Tomasveski advances the crucial importance in her works, highlighting the need to ensure that education meets the threshold in all states. The Special Rapporteur notes that the ‘simple 4A scheme structures governmental human rights obligations to making education available, accessible, acceptable and adaptable ... captures both horizontal and vertical division of competence in education’.¹²² Major obstacles to the full realisation are identified to be the role of several institutions, such as the World Bank, whose policies have at some point made access to basic

¹¹⁹ General Comment, paras 25-27. For some insight into the obligation envisaged by the GC, see, generally, G Mbajiorgu & T Mafumo *Striving for quality education: The right to education as a socio-economic right* (2014) 303.

¹²⁰ General Comment para 43.

¹²¹ General Comment para 44.

¹²² K Tomasevski ‘The right to education report submitted in accordance with Commission resolution 2002/23, mission to Indonesia’ 1-7 July 2002. E/CN.4/2003/9/Add.1 4 November 2002.

education out of the reach of children from developing nations.¹²³ The pivotal role of the concept is also well reiterated by Wolman and Fleisch.¹²⁴ Below is a detailed discussion of the 4A's concept of education.

i. Availability

Availability of basic education speaks to the sufficiency of infrastructures.¹²⁵ It is paramount to take cognisance of the fact that there are basic acceptable standards of infrastructure that must be in place, especially as it relates to ensuring that the sanitation and health situation of girls are well taken care of. It is noted that an educational infrastructure that does not provide separate toilet facilities for girls is discriminatory and also contributes to the growing level of out of school children and dropout rates.

Availability is also viewed from the act of denying basic education as a right which, in the words of Tomasveski, 'is hidden behind quantitative targets and evasive vocabularies used by global educational bureaucracies'.¹²⁶ The meaning of this proposition by Tomasveski speaks to the ill-framed policies that eventually make educational institutions unavailable to pupils.¹²⁷ Consequently, it is important to ensure that the policies put in place to govern the administration of education are formulated with the specific needs of people. For education to be available, it must meet the lifestyle and natural inclinations of people, adapting to their cultural way of life and not creating any form of strife as to their religious beliefs. This

¹²³ K Tomasevski 'Six reasons why the World Bank should be debarred from education' 1 available at <http://www.brettonwoodsproject.org/2006/09/art-542516/> (accessed 21 May 2014).

¹²⁴ S Woolman & B Fleisch 'On the right to an 'adequate' basic education in Woolman & Fleisch (n 37 above) 109- 164.

¹²⁵ The meaning of this as conceptualised by General Comment 13 on education opines that '[f]unctioning education institutions must be available so as to ensure that its programmes are sufficient to cater for the need of peoples'.

¹²⁶ K Tomasevski (n 123 above). See also the Commonwealth Secretariat, Business Guide to the General Agreement on Trade in Services that recognises education as a right, but goes further to restate the need to pay for its access.

¹²⁷ Tomasveski advances this concept in her top-down approach of financial policies by the World Bank that ensured the low value of public education and enhanced private education. See generally K Tomasevski 'Globalising what: Education as a human right or as a traded service?' (2005) 30 *Indiana Journal of Global Legal Studies* 12: 1.

explains the basis on which special education policies for indigenous peoples' or minorities are fashioned to ensure that their way of life is not disrupted.

With the above in mind, it is also important to take cognisance of the fact that available education which is not accessible is ultimately unavailable. This concept is already described in chapter one as threshold and actual access to basic education.

ii. Accessibility

Accessibility of available educational institutions is another important aspect of the content of basic education. Importantly, threshold access must be distinguished from real access.¹²⁸ This is important, as enrolment speaks only to the threshold, and completion rate to real access. A child who enrolls in school and is unable to continue through the basic education cycle cannot be deemed to have access. Certain factors affect access. These include, but are not limited to, poverty, discrimination and poor curriculum content.¹²⁹

Basic education must be free and non-fee demanding.¹³⁰ Tomasveski suggests that this is not the case; she decries this situation by stating:¹³¹

¹²⁸ JK Enahwo 'Access. Cost and quality in Nigeria education', Keynote address to the 23rd Annual Congress of the Nigerian Academy of Education.

¹²⁹ For further insight into factors that inhibit access beyond basic education in Nigeria, see generally O Aluede, PO Idogho & JS Imonikhe 'Increasing access to university education in Nigeria: Present challenges and suggestions for the future' (2012) *The African Symposium* 12: 1. The enumerated challenges are not peculiar to basic education in Nigeria. Tertiary education also face the same challenges. For a general insight into the effect on tertiary education, see, generally, CK Ayo, JA Odukoya & A Azeta 'A review of open and distance education and human development in Nigeria' available at <http://eprints.covenantuniversity.edu.ng/4549/1/Distance%20Education%20and%20Human%20Development%20in%20Nigeria%20-%20CK%20Ayo%20JA%20Odukoya%20et%20al.pdf> (accessed 7 July 2015).

¹³⁰ In South Africa, the argument on whether sec 29(1)(a) grants an unqualified right to education has raised some concerns. Some scholars have attempted to align the case of basic education with the decision of the Constitutional Court in the *Soobramoney* case. See generally S Liebenberg 'The interpretation of socio-economic rights' in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2004); S Woolman & B Fleisch 'On the right to an 'adequate' basic education' in Woolman & Fleisch (n 124 above) 122. Tomasveski argues that the 'willingness of governments to provide education must be channelled towards the show of the will and ability to raise revenue and devote maximum available resources to human rights, especially the right to education'. See generally K Tomasevski 'Globalising what: Education as a human right or as a traded service?' (2005) 30 *Indiana Journal of Global Legal Studies* 12: 1; Enahwo describes issue of cost in accessing basic education as an iron triangle, where cost is the base on which effective access must be hinged. See generally JK Enahwo 'Access cost and quality in Nigeria education' Keynote address to the 23rd Annual Congress of the Nigerian Academy of Education.

The oldest international human rights law mandated free and compulsory education for all children up to the minimum age of employment. Thenceforth it specified safeguards for labour rights and trade union freedoms. This provides worldwide protection for the rights of children and their teachers, but has been excluded from the World Bank's model. Financial responsibility for education has been transferred from governmental to family budgets, dooming poor children to grow up without the qualification and socialisation which education should provide.

In a report, Tomasveski further denounces the role of international financial institutions that have reinforced the non-accessibility of education by making underlined financial requirements that end up locking out several children from accessing basic education, by stating:¹³²

The core of human rights is jeopardised by transposing the language of rights to the sale and purchase of education. Human rights are entitlements inherent in human beings and are regulated by public rather than private law. Blurred vocabulary camouflages this legal duality, with a risk of obfuscating the boundaries between trade law and human rights law. Both domestically and internationally, concerns about the future of education as a free public service have heightened the need to reaffirm and reinforce education as a human right.¹³³

The language of rights expressed above could be interpreted as the absence of explicit legal guarantees in the majority of constitutions, including that of Nigeria, where the constitutional provision is interpreted as 'guidance for government policy rather than specific obligations'.¹³⁴ Consequently, the negligence of public schools with regard to funding and administrative control has put the private school on a pedestal, namely, that it provides better quality education in Nigeria and, thus, reinforcing the assumption that public schools are for

¹³¹ K Tomasevski 'Six reasons why the World Bank should be debarred from education' 1 available at <http://www.brettonwoodsproject.org/2006/09/art-542516/> (accessed 21 May 2014).

¹³² E/CN.4/2001/52 of 11 January 2001, paras 55-59. The Structural Adjustment Programme (SAP) introduced stringent financial burdens on Nigeria during the military rule of General Babangida. This resulted in a large number of children not being able to access any form of education.

¹³³ K Tomasevski 'The right to education report, mission to United States of America' 24 September-10 October 2001E/CN.4/2002/60/Add.1 January 17, 2002.

¹³⁴ K Tomasevski 'Globalising what: Education as a human right or as a traded service?' (2005) 30 *Indiana Journal of Global Legal Studies* 12: 1.

lowly-placed children in society.¹³⁵ The effect hereof is that there is a tendency to discriminate both in the social sphere and in the labour market. Ultimately, it reduces the threshold access to quality basic education, as the majority of children fall in the poverty range with parents who are unable to fund private education.¹³⁶

Thus, to ensure that basic education is free and compulsory, it has been advanced that this may not be attainable because ‘to compel somebody to attend a school he cannot afford, does not make sense’.¹³⁷ In support of this position, state parties are encouraged to devote the ‘maximum amount of resources available towards the realisation of right to education’.¹³⁸

Furthermore, the restriction of access to basic education on the basis of financial challenges in Nigeria was highlighted in the National Education Data Survey (NEDS) report, which stated:¹³⁹

Nearly all pupils’ households spent money on books and supplies, and nine in ten (92 per cent) spent money on handworks, and school uniforms and clothing. Six in ten pupils’ households spent money on PTA fees, and one in two pupils household spent money on food. About one-quarter of

¹³⁵ Tomasevski (n 133 above). In para 54, Tomasevski reiterates that ‘[a]ccess to school may be secured for all children but this does not mean that schools are good, and those schools that are good may not be affordable. Opting out of public schools is possible for those parents who can afford private and/or religious education. Parental choice amongst public schools is determined by their ability to afford living in a neighbourhood where schools are good. The varying quality of schools is exemplified by advertisements for the sale of family houses, which include testing scores of neighbourhood schools as an important marketing item. This process of economic exclusion flouts the common school ideal.’

¹³⁶ This is treated as an assumption because in several circumstances children from the public-funded schools perform better than their counterparts in the private sphere. It is therefore paramount that if the public-funded schools are empowered appropriately, then the level of educational quality will be increased.

¹³⁷ Beiter (n 67 above) 97.

¹³⁸ See arts 28(1) & 4 of the CRC and art 10 of the African Women’s Protocol on the need to dedicate sufficient funds to the realisation of education. Particular attention is directed to the plight of the girl child and also the disabled. It is important that the concept of making education for the most vulnerable groups free must entail all aspects, including the elimination of distance and cost alongside other obstacles that negate the realisation of the right to basic education.

¹³⁹ National Population Commission (Nigeria) and RTI International, 2011 Nigeria Demographic and Health Survey (DHS) EdData Profile 1990, 2003, and 2008: Education Data for Decision-Making 2011 Washington DC, USA: National Population Commission and RTI International 25 available at [https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=https%3A%2F%2Fwww.eddataglobal.org%2Fdocuments%2Findex.cfm%2FTechR_NEDS_Nigeria_EdData_Survey_2010\(lgrpt\).pdf%3Ffuseaction%3Dthrowpub%26ID%3D329&ei=NoCbVe6jOcPfU7Wak6gL&usg=AFQjCNG7CauKZDPvJWgFqJ2JmpLuKKkQcg&sig2=2wo0ZQjRlofxwYtgJzkkJA&bvm=bv.96952980,d.ZGU](https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=https%3A%2F%2Fwww.eddataglobal.org%2Fdocuments%2Findex.cfm%2FTechR_NEDS_Nigeria_EdData_Survey_2010(lgrpt).pdf%3Ffuseaction%3Dthrowpub%26ID%3D329&ei=NoCbVe6jOcPfU7Wak6gL&usg=AFQjCNG7CauKZDPvJWgFqJ2JmpLuKKkQcg&sig2=2wo0ZQjRlofxwYtgJzkkJA&bvm=bv.96952980,d.ZGU) (accessed 7 July 2015).

pupils' households spent money on extra lessons, a third on the school development levy, and on tuition.

The GC on education highlights the importance of access by stating that education must be devoid of discrimination, physical accessibility and financial ability of pupils to be exposed to facilities in a sufficient manner. Discrimination addresses the content of education curriculum, stereotypes and attitudes of both teachers and government administrators. It also guarantees the freedom component of education, which ensures that no one must be denied access to education in a discriminatory manner.¹⁴⁰

The question of physical accessibility is enunciated by the fact that students must be able to access available educational institutions within a determined distance. Physical access by people with disabilities is an ongoing challenge in Nigeria. Regarding physical access, inclusive education of persons living with some form of disability is also crucial to the matter of threshold of access as conceptualised by the GC.

The position of the GC is further supported by the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, which calls for the following:¹⁴¹

General educational authorities are responsible for the education of persons with disabilities in integrated settings. Education for persons with disabilities should form an integral part of national educational planning, curriculum development and school organisation.

Education in mainstream schools presupposes the provision of interpreter and other appropriate support services. *Adequate accessibility and support services*, designed to meet the needs of persons with different disabilities, should be provided.

Buttressing this challenge within the Nigerian education framework, it was captured in the NEDS report:¹⁴²

¹⁴⁰ Beiter (n 67 above) 101.

¹⁴¹ Rule 6 of The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 48th session, Resolution 48/96, annex, 20 December 1993 (my emphasis). This is to underscore the importance of access in line with the best interests of children suffering from disability.

As expected, children in rural areas face longer distances and walking times to the nearest primary and secondary schools than children in urban areas. Children living far from school may be likely to start attending school over-age or not to attend school at all. Among over-age children, those in rural areas are more likely than those in urban areas to have started school over age because of the distance to the nearest school. In addition, the distance to school in part explains why young school-age children do not attend school, since it may be difficult or unsafe for children to walk long distances to school ...

The position of Tomasveski is therefore reiterated in the thesis, that any form of education for which fees are charged is a violation of the right of the Nigerian child to access basic education. The claims of availability without the necessary accessibility still amounts to a violation of the right and negligence on the part of the government of Nigeria with regard to its obligation to promote access to basic education.

iii. Acceptability

As shown in the conceptualisation of the meaning of education, all early scholars seem to agree on one basic aspect of education: that education must be central and acceptable to the individual. However, the position of determining the curriculum content of basic education based on the intellectual ability of pupils is an unacceptable premise and violates the acceptability test. The best interests of the child therefore remain the nucleus of fashioning any style of education that is offered to a child.

Another important aspect of acceptability is hinged on compliance of education curricula with the cultural and religious inclinations of people. A perusal of global and regional human rights instruments highlights the importance of taking into consideration the culture and religious beliefs of people. In addition, the language of communication is another aspect of the acceptability framework. As advanced in this thesis, respect for the language rights of people contributes a great deal to the level of acceptability.

¹⁴² n 139 above.

Furthermore, the main problem of acceptability within the Nigerian context, and especially in Northern Nigeria, is hinged on the parochial approach of the colonial powers. Omotoso opines that¹⁴³

[t]he colonisation of Africa by the Europeans which lasted about a century has come and gone but its impacts linger on many decades after. While some of these impacts are good and desirable, some are in conflict with the African culture and are not desirable.

This proposition, it is argued, is one of several reasons for the rejection of Western education in the northern part of the country, as the early missionaries had an agenda to convert the existing beliefs in the region to the beliefs of the colonial powers.¹⁴⁴ Another offshoot of the above proposition is captured by Azikiwe when he states:

... forces which, hitherto, had encouraged the brain-washing of Nigerians to lose faith in their innate genius and to doubt their capacity to stand by themselves are now ... converted to believe in education as an investment which should yield rich dividends in the future.¹⁴⁵

Another factor that affected acceptability is advanced by Fajana who, in restating the difference between the African traditional style of education and that of colonialism, reiterates the pivotal role of both moral learning and other forms of education, as opposed to the Western style, which concentrated only on the form and in addition mind training.¹⁴⁶ This view also finds support in the views of Omotoso, who claims that Islamic education was preferred in some quarters of Nigeria because it was more all-encompassing than Western

¹⁴³ SA Omotoso 'Education and emancipation: An African philosophical perspective' (2010) 223 *The Journal of Pan-African Studies* 3:9.

¹⁴⁴ Omotoso (n 143 above) argues that '[w]hen the colonialists came to Nigeria in the 19th century, together with Christian missionaries, they discovered that Islam had firmly established itself in most parts of the North and in some parts of the West of the country. Apparently, they would have preferred to replace Islam with their own religion. The educational system was virtually in the hands of the missionaries who ensured that the learning process in schools encouraged and in some cases demand the conversion of beneficiaries of the system into Christianity. Although they did not quite succeed in converting everybody who went through the system into their own religion, the effect of their attempt left a lasting impact on the mentality of the Muslims.' At 52.

¹⁴⁵ Foreword as written by N Azikiwe in O Ikejiani (ed) *Education in Nigeria* (1965) xiii.

¹⁴⁶ A Fajana *Education in Nigeria 1842-1939 (A Historical Analysis)*(1978) 30-31.

education.¹⁴⁷ It is, therefore, important that for education to be acceptable, it must embrace a large perspective of people and seek an all-encompassing approach to building an educational philosophy. Finally, it is emphasised that acceptability is linked to an educational policy accommodating cultural differences of people. Where a policy is put in place and the culture of the people is not properly captured, then such a policy will not be acceptable and be tantamount to a denial.

iii. Adaptability

Woolman and Fleisch advance that adaptability speaks to ‘curriculum and school environment able to adapt and accommodate persons with different capabilities’.¹⁴⁸ The GC conceptualises adaptability to include the consideration of ‘diverse social and cultural inclination’. Consequently, it can be inferred that the educational curriculum must fulfil this threshold in order to be able to meet this standard.

Ikejiani argues that colonial policies (education included) favoured the maintenance of colonial territories and not with intent to adapt to the colonised people.¹⁴⁹ To ensure adaptability, the community must be engaged so as to appreciate the ‘common good’ which they are to benefit from.¹⁵⁰

Thus, for education to meet the core content of adaptability, it must take into consideration the general culture, religion and way of life of people. Furthermore, it must also ensure that conditions that could make a certain group feel discriminated against and unable to adapt to a particular schooling schedule, such as physical and geographical limitations, are taken into account when designing an educational model.

¹⁴⁷ AO Omotosho ‘The impact of colonial education and culture on the Muslims of Nigeria’ (1998) 52-61 *Journal of Arabic and Islamic Studies*.

¹⁴⁸ Woolman & Fleisch (n 124 above) 135.

¹⁴⁹ O Ikejiani ‘Background to the problems of Nigerian education’ in O Ikejiani (ed) *Education in Nigeria* (1965) 3.

¹⁵⁰ E Unterhalter ‘Ensuring a fair chance for girls, global campaign for education’ in S Aikman & E Unterhalter (eds) *Beyond access transforming policy and practice for gender equality in education* (2005) 51.

2.4.5 Inextricable link between education and other rights

Where basic education is devoid of quality, the recipient is unable to have the full benefit of education.¹⁵¹ The link between the right to education and other rights, such as the right to health, is described by Lundy as a ‘perfect example of the indivisibility and interdependence of human rights obligations, restating that the right to education and the right to health are inextricably linked’.¹⁵² This argument is advanced in light of the fact that education provides an insight into healthy living and a way of handling challenges.

Article 28 of the Convention on the Rights of the Child (CRC) provides for the core basis of the realisation of the right to education. Enshrined in the article is the three-layered responsibility of the state to ensure the realisation of the right to education. The first area covers the responsibility to recognise;¹⁵³ the second is a protective one, ensuring compliance;¹⁵⁴ and the third is that of promotion and seeking international co-operation.¹⁵⁵ A joint reading of the three arms of article 28 shows a ‘new dimension that is put in existing education rights, by broadening the arsenal of binding international provisions on the right to education’.¹⁵⁶ Notwithstanding the fact that the wording of article 28 suggests the progressive realisation of the right, it has been canvassed that it is important to entrench an effective means of holding the government to account to ensure that they comply with the responsibility regarding the right to education.¹⁵⁷

¹⁵¹ L Lundy ‘School children and health: ‘The role of international human rights law’ in N Harris & P Meredith (eds) *Children, education and health: International perspectives on law and policy* (2005) 4.

¹⁵² As above. Apart from health, education is linked to other aspects of human rights; see, generally, DC Hodgson ‘The role and purposes of public schools and religious fundamentalism: An international human rights law perspective’ available at <http://files.eric.ed.gov/fulltext/EJ979441.pdf> (accessed 7 July 2015).

¹⁵³ CRC, art 28(1).

¹⁵⁴ CRC, art 28(2).

¹⁵⁵ CRC, art 28(3).

¹⁵⁶ M Verheyde *A commentary on the United Nations Convention on the Rights of the Child, Article 28 - Right to education* (2006) 9.

¹⁵⁷ K Tomasevski ‘Globalising what: Education as a human right or as a traded service?’ (2005) 30 *Indiana Journal of Global Legal Studies* 12: 1.

Another important significance of the provisions of article 28 is that of the protection of the right in education. Jjuuko and Kabonesa debate the importance of the realisation of the right in education, insisting that its elimination is a sure way of enhancing access beyond the threshold point.¹⁵⁸ Among indigenous groups, for instance, a lack of respect for their status and consequently their rights in education results in the eroding of their self-dignity and liberty.¹⁵⁹ Examples of rights in education are any acts that are tantamount to inhuman and degrading treatment, which manifests in terms of verbal abuse, corporal punishment and discrimination.¹⁶⁰

Another core content of the protection of the right to education is with respect to the right of persons living with disabilities. In this regard, reliance on article 23 of the CRC is important to ensure that basic education is not denied to children who are suffering from disabilities. Lundy argues that this will ensure that a child is able to ‘achieve the fullest possible integration and individual development’¹⁶¹ when the right to basic education is effectively interpreted.

The reading of this provision in line with article 24 of the Convention on the Rights of Persons with Disability (CRPD) further reinforces the need to adapt the inclusive education model to ensure that the right to education is realised. The importance of ensuring an integrated approach to education is further advanced by the fact that

[p]ersons with disabilities live a more degraded life which is dependent of the educational system that excludes them from the society. Consequently, if these problems must be solved, then it must be taken into cognisance that education lightens the

¹⁵⁸ F Jjuuko & C Kabonesa *Universal primary education (UPE) in contemporary Uganda: Right or privilege?* (2007) 6 HURIPEC Working Paper 8.

¹⁵⁹ Among the Batwa group in Uganda, discrimination which results in the violation of the right to education is a major factor that has affected the right to education of the Mutwa child. See, generally, AC Onuora-Oguno ‘Assessing the right of the indigenous child to education: Case study of the Batwa’ available at <http://repository.up.ac.za/bitstream/handle/2263/8005/azubike.pdf?sequence=1> (accessed 21 May 2014).

¹⁶⁰ Verheyde (n 156 above) 60.

¹⁶¹ Lundy (n 151 above) 11.

burden of various forms of social disadvantages and opens the door to better living conditions.¹⁶²

2.4.6 Education abhors discrimination

The UNESCO Convention against Discrimination in Education¹⁶³ recognises the right to education as a core component of its aims and terms.¹⁶⁴ To achieve this, the Convention¹⁶⁵ seeks to protect the individual against all forms of discrimination that may exist in the pursuit of the right to education. The challenges recognised by UNESCO do not, however, preclude the three-layered obligation on a state to ensure the promotion, protection and fulfilment of ensuring ‘full and equal opportunities for education for all’.¹⁶⁶

In addition, UNESCO is alive to the importance of the effective implementation of the obligation that is placed on a state. This can be achieved by reliance on both legal and policy frameworks that must be implemented in line with the international guidelines set. An integral part of the UNESCO oversight function is grounded in the fact that UNESCO member states have the constitutional obligation to report to the organisation on measures taken for implementing UNESCO conventions and recommendations.¹⁶⁷

Furthermore, UNESCO, in realising the right to education, set up the Education for All (EFA) campaign, which aimed at ensuring the realisation of the basic aim of UNESCO.¹⁶⁸

Another programme initiative in this regard is the Dakar Framework for Action.¹⁶⁹

¹⁶² Monitoring the implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities [A/52/56 - Report on First Mandate of the Special Rapporteur] - part 2 available at <http://www.un.org/disabilities/default.asp?id=59> (accessed 22 May 2013). See Lundy (n 151 above) 11 for further discussions on the import of rule 6 of the Standard Rules on the Equalisation of Opportunities for Disabled People.

¹⁶³ Convention entered into force on 22 May 1962.

¹⁶⁴ UNESCO *The right to education*.

¹⁶⁵ 14 December 1960.

¹⁶⁶ Preamble of UNESCO Constitution.

¹⁶⁷ CL McNeely ‘Prescribing national education policies: The role of international organisations’ (1995) 483-507 *Comparative education review* 39:4.

¹⁶⁸ UNESCO: *Inclusive Dimensions of the Right to Education: Normative Bases Concept Paper* prepared for the 8th and 9th Meetings of the Joint Expert Group UNESCO (CR)/ECOSOC (CESCR) on the Monitoring of the Right to Education (2008) 4.

The UNESCO Convention has 19 articles that seek to protect the right to education. It describes discrimination as

distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education ...¹⁷⁰

The significance of this provision restates the importance of ensuring that no state policy violates the religious or cultural beliefs of people.¹⁷¹ This speaks to the extent of the acceptability of basic education and its curriculum content. The strong wording of the Convention and the Constitution of UNESCO stresses the role of states, ensuring that the right to education of every child is protected. Thus, education is referred to as ‘all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given’.¹⁷²

The importance of the UNESCO Convention is further reinforced by its reference to the UDHR and other global and regional human rights law that provides for the right to education. According to Daudet and Eisemann:

The preamble to the Convention against Discrimination in Education is an extension of the Universal Declaration of Human Rights, which, as the preamble states, ‘asserts the principle of non-discrimination and proclaims that every person has the right to education’ ... the Constitution of UNESCO affirms ... that ‘the States Parties to this Constitution believe in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge’.¹⁷³

¹⁶⁹ 2000. The Dakar Framework was adopted during the World Forum on Education. Part of the target set during the forum was a reaffirmation of the importance of education and the urgent need to realise it. In addition, 2015 was set as a target for achieving equal education for the child (boy and girl inclusive). Aside the issue of the child, adult literacy levels were also set as targets.

¹⁷⁰ UNESCO Convention against Discrimination in Education, art 1.

¹⁷¹ UNESCO Convention against Discrimination in Education, art 4.

¹⁷² UNESCO Convention art 2.

¹⁷³ Y Daudet & PM Eisemann *Right to education: Commentary* (2005) 9-12 UNESCO.

Based on the above, it is clear that discrimination in any form is not acceptable within the ambit of the human right approach to access to basic education. Discrimination against persons with disabilities has further received legal protection in international law and is discussed below.

2.4.7 Eliminating discrimination against persons with disabilities within the space of basic education

The need to specifically protect persons with disabilities informed the putting into place of the Convention on the Rights of People with Disabilities (CPRD).¹⁷⁴ While the Convention deals with several rights of people living with disabilities, article 24 provides specifically for the right to education. Unlike the wording of other international instruments providing for the right to education, the CRPD mentions in specific terms states' obligation to recognise the 'right of persons with disabilities to education'.¹⁷⁵ It further restates the wording of the UNESCO Convention to ensure that the right is devoid of any form of discrimination. A model of inclusive education is enshrined in article 24, stating that 'persons with disabilities are not excluded from the general education system on the basis of disability'.¹⁷⁶ For education to be inclusive, it must entail an extra effort by the state to ensure support as far as infrastructure is concerned and personnel with skills to ensure effective and quality access to education at all levels.¹⁷⁷ This further entails taking into account that every child, apart from having a fundamental right to education, must be 'given an opportunity to have an acceptable

¹⁷⁴ <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (accessed 29 May 2013).

¹⁷⁵ CRPD art 1.

¹⁷⁶ CRPD art 24(2)(a).

¹⁷⁷ SD Kanga 'The right to education of persons living with disability', lecture delivered during the Advanced Human Rights Courses, Centre for Human Rights, University of Pretoria, March 2013.

level of learning and ensuring that each child's unique interest, abilities and learning needs are protected'.¹⁷⁸

2.4.8 Right to basic education in African regional human rights law

Discussing education under the African human rights system requires a brief restatement of the concept of education in Africa. This is important as it goes a long way towards effecting the level of acceptability and adaptability as envisaged in the ICESCR. The fact that Africa had a style of education that was peculiar to it has been reiterated in several literatures.¹⁷⁹ Relying on Nduka¹⁸⁰ and Nwonwu,¹⁸¹ the importance of education and its meaning in Africa is reiterated, as allowing for African indigenous knowledge and the transmission of culture from one generation to another.¹⁸² The following section details the provisions of the right to education in several regional human rights instruments within Africa.

2.4.9 Africa respects education

The African Charter on Human and Peoples' Rights (African Charter),¹⁸³ in enshrining the protection of the right to education, provides in unqualified terms that 'every individual shall have the right to education'.¹⁸⁴ Although not expressly stated, it can be implied that the Charter reiterates the importance of ensuring that education as a right must be realised within

¹⁷⁸ The Salamanca Statement and Framework for Action on Special Needs Education adopted by the World Conference on Special Needs Education: Access and Quality Salamanca, Spain, 7-10 June 1994 Principle 2. See also generally General Comment 9 of the CRC.

¹⁷⁹ See eg the works of AB Fafunwa *History of education in Nigeria* (1974); WT Kalusa 'Indigenous education in pre-colonial Africa' in HT Msango *et al* (eds) *Selected topics in philosophy and education* (2000) 24-3.

¹⁸⁰ O Nduka *Western education and the Nigeria cultural background* (1964) 12.

¹⁸¹ FOC Nwonwu *Indigenous knowledge systems in Igbo traditional agriculture* (2011) 11.

¹⁸² M Hansungule & AC Onuora-Oguno 'African perspective of education: A catalyst for the desired Africa of tomorrow?' presented at the 2013 Symposium on finding solutions to Africa's development organised by the Thabo Mbeki African Leadership Institute 25-26 July 2013.

¹⁸³ Adopted 26 June 1981, entered into force on 21 October 1986. The African Charter is the first instrument that sets out obligations from both state parties and individuals. In addition, it does not distinguish between rights in any particular hierarchy in terms of dividing rights into civil and political or economic and social rights.

¹⁸⁴ Art 17(1) of the African Charter provides that '[e]very individual shall have the right to education'.

the ambit of cultural, traditional and religious beliefs.¹⁸⁵ It is certain that this is in line with the provisions of the ICESCR and the GC in ensuring that education is acceptable and adaptable. Thus, basic education curricula, policy frameworks and implementation should respect the provisions of article 17 of the African Charter.

2.5 Education is culture in Africa

The African Cultural Charter¹⁸⁶ brings to the fore the pivotal role education plays in the cultural life of African society. The system of African education promotes communalism depicted in the concept of *ubuntu*.¹⁸⁷ To this effect, the realisation of education is set out in the principles of the Cultural Charter, with ‘African states solemnly subscribing to ensure access of all citizens to education and culture’.¹⁸⁸ The Charter further enshrines the ‘transcription, teaching and development of national languages and the adaptation of educational curricula to development needs’.¹⁸⁹ The scope of these provisions speaks to the importance of ensuring that education must be acceptable and adaptable to the existence of a group and should not in any form derogate from its cultural existence.¹⁹⁰

This is further referred to when the Charter in its *modus operandi* for realising education specifically encourages the introduction of African culture, language and the establishment of appropriate institutions.¹⁹¹ The role of teachers is further emphasised by providing that states must invest in the training of competent staff.¹⁹²

¹⁸⁵ Arts 17(2) & (3) African Charter.

¹⁸⁶ Adopted at the 13th ordinary session of the OAU 1976, available at http://au.int/en/sites/default/files/CULTURAL_CHARTER_AFRICA.pdf (accessed 29 May 2013).

¹⁸⁷ Hansungule & Onuora-Oguno (n 182 above).

¹⁸⁸ African Cultural Charter, art 2.

¹⁸⁹ African Cultural Charter, Priority 1(a) & (c).

¹⁹⁰ African Cultural Charter, art 10 provides that ‘African states shall endeavour to raise continually the cultural awareness of young people through the introduction of African cultural values into education and through the organisation of national and Pan-African festivals, conferences, seminars and training and refresher courses’.

¹⁹¹ African Cultural, Priority 2(a)-(c).

¹⁹² African Cultural Charter, Priority 2(d).

The appropriateness of education is also enshrined in the Charter,¹⁹³ thus addressing the core aspect of the obligation on the state to realise the right to basic education.

2.5.1 Education and the African child

The African Charter on the Rights and Welfare of a Child (African Children's Charter)¹⁹⁴ focuses specifically on the protection of the rights of the African child. It may be seen as a version of the UN CRC, but is unique in the sense that it places obligations on the child. The Children's Charter provides a further elaboration on the rights that can accrue to a child. Considering that the emphasis in this thesis is on basic education, the period covered will mostly fall under the scope of the definition of a child. It is imperative that the provisions of the Children's Charter as regards the right to education be considered. A starting point is reiterating the basis that, whatever decisions are taken by the government or the parents of a child, they must be in the best interests of the child.¹⁹⁵

The first mention of the right to education in the African Children's Charter is couched in the same terms as in the African Charter, restating the compulsory nature of the right of every child to an education.¹⁹⁶ It further addresses the importance and outcomes of the education received by a child, that it must assist the child and the community. As put forward by Mandela, the general import of education is to emancipate, as education is the greatest engine of personal development. Mandela further reiterates that '[i]t is through education that the daughter of a peasant can become a doctor; that a son of a mine worker can become the head of the mine'.¹⁹⁷

¹⁹³ African Cultural Charter, art 16: "African governments should take steps to organise continuous training in a rational way and to establish an appropriate system of education which satisfied the specific needs of their people".

¹⁹⁴ <http://acerwc.org/acerwc-charter-full-text/> (accessed June 2013).

¹⁹⁵ African Children's Charter, art 2.

¹⁹⁶ African Children's Charter, art 11.

¹⁹⁷ Nelson Mandela Quotes <http://www.education.gov.za/LinkClick.aspx?fileticket=8d6cPhef%2FL8%3D&tabid=656&mid=1849> (accessed 29 May 2013).

The Children's Charter lends support to a style of education that must promote the child's personality,¹⁹⁸ promote respect of human rights,¹⁹⁹ that it should ensure the protection of the cultural heritage, and sustain mutual respect for individuals and the state.²⁰⁰ Furthermore, the obligation of the state to protect the right to education follows the spirit of the wording of the ICESCR.²⁰¹

However, an interesting provision of the African Children's Charter seeks to safeguard the place of the girl child. It provides:

States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.²⁰²

The interests of children suffering from disabilities are also established by a call on state parties to ensure that 'special measures are taken to promote self-reliance and participation in the community'.²⁰³ The use of the phrase 'subject to available resources' in article 13(2) of the Charter does not suggest a leeway for states to fail in their obligation. It is assumed, therefore, that an application of the recommendations of the GC will suffice here. Indeed, the judicial use of available resources to ensure the integrative inclusion of children with disabilities can be construed to mean disapproval of the menace of corruption.²⁰⁴ It is argued that, if the obligation placed on the child is realisable, quality basic education in African

¹⁹⁸ African Children's Charter, art 11(2)(a).

¹⁹⁹ African Children's Charter, art 11(2)(b).

²⁰⁰ African Children's Charter, arts 11(2)(c)-(e).

²⁰¹ While it recognises the liberty of private individuals to provide education, art 11(7) of the Charter provides that '[e]ducation given in such institutions shall conform to such minimum standards as may be laid down by the states'. In the state's responsibility to ensure that the content of education curriculum in non-public schools are regulated to meet a minimum core is established.

²⁰² African Children's Charter, para 6.

²⁰³ African Children's Charter, art 13(1).

²⁰⁴ African Children's Charter, art 13(3). It is argued here that the call to use available resources to progressively realise the right to education of children with learning challenges precludes the wanton corruption that has eaten deep into the quest for the realisation of the right to education. As will be shown later in the session of the challenges confronting the realisation of the right to basic education in Nigeria, corruption remains a monster that must be subdued if the question of basic education will not remain political rhetoric.

countries, and Nigeria in particular, is not a negotiable option, since education has been accepted as a basis for the realisation of other rights.²⁰⁵

2.6 Conclusion

A preliminary conclusion of this chapter begins by reiterating the indispensability of the right of access to basic education as a fulcrum for the realisation of other human rights.²⁰⁶ ‘Human rights are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedom, entitlements and human dignity.’²⁰⁷ In these circumstances, the realisation of the right to basic education places an onus on government to ensure the promotion, fulfilment and protection of fundamental rights. It is also concluded that Africa has a unique perspective of education and the concept of rights, with the sole aim of enabling individuals to contribute meaningfully to society.

Individuals are also expected to ensure that the guaranteed rights to education are not violated. Consequently, ‘education as a fundamental human right is key to sustainable development, peace and stability among countries’.²⁰⁸ It is also trite to conclude that the right to education ‘imposes an obligation on states to ensure that all citizens have opportunities to meet their basic learning needs’.²⁰⁹ All the instruments discussed clearly envisage the intention of state parties to implement them and also to adopt guidelines when provided.²¹⁰

The next chapter analyses the various obstacles and challenges inhibiting access to basic education. It will also bring to the fore the impact of identified challenges on the education system, particularly on the Nigerian society.

²⁰⁵ African Children’s Charter, art 31.

²⁰⁶ World Education Forum (2000).

²⁰⁷ Frequently-asked questions on a human rights-based approach to development Co-operation Geneva 8, 2006.

²⁰⁸ UNESCO Round Table on Constitutional and Legal Bases of the Right to Education as a Fundamental Human Right, 5 December 2002, 12, para 9.

²⁰⁹ As above.

²¹⁰ UNESCO (n 208 above) para 13.

Chapter 3

Obstacles to the right of access to basic education in Nigeria

3.1 Introduction

Identified challenges discussed in the thesis include, but are not limited to, challenges of policy and law, poor infrastructure and weak institutions. In addition, the impact of challenges of culture, religion, ethics and corruption are also examined. This chapter examines the shortfalls in the legislative approach to enacting viable legislation, judicial adjudication and oversight functions to ensure prompt delivery and execution of policies by the executive arm of government.

Furthermore, the chapter attempts a brief overview of quality education. It is noted that, notwithstanding, access to basic education is an intrinsic and fundamental right. As already canvassed in the preceding chapter, its realisation remains largely rhetoric in Nigeria. The state of access to basic education remains at its lowest ebb, as shown by the very poor conditions that are characteristic of the state of education in the country and recent statistics on both out of school children and adult illiteracy ratios.¹ The challenge does not only lie in the realisation of the right to access basic education, but also with the education received being a quality one. Besides the above-mentioned challenges, numerous other challenges are discussed in this thesis as major factors at the bedrock for the continued non-realisation of the right to access basic education in Nigeria. This chapter thoroughly engages these factors with a view of positing ways through which they can either be eliminated or minimised.

¹ Nigeria is rated to be one of the 10 nations in the world with the highest number of adult illiterates. This figure is presently put at about 46 million adults ranging from ages 15 and above. The World Bank has already expressed concerns over this worrying statistic and is trying to collaborate with the Federal Ministry of Education in trying to see how this percentage can be reduced. However, it is the author's conviction that if the challenges that will be discussed in this chapter are not tackled properly, the projects may yield limited results. For more news on the World Bank planned project, see *The Sun Newspaper*, 21 October 2013.

3.2 Quality basic education - A brief overview

According to the World Education Forum, giving quality content to education is very important.² To achieve this, it is stated that education must not only be accessible, but that the accessed education must ‘improve all aspects of the quality of education to achieve recognised and measurable learning outcomes for all-especially in literacy, numeracy and essential life skills’.³ As aptly captured by Fredriksson, the importance of quality education and the role teachers must play are both central to ensuring enhanced access to basic education. Fredriksson notes that:⁴

As gleaned from various international instruments, the quality of education must be in place to ensure that the life of the child is empowered to the point that the child is able to make an impact on the community and personally. The background on the Dakar action point reiterates further the importance of quality education

A quality basic education system must provide all children and young people with a comprehensive education and with appropriate preparation for working life, life in society and private life. This should be achieved without distinction of any kind, such as that based on the parent’s income, colour, gender, language, religion, political or other opinion, national or social origin.

Ajayi and Adeyemi, relying on the reports of the World Bank, observe that, although the situation of poor access to quality education is not peculiar to Nigeria, the situation in Nigeria is highly deplorable as basic education in Nigeria today ‘suffer[s] from very poor conditions of learning in dilapidated or half-completed buildings, insufficient desks, overcrowded classrooms, inadequate learning materials, poorly educated and motivated teachers’.⁵ Abbass

² U Fredriksson ‘Quality education: The teachers’ key role’ Workshop 4, 1 *Education International* available at www.ibe.unesco.org (accessed 4 December 2013).

³ Dakar Framework for Action Article 7, World Education Forum, 2000.

⁴ See generally Fredriksson (n 2 above).

⁵ K Ajayi & M Adeyemi ‘Universal Basic Education (UBE) policy implementation in facilities provisions: Ogun State as a case study’ (2011) 2 *International Journal on New Trends in Education and Their*

notes that ‘public schools in Nigeria have degenerated beyond limits in terms of physical structures, infrastructure, and the commitment or quality of teachers as well as the concern of authorities in ensuring standard and achievement of objectives’.⁶

Issues surrounding basic education and other levels of education have become greatly politicised in Nigeria. The political class, rather than treat the provision of quality education to Nigerians as a right, approaches it as a mere obligation seeking to score political points by attempting to shift blame and responsibilities.⁷

Apart from the political tone of the Nigerian nation on and the rhetoric of achieving the right to basic education, another interesting issue is the apparent rejection of education based on religious and cultural philosophies. Notably, the events that led to the seeming rejection of education as hinged on culture and religion were premised on the intent of the colonial powers in attempting to erode the mind of Africans. Ngugui clearly paints the picture of post-independent Africa and its reliance on colonial thought as follows:⁸

Berlin of 1884 was affected through the sword and the bullet but the night of the sword and the bullet was followed by the morning of the chalk and the black board. The physical violence of the battlefield was followed by the psychological violence of the classroom. Where the former was visibly brutal the later was visibly gentle.

The gentility spoken about was that of a gradual erosion of identities which graced the education landscape of African nations. The impact of colonial education came with its objectives of redirecting the perception of the African personality. It is consequently

Implications 35-36; T Moja ‘Nigeria education sector analysis: An analytical synthesis of performance and main issues’ 10, report produced for the, World Bank 2000 available at http://siteresources.worldbank.org/NIGERIAEXTN/Resources/ed_sec_analysis.pdf (accessed 24 September 2013).

⁶ IM Abbass ‘Community participation in education: Challenges and prospects in Nigeria’s democracy’ (2012) 8 *European Scientific Journal* 3.

⁷ Various political parties in Nigeria, in the build-up to 2015 have been organising various forum on governance, education and infrastructural development. It is my opinion that the majority of the discussions are laden more with political and vote-canvassing techniques as opposed to resolve to foster a sustainable education initiative.

⁸ WT Ngugi *Decolonising the mind: The politics of language in African literature* (1981) 9.

important that a reconceptualisation or renaissance must be achieved about the true nature of Africa if education must be accepted and embraced thus enhancing access and eliminating various forms of culture-religious philosophies inhibiting it. The shock of the cultural diversity which greeted Africans at the advent of the colonial education is succinctly put thus:⁹

The language, through images and symbols, gave us a view of the world, but it had a beauty of its own. The home and the field were then our pre-primary school but what is important... the language of our evening teach-ins, and the language of our immediate and wider community, and the language of our work in the fields were one. And when I went to school, a colonial school, the harmony was broken. The language of my education was no longer the language of my culture.

Consequently, for quality education encompasses sufficient availability of infrastructure and value laden respect and preservation of human dignity.

3.3 Challenges to accessing basic education

3.3.1 Failure of the executive arm of government

The executive has the responsibility of ensuring the implementation of laws and adhering to the state obligations. Nigeria as signatory to several international law instruments that recognise access to basic education as a right is yet to put in place appropriate institutional mechanisms to ensure the realisation of the state obligation to basic education. As already stated, disharmony continues to exist between the various states in Nigeria and the federal government with respect to accessing the funds earmarked for promoting and fulfilling the obligation of access to basic education.

The inability of the executive to curb the menace of corruption, which is rife in all arms of the executive, also presents another challenge. The further failure of the executive is exposed

⁹ As above.

by the inefficiency of its agencies that are saddled with the responsibility of basic education, the Universal Basic Education Commission (UBEC). The Federal Ministry of Education (FME) at the federal level and the State Universal Basic Education Board (SUBEB) at the state level continue to perform below par in the discharge of their various functions.¹⁰

The need, therefore, exists for the executive arm of government to drive a targeted and concerted effort of ensuring that the right to access basic education is protected, promoted and fulfilled.¹¹

3.3.2 Legislative challenges

Having identified and discussed the place of education under international law and Nigerians' obligations to the laws that should influence Nigeria's legislative attitude towards the basic education sector in Nigeria and ensure that it meets the standards of the Education for All or the UNESCO framework and aspirations, it is important to underscore the fact that legislative regulation of basic education still remains a challenge in Nigeria.

The inconsistencies relating to the implementation of educational policies in Nigeria have, instead of creating stability in the uniform implementation of policies, created disparity and inequality. This is evidenced by the existence of several standards relied on by both government-funded institutions and privately-funded ones. It is also noted that even among the government-owned schools, some are treated as UBE education centres, leading to the neglect of others not so labelled.¹²

¹⁰ D Oyedele *Strides, challenges in basic education* available at <http://www.thisdaylive.com/articles/strides-challenges-in-basic-education/153896/> (accessed 17 April 2015).

¹¹ For a detailed responsibility placed on the executive arm of government of Nigeria in ensuring that education is provided, promoted and fulfilled, see generally the Federal Ministry of Education status report available at <http://planipolis.iiep.unesco.org/upload/Nigeria/Nigeria%20Ed%20Sector%20Status%20May%202003.pdf> (accessed 17 April 2015).

¹² Ajayi & Adeyemi (n 5 above). The Governor of Lagos State, Mr Babatunde Raji Fashola, in a recent television interview on 18 September 2013 in Lagos, re-emphasised the need to ensure the uniformity of the

For instance, speaking of the failure of the UPE in its debut in Nigeria, Abbass notes:¹³

When the Universal Primary Education (UPE) was launched in 1976, for example, there was no adequate plan to achieve the enshrined objectives in all respects and at all levels. These include the projected number of pupils/students, number of schools/classrooms needed, the number and quality of teachers required and other infrastructures and instructional materials.

Stability in policy formulation and implementation is hinged on policy consistency pertaining to the realisation of access to education with basic education at the foundation.¹⁴ Basic education in itself is a tool that ensures that the individual is functionally literate.¹⁵ This is further underscored by the fact that it lays the groundwork for further education. This culminates in ensuring that all possible challenges capable of derailing its realisation are limited to a large extent by ensuring proper formulation and implementation of policies and laws.¹⁶

The changing faces of several policies during the various governments in Nigeria, especially with the advent of the military junta regimes, remain a core example of the negative effect of inconsistencies in the implementation of national education policies. Kazeem and Ige, for instance, pin-point these inconsistencies as a major clog in Nigeria's basic education sector. During the Alhaji Sheu Shagari-led government, to boost access to university education, which was alternatively meant to ensure the production of quality teachers and other needed skills to fill the gap created by the lack of qualified professionals in Nigeria, the National

school calendar. He opined that this would enable the government to monitor out-of-school children and to have verifiable working data that can be relied on to ensure the eradication of out-of-school children in the state.

¹³ Abbass (n 6 above).

¹⁴ It is noted here that several other policies as it affects the access to secondary and tertiary education also exist. While the tertiary education in Nigeria is currently confronted with huge challenges and strikes hinged on the non-implementation of policies, it does not fall with the scope of the education discussed in this thesis.

¹⁵ For further reading on adult functional literacy in Nigeria, see generally JB Ayodele & MO Adedokun 'Towards achieving functional adult literacy in Nigeria' (2012) 8 *European Scientific Journal* 209-235.

¹⁶ DA Olaniyan & OE Obadara 'A critical review of management of primary education in Nigeria' (2008) 10 *International Journal of African and African American Studies* Vol VII, No 1.

Open University of Nigeria was established.¹⁷ With the takeover of government by the General Buhari military regime the initiative was abolished. The end of food for school policy also represents an era in which educational policy was discarded with no regard for its positive effect.¹⁸ The aftermath of these inconsistencies meant that ‘Nigerian education descended into a further dismal situation, resulting in the total dislocation of indigent students, who constitute more than 90% of the student population’.¹⁹

Decrying the very strong effect on inconsistent policy, Atoyebi, echoing Umezurike, reiterates the situation in Nigeria thus: ‘If there is anything in which we have become experts in this country, it is our propensity to bungle the implementation of policies.’²⁰

The policy inconsistencies discussed above also manifest inconsistent education curricula in the various basic education outfits in Nigeria. ‘Curriculum is the heart of any educational programme without which such programme will be in jeopardy; and curriculum is also a structured plan of action that guides the process of education.’²¹ Curricula and teaching plans are not consistent in Nigeria, ranging from individually-managed schools to mission-based and government institutions; educational resources used for teaching vary. Unfortunately, despite the fact that the ‘UBE necessitated a curriculum change and innovation as a result of

¹⁷ National Open University of Nigeria (NOUN) was initially established on 22 July 1983 and subsequently closed on 25 April 1984. For a detailed history and challenges to NOUN, see TN AMBE-UVA ‘National Open University of Nigeria (NOUN): A historical perspective and challenges’ *Turkish Online Journal of Distance Education-TOJDE* January 2007 ISSN 1302–6488, Volume: 8 Number: 1 Article: 6 available at <http://files.eric.ed.gov/fulltext/ED494830.pdf> (accessed 31 October 2013).

¹⁸ K Kazeem & O Ige ‘Redressing the growing concern of the education sector in Nigeria’ (2010) 42 *Edo Journal of Counselling* Vol 3 No 1.

¹⁹ As above.

²⁰ JA Atoyebi ‘A critique of the five main objectives of the philosophy of Nigerian education in the contemporary socio-economic and political trends in the country’ available at <http://www.unilorin.edu.ng/publications/atoyebi/J.A.%20ATOYEBI.htm> (accessed 23 September 2013). See generally A Adegbite ‘Languages and the challenges of education in Nigeria’ (2010) *Journal of the Nigerian English Studies Association (JNESA)* 14:1. 14, where Adegbite describes policy formulation in Nigeria in these words: ‘In Nigeria, several policies have been formulated and programmes initiated and embarked upon, albeit sporadically and haphazardly in many areas.’

²¹ BT Danmole ‘Emerging issues on the Universal Basic Education Curriculum in Nigeria: Implications for the science and technology component’ (2011) 62-68 *Pakistan Journal of Social Sciences*, Volume 8 Issues 1.

the desire for the improvement and transformation of the educational system’;²² many schools do not adopt the curriculum.²³ In Danmole’s observation, the failure to adopt the UBE curriculum pattern is attributed to the incompetency on the part of the teachers who are invariably not learned in the envisaged style of teaching. Danmole observes that the UBE curriculum is a ‘spiral curriculum which requires child-centred and activity-oriented teaching and learning processes’ but which is still not fully adhered to by teachers.²⁴

This has obvious implications for the level of quality in education being churned out. The first implication affects equality in education, as children from less economically-empowered homes tend to attend schools where the curriculum is argued to be of poorer quality than others. This invariably affects the level of competence that a child can imbibe in enabling the child meet the target of education in the home and community as a whole.

While taking into cognisance the challenges that curriculum development constitutes, it is important to underscore the fact that the education curriculum as of a necessity must be developed with the best interests of the child in mind and not the child trying to adapt to the curriculum.²⁵ Beiter is of the opinion that:²⁶

Education must be flexible so that it can adapt to the special situation of working children, if it is not possible to bring child to where education is given, education must be adapted so that it can be brought to where children are.

Thus, in developing education curricula, it is very germane that various classes of children must be taken into consideration. In this regard, the development of curricula for children

²² As above.

²³ Some of the factors responsible for this range from the fact that some schools, especially the private-owned schools, because of better availability of funds, employ more skilled teachers who invariably are supposed to have better skills. Subsequently, many disparities on educational facilities available to them exist from one school to another.

²⁴ Danmole (n 21 above).

²⁵ K Tomasevski *Removing obstacles in the way of the right to education, Right to education Primers* (2001) 1NO. 1, 12.

²⁶ KD Beiter *The protection of the right to education by international law* (2006) 509.

with disabilities, working children and far to reach children must all be taken into consideration. Talking about the development of curriculum for children with disabilities, it must be noted that an inclusive approach is advanced as opposed to the present situation of special education presently prevalent in Nigeria. The impact of a relevant curriculum is generally underscored by the fact that it enhances and discourages non-attendance by children and thereby eliminating any need for state enforcement.²⁷

3.3.3 Judicial challenges

The judiciary represents the third estate in the realm of governance. Its major responsibility is to ensure the interpretation of laws and, by extension, protect the rights of individuals. While the judiciary is primed in the implementation of economic and social responsibilities, the role it can play in ensuring strict adherence of the executive to its obligation is settled. The Nigerian judiciary's inability to play this role in the sphere of accessing basic education is worrisome and presents a huge challenge.

The entrenchment of corruption in the executive arm of government and Nigeria's lack of respect for its obligations under international law further exhibits the failure of the Nigerian judiciary in aiding the realisation of access to basic education. This suggests why litigation is taken to the ECOWAS Community Court of Justice (ECCJ) for issues that inhibit the actualisation of realisation of access to basic education.

Despite the assumption that the Nigerian Constitution does not recognise education as a justiciable right, it is suggested and discussed in further detail in chapter five that the judiciary can rely on judicial activism like in India to contribute a positive jurisprudence for the enhancement of the realisation of the right to access basic education in Nigeria.

²⁷ Beiter (n 26 above) 512.

Besides the above challenges, another major challenge that beleaguers the access to basic education in Nigerian is the place of education of children suffering with disabilities.

3.3.4 Access to basic education of persons living with disabilities

The CPRD is the first treaty that specially protects the rights of persons living with disabilities. Nigeria ratified the CRPD in 2010 along with its optional Protocol.²⁸ Despite this ratification, the education of persons with disabilities in Nigeria continues to be a challenge.

The first challenge that must be noted in inclusive education is that put forward by McClain-Nhlapo, who reiterates:²⁹

In Africa, exclusion, prejudice and discrimination remain common experiences for millions of people with disabilities. Poverty, malnutrition, *low school enrolment rates for children with disabilities*...as do negative cultural beliefs about disabilities and attitudes towards persons with disabilities remain real and well entrenched.

Realising that *ab initio* persons living with disabilities (PLWD) are disadvantaged, it brings to the fore the further disadvantage suffered by children in accessing basic education. It is important to underscore the fact that disability in some quarters has been construed to be evil omens in some cultural and religious philosophies, leading to severe negative social concepts of PLWDs.³⁰

In attempting to conceptualise the meaning of disability, the following definitions are agreeable for the purposes of this thesis. ‘A disability may be generally defined as a condition which may restrict a person's mental, sensory, or mobility functions to undertake or perform a

²⁸ http://www.usicd.org/index.cfm/news_nigeria-ratifies-crpd-and-optional-protocol (accessed 17 April 2015).

²⁹ C McClain-Nhlapo ‘Foreword’ in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) vii (my emphasis).

³⁰ I Grobbelaar-Du Plessis & T van Reenen ‘Introduction to aspects of disability law in Africa’ in Grobbelaar-Du Plessis & Van Reenen (n 29 above) xv.

task in the same way as a person who does not have a disability’.³¹ Disability can also be viewed as ‘any continuing condition that restricts everyday activities’.³² According to the World Health Organisation:³³

Disabilities are an umbrella term, covering impairments, activity limitations, and participation restrictions. Impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. *Disability is thus not just a health problem. It is a complex phenomenon, reflecting the interaction between features of a person’s body and features of the society in which he or she lives.* Overcoming the difficulties faced by people with disabilities requires interventions to remove environmental and social barriers.

The above definitions bring to the fore the underpinning fact that disabilities are not just medical in nature but can also be social.³⁴ Another important inference from the definition is that disabilities are the complete handicapping of PWLD. Consequently, with the requisite support, access to basic education of PLWD can be enhanced. Also gleaned from the definitions is the fact that PLWDs have the capacity to engage and interact with others within the society with some form of support provided.

Having reiterated the importance of the protection of the right to education of PLWD as contained in various international law provisions³⁵ and the recent drive for inclusive education, the need for Nigeria to surmount the present challenges of educating PLWD is

³¹ <http://www.dwa.org.au/whatisadisability.htm> (accessed 23 October 2013).

³² <http://www.disability.wa.gov.au/understanding-disability1/understanding-disability/what-is-disability/> (accessed 23 October 2013).

³³ <http://www.who.int/topics/disabilities/en/> (accessed 23 October 2013) (my emphasis).

³⁴ For a detailed discussion on the medical and social models of disability, see Grobbelaar-Du Plessis & Van Reenen (n 30 above) xxiii-xxvii.

³⁵ For an interesting discussion on the protection of the rights of disability, see J Biegon ‘The promotion and protection of disability in the African human rights systems in Africa’ in Grobbelaar-Du Plessis & Van Reenen (n 29 above) xv.

important. In his comments on Nigerian education, Mkpa recounts the advent of the need for specialised education programmes and opines thus:

Specialised programmes have also been designed for such disadvantaged groups... for the disabled, especially blind or visually impaired. These groups, for environmental and economic reasons, cannot benefit from formal education offered in the normal schools. So it becomes necessary to extend access to them. Problem of Inadequate Funding of Education.

However, the provisions of the Convention on the Rights of People with Disability (CRPD) in article 24 that calls for inclusive education is important. Inclusive education seeks to ensure substantive equality among all persons. The dichotomy between special and inclusive education is, however, viewed by the author as not a paramount issue to be dwelt on in Nigeria at this time. It is advanced that the realisation of quality education is of greater importance to the nomenclature of special or inclusive education.³⁶

The core challenge arising from educating people with disabilities in Nigeria is embedded in the lack of resources (human and capital).³⁷ Teachers at the basic education level lack any form of acquisition of skills and expertise to take responsibility for PLWD. The challenge of accessing education facilities by PLWD is still at a very low ebb.³⁸ In Nigeria, there exists

³⁶ For a detailed discussion on special or inclusive education, see AC Onuora-Oguno 'Special education or inclusive education: Bridging the gap of access to quality education' paper presented at the Global Alliance for Justice Education, 10-14 December 2013.

³⁷ KE Hill & GMCH Gindiri 'Problems encountered by visually-handicapped Nigerian candidates in schools and public examinations and some strategies to overcome them' available at http://www.icevi.org/publications/educator/winter_99/nigeria.htm (accessed 23 October 2013).

³⁸ See generally D Awanbor 'Ten years of the national policy on education in Nigeria: An assessment of policy on special education' (1995) 42 *International Journal of Disability, Development and Education*. Awanbor underscores the point of proper implementation of the education for PLWD and suggests that a robust legal framework is a major basis for the realisation of the aspiration of the national policy on education. It therefore seems that with the current plans by the Nigerian senate to enact an Act that will deal specifically with the need of PLWD is a welcome development in this regard. However, other challenges that are attendant, such as skill acquisition by teachers who are expected to be responsible for the education of the child at this level, still loom large.

some special schools meant to educate PLWD but the availability of the institutions is insufficient.³⁹

However, the main aim of ensuring inclusive education is based on the fact that the need to ensure equal access to education of PLWD is important. In addition, the non-provision of educational opportunities beyond the basic education level is also another challenge coupled with the discrimination that PLWD face in the school environment.⁴⁰

Furthermore, the right of education of PLWD is further enunciated by the ESCR Committee when it reiterated that:⁴¹

States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers. In the case of deaf children, for example, sign language should be recognised as a separate language to which the children should have access and whose importance should be acknowledged in their overall social environment.

³⁹ Notable among the list of special schools in Nigeria includes, but is not limited to, the Special Education Centre, Orji River, Anambra State; the Special Education Centre, Ogbunike, Anambra State; St Francis School for the Handicapped Vandekiya, Benue State; School for the Handicapped, Tudun Maliki, Kano State; Community School for the Handicapped, Ogbomosho, Oyo State; Special Education Unit, Ayegbaju, Ile Ife, Osun State; Handicapped School, Iwo, Osun State; Special Education Unit, St Philips Anglican School, Ilaro, Ife, Osun State; School for Handicapped Children, Ibereodo, Ogun State; Special Education Centre, Orlu, Imo State; Special School Ikoyi, Osun State; HILA Special Education, Agodi, Ibadan, Oyo State; Special School for the Handicapped, Ilesa, Ogun State, Lagelu; Special Education Unit, Lalupon, Oyo State; Omoyemi Special Unit, Ibadan, Oyo State; Special Education Centre, Jada; School for Handicapped Children, Benin City, Edo State; School for the Handicapped, Roni, Kano, CMML; Special School Iyale; St Louis Centre, Ifohu, Ikot Ekpene, Akwa Ibom State; The Children Special School Ikot Ekpene; Sokoto State School of Handicapped Sokoto; School for the Handicapped, Bauchi; Good Shepherd Special Education Centre, Ogojo, Cross River State; All Saint Special School, Osogbo, Osun State; School for Handicapped Children, Ilaro, Ogun State; School for Handicapped Children, Shagamu Remu, Ogun State; and Modupe Cole Centre, Akoka Lagos State.

⁴⁰ It is the author's personal experience of having classmates at the University and the Nigeria Law School that did not get any form of support from the institution; this remains a challenge that is worth noting. As was the case, the individuals had to rely on their friends and incurred huge financial responsibilities before they could realise their academic objectives. If special schools must therefore continue to exist in Nigeria, there is a need to ensure that there is continued support for PLWD to attain their educational aspirations. The need for equal access is further captured in the case of a blind student. See generally B Obi 'Equalising education opportunities for the Nigerian-Ghanaian blind girl-child' available at <http://wecando.wordpress.com/2007/11/11/paper-equalizing-educational-opportunity-for-the-nigerian-ghanaian-blind-girl-child/> (accessed 23 October 2013).

⁴¹ ESCR Committee General Comment 5, para 35.

In the jurisprudence of the German Court in the *Integrated Schooling* case,⁴² it was found that the inability of the government to provide an integrated secondary school for a girl was not entirely a violation of the right to education of the child. However, in the analysis of the case by Beiter, he reiterates that ‘a referral to a special school could result to discrimination if such referral excludes the child from opportunities which are generally available because of lack of support’.⁴³ Beiter further opines that it is needful for schools to ‘take substantial measures to adapt to the needs and abilities of disabled pupils’.⁴⁴ Quality assurance resonates in the case as a basis of referral if it must be recommended. This situation is, however, to be contrasted in the absence of any quality in special education setting in Nigeria, especially with the education of children with hearing challenges in Nigeria.⁴⁵ This challenge is further deepened by the lack of statistics and protection of the access to basic education of children that are described as children with special education needs (SEN). Akyeampong *et al* find that:⁴⁶

There is little research on disability, Special Educational Needs (SEN) and access to education in Nigeria. Indeed, there is little statistical data on prevalence rates or access for children with SEN, each state government funds a special school for students with disabilities. However, there is no special provision within the UBE policy to mainstream disabled students into the mainstream schools.

Thus, it is advocated that more efforts are required in the provision of education for PLWD in Nigeria.

⁴² Decision of 8 October 1997.

⁴³ Beiter (n 26 above) 303.

⁴⁴ Beiter 508-509.

⁴⁵ AC Onuora-Oguno & VI Nwaigwe ‘Excluded and forgotten: The case of educating deaf children in Nigeria’ paper presented at the Disability Conference at the Centre for Human Rights, University of Pretoria, 4-8 November 2013.

⁴⁶ K Akyeampong, R Sabates, F Hunt & J Anthony ‘Review of research on basic education provision in Nigeria’ available at http://www.academia.edu/257936/Review_of_Research_on_Basic_Education_Provision_in_Nigeria (accessed 7 May 2014).

3.4 Infrastructural and institutional challenges

To achieve a strong educational foundation, the Nigerian primary education system needs adequate facilities such as blocks of classrooms, furniture, teachers, instructional materials, libraries and other school equipment. The pivotal role of adequate infrastructures is expected to provide for effective teaching and learning to take place: adequate classroom population; effective classroom climate; and standard pupil-teacher classroom ratio and pupils' academic achievement to be attained, among others.⁴⁷

The importance of effective design and management of learning environments is identified as a major source of determining the quality of education at the basic level.⁴⁸ It is therefore paramount that the planning of the basic education landscape in Nigeria must engage all the required institutional support to ensure that learning is advanced in a safe and healthy environment. In achieving this target, recourse must of necessity be had to adequate capacity and planning ranging from the physical infrastructure and institutional surveys for an effective education system.⁴⁹ It was found by the Department for International Development (DFID) that:⁵⁰

A school environment that may be acceptable to boys may be hostile to girls. The physical and sexual violence against women that is common in many societies is reflected in the school environment in a number of countries. Physical abuse and abduction are not only a major violation of girls' basic human rights; they also present a major practical constraint in

⁴⁷ K Ajayi & M Adeyemi 'Universal Basic Education (UBE) policy implementation in facilities provisions: Ogun State as a case study' (2011) 35 *International Journal on New Trends in Education and Their Implications*.

⁴⁸ GO Udo & AP Chuks 'Effect of design, layout and management of primary school facilities on performance of pupils' available at <http://www.aibuma.org/archive/proceedings/.../Chukwu,%20Nigeria.doc> (accessed 24 September 2013).

⁴⁹ T Moja 'Nigeria education sector analysis: An analytical synthesis of performance and main issues' 10, produced for the World Bank 2000 available at http://siteresources.worldbank.org/NIGERIAEXTN/Resources/ed_sec_analysis.pdf (accessed 24 September 2013).

⁵⁰ 'Girls' education: Towards a better future for all' 9 published by the Department for International Development (2005) available at <http://www2.ohchr.org/english/issues/development/docs/girlseducation.pdf> (accessed 14 October 2014).

getting to school. Parents feel a duty to protect their daughters and may decide to keep them at home if they feel the school is too far away. Violence against girls and women has been identified as a key barrier to girls' education.

Apart from the challenge of infrastructure, another major institutional challenge confronting access to basic education in Nigeria is the joint roles of the Parent Teachers' Association (PTA) and the Nigerian Union of Teachers (NUT). The PTA and NUT must work closely to ensure the engagement of children in school. The role of parents is captured in the African Children's Charter, article 20, which provides:

- 1 Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:
 - (a) to ensure that the best interests of the child are their basic concern at all times.

The importance of education as a tool for emancipation is not to be taken for granted and its pivotal basis of always being in the best interests of the child will be further espoused in chapter five when the South African jurisprudence is discussed. Consequently, there must be a consistent effort by both the PTA and NUT to ensure the continued reiteration of the importance of education to pupils. In a study, Oranu observes:⁵¹

Teachers expecting students to come to school on their own; making no effort to encourage them remain some form of challenge especially in the hard to access communities where cultural practices still becloud the importance of education to children especially the girl child.

⁵¹ PC Oranu 'Student engagement: issues and concerns for Nigerian Schools in achieving Millennium Development Goals' (2012) 256 *International Journal of Academic Research in Progressive Education and Development* Volume 1, No 1.

The above interaction represents the act of student engagement,⁵² which Oranu describes as ‘students’ sense of owing education’.⁵³ The challenge this poses is further shown in the level of sexual abuse and other forms of discrimination that the girl child faces in schools and some children who have to travel over a long distance to access education facilities in other communities. Thus, to be able to overcome the looming challenge of a lack of interaction, the school environment must be established to ensure that it is friendly both to the boy and the girl child.⁵⁴ It is, however, underscored that the interaction envisaged in this sense is not wholly of an economic perspective. In a research carried out by Onuora-Oguno in 2012 in the Olumbanasa community of Anambra State, it was found that the Parent Teachers’ Association (PTA) in most schools was under the obligation to contribute and sustain teachers. The effect of this was that pupils whose parents were unable to meet this obligation were not allowed access to schools.⁵⁵

The Nigeria Union of Teachers (NUT) is the umbrella body that ‘regulates the teaching profession through improved quality and professionalism’ among other responsibilities.⁵⁶ However, the apparent inability of the Union to advance its aims and objective remains problematic. As in most institutional inefficiencies in Nigeria, the NUT blames other stakeholders in the education sector for its inability to drive quality education in Nigeria. In a

⁵² For further views on students’ engagement and its overall importance, see generally RD Jones ‘Strengthening student engagement. International Centre for Leadership in Education’ (2008) available at <http://www.cesdp.nmhu.edu/prof-learning/docs/Teaching%20and%20Learning/Student%20Engagement/Strengthen%20Student%20Engagement%20white%20paper.pdf> (accessed 22 September 2013).

⁵³ Oranu (n 51 above).

⁵⁴ O Igbuzor ‘The state of education In Nigeria, ActionAid International Nigeria’ (2006) available at <http://www.gamji.com/article6000/NEWS6144.htm> (accessed 22 September 2013). These challenges does not affect only children but also teachers see generally, VMC Chigbu ‘Morale and motivation of teachers in Nigeria’ unpublished PhD thesis available at <http://bura.brunel.ac.uk/bitstream/2438/3869/1/FulltextThesis.pdf> (accessed July 7 2015).

⁵⁵ Children who were found at home during school periods were said to be out of school because their parents were unable to pay the PTA levies.

⁵⁶ http://www.nutnigeria.org/_nut/About%20Us.php (accessed 23 May 2014).

press statement issued by Olukoya, he blames the inability of the NUT to function by claiming:⁵⁷

While the Nigeria Union of Teachers is committed to effective and efficient service delivery in the Education sector, we wish to state clearly again that some other stakeholders in the Education industry are drawing back the hands of the clock through their actions and inaction.

It is argued here that there exists a direct link between the quality of teachers and the quality of education.⁵⁸ The seeming drop in the quality of the Nigerian Teachers Institute (NTI)⁵⁹ and the Colleges of Education/Faculty of Education, where professional teachers are meant to be trained, remains a major setback. The relationship between the NTI and the NUT at present is not cordial with the NUT accusing the NTI of deliberate actions to undermine the welfare of teachers. This rift is further advanced by Olukoya when he states:⁶⁰

The National Teachers Institute (NTI) one of the major stakeholders in Education, the training organ of the Federal Government as regards training and retraining of teachers whose responsibilities among others is to ensure that teachers are academically and professionally sound to handle teaching has suddenly joined those who take delight in cheating the teachers of Nigeria...

The strained relationship between the NUT and the NTI occasions the lack of co-operation and implementation of policies that is capable of improving the quality of Nigerian teachers. Furthermore, the use of casual teachers in a bid of what Olukoya tags as ‘modern day slave

⁵⁷ Comrade MA Olukoya is the president of the Nigeria Union of Teachers; see press statement at http://www.nutnigeria.org/_nut/news_events.php?id=5 (accessed 23 May 2014).

⁵⁸ See generally U Fredriksson ‘Quality education: the teachers’ key role’ Workshop 4, 1 *Education International* available at www.ibe.unesco.org (accessed 4 December 2013).

⁵⁹ Established in 1976. Nigeria Teachers Institute has its headquarters in Kaduna Act 7 of the Federal Military Government; see <http://www.nti-nigeria.org/establishment-act.html> (accessed 24 May 2014).

⁶⁰ n 57 above.

labour' in private and government schools accounts for the engagement of poorly-qualified teachers.⁶¹ The gap continues to widen with poor institutional support from the NTI.

It is observed that the Colleges of Education (COE), the tertiary institutions where the National Certificate of Education (NCE) is obtained is devoid of quality in terms of academic resourcefulness and infrastructural support. Another challenge that faces COE in Nigeria is that of neglected status besides poor research qualities from the institutions. Thus, the inability of the NTI to adhere to its aspirations lends credence to the claims of Olukoya. The NTI has a responsibility of:⁶²

- i. providing courses of instruction that will help capacity building, development and professional certification of Nigerian teachers;
- ii. upgrading teachers' knowledge and skills in curriculum implementation;
- iii. enhancing professional skills of teachers for high quality delivery.

The above targets are at present below par in Nigerian education and attests to increase deficiency and rot in the basic education sector.

Apart from the poor quality in the teachers' education process, the recruitment procedure presents huge challenges. It is not encouraging that people that do not have any form of teacher education are currently preferred to teach in basic education institutions. The effect of this is that, although graduates of universities, non-professional teachers without the requisite skills to impart knowledge and guide learners are saddled with teaching responsibilities with little or no effort aimed at inculcating these skills in them. Bad as this may seem, the

⁶¹ As above.

⁶² See 'Mission, Mandate and Vision of the Nigerian Teachers Training Institute' available at <http://www.nti-nigeria.org/> (accessed 24 May 2014).

recruitment process continues to present huge challenges. This challenge is presented by Kazeem and Ige when they opine that:⁶³

The problem of quality of teachers in the system can also be traced to teachers' recruitment practice... The practice is doing more harm than good to Nigerian education. The situation is worse in Colleges of Education and Polytechnics, where the Ministries direct Provosts and Rectors to 'admit bearer'.

It is therefore suggested that, while it is not completely wrong that some individuals without experience and skills from fields other than education be saddled with teaching responsibilities, the NTI and NUT should as a matter of policy insist on the acquisition of educational experiences from recognised teacher certification and training institutions.⁶⁴

The prominence and crucial role of the Teacher Registration Council of Nigeria (TRCN) must be reiterated.⁶⁵ It is inferred that if the TRCN becomes empowered and functional in regulating the practices of teachers, that it will lead to the reintroduction of the quality that is currently lacking in the Nigerian education sector. In addition, the responsibilities of the TRCN remains relegated to the background as many teachers are oblivious of its existence.⁶⁶

The National Education Research and Development Council (NERDC)⁶⁷ must ensure that it engages all stakeholders in ensuring that quality in the Nigerian basic education curriculum is enhanced. The core responsibility of NEDRC is to:

⁶³ K Kazeem & O Ige 'Redressing the growing concern of the education sector in Nigeria' (2010) 45 *Edo Journal of Counselling* Vol 3 No 1.

⁶⁴ The assumption here is that students of education are better equipped to impart knowledge, by virtue of the training and exposure as teachers. The process of learning various teaching pedagogy cannot be overemphasised and there needs to be some level of adherence. It is also assumed that this will further enhance the professional status of the teaching profession.

⁶⁵ TRCN Act CAP T3 of 2004 Laws of the Federal Republic of Nigeria (LFN) as amended.

⁶⁶ In ch 6 of this thesis the establishment Act of the TRCN will be analysed with a view to identifying gaps and proposing a possible amendment on its operations. It is, however, noted that, at this point, if the TRCN elevates the teaching profession as it is with other bodies, such as the National Bar Associations, National Medical Association, etc, respect for and the dignity of the teaching profession will improve.

⁶⁷ Established in 1988, Decree 53, presently Act 53 LFN 2004 as amended. The NEDRC is a merger of the Nigerian Educational Council, Comparative Education Study and Adaptation Centre, Nigeria Book Development Council and Nigerian Language Centre. See <http://nerdc.ng/> (accessed 24 May 2014).

- i. build and sustain a culture of strategic educational research and developments with the aim of formulating and effectively implementing education policies;
- ii. create an enabling environment for education research; and
- iii. encourage national development by encouraging public private partnership

With the poor state of basic education in Nigeria, it is clear that the NEDRC is at the moment not advancing the core of its responsibilities, especially with ensuring harmony in curriculum implementation and there is an urgent need to reverse the situation. In a study conducted by Obioma, the lack of implementation of uniform curricula in Nigerian's basic education is presented as follows:⁶⁸

The findings of this study reveal a sorry state of CA practices demonstrated by primary and junior secondary schools teachers in Nigeria and have implications for not only Nigeria but other African countries striving to implement the universal basic education programme and school-based assessment policy in their schools. Particularly for Nigeria the survey reveals that CA guidelines varied across schools and were inappropriately applied.

Moving forward, it is reiterated that the role of NERDC is not limited to curriculum development, but also encompasses enforcing implementation. This, therefore, must have the legal backing to ensure the efficient implementation of the mandates of NERDC.

⁶⁸ G Obioma 'Continuous assessment practices of primary and junior secondary school teachers in Nigeria' available at http://www.iaea2008.cambridgeassessment.org.uk/ca/digitalAssets/180437_Obioma.pdf (accessed 24 May 2014).

Closely related to the challenge posed by poor teacher training and recruitment process is that of teacher welfare. As pointed out in chapter two, General Comment 13 advocates the importance of teachers' welfare and remuneration. While international human rights law does not set standards for what must be the minimum amount paid to teachers; it is argued that it must be able to enable teachers live above the \$1 per day benchmark. It is estimated that the average teacher in Nigeria receives about '\$112 per month' and more often than not they are owed wages leading to strike action and poor work and living conditions.⁶⁹

Employers, especially at the privately-managed basic school, in lieu of limiting costs, employ unqualified personnel, while in the government-owned school salaries are poor and not consistent.⁷⁰ This situation has led to several actions by the NUT demanding pay. In some circumstances, teachers turn their classrooms into mini markets and valuable time designed for teaching and researching is used for selling commodities.⁷¹ In the same light, the 'job context, job content and reward systems' have been described as core factors that affect the productivity of NUT in Nigeria.⁷² To bring out the best in the teacher in order to drive towards the realisation of quality delivery of basic education, the level of interaction between

⁶⁹ According to the report by Educrisis: 'The minimum wage in Nigeria is now US \$112 a month. However, teachers are not receiving this and the government has yet to implement a promised 30 per cent salary increase. Not only are teachers in Nigeria struggling with poverty wages, but they are also working in often unsatisfactory conditions and with classes as big as 150' available at <http://educationincrisis.net/country-profiles/africa/item/558-nigeria> (accessed 31 October 2013).

⁷⁰ Primary schools in Anambra State did not operate for one calendar year in 2001 because teachers were owed salaries and the NUT was on strike. The effect was that children whose parents could not afford to travel to other states in the federation lost one academic year and could not proceed with their studies. For information on the number of strike actions by primary schools teachers in Nigeria, see the following links: 'Primary school teachers end strike in Edo' available at <http://www.vanguardngr.com/2013/07/primary-school-teachers-end-strike-in-edo/> (accessed 31 October 2013); 'No going back on primary school teachers strike in Kogi – NUT' available at <http://www.vanguardngr.com/2013/07/no-going-back-on-primary-school-teachers-strike-in-kogi-nut/> (accessed 31 October 2013); [The silence of government of the Cross River State of Nigeria on the current teachers strike is worrisome](http://www.elombah.com/index.php/articles-mainmenu/17884-the-silence-of-government-of-the-cross-river-state-of-nigeria-on-the-current-teachers-strike-is-worrisome) available at <http://www.elombah.com/index.php/articles-mainmenu/17884-the-silence-of-government-of-the-cross-river-state-of-nigeria-on-the-current-teachers-strike-is-worrisome> (accessed 31 October 2013).

⁷¹ Kazeem & Ige (n 63 above).

⁷² MA Adelabu 'Teacher motivation and incentives in Nigeria' (2005) available at http://www.eldis.org/vfile/upload/1/document/0709/Teacher_motivation_Nigeria.pdf (accessed 31 October 2013).

the NUT and PTA must be enhanced; a viable and sustainable reward system must be put in place; and ensuring teachers' participation in policy making and implementation assured.⁷³

Another important institution involved in the direct management of education in Nigeria is the Federal Ministry of Education (FME). FME is tasked primarily to ensure that the national objectives of education in Nigeria are achieved. This it seeks to do through ensuring that various policies are implemented holistically with a view of achieving quality in Nigerian education. The FME is controlled by a minister supported by a minister of state for education.⁷⁴ Regrettably, the insecurity of tenure of the education minister in Nigeria contributes immensely to the stuttering level of policy implementation.

The FME works closely with the National Council of Education and has the advisory support of other education experts from the various states of the federal republic, education boards and academic institutions.⁷⁵ With collaboration between the federal ministry and state ministry not often cordial, the seeming disconnect hampers the development of education in Nigeria.⁷⁶ The major factor responsible for the disconnect in policy formulation and implementation between the state and federal government in Nigeria based on the fact that

⁷³ CA Muokwue & WN Ofojebe 'Re-engineering primary school teachers for sustainable development through appropriate motivation' (2009) 302 *International Multi-Disciplinary Journal* Vol 3.

⁷⁴ In the course of writing the thesis, Prof R Lawal was sacked by Dr Goodluck Jonathan and the former Minister for State Education Wike is the supervisory Minister. The situation of not having a substantive minister in the FME is decried as the ministry is one that has a fundamental role in achieving the goals and aims of education in Nigeria.

⁷⁵ T Moja 'Nigeria education sector analysis: An analytical synthesis of performance and main issues' 4, produced for the World Bank 2000, available at http://siteresources.worldbank.org/NIGERIAEXTN/Resources/ed_sec_analysis.pdf (accessed 24 September 2013).

⁷⁶ The recent impasse in Osun State of Nigeria, where the state governor has taken decisions that are not in line with the policy of the government to encourage faith-based institutions to own and run schools, is instructive. See generally the following news reports: Osun school merger crisis: Monarchs, Baptist Church meeting deadlocked <http://www.tribune.com.ng/news2013/index.php/en/component/k2/item/23731-osun-school-merger-crisis-monarchs,-baptist-church-meeting-deadlocked.html> (accessed 31 October 2013); Education Rights Campaign Press Statement religious degeneration of Osun Schools' merger controversy: Another example of the failure of the policy <http://www.socialistnigeria.org/print.php?print=2274> (accessed 31 October 2013). This position can be contrasted with the sharing of vehicles by the Anambra state government to church-run schools by Governor Peter Obi. See generally the following media report <http://www.vanguardngr.com/2013/10/obi-distributes-500-buses-secondary-schools/> (accessed 31 October 2013); <http://m.news24.com/nigeria/National/News/Anambra-Governor-distributes-100-vehicles-to-schools-20131031> (accessed 31 October 2013).

appointments into these positions are highly political and most times political parties pursue their political agenda in place of policy guidelines. This has the effect of ensuring that policies are not always adhered to as each political thought tampers with education policy as envisaged and deemed proper to them.⁷⁷

The FME also lacks the monitoring and oversight capacity in terms of regulating the activities of the various institutional arms that ought to enable it to ensure that the management of the education sector is empowered to provide the needful impact. The FME lacks sufficient data on the state of basic education in Nigeria and thus lacks the capacity to support effective ideology in policy formulation.⁷⁸ The non-implementation of policies that are fashioned out to strengthen the institutional framework like teacher education continues to plague the Nigerian education sector. This inability is sadly recognised and lauded by the persons saddled with the responsibility to ensure the implementation of the policies. Speaking during the 59th National Council of Education held in Abuja, a former education minister attested to this inability and accepted that it was a prime challenge to the delivering of quality education in the country.⁷⁹

Despite this acknowledgment by the FME of Nigeria, the minister reiterates the need for governments to follow through on other projects like the *almajiri* education scheme. The question therefore is what effective efforts are in place to show a realisation and implementation of already-existing policies. The solution to this is offered in chapter six when the thesis advances how institutions will be strengthened in order to achieve the realisation of access to basic education in Nigeria.

⁷⁷ Aluede describes the conflict between the various policies as making no sense in most circumstances when changes are made. See ROA Aluede 'Universal basic education in Nigeria: Matters arising' (2006) 97 *Kamla-Raj J Hum Ecol*.

⁷⁸ As above.

⁷⁹ 'Non-implementation of policy, major challenge to Nigeria's education system' Agency Report, 27 June 2013 available at <http://leadership.ng/news/270613/non-implementation-policy-major-challenge-nigerias-education-system-minister> (accessed 23 October 2013).

3.5 Cultural and religious challenges

Another important challenge to the realisation of the right to access basic education in Nigeria is culture and religion. As already noted in this research, the rejection by some groups in Northern Nigeria of the concept of Western education can to a very great extent be hinged on the fact that the introduction of Western education in the north brought with it an apparent erosion and aspiration to replace the Islamic way of thinking with the Christian way of thought. The recent attacks on educational facilities in the north of Nigeria provide a serious challenge to access. Besides the activities of *Boko Haram*, the practice of early child marriage of girls and the *almajiri* practice are other core cultural and religious practices that hinder access to basic education.

For education to meet the threshold of properly being so called, it must be acceptable and act as a tool for bolstering the religious and cultural belief of the beneficiaries. The seeming conflict between formal education as introduced by the colonial masters and the informal structures that existed in the majority of African societies is described as a world of two realities. Ngugi opines that ‘African realities as they are affected by the great struggle between the two mutually opposed forces in Africa today, an imperialist tradition and resistance tradition’.⁸⁰ This addresses the continued friction between embracing formal education in some cultural and religious domains in Nigeria. The viability of the African way of thinking that was discredited in the case of Nigeria by the British colonialists remains an issue to be discouraged. The experience, as already noted, resonates across the continent, leading to Ngugi reiterating the fact thus: ‘Indeed contrary to opinions, indigenous African language meant more than words, as they had very strong suggestive powers that were able to crystallise.’⁸¹ This elucidates the virility and viability of the thought process that was

⁸⁰ Ngugi (n 8 above) 2.

⁸¹ Ngugi 10.

suddenly rejected by the colonialists, leading to inevitable friction witnessed today in the northern part of Nigeria.

Consequently, based on the above proposition, the roles that communities play in ensuring the provision and management of education as well as teaching, learning and enforcement processes is an enormous one.⁸² According to Hansungule, although enforcing the right to education remains the sole responsibility of government; Africans must grow to the point of individuals and corporate organisations committing their resources to the advancement of education.⁸³ This also underscores the possibility of communities assisting in the maintenance of educational facilities already provided by government,⁸⁴ ensuring that they contribute in curriculum development in line with the standard set out by the FME and the general purpose of education, ensuring stability and safety of education providers and even pupils who access schools.⁸⁵

Underscoring the importance of community participation further, it is noted that the failure to find support from the community would inevitably lead to project failures and the creation of new problems. This challenge finds further expression in recent killings in Nigeria by the members of the *Boko Haram* sect of teachers and students in Northern Nigeria.⁸⁶ Presently, there looms an unprecedented reluctance by individuals who are meant to be engaged in the National Youth Service Commission (NYSC) scheme that sends fresh graduates to teach in several rural communities as part of their compulsory service in Nigeria. This is occasioned

⁸² Abbass (n 6 above) 3.

⁸³ During an interaction with Michelo Hansungule in the office during the process of writing this thesis, Hansungule hinges his argument on the fact that the African Charter places obligations on individuals that wealthy African individuals must take a cue from their counterparts in the United States of America and Europe by committing substantial amounts of money towards education support and research.

⁸⁴ This argument is advanced with the *caveat* that the government must not envisage it as a leeway of abdicating its obligations under international law. It is noted that no matter the participation of individuals and communities, the provision of adequate quality education is the core responsibility of the government.

⁸⁵ Abbass (n 6 above) 3.

⁸⁶ Boko Haram have continued in the north-eastern states of Nigeria since 2010, the last being on 3 December 2013.

by several killings of these corps members by some hostile host communities.⁸⁷ The resultant effect is the continuous increase in the already poor supply of human resources in the education sphere of the affected areas.

The hostility of some communities reinforces the failure and tragedy of the fact that government efforts in education are not enough to meet the needs and aspirations of Nigerians with the poor results shown invariably in the quantitative and qualitative collapse of productive educational pursuits and achievements.⁸⁸ It is therefore germane that community involvement is canvassed and encouraged.⁸⁹

Abbass succinctly captures the importance of community support for education thus:⁹⁰

School-community connections must be vigorously pursued and developed in order to significantly improve the schools as well as strengthen the community that also ensures that other elements in the participatory approaches and democratic development strategy are all combined together for the enhancement of education through community participation. Since direct community participation in education builds integral and sustainable linkages.

To overcome this challenge, the thesis makes some suggestion in chapter six on the need to explore non legal means toward realising basic education in Nigeria by the recognition of the elephant in the room.

3.5.1 The challenge of language in access to basic education in Nigeria

Closely related to the challenge of community participation is the challenge faced by minority ethno-linguistic communities in Nigeria. Considering the number of languages in Nigeria, it is noted that language is a major barrier to the realisation of basic education.⁹¹ The

⁸⁷ MI Tsiga 'Killing of NYSC members: My worst moment' <http://leadership.ng/news/111013/killing-nysc-members-my-worst-moment-tsga> (accessed 31 October 2013).

⁸⁸ Abbass (n 6 above) 7.

⁸⁹ As above.

⁹⁰ Abbass (n 6 above) 9.

⁹¹ Nigeria has over 250 ethnic languages.

place of language in achieving enhanced access to basic education is germane as ‘the ability to read and write in a language, whether it is exogenous or indigenous, constitutes an integral part of defining a literate individual’.⁹²

In support of the fulcrum of mother tongue in enhancing literacy, UNESCO⁹³ supports learning in native languages.⁹⁴ It has been argued by several scholars that basic education achieves the best impact if undertaken in the native language of the child. Fafunwa championed the use of local languages in basic education in Nigeria. Fafunwa insisted that the colonial legacy of education needed to be reviewed in several ways to enable Nigerians to benefit from education. Speaking on the erosion of cultural dignity of Nigeria, Fafunwa posited:⁹⁵

In its colonial and non-colonial stages, Nigeria’s education has impacted negatively on the people and society in terms of cultural alienation and the erosion of positive traditional, spiritual and moral values of self- realisation, job orientation, social responsibility and collective participation.

The philosophy of educating in local languages as advanced by Fafunwa nevertheless received much criticism as it was pinpointed to have retarded the educational advancement of several children. Part of the criticism was because there was no thought-out progressive policy that would ensure the smooth transition from basic education to other levels of education.

⁹² CI Ofulue ‘Literacy at a distance in multilingual contexts: Issues and challenges’ (2011) *International Review of Open and Distance Learning* available at <http://www.irrodl.org/index.php/irrodl/article/view/981/1957> (accessed 24 October 2013).

⁹³ United Nations General Assembly Resolution A/RES/61/266, 21 February is declared as International Mother Language Day. According to UNESCO ‘the date represents the day in 1952 when students demonstrating for recognition of their language, Bangla, as one of the two national languages of the then Pakistan, were shot and killed by police in Dhaka, the capital of what is now Bangladesh’. See <http://www.un.org/en/events/motherlanguageday/> (accessed 24 October 2013).

⁹⁴ The EFA report of 2005 states the importance of language in enhancing literacy when it opines clearly that learning in one’s mother tongue naturally improves the ability to learn other languages and also improves literacy and educational development.

⁹⁵ AB Fafunwa ‘An integrated primary school curriculum scheme in Nigeria: A six year project’ in A Afolayan (ed) *Yoruba language and literature* (1982) 15.

However, it is important to take into account the fact that, had the proposition of Fafunwa been given further consideration and its implementation advanced from various perspectives; the possibility of its success could have been envisaged.⁹⁶

The challenge of language in Nigerian education is further exacerbated by her colonial experience which has led to the neglect of the local languages and furthermore by the fact that post-independence Nigeria was not in any way situated to ensure the surmounting of the language challenges.⁹⁷ In addition to the above challenges of the non-use of local languages in Nigeria education, it is opined that the over-reliance on English is a major bane of the development of Nigeria, generally, and even its education sector as English has assumed a superior stance over indigenous languages.⁹⁸

Adegbite attempts to proffer a solution to the challenge of language in ensuring the realisation of basic education by advancing the focal nature of the right to education as an integral aspect of a nation's co-operative existence. He lays out the following as to how education must be elevated for it to achieve its goals by reliance on use of languages:⁹⁹

... a recognition of the primary roles of language as an instrument of thought, cognition and emotions, a means of social communication and cohesion and a medium of earning, use and broadcasting of knowledge and information; a recognition that no policy in any of the areas mentioned above can be effectively implemented without language considerations; a recognition that ... are interconnected and has to be integrated in the formulation of policy (ies) on any area of experience; for example, we can talk of a lingual-cultural policy of education.

⁹⁶ This promise of success is not embraced without taking cognisance of the peculiarity of the Nigerian multi-lingual terrain, the shortage of teachers skilled in the various languages and the deep ethnic divisions perpetrated by colonial rule.

⁹⁷ See generally W Ogundele 'Wipe your feet on it. Yes, it's Kente: Armah's anatomy of colonial education in Nigeria' (2008) 9 *Papers in English and Linguistics* 194-213.

⁹⁸ A Adegbite 'Languages and the challenges of education' *Nigeria Journal of the Nigeria English Studies Association (JNESA)* 14:1. 11.

⁹⁹ Adegbite (n 98 above) 21-22.

This argument is advanced on the premise of the link between language and education which is argued to represent the major driving basis for any sustainable development.¹⁰⁰ Adegbite further argues that the seeming disparity in development of not just Nigeria but black Africa compared to other parts of the world is traceable to the neglect of indigenous languages. In his position, he reiterates that:¹⁰¹

Developmental paradigms elsewhere outside Black Africa did not ignore language because this uniquely human possession plays an extremely important role as a facilitator in thought, description, analysis, and argumentation that are so crucial in development and which are so often taken for granted.

Along this paradigm, it is agreeable that the importance of language in achieving effective education is one that cannot be over-emphasised. Nigeria is currently one of the poorest in educational output and literacy levels. However, in Nigeria, the large population and prevalence of several ethnic languages possesses some challenges on its own. While English remains the *lingua franca*, it is still a case for the argument that the majority of the Nigerian population are not literate in the English language and are also unable to access basic education in their own language.¹⁰²

A perusal of the various education policies in Nigeria, especially the National Policy on Education (NPE) 2004, shows that the role of language is not overlooked. The NPE underscores the appreciation of the importance of language as a tool through which social cohesion can be achieved. The NPE proceeds to state ‘that every child shall learn in the language of his immediate environment and makes compulsory the learning of the three

¹⁰⁰ Adegbite 13.

¹⁰¹ Adegbite 14. See generally Ngugi (n 8 above).

¹⁰² For further insight into the multilingual situation in Nigeria, see generally EE Adegbija *Multilingualism: A Nigerian case study* (2004); L Aronin & D Singleton *Multilingualism: Impact studies in language and society* (2012), particularly ch 5 where multilingual and personal development is discussed. It is underscored in 79 that the link between language and identity is strong as it goes to the extent of defining the identity and personality of an individual. It follows, therefore, that the role of languages in basic education is crucial as it is a means of preserving the identity of a child as the child grows up in society.

major languages, Hausa, Igbo and Yoruba’; The NPE further nominates French as a second language and, on basic education, it states particularly that

[t]he medium of instruction in the primary school shall be the language of the environment for the first three years. During this period, English shall be taught as a subject. From the fourth year, English shall progressively be used as a medium of instruction and the language of the immediate environment and French shall be taught as subjects.¹⁰³

The first question that arises from the provision of the NPE is whether teachers are learned in the languages of the immediate environment that they teach in. In addition, what is the impact of nominating Igbo, Hausa and Yoruba as languages that must be learnt by all other ethnic languages in Nigeria? The obvious answer to the first question is a definite no, as the majority of the teachers are not learned in these languages and, therefore, communities that are classified as hard to reach and a minority in nature suffer the inability of not learning in the languages of their immediate environment. Thus, it provides the first challenge in accessing of basic education by ethno-linguistic communities.

Ofulue is of the view that, because of the fact that ‘Nigeria assigns important roles to the exogenous languages,¹⁰⁴ in the present circumstance English; it is only natural that attitudes towards learning using the mother tongue will suffer’.¹⁰⁵ The ultimate effect of this is that the majority of teachers are learned only in the English language and are unable to teach in any local languages.

On the second question, the nomination of the three languages is a means of erosion of identity and personal dignity. Closely linked to the call by UNESCO depicting the intricacy of the language in the growth of the history of a people, Ngugi conceptualises language that

¹⁰³ See Nigerian National Policy on Education 2004, 5-11.

¹⁰⁴ The Mondos linguistic dictionary defines an exogenous language ‘as ‘one that is used as an official, institutionalised language but has no speech community in the political entity using it officially’, <http://mondoslinguisticdictionary.blogspot.com/2008/03/endogeneous-and-exogenous-language.html> (accessed 31 October 2013).

¹⁰⁵ Ofulue (n 92 above).

remains spoken with a living ability that enhances the survival of people. Ngugi opines that ‘living languages grow like living things’.¹⁰⁶ The challenge posed by the ‘big three’¹⁰⁷ has meant that efforts and suggestions made by the Language Development Centre (LDC) that only Edo, Fulfulde, Ibibio, Idoma, Igala, Ijo, Kanuri, Nupe, and Tiv feature in Nigeria schools is faulted by the author as the effect is ultimately geared towards enshrining a division and sense of ethnic superiority.¹⁰⁸ This is therefore seen as a major means of continued strife in Nigeria as other ethnic minorities today strive towards a restoration of dignity and self-esteem and language revival that has been lost over the years by the teaching of the big three languages.¹⁰⁹

As identified, the NPE encourages the use of mother tongue languages in basic education, but the challenge is hinged on its implementation. As rightly pointed out: ¹¹⁰

The language policy, as practiced, excludes a fair percentage of ... learners from literacy because the language of instruction is not their mother tongue. In the urban setting, it is doubtful that the policy is being implemented as most schools use English as the preferred medium of instruction.

An often-cited challenge is the lack of teaching materials in other languages.¹¹¹ However, it is advanced that it is never too late to commence the development of local languages.¹¹² The

¹⁰⁶ WT Ngugi, Wa Thiongo *Decolonising the mind: The politics of language in African literature* (1981) 8.

¹⁰⁷ This is used to describe the recognition of accorded the Igbo, Yoruba and Hausa languages as the major languages in Nigeria.

¹⁰⁸ O Awobuluyi ‘Language education in Nigeria: Theory, policy and practice’ *Fafunwa Foundation Internet Journal of Education* available at <http://fafunwafoundation.tripod.com/fafunwafoundation/id8.html> (accessed 24 October 2013).

¹⁰⁹ UNESCO underscores the importance of language by stating that ‘[l]anguages are the most powerful instruments of preserving and developing our tangible and intangible heritage’. <http://www.un.org/en/events/motherlanguageday/> (accessed 24 October 2013).

¹¹⁰ Ofulue (n 92 above).

¹¹¹ Awobuluyi (n 108 above).

¹¹² Recourse is had to the position of the Ngugi as to the ability of a language to grow just like a human being if in constant use.

seeming advantage gained by the ‘big three’ is simply because of the priority that has been given to them over the decades in the Nigerian educational system.¹¹³

Despite the above, the recognition of language rights under the Nigerian Constitutions and NPE makes it an obligation on the government to ensure its implementation and realisation. According to Awobuluyi:¹¹⁴

The spirit of that provision, which derives from the needs of national unity, would seem to require each school child in the country to be able to communicate in a major indigenous language native to some major cultural zone in the country other than his own. That being the case, a child who has studied a major indigenous language as his first language has thereby only been exposed to his own major cultural zone, and must therefore study yet another major indigenous language as his second language in order to fulfil the real spirit of the language provision in question.

It is, however, contended by the author that this is premised on the fact that the furtherance of national unity will not in any way be achieved by the erosion of the identity of any group in Nigeria, but rather is more likely to lead to ethnic strife and violence that will ultimately ensure the denial of access to basic education.

The question of an individual having a right to be educated in his own language needs also to be settled. In international law, the place of language in education is well captured, but it remains unsettled as to the extent that an individual’s right is guaranteed under international law. According to De Varennes, such a right does not exist, but it is paramount to take into consideration the population of a particular language speaking group in advising on the

¹¹³ For suggestions on the gradual implementation language in Nigeria education, see generally A Bamgbose & F Akere (eds) *Summary of Recommendations from the Seminar on the Implementation of the Language Provisions of the National Policy on Education*, Abuja, Nigeria: Nigerian Educational Research and Development Council, Federal Ministry of Education.

¹¹⁴ O Awobuluyi ‘Towards a national language’ (1966), quoted in O Awobuluyi ‘Language education in Nigeria: Theory, policy and practice’ *Fafunwa Foundation Internet Journal of Education* available at <http://fafunwafoundation.tripod.com/fafunwafoundation/id8.html> (accessed 24 October 2013).

propriety of the state having a responsibility to provide learning in their mother tongue.¹¹⁵ This suggests that, while an individual may not make a claim to learn in a particular language, the population of a particular language speaking group within a location can warrant the teaching in that particular language.

In his opinion, Beiter finds that ‘it remains conceivable that the state’s denial of education in a certain language may violate the right to education’.¹¹⁶ He further posits that ‘[e]ducation rights cannot be separated from language issues noting that in certain circumstances, the failure to provide education in the mother tongue, in fact, violates the right to education’.¹¹⁷ This circumstance, as envisaged by Beiter, seems to the author to be in line with the position advanced by De Varennes, considering the population of a particular linguistic group being a basis for advancing the use of local language.

An examination of some judicial jurisprudence is central to the understanding of the position in international law, namely, from the jurisprudence of the European Court of Human Rights. In the Belgian linguistic case,¹¹⁸ some individuals who spoke French in an area occupied majorly by Flemish-speaking people in Belgium sought to access schools in their chosen language as their Dutch-speaking counterparts. Reliance was placed on the legal provisions of section 4 of the Belgian Act pertaining to the use of language in education. It was argued by the applicant that this constituted a violation of articles 8 and 14 of the European Convention of Human Rights (ECHR) and also of article 1 of the additional protocol to the ECHR. While the case was centred on the issues of language and discrimination, the decision

¹¹⁵ F de Varennes *International and comparative perspectives in the use of official languages models and approaches for South Africa* (2012). During the presentation of this report, the author was opportune to interact with De Varennes on the crucial role of language in education, especially with the difficulty it presents. It is De Varennes’s opinion that the place of language must be sustained by the government, whatever the economic implications. This he advanced largely on the relationship between dignity and language and the fact that language was a major source of ethnic violence.

¹¹⁶ KD Beiter *The protection of the right to education by international law* (2006) 425.

¹¹⁷ Beiter (n 116 above) 427.

¹¹⁸ (No 1) (1967), Series A, No 5 (1979-80) 1 EHRR 241 (No 2) (1968), Series A, No 6 (1979-80) 1 EHRR 252.

on language was to the effect that the state had no obligation to ensure the provision of schools in languages demanded by each individual citizen of the state. This is especially as in situations where such individuals have the option of attending private institutions.

Considering the diversity that is peculiar to Africa, and Nigeria in particular, it is suggested that the decision of the ECHR might not have been the same in Nigeria. As already advanced, the multi-ethnic diversity in Nigeria presents a unique situation. It is, however, maintained that the only way to make a path is to keep walking thereon; consequently, building a virile language policy for basic education in Nigeria can only be sustained by usage and development over time.

However, when confronted with the question of a sustained policy of providing language education, as earlier described in Nigerian policy implemented by Fafunwa, the European Court of Human Rights found that a 'state's failure to provide sustainable education in a language after providing same at the primary level could be assumed to be a violation of the right to education obligation held by a state'. The position was taken in the case of *Cyprus v Turkey*,¹¹⁹ where it was found:¹²⁰

As to the provision of primary-school education in the Greek language, the Commission considered that the right to education of the population concerned had not been disregarded by the Turkish-Cypriot authorities and that any problems arising out of the vacancy for teaching posts had been resolved.

The ECHR further found:¹²¹

However, in the Court's opinion, the option available to Greek-Cypriot parents to continue their children's education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a

¹¹⁹ Application 25781/94.

¹²⁰ See para 276 [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454#{'itemid':\['001-59454'\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454#{'itemid':['001-59454']}) (accessed 31 October 2013).

¹²¹ See para 278 ([http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454#{'itemid':\['001-59454'\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454#{'itemid':['001-59454']}) (accessed 31 October 2013) (my emphasis).

Greek-Cypriot school there. The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language. Having assumed responsibility for the provision of Greek-language primary schooling, the failure of the 'TRNC' authorities to make *continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue.*

From the two cases above, it is gleaned that the need to be consistent in policy implementation is important, the failure of which is a violation of the right to education. In a conversation with a colleague, he laments the effect of the Nigerian policy on education, as advanced during the era of Fafunwa, on his siblings, reiterating that 'my brother was unable to proceed with secondary education as there were no schools for him to attend after having his primary education in Yoruba'.¹²²

3.6 The challenges of cultural and religious perceptions of the child

The practice of child marriage of girls and the *almajiri* practice are two crucial factors that inhibit access to basic education in Northern Nigeria. However, considering that the girl child is more vulnerable than the boy child, this section discusses the girl child in further detail. Thus, the perception on the non-importance of the education of the girl child remains a challenge hinged on cultural practice and belief.

It should be reiterated that '[e]ducation has a profound effect on girls' and women's ability to claim other rights and achieve status in society, such as economic independence and political representation ... having an education can make an enormous difference to a woman's chances of finding well-paid work, raising a healthy family and preventing the spread of diseases such as HIV and AIDS'.¹²³ Despite the general acceptance of the importance of

¹²² Comments made during the monthly research group discussion at the Centre for Human Rights, University of Pretoria.

¹²³ 'Girls' education: Towards a better future for all' (2005) 4 published by the Department for International Development. The DFID report further enumerates other important factors regarding the education of the girl child by an ability to avoid poverty by women with basic education, better employment and healthy living of both the woman and the children.

education to the child, it is estimated that close to 58 million girls and about 45 million boys are unable to access education systems across the world.¹²⁴ Nigeria records for 10.5 million of the statistics.¹²⁵

Cultural practices contribute to the hampering of access to education for particularly the girl child. It must be noted here that, while the African Charter supports the protection of African culture, it supports only positive cultures. Article 29(7) of the African Charter provides:

The individual shall have the duty to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and in general, to contribute to the promotion of the moral well-being of society.

On the religious challenge to access to basic education in Nigeria, the impact of violence perpetrated on the basis of religion remains the most recent disturbing situation. For access to education to be stable in a country, it is important that peace and security are in place.¹²⁶ Security of life guarantees free movement and ease of mind. The absence of same will in several ways limit the extent to which people are willing to access public places while also hampering development.¹²⁷ In recent times, the decline of access to basic education in Nigeria can be blamed on the different shades of violence. Violence, though not alien to Nigeria, is assuming a different dimension in recent times. It is noted that several forms of

¹²⁴ Girls' education: Towards a better future for all (2005) 2 published by the Department for International Development.

¹²⁵ These statistics have received some criticism by people in Nigeria. Governor Fashola of Lagos State in his comments during the governors' forum, monitored on television channels, questions the basis of the statistics. In a bid to ascertain the actual number of out of school children, Nigeria plans to have a census of children in school. See generally <http://www.premiumtimesng.com/news/139547-nigeria-plans-census-of-out-of-school-children.html> (accessed 26 May 2014).

¹²⁶ For the impact of violence on educational development in a country, see generally, B Barakat & H Urdal 'Breaking the waves? Does education mediate the relationship between youth bulges and political violence?' (2009) available at B Barakat & H Urdal 'Does education mediate the relationship' (2009) papers.ssrn.com (accessed 21 October 2013).

¹²⁷ JO Arowosegbe 'Violence and national development in Nigeria: The political economy of youth restiveness in the Niger Delta (2009) *Review of African Political Economy* 36.122: 575-594. While Arowosegbe comments more on the impact of violence on economic life of Nigeria with particular respect, he notes that the influence of violence on other spheres of the nation's development also abounds.

violence have in the past thwarted peace in the country, but the recent spate of attacks on educational facilities is more alarming now than ever.¹²⁸

Especially in the north-eastern part of Nigeria, statistics remain very high of the poor level of access to and completion of basic education. Violence has been employed to ensure that this negative statistic continues to swell. While violence has distorted access to basic social services in Nigeria over the years, a new conundrum is the rise of the *Boko Haram*, a supposed Islamist group which in 2012 alone ‘burnt down 14 schools in Maiduguri, the capital of Nigeria's Borno state, forcing over 7 000 children out of formal education and pushing down enrolment rates in an already ill-educated region’.¹²⁹ This has led to a reduction in access to basic education in the region and the closure of schools.¹³⁰

In 2013, several students lost their lives in co-ordinated attacks on educational institutions in Nigeria. Various news reports have highlighted the sad incidences that have continued to ensure that access to education remains at low. For instance, it was reported:¹³¹

Thousands of students and teachers across northern Nigeria have been forced to abandon their schools due to increasingly

¹²⁸ The effects of religious, domestic and electoral violence have at different times had a serious impact on the existence and enjoyment of social services like education in Nigeria. For instance, in domestic violence, the girl child has suffered severely by not being allowed access to school or being subjected to domestic help. During electoral violence, unassuming pupils are engaged by politicians to engage in several forms of violence. In some instances, the already insufficient educational facilities are destroyed in the process of violence. For further insight into the different forms of violence underscored, see generally ON Aihie ‘Prevalence of domestic violence in Nigeria: Implications for counselling’ available at www.ajol.info/index.php/ejc/article/download/52648/41252 (accessed 21 October 2013); NO Obakhedo ‘Curbing electoral violence in Nigeria: The imperative of political education’ (2011) 99-110 *International Multidisciplinary Journal* Vol 5 (5), Serial 22. www.ajol.info/index.php/afrrrev/article/download/72297/61230 (accessed 21 October 2013).

¹²⁹ <http://www.protectingeducation.org/news/nigeria-school-attendance-down-after-boko-haram-attacks> (accessed 13 November 2012).

¹³⁰ A state-by-state literacy status compiled by the Commission covering 2008 to 2010 shows that very few states have done well. Most of the states in the north-east and north-west zones have not done well at literacy level. Borno State has only 14,5 per cent of literate population; Gombe has 39 per cent; Jigawa has 24 per cent; while Katsina has 21 per cent. Those doing well are Lagos with 92 per cent; Anambra has 75.1 per cent, Abia has 72.5 per cent while Ekiti has 74.7 per cent. FCT has 61.4 per cent. See <http://nigerianpilot.com/index.php/-other-section/-features/4085-the-challenges-of-mass-illiteracy-in-nigeria> (accessed 13 November 2012).

¹³¹ <http://www.irinnews.org/report/98878/boko-haram-violence-takes-toll-on-education> (accessed 21 October 2013).

brazen attacks by radical Islamist group Boko Haram (BH). In the latest school attack, on 29 September, BH gunmen on four-wheel-drive vehicles and motorbikes stormed student dormitories at a college of Agriculture in the town of Gujba, in the northern Yobe State, opening fire on sleeping students and killing 40.

According to Amnesty International (AI), the attacks are not just violent attacks, but violence and attacks on the right to education. In a report, AI, in calling attention to the dangers of an attack on the right to education in Nigeria, restated that:¹³²

At least 70 teachers and over 100 students have been killed or wounded in Northern Nigeria. Educational facilities have been burned, thousands of children forced out of schools and teachers made to flee for safety.

In July 2013, purported leader of Boko Haram Abubakarr Shekau, in a video statement, said Boko Haram were attacking schools because they are ‘un-Islamic’. He also called for more teachers to be killed. In it he said: ‘teachers who teach Western education, we will kill them. We will kill them. We would burn down the schools, if they are not Islamic schools. We don’t touch small children. Our religion does not allow that, but we’ll burn down the schools.’¹³³

Consequently, religious and cultural activities impact to a great extent on the limitation of access to basic education in Nigeria.

3.7 The challenges of corruption and ethics

It is to be noted that, while some lapses exist in the institutional and policy frameworks in the implementation of basic education in Nigeria, a major challenge is the ethical approach of individuals saddled with the responsibility of implementing policies. A major cankerworm in this respect, apart from attitude to work and responsibility, is that of corruption. As a

¹³² ‘Nigeria: Keep away from schools or we’ll kill you’: Right to education under attack in Nigeria’ <http://www.amnesty.org/en/library/info/AFR44/019/2013/en> (accessed 21 October 2013).

¹³³ For the video clip, see <http://www.youtube.com/watch?v=bS-5v-QhWug> (accessed 21 October 2013).

developing country, Nigeria faces several challenges, one of the three of such challenges identified by Sen, that have a direct impact on education is corruption.¹³⁴

Corruption has been described as an ‘endemic monster that has eaten deep into the fabric of the operational existence of the country’.¹³⁵ For instance, in Ogun state, Ajayi and Adeyemi underscore this fact when they posited:¹³⁶

The inadequacy in the provision of the UBE facilities to primary schools in the State as pointed out in the findings of this study shows that a lot has need to be done not only in the area of fund commitment to the programme *but also ensuring that such are utilised for the purpose they are meant for and not diverted for other uses as widely reported of State Governments in the country.*

It may not be safe to argue that Nigerian governments over the years have failed to commit some amount of money into the education industry, especially as seen in the UBE scheme. However, the menace of corruption is one of the major conduits that ensures that such funds committed are not utilised. The role of education as an emancipator cannot be over-emphasised, but ‘the paradox accompanying this belief is that, despite the huge investment in education, there exists no strong evidence of growth-promoting externalities of education in Nigeria’.¹³⁷

As at 2009, Nigeria was ranked the 130th most corrupt nation in the world¹³⁸ and, in the 2013 index, Nigeria is ranked 144 out of 177 nations.¹³⁹ In addition, it is claimed that there is a

¹³⁴ Y Sen ‘Challenges and prospects of Nigeria’s development at 50’ Golden Jubilee Symposium Paper at Carleton University, Ottawa, Canada, 30 September 2010 9.

¹³⁵ K Ajayi & M Adeyemi ‘Universal Basic Education (UBE) Policy Implementation in Facilities Provisions: Ogun State as a case study’ (2011) 43 *International Journal on New Trends in Education and Their Implications* April, May June Volume 2 Issue 2.

¹³⁶ Ajayi & Adeyemi (n 135 above) (my emphasis).

¹³⁷ NA Ndiyo ‘A dynamic analysis of education and economic growth in Nigeria’ (2007) 3 *The Journal of Developing Areas*, Volume 41. Ndiyo further asserts that in Nigeria ‘education has utilised large amounts of the country’s resources because of the perception that education is important to the unity of the country’. See 4.

¹³⁸ Global Corruption Perceptions Index (CPI) 2009 by Transparency International (TI) available at http://www.transparency.org/research/cpi/cpi_2009/0/ (accessed July 5 2015). For more on corruption in Nigeria, see generally E Chukwuemeka, BJ Ugwuanyi & N Ewuim ‘Curbing corruption in Nigeria: The imperatives of good leadership’ (2012) 6 *African Research Review*.

possible loss of about US \$500 billion of Nigeria's wealth due to corruption annually.¹⁴⁰

Corruption emanates from the Greek word *corruptus*, translating to some kind of aberration or a misnomer; corruption can also be described as 'abuse of power for private gain'.¹⁴¹

Waziri, describing the various facets of corruption in the corporate existence of Nigeria, describes it in the following words:¹⁴²

award of contracts by public office holders to cronies and personally held companies, bribery, fraud, political corruption eg nepotism or favouritism, ethnicity, rigging of elections, misappropriation and conversion of public funds for personal gains, bureaucratic corruption, extortion, manipulation of procurement processes e.g by over-inflation of contracts, leaking tender information to friends and relations etc., corporate corruption e.g diversion and misappropriation of funds through manipulation or falsification of financial records.

Corruption, therefore, could be argued to have ensured that 'the educational system apart from being a poor social service in Nigeria lacks quality, proper orientation and quantity'.¹⁴³

Corruption in very recent times is described as a way of life and the core component of the existence of Nigeria; alive in all sectors of the country.¹⁴⁴ Considering the enormity of the corruption menace, the tendency to assume that corruption is an innate way of life for not just Nigerians, but Africans in general, exists. However, this position, as argued by Odinkalu, is erroneous and lacks any basis.¹⁴⁵

¹³⁹ Transparency International 'The global coalition against corruption' <http://transparency.org/cpi2013/results> (accessed 10 December 2013).

¹⁴⁰ Sen (n 134 above) 12.

¹⁴¹ The United Nations Global Programme against Corruption (GPAC).

¹⁴² F Waziri 'Chairman's opening remarks' CLEEN Foundation (2010) 1 Monograph Series 7.

¹⁴³ Sen (n 134 above) 10.

¹⁴⁴ Waziri (n 14 above).

¹⁴⁵ CA Odinkalu 'Corruption and governance in Africa: How do we break the cycle in Nigeria?' CLEEN Foundation (2010) 16 Monograph Series No 7.

This notwithstanding, Nigeria is not the only country that suffers from corruption and its huge retarding of the benefits of development, especially in the realisation of the right to basic education. For instance, in South Africa, corruption is said to be manifested by the number of accumulated riches in the ‘absence of visible means of accumulation of such riches.’¹⁴⁶ Aptly put, Madonsela captures the effect of corruption in the case of South Africa thus:¹⁴⁷

We cannot deny that corruption is behind a lot of the underdevelopment in our countries and continent. It causes, among others, poor quality goods and services, lack of efficiency, excessive costs, and ineffective public programmes. Corruption basically destabilises societies. In many instances corruption also endangers the security of our states.

The above assertion brings to the fore the impact of corrupt acts on the provision of state responsibilities *vis-à-vis* the provision of the right to access basic education and the quality component.¹⁴⁸ While it is accepted that corruption is indeed a challenge to the realisation of the right to access basic education in Nigeria, it is important to reiterate the fact that it is not, in itself, the biggest challenge.¹⁴⁹

Corruption, as argued by Ribadu, is unable to thrive without the presence of impunity: ‘The challenge of impunity remains the main reason behind the continued survival of corrupt acts.’¹⁵⁰ Particularly in the education industry, money voted for the provision of textbooks and provisions of other learning materials to enhance access to quality of basic education in

¹⁴⁶ TN Madonsela ‘Corruption and governance challenges: The South African experience’ CLEEN Foundation Monograph Series No 7 (2010) 45.

¹⁴⁷ As above.

¹⁴⁸ India is not absolved from the menace of corruption in education. The recent cases of serious examination malpractice raise issues of concern on the level of corruption in India. See generally JA Ogunji ‘Examination management and examination malpractice: The nexus’ (2011) 53 *Journal of International Education Research*; first class exam malpractice in Bihar India available at <http://cynthiasbay.blogspot.com/2015/03/first-class-exam-malpractice-in-bihar.html> (accessed 17 April 2015).

¹⁴⁹ N Ribadu ‘Obstacles to effective prosecution of corrupt practices and financial crime cases in Nigeria’ available at <http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/OBSTACLES%20TO%20EFFECTIVE%20PROSECUTION%20OF%20CORRUPT%20%20PRACTICES%20&%20FINANCIAL%20CRIMES%20IN%20NIGERIA.pdf> (accessed 26 May 2014).

¹⁵⁰ Odinkalu (n 145 above); GO Adeleke ‘Prosecuting corruption and the application of plea bargaining in Nigeria: A critique’ (2012) 53-70 *International Journal of Advanced Legal Studies and Governance* Volume 3

Nigeria has mysteriously found its way to individual pockets. Despite the obvious abnormality, there does not seem to be any mechanism put in place to curb this menace. It is argued that if institutions that are saddled with the responsibility of ensuring that educational policies and funds are managed effectively, the progressive elimination of structural challenges and welfare issues will be within reach in Nigeria.

While there are several institutions that have been set up by government to stem the continued decimation occasioned by corruption, it is assumed that ‘in the effort to enhance governance in Nigeria and combat corruption, public agencies suffer a crisis of credibility – they can no longer be taken seriously’.¹⁵¹ Odinkalu further states:¹⁵²

The institutional architecture for accountability begins with the political process, which, as demonstrated here, has been fundamentally compromised to the point of denying choice to the citizens. It includes the public finance and accounting systems supervised jointly by the Finance Minister, the Head of Service and the Auditor-General, all appointed by an unaccountable President. Of particular significance is the infrastructure of documented transactions, which has increasingly been rendered irrelevant of redundant.

According to Mkpa:¹⁵³

The managers of primary, secondary and tertiary institutions in Nigeria are in consensus that these institutions are grossly under-funded. Evidence exists on the degree of dilapidation that characterises the primary and secondary school buildings in parts of the country; the non-payment of teachers’ salaries and allowances as a result of which strikes are the order of the day; the lack of necessary teaching and learning materials at all levels of the educational system; poor working conditions of all teachers in the country, among other indices. It has also been argued that financial mismanagement and lack of accountability by officials led to diverting substantial resources¹⁵⁴ from the educational institutions to other ends.

¹⁵¹ Odinkalu (n 145 above) 31.

¹⁵² Odinkalu 35-36.

¹⁵³ MA Mkpa ‘Overview of educational development: Pre-colonial to present’ available at <http://www.onlinenigeria.com/education/?blurb=534> (accessed 23 October 2013).

¹⁵⁴ The budgetary commitment of the federal government on education management at primary level will be discussed in further detail in the next chapter.

Two issues are relevant: need for enough funds and the need for responsible and proper management of the funds.

The challenge, therefore, lies more in the ethical management of funds that the government has in the recent past devoted to education. It is still canvassed that the menace of corruption and the attendant lack of political will, cum impunity to check the acts, deepen the poor quality of access to basic education in Nigeria. The direct impact of corruption in education is felt by the poor. Like in any other sector of the society, it is the poor who are unable to access quality amenities like education.

Consequently, it is the poor child from a poor home that is vulnerable to the denial of access to basic education, not to mention access to a quality basic education.¹⁵⁵ As evidenced by the alarming statistics of the number of out of school children in Nigeria, corruption has been identified judicially as the main basis for the violations. The jurisprudence on the impact of corruption on education, unfortunately, has not emanated from a national court but rather from a sub-regional court.

In the case of *The Registered Trustee of the Socio-Economic Rights and Accountability Project (SERAP) v the Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)*,¹⁵⁶ the effect of corruption on basic education in Nigeria was the crux of the matter before the court. The case was brought before the Economic Community of West African States (ECOWAS) Court, and hinged on the violation of several provisions of the African Charter.¹⁵⁷ Particularly, article 17 provides:

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.

¹⁵⁵ C Achebe *The trouble with Nigeria* (1983). In this work Achebe captures the paucity of the Nigerian nation and blames corruption for the decline of both human and social capital of a nation he describes as possessing great potential.

¹⁵⁶ Suit ECW/CCJ/APP/12/07; Judgment ECW/CCJ/JUD/07/10.

¹⁵⁷ Arts 1, 2, 17, 21 & 22.

- 3 The promotion and protection of morals and traditional values recognised by the community shall be the duty of the state.

The facts of the case were based on alleged corrupt acts that were perpetrated in UBEC which accounted for loss of millions of naira that the Independent Corrupt Practices Commission (ICPC) had as yet been unable to recover. It also raised the level of impunity on the part of the federal government in investigating and prosecuting erring officials. The defence of the defendants was solely based on procedural issues as they contested the jurisdiction of the court, among other technicalities.

The Court, after considering the pleas of both parties, found among other reliefs that:

The right to education though claimed not to be justiciable under the Nigerian law is justiciable under the ACHPR.¹⁵⁸

In addition the act of corruption alleged by the applicant is sufficient and will ground a ‘negative impact’ on basic education and thus requires the government to take extra measures to fill in the gap created by corruption pending its prosecution and recovery of looted funds.¹⁵⁹

In the wording of the Court, this is important¹⁶⁰

to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.

The far-reaching implication of the decision of the Court in this case is discussed in detail in chapter 5. It is, however, important to reiterate the fact that the Court declined making a finding on the arrest of the individuals that the applicants alleged were guilty of the embezzlement of funds. This decision was reached based on the fact that they were not parties before the Court. The Court, however, provided a possible avenue to be further

¹⁵⁸ Suit ECW/CCJ/APP/12/07; Judgment ECW/CCJ/JUD/07/10, Relief 1.

¹⁵⁹ n 156 above, Relief 3.

¹⁶⁰ n 156 above, Relief 3, para 28.

explored by NGOs and CSOs involved in public interest litigation in the expansion of the judicial jurisprudence on the realisation of the right to basic education.¹⁶¹

3.8 Conclusion

A safe conclusion of this chapter can be drawn from the findings of Abbass when he reiterated that:¹⁶²

For communities to effectively participate in education, a feasibility study should be conducted amongst relevant communities in order to understand how their common and diverse interests can strengthen partnership in education for the general good. This also goes on to determine the nature and perspectives of learning or educational activities in the communities, support services and the nature of involvement.

The realisation of the importance of the community can only be reached with the establishment of a virile relationship among the various stakeholders in a particular community. Abbass identifies the major stakeholders to include, although not limited to, PTAs, School Management Boards, and School Community Committees.¹⁶³

In addition, another premise for conclusion is to accept the position as stated by Adegbite:¹⁶⁴

The myriads of problems that mitigate against Nigeria's politico-economic development with particular attention to education and language, have persisted and continue to defy solutions because no coordinated policies and programmes have been formulated, designed and implemented to ameliorate the problems. It has been suggested that rather than pursue separate policies in different aspects of the nation's cultural life, a synthesis of lingual and cultural policies can be considered.

The continued struggle of realising the right to basic education must adopt a means of creating awareness to all of the importance of education which must be reconceptualised to

¹⁶¹ n 156 above, Relief 2, para 27.

¹⁶² Abbass (n 6 above) 3.

¹⁶³ As above.

¹⁶⁴ A Adegbite 'Languages and the challenges of education' *Nigeria Journal of the Nigeria English Studies Association* (JNESA) 14:1. 24.

elevate the dignity of various indigenous groups in Nigeria. Realising this will ensure that, as put forth by Ngugui, will mean, among several options re-establishing the importance of local languages in education. Ngugui noted this importance when she stated:¹⁶⁵

The choice of language and the use to which language is put is central to a people's definition of themselves in relation to their natural and social environment...

Invariably, the challenges that inhibit access to basic education in Nigeria are hydra-headed. From inefficiency on the part of the executive, failure on the part of the legislature and the non-adventurous posture of the judiciary to poor infrastructure, unstable policies and corruption; the need for strengthened institutions are crucial towards realisation of the right to access to basic education in Nigeria.

¹⁶⁵ Ngugi (n 8 above).

Chapter 4

Evolution of regulatory frameworks of basic education in Nigeria

4.1 Introduction

In light of the preceding discussions on basic education in international law and challenges that confront realisation of basic education in Nigeria, this chapter examines the various regulatory frameworks that have provided for basic education in Nigeria. It interrogates to what extent the frameworks have aided or inhibited access to basic education in Nigeria. The constitutional development of Nigeria and the various provisions for education are examined and thereafter the various policies are examined. A brief scrutiny of the impact of military rule on the education landscape of Nigeria is also attempted. This discourse will provide the framework on which we can interrogate the present status and performance of access to basic education as a right in Nigeria and how it can help the realisation of the right.

The chapter is divided into three sections, considering the pre-colonial, colonial and post-colonial eras in the education landscape of Nigeria. The situation of access to basic education in Nigeria during the post-colonial military era is analysed in light of several military decrees and edicts that were in place. This is important as it will provide a clear picture from past education laws and policies, while laying the basis for moving forward in the realisation of the right to access basic education in the country.

4.2 Basic education in Nigeria - A brief overview

Basic education is that period in the life of a child when learning activities take place within the home, social groups, schools and also in the formal settings.¹ Basic education, according to Obanya,²

covers a continuum ranging from basic to post-functional literacy ... level and content of formal education considered in each community as laying the foundation for lifelong learning, as well as programmes of non-formal education involve the consolidation and assimilation of literacy skills in addition to the acquisition of other skills necessary for meeting life's basic needs, including the ability to lead a life of continuous learning.

In Nigeria, the concept of basic education may be used interchangeably with universal primary education (UPE). UPE was established in Nigeria in 1976, denoting six years of primary school. Presently, basic education in Nigeria entails nine years of primary school.³ In its expanded concept, UBE deals with issues of access, equity and environmental learning.⁴ The concept of basic education in Nigeria is supposed to be closely linked with the UNESCO project Education for All which seeks to ensure that basic education is available to every child from the age of 0-15 years; however, this is not in reality the case as a large number of children are still denied access to basic education.

In its guiding principles, the Federal Government of Nigeria stipulates that UBE must be universal, free and compulsory and must ensure the elimination of factors that will disrupt the

¹ SO Labo-Popoola *et al* 'Universal basic education in Nigeria: Challenges and way forward' (2009) 636-649 *The Social Sciences, Medwell Journals*, 4: 6.

² P Obanya 'The place of languages in literacy and basic education programmes: An overview' in A Ouane (ed) *Towards a multilingual culture of education* 121 UNESCO Institute for Education available at <http://www.unesco.org/education/uie/pdf/uiestud41.pdf> (accessed 10 September 2013).

³ A Adepoju 'Universal basic education in Nigeria: Challenges and prospects' available at http://uaps2007.princeton.edu/papers/70830_1 (accessed 6 April 2013).

⁴ AE Yoloje 'The relevance of universal basic education in the development of primary education system in Nigeria' in TL Adepoju (ed) *Planning and implementation of universal basic education in Nigeria* (2004) 11.

realisation of the right to basic education. Access, as stated in chapter one, goes beyond threshold access and should be actual access. In addition, Duze rightly states:⁵

The question of equality of educational opportunity is not so much a matter of the amount of free tuition given by the government as the consideration that every single child in school, at whatever age and level, should be able to perform at his or her fullest capacity. Equal educational opportunity should therefore be better seen and organised in such a manner as to provide every single individual child every needed human, physical, and financial inputs in adequate proportions and as at when due.

In UNESCO's 2012 report, Nigeria accounts for about 10.5 million out of school pupils in the world. This represents a total estimate of approximately 58 million children all over the world that are out of school.⁶ The girl child is further perceived as the most vulnerable as far as her ability to access basic education in Nigeria is concerned, especially in the northern part of the country. UNESCO records that only about 2 per cent of girl's access schools in this region.⁷ The statistics illustrate the inability and failure on the part of the Nigerian government with regard to its obligation to achieve universal access to basic education of the Nigerian child.⁸

The military dispensation and its introduction of the Structural Adjustment Programme (SAP) meant that paying of fees was introduced into the Nigerian education system. This succeeded in derailing the development of education in Nigeria. It was not until 1999 that the Universal Basic Education (UBE) project was revived with the aim of reversing the problems of the

⁵ CO Duze 'Educational policies/programmes' effect on attrition rates in primary schools in Nigeria' (2012) 39 *International Journal of Education Administration and Policy Studies* 4:2 available at <http://www.academicjournals.org/IJEAPS> (accessed 10 July 2013).

⁶ See generally <http://www.uis.unesco.org/FactSheets/Documents/fs-28-out-of-school-children-en.pdf> (accessed 20 April 2015).

⁷ UNESCO Teaching and learning: Achieving quality for all available at <http://unesdoc.unesco.org/images/0022/002266/226662e.pdf> (accessed 20 April 2015).

⁸ G Brown 'On the road to education for all in Nigeria' available at <http://gordonandsarahbrown.com/2013/09/on-the-road-to-education-for-all-in-nigeria/> (accessed 10 September 2013); P Rose 'Spotlight on Nigeria's education crisis' available at <http://efareport.wordpress.com/2013/09/10/spotlight-on-nigerias-education-crisis/> (accessed 10 September 2013).

Nigerian education sector.⁹ The UBE Act laid down goals which were supposed to be its bench mark. Among the goals stipulated are to:¹⁰

- i. ensure the development among Nigerians of a desire to pursue the benefits of education;
- ii. ensure that every child of school going age in Nigeria had access to basic education;
- iii. ensure that aside thematic access that children complete the education cycle;
- iv. ensure that the style of education employed met the need of everyone in need of basic education; and
- v. improve the general literacy and numeric ability of every child and lay a foundation for a worthy life beyond the basics.

While the above goals are lauded, it is argued in this thesis that the goals can only be realised with the right legal framework and policy in place and through monitoring of their implementation. In addition, the obvious neglect of the quality of available education in the above objectives also raises some concern. However, the thesis advocates that the gains of a robust regulatory framework will enable individuals to seek redress and have available remedies enforced where the right to access basic education is violated.

The need to rectify the education policy in Nigeria is very important as it affects the extent of its availability and ultimate access. Education policies must respect the views of all identified

⁹ CO Duzé 'Educational policies/programmes' effect on attrition rates in primary schools in Nigeria' (2012) 39 *International Journal of Education Administration and Policy Studies* 4:2 available at <http://www.academicjournals.org/IJEAPS> (accessed 10 July 2013). Duzé opines that the policy was part of the efforts by the government to make education accessible on an equal basis for all Nigerian children.

¹⁰ Basic education was launched in Nigeria by former President Olusegun Obasanjo in Katsina State of Nigeria and set out the objectives of UBE.

stakeholders in the education industry. Notably, the danger of an improper policy or its implementation will lead to what Zukker describes as ‘inappropriate schools and programs’.¹¹

What happens in schools, public or private, is seldom examined through the human rights lens ... examining what happens to children at school requires questioning of the state’s prerogative of compulsory education’.¹²

Considering the nature of the Nigerian nation and the fact that the education responsibility is a concurrent one, it is important that state education policies align with federal education policies. This is advanced on the premise that the federal government has a high stake in assuring and guaranteeing quality of education in terms of curriculum, teachers’ welfare and other infrastructural development needed to enhance access to quality basic education.

Hanson, addressing the importance of developing a federal plan of education in Nigeria, stated:¹³

Admittedly, African education poses a problem of quantity but the question raised by the ‘quality’ content of education and the nature of the syllabi has the connection a revolutionary significance. Indeed, the African of 1980 will be the product of the syllabi drawn up in 1961. The type of man who will rule over the Africa of tomorrow is potentially contained in these curricula.

Hanson’s stance addresses the crucial basis of ensuring that education policies in a country are aligned with human rights standards which will, in turn, ensure enhanced access and quality. The disconnect between access and quality points to the fact that the current challenges that confront basic education in Nigeria cannot be divorced from the various policies and implementation thereof that predate education in Nigeria. In the same vein, the wide gap between educational practice in all regions of the country ensures the continuance of discrimination and inequality, which leads to violence and a threat to a peaceful Nigerian

¹¹ MA Zuker *Education law* (2002) 281.

¹² K Tomasevski *Education denied - ZCosts and remedies* (2003) 15.

¹³ JW Hanson ‘Developing a federal plan for education’ in O Ikejiani (ed) *Education in Nigeria* (1965) 70.

nation. Based on this above, the next section proceeds to discuss the legal framework for education in Nigeria.

4.3 Nigeria legal framework for education

A discussion of the legal education framework in Nigeria is hinged on the constitutional development era. Since the 1914 amalgamation of the north and south of Nigeria, several constitutions have served the Nigeria nation. The various constitutions are analysed with the aim of ascertaining to what extent the right to education is provided for in the past and present Constitutions. Also discussed in this section of the thesis is the Universal Basic Education Act 2004 (UBEA) and the Childs Right Act 2003.

4.3.1 Nigerian Constitutions and the right to education

The 1951 Constitution of Nigeria¹⁴ introduced regionalisation in the country and did not make any particular mention of right to education, but rather provided that the regional arms of the country will take responsibility for enacting laws as it pertains to education.¹⁵ The 1954 Constitution of Nigeria¹⁶ differed from the 1951 Constitution by providing for the administration of education under its part II, in the concurrent legislative list.¹⁷ The significance of this was that the regions were not to make decisions about the administration of education alone, but the federal government also had the power to make decisions.

It is suggested that the inclusion of education in the concurrent legislative list is supposed to provide a two-pronged approach to the administration of education, the first being that the federal government could exercise an oversight function as regards education in the federation as a whole in terms of policy, financing and quality assurance. Secondly, the state or regional governments were supposed to ensure that policies set at federal level are

¹⁴ The Nigeria Constitution Order in Council, 1951, No 1172, Foreign Jurisdiction.

¹⁵ The Nigeria Constitution (n 14 above), Third Schedule No 8, 68.

¹⁶ The Nigeria Constitution Order in Council, 1954, No 1146.

¹⁷ The Nigeria Constitution Order in Council, 1954, No 1146, Part II, No 30.

interpreted to ensure that the policies are implemented with the needs of the people at heart and to the best of their interests. As already argued, these two positions did not work because the education disparity between the various regions in Nigeria continued to widen without any serious attempts to stem the incidence.¹⁸

The Constitution of the Federal Republic of Nigeria¹⁹ (CFRN) of 1979 provides for education in section 18, stating it as an aspiration of the federal government to provide equal and adequate educational opportunities. It listed responsibilities for educational matters in the concurrent legislative list.²⁰ The CFRN 1999 follows in the same spirit of the CFRN 1979 by providing for education as a mere state objective²¹ and aspiration and also in the concurrent legislative list. Furthermore, the CFRN 1999 seemed to enshrine an important aspect of acceptability of education by any individual by restricting coercion and indoctrination of any religious views. It is provided:²²

No person attending any place of *education shall be required to receive religious instruction* or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.

The federal government (FG) further gets superior control of matters relating to education by the empowerment of the Constitution to ensure quality control of education. In its exclusive

¹⁸ Decree 1 of 1989 that was subsequently promulgated to establish the National Commission for Nomadic Education was supposed to follow the UNESCO aspirations of providing Education for All (EFA). However, like other policies, it was not fashioned with the desire and overall objective of the targeted recipients, therefore recording the not too successful implementation of the policy.

¹⁹ 1979.

²⁰ CFRN 1979 Item K, No 25-28.

²¹ CFRN sec 18.

²² CFRN 1999 sec 38(2) (my emphasis). It is reiterated that this was the major bane of education, as was brought by the colonial masters that initiated a rejection by northern region of the country. See sec 38(3) of CFRN 1999, for greater respect for tolerance in educational institutions. 'No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.'

legislative list section, paragraph 60(e)²³ vests the power to ensure quality of education at all levels in the FG, despite the role of the state governments in also administering education.²⁴ In addition, the Local Government Education Authority (LGEA) is equally empowered, specifically by the CFRN 1999, to administer and oversee the running of primary education. It provides that LGEA has a responsibility for ‘the provision and maintenance of primary, adult and vocational education’.²⁵

A responsibility can be deduced from the powers of the FG from the conferment of more specific powers of inspection and quality control on the Federal Capital Territory (FCT), when the CFRN 1999, as noted earlier, defines education within the FCT as follows:²⁶

‘Education’ includes overseeing all educational facilities, including public and private schools, with the aim of providing a high standard of qualitative education within the Territory and all charitable, social or economic and business activity that encourages all aspects of the human development of children, youth and adults of the Territory;

The Secretariat of Education is further empowered:²⁷

The Secretariat may upon such terms and conditions which it deems fit appoint persons who shall be known as Inspectors with powers to:

- (a) enter, inspect and examine at any time of the day premises that are being used as educational establishments and request the proprietor or the head of furnish them in such form as they may direct with any information on any matter

²³ To prescribe minimum standards of education at all levels.

²⁴ See CFRN 1999, Part II Concurrent Legislative List Extent of Federal and State Legislative powers 25-30.

²⁵ Fourth Schedule Functions of a Local Government Council, 2(a). Part of the identified challenges affecting the LGEA in carrying out the task of monitoring and providing basic education is attributable to the fact that, in the current political dispensation in Nigeria since 1999, the functioning of the LGEA has been hampered. In several states of the country, the state governments have either never conducted elections into this arm of government or starved them of the allocations that emanated from the federal government. See, generally, JO Oni ‘Management of primary education in Nigeria: Trends, constraints and solutions’ (2009) 4 *Medwel Journal* 286-290.

²⁶ Second Schedule – Regulation 12(1)(b) The Education Secretariat, para 2.

²⁷ Fourth Schedule Functions of a Local Government Council, 5(a).

specified in accordance with the accreditation license issued.

From the foregoing, it is the position of this thesis that the constitutional provision pertaining to the right of access to basic education, is not comprehensive. This argument is grounded on the basis that the provision do not specifically provide the basis of quality and how it is to be measured. It also fails to place specific obligations on the different arms of government which it is envisaged will help solve the challenges that face each of the arms in the quest of providing access to basic education. For instance, the lack of a constitutional provision empowering the judiciary to play a role of adjudication on matters concerning education is a major challenge.

Having examined the constitutional developments of Nigeria pertaining to the protection of the right to basic education, the question may arise as to the importance of specific provisions and the protection of basic education in the text of the Constitution. It is the position of the thesis that it is imperative to underscore the importance of constitutional recognition of the right to basic education in Nigeria. While it is taken into consideration that some countries, like the United Kingdom and the United States of America, do not have constitutional recognition of the right to education, they nevertheless are among the forerunners in providing access to basic education.

To understand the reason behind this and to reinforce the call for specific recognition in this thesis, certain peculiar factors are identified in the Nigerian context. However, it is noted and appreciated that a mere literal provision of the right to basic education as a justiciable right in the CFRN does not guarantee enhanced access.²⁸ With the above caution taken into consideration, the thesis notes that with the influence of the chequered governance challenges

²⁸ For a further understanding into the question of Constitutionalism and right in Nigeria, see generally LI Uzoukwu 'Constitutionalism, human rights and the judiciary in Nigeria' unpublished LLD thesis available at http://uir.unisa.ac.za/bitstream/handle/10500/3561/thesis_ozoukwu_1.pdf?sequence=1 (accessed 3 July 2015).

that Nigeria experienced and the ongoing level of poor governance and lack of respect for the rule of law, a different approach is required. This position is also advanced in the thesis based on the political experience of Nigeria, which is best described by the failure on the part of both the legislature and the executive arms of government.²⁹

It is also noted that the importance of codification of rights is important, especially in circumstances such as described in Nigeria above. This reason is advanced in the thesis, leaning on the basis on which the French Declaration proceeded:³⁰

Considering that ignorance, forgetfulness, or contempt of the rights of man are the sole causes of public miseries and the corruption of governments, have resolved to set forth in a solemn declaration the natural, inalienable, and sacred rights of man, so that this declaration, being ever present to all the members of the social body, may unceasingly remind them of their rights and duties; in order that the acts of the legislative power, and those of the executive power, may at each moment be compared with the aim and of every political institution and thereby may be more respected; and in order that the demands of the citizens, grounded henceforth upon simple and incontestable principles, may always take the direction of maintaining the constitution and welfare of all.

From the above, it is advanced that specific recognition of the right to education will serve as a sign post reminding the political class in Nigeria of the importance of education, while also providing a basis for individuals to demand the performance of state obligations.

In addition, as shown in chapter six, the apathy of lawyers and judges is also an important reason. The training and perceptions of lawyers in Nigeria position them to lean more towards the positive school of law,³¹ which recognises a right only as that which is written.³²

²⁹ See generally IA Ibrahim & A Buba 'Successive failure of democracy in Nigeria: The way out' (2013) 4 *Mediterranean Journal of Social Sciences* 119; JT Edet & JA Amadu 'The legislature and national development: The Nigerian experience' Vol 2 No 9 *Global Journal of Arts, Humanities and Social Sciences* 63-78.

³⁰ Declaration of the Rights of Man and the Citizen August 1789, available at <http://www.historyguide.org/intellect/declaration.html> (accessed 3 July 2015).

³¹ The position of the positive school accepts only that which is expressly provided in the written laws are laws. See generally <http://legal-dictionary.thefreedictionary.com/Legal+Positivism> (accessed 4 July 2015).

While the thesis has gone further to advocate and proffer ways in which regional and sub-regional law can be utilised to realise access to basic education; it is further reiterated that specific constitutional recognition is important. This is so considering the challenges that the application of international law is faced with in the Nigerian legal system.³³ This position of leaning towards the ‘positive legal theory is not peculiar to Nigeria, but is indeed described as affecting the protectors of traditional rights as against the presumed new generations of rights’.³⁴

The position adopted by the Nigerian judiciary, as presented in detail in chapter six, further supports the position adopted by this thesis. The judiciary in the past and in recent times has shown a preference for constitutional provisions over and above other legislative positions. In the case of *Abacha v Fawehinmi*,³⁵ the question of applicability of international law was a major point of contention. While the court found that it was important to respect international obligations, it specifically found that the Constitution of Nigeria was supreme and must be respected.³⁶ In recent jurisprudence emanating from Nigeria, subsidiary legislation has been struck down because of inconsistency with the Nigerian Constitution, simply because the provisions of the Act are not specifically mentioned in the Constitution and not because it violated any constitutional provision.

³² Some Nigerian authors have described the supremacy of written law above other aspirations of legal thoughts. See generally AA Ogungbure ‘Legal positivism and immorality of law: Implications for Nigeria’ available at <http://www.authorsden.com/visit/viewarticle.asp?id=58469> (accessed 4 July 2015). Customary law has also suffered the same relegation due to its lack of codification in Nigerian laws. See generally D Asiedu-Akrofi ‘Judicial recognition and adoption of customary law in Nigeria’ (1989) *American Journal of Comparative Law* 571-593.

³³ CN Okeke ‘International law in the Nigerian legal system’ (1996-1997) 27 *Cal W Int’l LJ* 311.

³⁴ JJ Shestack ‘The philosophic foundations of human rights’ in C Heyns & K Stefiszyn (ed) *Human rights, peace and justice in Africa: A reader* (1998) 5.

³⁵ (2000) 6 NWLR (Pt 660) 228.

³⁶ For further insight, see generally AA Oba ‘The African Charter on Human and Peoples’ Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11’ (2004) 4 *African Human Rights Law Journal* 275-302.

In the recent case of *Ebah v Federal Government of Nigeria*,³⁷ the plaintiff sought to rely on the Fundamental Rights and Enforcement Act 2009 to challenge the Same-Sex Prohibition Act in Nigeria. The court found that, since the plaintiff could not show specific and personal injury, he could not rely on the Fundamental Rights and Enforcement Act to challenge the law.³⁸ Consequently, for such an important right like the right to basic education, specific constitutional protection is advocated and the Indian situation will be used to further support this assertion in chapter five of the thesis.

4.3.2 Universal Basic Education Act, 2004

The Universal Basic Education (UBE) Act represents the present effort by the Federal Government of Nigeria to pursue the realisation of the right to basic education. The scheme was re-launched in 1999 after several attempts of the UPE failed, with improper planning as the greatest challenge. The UBE Act contains four parts and 16 sections dealing with various issues of basic education.

Section 1 reiterates the commitment of the federal government to ensure uniform and qualitative basic education in the country. This is important, as it further underscores the point that, even though basic education is enshrined in the concurrent legislative list of the CFRN 1999, the federal government has a higher degree of responsibility to ensure compliance by other stakeholders in the administration of education in Nigeria.

Section 2 goes further to guarantee basic education as a fundamental right that must be respected. The UBE Act represents the only document that directly acknowledges basic education as a right in Nigeria. The question, however, is the manner in which the conflict

³⁷ Suit FHC/ABJ/CS/197/2014.

³⁸ See generally AC Onuora-Oguno 'Protecting the rights of same-sex relationships in Nigeria: Case note on *Teriah Joseph Ebah v Federal Government of Nigeria*' presented at the Centre for Human Rights Sexual Orientation Seminar, December 2014.

between the UBE Act and the provisions of CFRN 1999, which ought to describe the right to basic education as a mere state objective and not a justiciable one. As will be argued later on in the thesis, the justiciability of the right to basic education in Nigeria can possibly be driven by reliance on the provisions of the UBE Act and other regional and global human rights instruments if the judicial institutions in Nigeria are aligned to emulate the jurisprudence of courts from the diaspora.

In section 4, the UBE Act places an onus on parents to ensure that the child's access to basic education is not inhibited. The role of parents as stakeholders in playing a part in fashioning a suitable curriculum of education is underscored by this provision. It, however, remains unencouraging that the role of parents in Nigerian basic education is limited only to the formation of the Parents' Teachers Association (PTA), without taking into consideration their role in contributing to the fashioning of an acceptable basic education curriculum.

Interestingly, the provision in section 6 of the Act confers jurisdiction on a magistrate's court or any court of competent jurisdiction. The section provides:

The Magistrate Court or any other State Court of competent jurisdiction shall have jurisdiction to hear and determine cases arising under section 2 of this Act and to impose the punishment specified.

Section 2 of the Act reads:

- (1) Every government in Nigeria shall provide free, compulsory and Universal basic education for every child of primary and junior secondary, school age.
- (2) Every parent shall ensure that his child or ward attends and completes his -
 - (a) primary school education; and
 - (b) junior secondary school education, by endeavouring to send the child to primary and junior secondary schools.
- (3) The stake-holders in education in a Local Government Area shall ensure that every parent or person who has

the care and custody of a child performs the duty imposed on him under section 2(2) of this Act.

- (4) A parent who contravenes section 2(2) of this Act commits an offence and is liable -
- (a) on first conviction, to be reprimanded;
 - (b) on second conviction, to a fine of N2,000 or imprisonment for a term of 1 month or to both; and
 - (c) on subsequent conviction, to a fine of N5,000 or imprisonment for a term of 2 months or to both.

The legal liability is placed on parents to realise the right to basic education as punishment is mainly reserved for parents whose wards are out of school.³⁹ Although section 3 of the Act places a responsibility on any individual who receives any form of fee from a child, it further stipulates punishment for the parent. The combined purport of these provisions, it is argued, leaves much to be desired when placed against the framework of regional and global human rights law examined earlier. It is argued that greater responsibility ought to be placed specifically on government officials and teachers who are found guilty of corrupt practices that inhibit access to basic education.

In addition, the Act does not fully take into consideration the challenges that poverty pose to parents who, in turn, are unable to meet the needs of various fee components of basic education in Nigeria, which include, but are not limited to, transportation and the acquisition of learning materials and resources.

Part 2 of the Act deals with the manner in which members of the UBE are appointed. While the composition is lauded, the extent to which participation is in reality ensured remains to be

³⁹ The Delta State government in Southern Nigeria commissioned what are known as education special marshals to arrest students and parents who are not in school during school hours on 16 September 2013.

questioned. In addition, the provision of section 9⁴⁰ of the Act, which lays down the various responsibilities of the Commission, is laudable. However, several of the responsibilities therein are not implemented as envisaged. For instance, the deficiency in the current policy that is expected to govern the implementation of the UBE Act remains a major challenge to the realisation of the promising potential of the Act in Nigeria.

Another major challenge is that of corruption. There seems to be a *lacuna* in the Act regarding the ability of the Commission to investigate the proper implementation and disbursement of funds that are allocated for educational resources. The prescription of a standard of education on a uniform scale still looms large. The disparity is found mostly in government-owned schools compared to those that are privately owned, either by individuals or missions. The responsibility of quality control goes to the depth of curriculum content, ensuring that the main objectives of basic education, as already conceptualised, are set out

⁴⁰ The functions of the Commission shall be to – “(a) formulate the policy guidelines for the successful operation of the universal basic education programme in the Federation; (b) receive block grants from the federal government and allocate to the states and local governments and other relevant agencies implementing the Universal Basic Education in accordance with an approved formula as may be laid down by the Board of the Commission and approved by the Federal Executive Council; Provided that the Commission shall not disburse such grant until it is satisfied that the earlier disbursements have been applied in accordance with the provisions of this Act; (c) prescribe the minimum standards for basic education throughout Nigeria in line with the National Policy on Education and the directive of the National Council on Education and ensure the effective monitoring of the standards; (d) enquire into and advise the Federal Government on the funding and orderly development of basic education in Nigeria; (e) collate and prepare after consultation with the states and local governments, and other relevant stakeholders, periodic master plans for a balanced and coordinated development of basic education in Nigeria including areas of possible intervention in the provision of adequate basic education facilities, which include - (i) proposals to the Minister for equal and adequate basic education opportunity in Nigeria; (ii) the provision of adequate basic education facilities in Nigeria; and (iii) ensure that the basic national curricula and syllabi and other necessary instructional materials are in use in early childhood care and development centres, primary and junior secondary schools in Nigeria ; (f) carry out in concert with the states and local governments at regular intervals, a personnel audit of teaching and non-teaching staff of all basic education institutions in Nigeria ; (g) monitor federal inputs into the implementation of basic education; (h) present periodic progress reports on the implementation of the universal basic education to the President through the Minister; (i) co-ordinate the implementation of the universal basic education related activities in collaboration with non-governmental and multi-lateral agencies; functions of the Commission; (j) liaise with donor agencies and other development partners in matters relating to basic education; (k) develop and disseminate curricula and instructional materials for basic education in Nigeria; (l) establish a basic education data bank and conduct research on basic education in Nigeria; (m) support national capacity building for teachers and managers of basic education in Nigeria; (n) carry out mass mobilisation and sensitisation of the general public and enter into partnerships with communities and all stake-holders in basic education with the aim of achieving the overall objectives of the Compulsory Free Universal Basic Education in Nigeria; (o) carry out such other activities that are relevant and conducive to the discharge of its functions under this Act; and (p) carry out such other functions as the Minister may, from time to time, determine”.

properly, without religious or cultural bias or discrimination, but with the concept of equality and mutual respect.

Part 3 of the Act deals with the financing of basic education in Nigeria. The major responsibility for finance to a large extent is the exclusive preserve of the FG. The sources of funds are primarily from the budgetary allocation which must not be below 2% of the consolidated revenue of government.⁴¹ Other sources include grants from international donors and FG credits.⁴² However, it must be noted that a condition precedent is laid down before states are able to benefit from the consolidated funds.⁴³ The challenge that arises from the equity contribution requirement by states is advanced on the differences in education already existing in the country. In effect, a state that is already lacking in education infrastructure requires greater financial resources to attempt to bridge the gap. In this sense, it is argued that a need exists for interventionist moves by the FG to try to ensure equal access to basic education of every individual within the borders of Nigeria.

Part 4 of the Act brings to fore the relationship between the Commission and the state branches by the establishment of State Universal Basic Education Board (SUBEB). While the SUBEB is given control over the various Local Government Education Authorities (LGEAs) on issues of basic education, the apparent oversight function of the Commission of the SUBEB or even LGEA is very blurred. This gap creates room for a lack of proper monitoring of policies formulated at the FG level. This challenge translates to a paucity of implementation of several policies and thereby poses a danger to the successful translation of policies to meet the need of the average child in Nigeria, whose right to basic education remains under constant threat.

⁴¹ UBE Act sec 11(1)(a).

⁴² UBE Act secs 11(1)(b) & (c).

⁴³ UBE Act sec 11(2).

Therefore, the relationship that could be established between the UBE Act and the CFRN is important. The identified weakness of the CFRN concerning access to basic education and considering the fact that the CFRN is a law superior to the UBE Act causes concern as to what extent the apparent improved provisions of the Act will go to in aiding the realisation of the right to access of basic education in Nigeria. It is therefore the position of the thesis that the provisions of the CFRN should be amended so as to bring the UBE Act in line with it. This is believed to be the only way the benefits of the provisions of the Act can be maximised.

4.3.3 Nigeria Child Rights Act (CRA) 2003

Issues pertaining to the promotion and protection of child's rights are not specifically captured in the CFRN. The general provisions of human rights are as contained in chapter 4 and also chapter 2 of the CFRN 1999.⁴⁴ Ladan is of the view that this non-specificity led to the need for the enactment of the Child Rights Act in 2003. This Act set out to state clearly the 'rights and responsibilities of a Nigerian child and provides for the child justice administration and the care and supervision of a child, among other things'.⁴⁵

The challenge of the non-recognition of the rights of children is not only peculiar to Nigerian laws. 'This situation led to the adoption of the CRC on 20th November 1989, by the United Nations General Assembly, whilst the OAU Assembly of Heads of States and Governments adopted the African Union Charter on the Rights and Welfare of the Child (ACHPRWC) in July 1990.'⁴⁶

⁴⁴ MT Ladan 'The Child Rights Act 2003 and the challenges of its adoption by state governments in the 19 northern states' Paper presented at one-day interactive forum for Sokoto State House of Assembly Legislators, organised by the Sokoto State Ministry of Women Affairs and UNICEF, 23 July 2007.

⁴⁵ MT Ladan 'The Child Rights Act 2003 and the challenges of its adoption by state governments in the 19 Northern States' Paper presented at one-day interactive forum for Sokoto State House of Assembly Legislators, Organised by the Sokoto State Ministry of Women Affairs and UNICEF, July 23 2007.

⁴⁶ UNICEF Fact sheet on the rights of a child 2007.

Nigeria ratified both the global and regional Conventions in 1991 and 2000 respectively. The Preamble of the CRC requires state parties to take definite steps to domesticate and re-enact the law in the various states so as to enable the law to act not just as an international instrument, but also as a domestic law. Regrettably, in Nigeria, while at federal level the law is in existence,⁴⁷ several states have not taken steps to ensure that the laws become part of state legislation.⁴⁸ The need for the implementation of the CRA was underscored by Kaalu who reiterates that ‘children in any society are entitled and guaranteed by law applicable to human rights, which aimed at providing the enabling environment for survival, development, protection and participation’.⁴⁹

The CRA 2003 stipulates obligations for both the child and parents, as well as for the state. As already highlighted, the need to ensure the full realisation of the fundamental rights of the Nigerian child is of paramount importance. The CRA stipulates and defines a child as any one below the age of 18 and, thus, reading together the provisions of the CRA and the UBE Act, there is no ambiguity as to the scope of basic education in Nigeria.⁵⁰ Despite the apparent controversy about the acceptable age of a child in Nigeria, especially under Islamic Shari’a law, Uwais has reiterated the danger of the irregularity in the treatment of age of maturity of the girl child, especially relating to marriage. According to Uwais:⁵¹

⁴⁷ The Act was passed in July 2003 by the National Assembly of Nigeria during the presidency of President Olusegun Obasanjo.

⁴⁸ Abia, Anambra, Bayelsa, Eboniyi, Ekiti, Imo, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Plateau, Rivers, Taraba are the states that have implemented the CRA in Nigeria.

⁴⁹ S Kaalu ‘Nigeria: Child Rights Act - Non-implementation worries UNICEF’ available at <http://www.gmfc.org/en/action-within-the-movement/africa/regional-news-in-africa/940-nigeria-child-rights-act-non-implementation-worries-unicef> (accessed 30 August 2013).

⁵⁰ This still remains a dispute in some quarters as to the age of maturity of the girl child in Nigeria. See generally AC Onuora-Oguno ‘Constitutionalising the violation of the right of the girl child in Nigeria: Exploring constitutional safeguards and pitfalls’ available at <http://ohrh.law.ox.ac.uk/?p=2362> (accessed 30 October 2013).

⁵¹ M Uwais ‘Compatibility of the Child Rights Act with Islamic legal principles’ available at http://webcache.googleusercontent.com/search?q=cache:SlCO702kyesJ:www.iwei-ng.org/iweingo2009/wp-content/uploads/2012/09/The_Compatibility_of_the_Child_Rights_Act_with_Islamic_Legal_Principles-by-Maryam-Uwais.doc+&cd=1&hl=en&ct=clnk&gl=za (accessed 22 May 2014); See generally C Arinze-Umobi & A Iguh ‘The Nigerian girl child, rights to education and the nexus with national development education in Africa’ in C Ikekonwu (ed) *Child education in Africa* (2010) 103.

Any honest observer would be fully conscious of the injury done to the girl-child's future when she is removed from school at a tender age for the sole purpose of being given away in marriage. Not only is she mentally unprepared to take on the onerous duties that attach to caring for a home and husband, she has no knowledge of family planning and is under pressure, almost immediately from family and friends, to become pregnant. Such child brides are prone to the VVF disease, not only because of the relatively immature size of their pelvis, but also because of the lack of adequate nutrition and basic healthcare at the actual time of delivery. She is placed in a situation where she can exercise no options; and virtually no life.

The right to education of a Nigerian child is captured in article 15 of the CRA.⁵² The CRA places an unqualified obligation on the government to provide basic education to every child in Nigeria, while also stipulating the responsibility of parents or guardians of the child to ensure the realisation of the right to education. Further, in the article penalties are stipulated for parents or guardians for any act of omission on their part that deprives the child from accessing basic education. Though not a direct provision of the CRA, it is argued that the CRA can indirectly advance the right to access of basic education of children in Nigeria who are differently enabled by ensuring the realisation of inclusive education, as stipulated by the CRPD.

Article 16 provides in clear terms:

- (1) Every child who is in need of special protection measures has the right to such measure of protection as is appropriate to his physical, social, economic, emotional and mental needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the affairs of the community.
- (2) *Every person, authority, body or institution* that has the care or the responsibility for ensuring the care of a child in need of special protection measures shall endeavour, within the available resources, to provide the child with *such assistance and facilities which are necessary for*

⁵² '(1) Every child has the right to free, compulsory and universal basic education and it shall be the duty of the government in Nigeria to provide such education. (2) Every parent or guardian shall ensure that his child or ward attends and completes his - (a) primary school education; and (b) junior secondary education.

*his education, training, preparation for employment, rehabilitation, and recreational opportunities in a manner conducive to his achieving the fullest possible social integration and individual development and his cultural and moral development.*⁵³

Thus, the CRA places obligations on individuals, authorities and institutions to ensure the realisation of the right to access of basic education of the Nigerian child. It is based on this provision that it will be argued later in the thesis that institutions like the judiciary, civil society like the Nigerian Bar Association (NBA), the Nigerian Union of Teachers (NUT), and the National Human Rights Commission (NHRC) must live up to the responsibility that is expected of them to ensure that the realisation of the right to basic education is no longer mere rhetoric.

Further, obligations that are provided for so as to ensure the realisation of the right to basic education of a child are in terms of ensuring the elimination of child labour and other related challenges that inhibit the realisation of the child's right to basic education.⁵⁴ While the CRA is lauded, its implementation faces severe challenges. Ladan identifies five basic challenges to the implementation, as follows:⁵⁵

i. local peculiarities;

⁵³ My emphasis.

⁵⁴ Section 20 of the Child Rights Act provides "Every parent, guardian, institution, person and authority responsible for the care, maintenance, upbringing, education, training, socialisation, employment and rehabilitation of a child has the duty to provide the necessary guidance, discipline, education and training for the child in his or its care such as will equip the child to secure his assimilation, appreciation and observance of the responsibilities set out in this part of the Act". Section 30 (1) No person shall buy, sell, hire, let on hire, dispose of or obtain possession of or otherwise deal in a child. (2) A child shall not be used (a) for the purpose of begging for alms, guiding beggars, prostitution, domestic or sexual labour or for any unlawful or immoral purpose ; or (b) as a slave or for practices similar to slavery such as scale or trafficking of the child, debt bondage or serfdom and forced or compulsory labour; (c) for hawking of goods or services on main city streets, brothels or highways ; (d) for any purpose that deprives the child of the opportunity to attend and remain in school as provided for under the compulsory, Free Universal Basic Education Act. The Act is available at <http://www.placng.org/new/laws/C50.pdf> (July 4 2015). For the impact of the violation of the provision of the Act see generally, C Akpeji 'In Taraba, Govet's apathy stunts children's rights' available at <http://www.ngrguardiannews.com/2015/05/in-taraba-govts-apaty-stunts-childrens-rights/> (accessed 7 July 2015).

⁵⁵ MT Ladan 'The Child Rights Act, 2003 and the challenges of its adoption by state governments in the 19 northern states' Paper presented at one-day interactive forum for Sokoto State House of Assembly Legislators, organised by the Sokoto State Ministry of Women Affairs and UNICEF, 23 July 2007.

- ii. judicial incompetency;
- iii. political will;
- iv. collaboration between government and civil society; and
- v. a lack of comparative judicial jurisprudence in human rights law (global and international).

The above forms part of the challenges already discussed in chapter three as inhibiting factors affecting the realisation of the right to access of basic education in Nigeria. However, it is important to note at this point that the implementation of the CRA faces enormous challenges in the northern part of Nigeria, and this is affecting the education of the girl child, especially occasioned by early marriage. The conflict as identified by Ladan as local peculiarities is in line with the reservation entered by states that are governed by Islamic Shari'a laws. Despite the apparent conflict between the CRA and Shari'a law, it has been posited by scholars like Uwais, reiterating the unequivocal link between human rights law and the Shari'a. Uwais posits that:⁵⁶

It cannot be disputed that international human rights norms are universal, and remain fundamental even within the Shari'a. Respect for justice, protection of human life and dignity and public welfare, especially of the more vulnerable (including children, the aged, widows, the divorced and the disabled) are cardinal principles of Islam, which brook no differences of opinion, even within the Shari'a itself. Since the protection and promotion of human rights must be achieved within the domestic laws of a country, recognition of those relevant Islamic law principles that relate to these fundamental issues will only enhance the realisation of its objectives in the states that apply Islamic law.

This conflict remains at the bedrock of actions that are targeted at ensuring that the Nigerian child does not have access to education, with the girl child being the most vulnerable. The

⁵⁶ M Uwais 'Compatibility of the Child Rights Act with Islamic legal principles' available at <http://webcache.googleusercontent.com/search?q=cache:SICO702kyesJ:www.iwei-ng.org/iweingo2009/wp-content/uploads/2012/09/The+Compatibility+of+the+Child+Rights+Act+with+Islamic+Legal+Principles-by-Maryam-Uwais.doc+&cd=1&hl=en&ct=clnk&gl=za> (accessed 22 May 2014).

continued attacks on educational institutions in the Islamic-populated region of Nigeria attest to this reality.

4.4 Educational policy in Nigeria: Pre-colonial and colonial eras

Discussing education policies in pre-colonial Nigeria necessitates a discussion of the activities of the various aims of colonial conquest of the entity called Nigeria. The colonisation of the entity today known as Nigeria was not a sudden one, but one that was predicated on the trade interactions with the British. As part of the incentive, missionaries of both Islamic and Christian beliefs all made contact with several regions of Nigeria. The significance of this was that each region, depending on the religion it first came in contact with, became influenced by the religious doctrine which in most circumstances made interactions with other religions difficult.

Fafunwa recounts that Northern Nigeria had access to education that was brought in by the Islamic Arabs dating up to 300 years before the advent of the Christian missionaries in Southern Nigeria.⁵⁷ He further states that Islam was first accepted by the ‘Kanem ruler Umme Jilmi who ruled between 1085 and 1097, with Kanem becoming a centre for Islamic learning and teaching of law and jurisprudence’.⁵⁸ Further in his account, Fafunwa recalls that in ‘Southern Nigeria, the introduction of Western-oriented education was exclusively due to the efforts of the Christian missionaries, with the first school established in Badagry in 1842’.⁵⁹ It must be noted, however, that the style of education in the north was not a complete failure as it gradually provided for the needs of the northerners. At best, the position is adopted that education in the north would still have led to a gradual and phased development had it not been disrupted.

⁵⁷ AB Fafunwa *History of education in Nigeria* (1974) 15.

⁵⁸ Fafunwa (n 46 above) 53.

⁵⁹ Fafunwa 66. In Fafunwa’s account, the first known Christian school was established in in 1843 by Mr and Mrs De Fract. See Fafunwa 82.

According to the account of Ikejiani, ‘the “real” history of school commenced in 1842 with a kind of education which was aimed primarily at religious education’.⁶⁰ Islamic education subsequently spread through the city of Ilorin down to Ibadan and Lagos with the establishment of Koranic education in major towns and cities along the northern arm of Nigeria.⁶¹ With the advent of the missionaries and the backing of the colonial powers of the British, ‘the spread of Western education took on the southern part of the country like wild fire’.⁶² This spread was not the same in the northern part of the country and is blamed today for the disparity in the level of access to education in the various regions of Nigeria.

The question that arises is: Why the apparent gap between the northern and southern regions of Nigeria considering that education arrived in the north first before it came to the south? Fafunwa attempts to provide an answer to this question by reiterating that:⁶³

Muslim education in Nigeria was retarded not because the Muslims were un-progressive or because their religion was opposed to formal education but because education in those days tended to mean ... when the Christian missions started converting animists and a few Muslims, majority of Muslim parents barred their children from attending the ‘free Christian schools’ for fear of conversion.

Imam attributes the widened gap between education in the north and south of Nigeria to some ‘historical antecedents, he points out these antecedents to mean that the British educational policy did not address the aspiration of the people leading to a clamour for change’.⁶⁴ As will be discovered later in the chapter, the rejection of education as proposed by Western colonial

⁶⁰ O Ikejiani ‘Background to the problems of Nigerian education’ in O Ikejiani (ed) *Education in Nigeria* (1965) 5.

⁶¹ Fafunwa (n 46 above) 15.

⁶² See, generally, O Ikejiani ‘Background to the problems of Nigerian education’ in O Ikejiani (ed) *Education in Nigeria* (1965); Fafunwa (n 46 above).

⁶³ Fafunwa 71-72. Adams, however, is of the opinion that ‘credit is due to the missions for the efforts in bringing education considering the low level of financial support that they got from the government’. See generally SC Adams Jr *Nigeria: Where education has not kept pace with politics* (1960) 162-68; The Phi Delta Kappan, 41:4, content downloaded from 137.215.6.53 on 19 June 2013.

⁶⁴ H Imam ‘Educational policy in Nigeria from the colonial era to the post-independence period’ (2012) 181 *Italian Journal of Sociology of Education*; SC Adams Jr ‘Nigeria: Where education has not kept pace with politics’ (1960) 162-68, The Phi Delta Kappan (n 52 above).

leaders by the northern region was hinged majorly on the failure of the education pattern to follow both an acceptable and adaptable basis with the religion and culture of the people.

In addition to the above assertion, it is worthy to reiterate that, despite the gap between education created by different policies in Nigeria, one fact remains and that is that education of Africans generally, and not only Nigerians, by the colonialists was wanting in several respects. It is noted that the 'colonial governments did not take the initiative to provide education for the non-literate Africans ... as they felt that if people learned to read and write they would be less willing to remain under the vestiges of colonial rule'.⁶⁵ Ikejaini recounts that the style of education that was given to the village child in Nigeria was meant only to prepare him for his local community without any particular focus on the future life he was anticipated to lead.⁶⁶ Citing Mckee, Ikejaini recalls that the policy simply meant that a rural urban drift was inevitably leading to people abandoning their way of life in pursuit of white-collar jobs.⁶⁷

This inclination and mind-set of colonial educators to a large extent ensured that various policies were not adaptable to Africans and thus affected access and quality in general. Sifuna captures the colonial power reluctance to provide quality education for African's thus:⁶⁸

Turning to education, available literature shows that most colonial powers were reluctant to offer it purely for the benefit of the colonised people. They were in a great dilemma, whether or not it should be provided, and if provided, what form was it supposed to take? For example at the time of colonisation, in France, a large segment of the French population opposed education for Africans because they thought that the purpose of colonialism was to satisfy the need for new markets for French industrial production and to be the source of cheap labour and cheap raw materials.

⁶⁵ Ikejaini (n 49 above) 5.

⁶⁶ Ikejaini 7.

⁶⁷ Ikejaini 8.

⁶⁸ DN Sifuna 'African education in the twenty-first century: The challenge of change' (2001) 21-38, CICE Hiroshima University, *Journal of International Cooperation in Education*, 4:1 available at <http://home.hiroshima-u.ac.jp/cice/sifuna4-1.pdf> (accessed 30 July 2013).

The effect of this was a neglect of African traditional education which, according to Fafunwa, had all that was required to gradually lead to the emancipation of the people if guided and promoted.⁶⁹

The import of the above views was that the colonial policy of education in Nigeria was carried out in ‘a vacuum in terms of African people’s everyday lives’.⁷⁰ The simple interpretation of this is that there was no clear design of appropriate education meant to empower colonised Nigeria. Consequently, with no clear perspective on the policy of education in Nigeria, the British Privy Council Committee on Education in 1847 put in place what was the very first attempt to examine the place of education policy in the colony for the running and administering of education in colonial Nigeria; the major problem being its parochial nature.⁷¹

During this period, government support was limited only to missionaries⁷² who were involved in various parts of the Lagos colony, leaving out the Muslim-dominated northern region.

It was not until 1882 that the first main education ordinance was promulgated.⁷³ Shortly after the 1882 policy, other policies were put in place, in 1887, 1916, 1926, 1926 and 1946.⁷⁴ Ijaduola claims that the failure of the 1882 Ordinance was hinged on the fact that it was not

⁶⁹ Ikejiani (n 49 above) 9; Fafunwa (n 46 above) 15-17. Fafunwa opined that ‘[e]very society, whether simple or complex, has its own system for training and educating its youth ... because indigenous education failed to conform to the ways of the Westernised systems, some less well-informed writers have considered it primitive’.

⁷⁰ OIW Jagusah ‘Educational policy in Africa and the issues(s) of context: The case of Nigeria and South Africa’ (2001) *International Education Journal*. Fafunwa states that schools had poor acceptance because people thought that ‘book’ will make them cowards. See Fafunwa (n 46 above) 85.

⁷¹ Fafunwa (n 46 above) 93.

⁷² H Imam ‘Educational policy in Nigeria from the colonial era to the post-independence period’ (2012) 183 *Italian Journal of Sociology of Education*. In Imam’s account, Quranic schools were excluded from government grants and aid.

⁷³ Fafunwa (n 46 above) 93.

⁷⁴ M Fabunmi ‘Historical analysis of educational policy formulation in Nigeria: Implications for educational planning and policy’ (2005) 2 *International Journal of African and African American Studies* 4: 2.

tailored after the colonies, but rather based on the English Elementary Education Act of 1870.⁷⁵

Fafunwa critique of the Ordinance of the British Education Act which provided, among other things, the basis for grants to schools which were based on discipline, performance and school attendance.⁷⁶ The purport of this meant the further marginalisation of schools in the northern part of the colony that were already run according to Islamic education standards and, as stated before, attendance was low because of the prejudice and rejection of the Western-styled education. The coming into force of the 1887 Education Ordinance is accounted to have come into place because of the need to ensure proper administration of the Gold Coast and Colony of Lagos.⁷⁷ It also provided for the special funding of various categories of school life and sought to ensure quality by providing for teacher certification.⁷⁸

The gap in the quality of proposed teachers in Nigeria grew as the few that had access to education were educated not to be empowered to fill future roles, as already stated, but to fulfil the desires of their masters. Thus, with little or not well-qualified teachers of Nigerian extraction in Nigeria, the introduction of the 1926 Code was a turn for the worst, making way for the formation of various teacher associations across the country.⁷⁹ This position meant that there were a dearth of qualified Nigerian teachers empowered to teach in the schools, occasioning further reliance on expatriate manpower. The effect of this impasse was to be felt later in the post-independence days affecting quality of education, as the quality of teachers to take over schools were generally poor and insufficient in most cases.

⁷⁵ KO Ijaduola *Education in Nigeria: An historical perspective* (1998) 28-28.

⁷⁶ Fafunwa (n 46 above) 94.

⁷⁷ As above; Fabunmi (n 63 above) 4: 2.

⁷⁸ Fafunwa (n 46 above) 95.

⁷⁹ KO Ijaduola *Education in Nigeria: An historical perspective* (1998) 46. Fafunwa holds a dissecting view when he restates that '[t]he Phelps-Stokes Report (on which the 1926 Ordinance was largely based) had a tremendous impact which made them to demonstrate interest in African education'. See Fafunwa (n 46 above) 123.

Furthermore, the 1926 Ordinance was based largely on the recommendation of the Phelps-Stokes Commission.⁸⁰ The Ordinance contained many positive provisions which would have the potential of directing the Nigerian educational policy on the right path if properly implemented. An identified component of this Ordinance was the registration of teachers before teaching, and a centralised authority to monitor the establishment of new schools and to ensure the compliance of individual education curricula to the needs of people.⁸¹ In the present education landscape, the importance of certification to guarantee quality is encouraged and well-lauded.⁸²

The era from 1930-1950 leading up to the independence of Nigeria represents a great educational expansion.⁸³ Apart from the coming into place of the 1948 and 1952 Education Ordinances under the governance of Sir Hugh Clifford, regional education laws came into place alongside the 1954 Constitution.⁸⁴ With the creation of the Nigerian Federation, the Education law of 1955 in the western region, and the Education Laws of 1956 in the eastern region created great diversity in the standards of education between all the regions of the federation. Lagos enacted its own Education Ordinance in 1957.⁸⁵

The last of the colonial education policies came in 1959, with the Ashby report that was constituted by the federal government detailing the need for improved availability of

⁸⁰ For a detailed analysis of the Phelps-Stoke Commission on Education in Africa, see, generally, EH Berman 'American influence on African education: The role of the Phelps-Stokes Fund's Education Commissions' (June 1971) *Comparative Education Review*, 15: 2.

⁸¹ Fafunwa recalls that findings of the Phelps-Stoke Commission awakened the British colonial government to the realities of poor education in its colonies. The findings of the Commission as captured by Fafunwa included among other things the need to ensure that education was adaptable to people of Africa. See, generally, Fafunwa (n 46 above) 119-121.

⁸² In Edo State Nigeria, a certain Mrs Augusta Odemwinge, a primary school teacher, was nabbed when she could not perform simple literary reading ability. See 'How Oshiomole detected teacher who can't read own certificate' available at <http://www.osundefender.org/?p=116273> (accessed 9 September 2013).

⁸³ Fafunwa (n 46 above) 128.

⁸⁴ Fabunmi accounts that the 1948 Ordinance was an off-shot of the Sir Sidney Philipson report that recommended the creation of a central board for education and four regional boards to take charge of Lagos, West, South and North.

⁸⁵ H Imam 'Educational policy in Nigeria from the colonial era to the post-independence period' (2012) 185 *Italian Journal of Sociology of Education*.

educational institutions in Nigeria.⁸⁶ Fabunmi recalls that the major flash points of the Ashby Commission were the finding and reiterating of the existing imbalance in education, especially between the north and the south, the parochial nature of the Nigerian education landscape and the poor quality of teachers in various schools across the country.⁸⁷ Imam records the pivotal role the Ashby Commission played in fashioning a plan for the great manpower need of the Nigerian Federation. He, however, deplores the little effect it had as ‘decentralisation and imbalance held sway, ushering the Federation into a division of ethnicity and tribalism’.⁸⁸

Conclusively, on pre-independence education policies, Ikejiani opines that the British educational policies represented two basic situations: ‘one dealing with the British philosophy and the other with British attitudes’. These, according to him, were hinged on the theory of imperialism which proposed that ‘colonies exist primarily for the benefit of the mother nation leading to reinforcing of the dictates of the ruling power’.⁸⁹ In addition, it is also a safe concluding point on the education policy in Nigeria during colonial rule to point to the fact that, while access was restricted on the basis of religious faith’ and acceptability being at its lowest ebb because of inappropriate curricula, issues of adaptability and availability of education were also very below par.

⁸⁶ D Adesulu ‘Nigeria @ 50: Milestones of Nigeria education’ available at <http://www.vanguardngr.com/2010/09/nigeria-50-milestones-of-nigeria-education/> (accessed 17 September 2013).

⁸⁷ M Fabunmi ‘Historical analysis of educational policy formulation in Nigeria: Implications for educational planning and policy’ (2005) 4 *International Journal of African and African American Studies* 4:2. In light of the shortage of teachers in Nigeria at the time, the Commission’s proposal for a crash programme to produce teachers also meant that attention was not given to quality. See D Adesulu ‘Nigeria @ 50: Milestones of Nigeria education’ available at <http://www.vanguardngr.com/2010/09/nigeria-50-milestones-of-nigeria-education/> (accessed 17 September 2013).

⁸⁸ Imam (n 74 above).

⁸⁹ O Ikejiani ‘Background to the problems of Nigerian education’ in O Ikejiani (ed) *Education in Nigeria* (1965) 11.

It is noted that ‘our human past teaches us what we should avoid and what we should pass on’.⁹⁰ Premised on this, the following section considers education post-independence with a view of attempting to ascertain whether the position of ‘colonial education and its production of half-educated men’ took any turn for the better in the new Nigerian nation.⁹¹

4.5 Educational policy in post-colonial era Nigeria

At independence, the emerging Nigerian nation required different levels of skill at all levels, but the educational road map never equipped Nigerians with the required skills.⁹² This resulted in the starting point of the educational policy in the independent Nigeria, being the challenge to ensure sufficient manpower to run the new government machinery.⁹³

This vacuum was difficult to fill as there was not a sufficient number of skilled Nigerians with high-level manpower and the skill and expertise to be able to take responsibility and thereby occasioning reliance on expatriates.⁹⁴ Adams poses the attendant challenges by stating:⁹⁵

[T]he tragic element is the shortage of trainers of key personnel functions and for widening and advancing the general education level for both youths and adults...the uncertainty is made more acute by uncertainties regarding the numbers of expatriate civil servants who will take lump sum compensations and depart thereafter ...

This situation posed serious challenges of ensuring an acceptable and adaptable education framework for the country, as the available teachers were those already groomed in the

⁹⁰ OIW Jagusah ‘Educational policy in Africa and the issues(s) of context: The case of Nigeria and South Africa’ (2001) 117 *International Education Journal*.

⁹¹ As above.

⁹² According to MO Olateju, the minutes containing the philosophy on which Nigerian educational policy was built were faulty *ab initio* and called for urgent review of the perception to the philosophy of education in post-colonial Nigeria; address presented at the All Progressive Congress (APC) Progressive Governors Forum, May 2014 held at Kaduna, monitored on Channels TV Nigeria.

⁹³ JW Hanson ‘Developing a federal plan for education’ in O Ikejiani (ed) *Education in Nigeria* (1965) 57.

⁹⁴ SC Adams Jr ‘Nigeria: Where education has not kept pace with politics’ in *Education and Independence*, IV 162, The Phi Delta Kappan, Vol 41 No 4 (Jan 1960) 165.

⁹⁵ Adams (n 83 above) 162-168.

British-styled education lacking a passion for the culture and way of life of the Nigerian people. The challenge is further captured succinctly by Ikejiani when he notes that the lack of an adequately-skilled workforce was the bane of the new Nigerian nation. As accounted by Ikejiani, since ‘no serious attempt was made to train Nigerians in higher skills ... Nigerians were happy to be clerks and labourers doing what they were told to do’.⁹⁶

The direct import of this meant that post-independence education in Nigeria fell short of meeting the basis set out by human rights law because its content was not sufficient to empower the individual, among several other shortcomings. Sadly, it is to be reiterated that the ‘Nigerian education system became one which was largely a colonial residue only partially reformed or reshaped to meet the needs of actual nationhood but failed to produce the skill in nationals to take charge of the need of the nation’.⁹⁷ This, it is argued, also had its effect on the various policy frameworks that graced the Nigerian educational terrain and, thus, the people who were saddled with the responsibility of moving the education landscape of Nigeria forward remained non-Nigerians.

In addition to the challenges of the lack of skilled manpower and the reliance of the Nigerian nation on expatriate support to build its educational system, a further bane of Nigerian educational planning was the over-reliance on colonial education policies,⁹⁸ despite the fact that the colonial policies ignored very crucial aspects of the educational need of Nigerians, as pointed out by Hanson, lauding the Ashby Commission for pointing out:⁹⁹

⁹⁶ O Ikejiani ‘Background to the problems of Nigerian education’ in O Ikejiani (ed) *Education in Nigeria* (1965) 8.

⁹⁷ JW Hanson ‘Developing a federal plan for education’ in O Ikejiani (ed) *Education in Nigeria* (1965) 56.

⁹⁸ BA Adeyemi OA Oribabor & B B Adeyemi ‘An overview of educational issues in Nigeria: Thoughts and reflections’ available at <http://nau.edu/uploadedFiles/Academic/COE/About/Projects/An%20Overview%20of%20Educational%20Issues%20in%20Nigeria.pdf> (accessed 30 July 2013). See also DN Sifuna *African education in the twenty-first century: The challenge of change* (2001) 21-38, CICE Hiroshima University, Journal of International Co-operation in Education, 4:1 available at <http://home.hiroshima-u.ac.jp/cice/sifuna4-1.pdf> (accessed 30 July 2013).

⁹⁹ JW Hanson ‘The nation’s education purpose’ in O Ikejiani (ed) *Education in Nigeria* (1965) 22.

Millions of the people who live in this Nigeria of 1980 under the present educational system more than half of them will never go to school ... the Nigerian people will have to forgo other things they want so that every available penny is invested in education.

This meant that the shortcomings identified in terms of improper planning resurfaced in post-independence Nigeria. To date, post-independence Nigeria still grapples with the challenges of effective education planning. This explains the failure of the first attempt of Universal Primary Education (UPE) in Nigeria.¹⁰⁰

The first post-independence policy operated from 1960-1976. The 1969 national education policy was built on the backdrop of a national curriculum conference, which had its main objective targeted towards fashioning a convenient and appropriate national education framework. The final end product of the process was the 1977 National Policy on Education. However, the shortcomings became evident, so much more that an attempt to fashion a national philosophy of education did not succeed. Other lofty aspirations of the policy included, although not limited to, pre-primary and primary education and the administration of educational resources in Nigeria.¹⁰¹

The 1977 policy included the change from the 8-5-2-3 to the 7-5-2-3 system in education and the introduction of fee-paying institutions from primary to secondary levels, especially during the military era.¹⁰² During the implementation of the policy, the emergence of oil into the Nigerian economic equation also meant that some mass literacy education projects were not

¹⁰⁰ SO Labo-popoola, AA Bello & FA Atanda 'Universal basic education in Nigeria: Challenges and way forward (2009) 637 *The Social Sciences* 4: 6, *Medwell Journals*; O Aluede, PO Idogho & JS Imonikhe 'Increasing access to university education in Nigeria: Present challenges and suggestions for the future' (2012) *The African Symposium* 12: 1. See also CK Ayo, JA Odukoya & A Azeta 'A review of open and distance education and human development in Nigeria' available at <http://eprints.covenantuniversity.edu.ng/4549/1/Distance%20Education%20and%20Human%20Development%20in%20Nigeria%20-%20CK%20Ayo%20JA%20Odukoya%20et%20al.pdf> (accessed 7 July 2015).

¹⁰¹ Other educational developments in Nigeria available at <http://www.onlinenigeria.com/education/?blurb=535> (accessed 30 July 2013).

¹⁰² Imam (n 74 above).

sustained because of corruption, aided by a lack of proper planning that heralded the demise of this phase of educational planning in Nigeria.¹⁰³

The 1977 National Policy on Education had as its main objective as ensuring that education was relevant to the Nigerian nation. A major objective of the policy was the need to ensure the promotion of the unity of the country coming from the post-civil war experience and also to foster national integration.¹⁰⁴ In addition, the policy initiated a deviation from the colonial style of sharing funding and responsibility for education, making the 6-3-3-4 system the accepted basis of education in Nigeria. The first six years represented the basic education level, which was supposed to be free but not compulsory, and it restated the government's aspirations to achieve the compulsory education target as soon as possible.

The failure of the 1977 policy was mainly because of its inability to ensure equality of access to education in all regions of the country. The 1977 policy placed an onus on the Federal Government of Nigeria to ensure equal access of every Nigerian child to educational opportunities without consideration of any form of disability or circumstances.¹⁰⁵ The Quranic education in the north remained mainly the way it was structured, plagued by itinerant pupils, while the south and east flourished with increased access, although not without challenges relating to quality. This was amplified by the shortage of educational facilities, infrastructure, books, teachers, welfare and training.

¹⁰³ K Kolawole & I Olusola 'Redressing the growing concern of the education sector in Nigeria' (2010) 43 *Edo Journal of Counselling* 3:1.

¹⁰⁴ Fafunwa recounts the rivalry that laced the Nigerian education landscape with the action group that was in control of the Western State rolling out its Universal Primary Education scheme, which was closely followed by the NCNC in the eastern part of the country. The north was unable to follow suit because of financial reasons and the stereotype already against the benefits of Western education. See generally Fafunwa (n 46 above) 167-175.

¹⁰⁵ Labo-Popoola *et al* (n 89 above).

Another interesting aspect of the 1977 policy, which was eventually revised in 1981, was the recognition of the study of the three major languages in Nigeria: Hausa, Igbo and Yoruba.¹⁰⁶ This also ensured that other minority groups in the country were put through an ethnic erosion of learning other languages which was not theirs. This policy, it is argued in this thesis, further entrenched the scepticism with which other tribes increasingly felt marginalised in Nigeria. The adoption of this policy was despite the fact that ‘it is an accepted principle that everyone is better educated in his or her mother tongue, not only because this greatly facilitates learning but because it is even a human right, the right to one’s own medium of expression’.¹⁰⁷ With the revision of the National Policy on Education came the desire to reinstate the operation of Universal Primary Education (UPE). However, the aspiration to guarantee free and compulsory primary education was once again not realised because ‘the Federal Government shed its responsibilities under the 1977 Policy’.¹⁰⁸

4.5.1 Education under the military

The interference of the military in governance in Nigeria further ensured the poor state of education in post-independence Nigeria. This is attested to by the various economic policies adopted by the military and the continued increase in corruption and looting of the national treasury. Noteworthy is the introduction of the Structural Adjustment Policy (SAP). Importantly, recalling that post-colonial Nigeria was plagued by the interference of the military in governance, starting from the first *coup* in 1966, which eventually led to the civil war. It is germane that in appreciating the impasse of education presently in Nigeria, the SAP era is discussed, albeit briefly.

¹⁰⁶ Imam (n 74 above).

¹⁰⁷ CN Fyle ‘Language policy and planning for basic education in Africa’ in A Ouane (ed) *Towards a multilingual culture of education* 115 UNESCO Institute for Education, available at <http://www.unesco.org/education/uie/pdf/uiestud41.pdf> (accessed 10 September 2013).

¹⁰⁸ Imam (n 74 above).

Education policies under the military era represent a period in which planning and data collection for national planning was at its lowest ebb. Therefore, it is safe to assume that the major bane of the Nigerian educational landscape was the lack of planning that greeted it and its huge military flavour.¹⁰⁹

With the introduction of SAP by the military regime of General Ibrahim Babangida, fee-paying schools were introduced with the implementation of some World Bank measures.¹¹⁰ This ensured that poverty-stricken households in Nigeria were unable to access basic education and thereby widened the gap of children unable to access basic education during the military era. The negative impact of the SAP in Nigeria and some other African nations is captured thus:¹¹¹

In Nigeria, for instance, per capita education spending dropped from 5.6 in 1981, through 3.9 in 1983, and 2.1 in 1986, to 1.1 in 1988 ... As far as the share of education in the national budget is concerned, both countries experienced downward trends from 1984 when education shares were 8.0 per cent and 15.1 per cent in Nigeria and Zambia respectively. By 1986, Nigeria ... experienced about 3 per cent and 7 per cent drops in education shares respectively.

SAP also occasioned numerous strike actions by the primary school education sector in Nigeria, among other factors that slowed down the pace of educational development in Nigeria. Kolawole and Olusola posited:¹¹²

¹⁰⁹ BU Gusau *Educational reforms in Nigeria: Successive years of inconsistencies and confusions* (2008), Gusau educational development association (GEDA), interactive session, available at <http://www.gamji.com/article6000/NEWS7831.htm> (accessed 30 July 2013).

¹¹⁰ For the impact of the Structural Adjustment Programme of the World Bank on education in developing countries, see generally K Tomasveski 'Globalising what: Education as a human right or as traded service?' (2005) *Indiana Journal of Global Legal Studies* 12: 1. See also E Obasi 'Structural adjustment and gender access to education in Nigeria' (1997) 161-178 *Gender and Education* 9: 2; GT Ijaiya 'Alleviating poverty in Nigeria: Investing in education as a necessary recipe' available at <http://unilorin.edu.ng/journals/education/ije/sept1998/Alleviating%20Poverty%20in%20Nigeria.pdf> (accessed 12 August 2013).

¹¹¹ JB Babalola, G Lungwangwa & AA Adeyinka 'Education under structural adjustment in Nigeria and Zambia (1999) 85 *McGill Journal of Education* 34: 1.

¹¹² K Kolawole & I Olusola 'Redressing the growing concern of the education sector in Nigeria' (2010) 43 *Edo Journal of Counselling* 3: 1.

The result of the policy came out in unpaid salaries of teachers for months. This resulted in primary teachers going on strike for six month in 1993. The problem virtually led to the total collapse of that sector. Indeed, the sector has not recovered from the dislocation of that policy till today.

Also, several policies in this era are described as policies that included irrelevant curricula and obsolete methods of instruction with its attendant end point being high dropout rates.¹¹³

Another attendant pitfall were the inconsistencies in the implementation of policies as it changed with the emergence of each government in power in the country.¹¹⁴

In addition to the above, an important factor of the Nigerian legal space as it pertains to education that is not neglected is the military factor. Therefore, some military edicts that impacted the education landscape of Nigeria are also discussed.

From the first takeover of the military in governance, several edicts and decrees were promulgated and used to govern the administration of education in Nigeria.¹¹⁵ For the purposes of this thesis, Decree 31 of 1988; Decree 3 of 1991 and Decree 96 of 1993 are of great importance as they affected the administration of basic education. The major challenge of Decree 31 of 1988 was that it vested superior powers in the National Primary Education Commission (NPEC) which did not receive support from various administrators at state level,

¹¹³ Imam (n 74 above); Kolawole & Olusola (n 101 above).

¹¹⁴ Labo-Popoola *et al* (n 89 above).

¹¹⁵ Some of the decrees include, but are not limited to, Decree 19 of 1984 that abolished private universities; Decree 16 of 1985 that provided for control of national universities by the ministry of education; Decree 3 of 1986 establishing the National Commission for Colleges of Education; Decree 20 altering the school calendar; Decree 31 of 1998 providing for the amendment of the National Primary Education Commission Decree; Decree 53 of 1988 establishing the Nigeria Education Research and Development Council; Decree 17 of 1990 creating the National Commission for Mass Literacy, Adult and Non-Formal Education; Decree 3 of 1991 establishing local government areas and local government education committees which managed and funded primary schools; Decree 6 establishing the education minimum standards and establishment of intuitions. For a detailed discussion on the Decree that pertains to higher education, see DO 'Durosaro Education Laws in Nigeria' available at <https://www.unilorin.edu.ng/publications/durosaro/Education%20Laws%20in%20Nigeria.pdf> (accessed 31 July 2013); RNO Ogbonna 'Education laws in Nigeria' in Basic Text on Education Management' 367 available online at http://www.nou.edu.ng/NOUN_OCL/pdf/pdf2/PED%20410.pdf (accessed August 2013).

as it was seen as a means of eliminating a channel through which public funds may be mismanaged.¹¹⁶

These agitations subsequently led to the scraping of the NPEC by the 1991 Decree. The unplanned nature and approach to educational laws meant that the NPEC was again brought back into the education administration of the nation by Decree 96 of 1996 with the creation of various State Education Primary Boards (SPEB) and the Local Government Education Authorities (LGEAs).¹¹⁷ Furthermore, the new Decree saw the establishment of the National Primary Education Fund (NPEF) which was to administer funds allocated to primary education.

It is pertinent to note that, while the SPEB structure is still maintained in the country, the LGEA exists merely on paper in several states of the federation, and state governors have not conducted elections into this arm of government. The consequence is that the administration of basic education at local level is done from a top-down approach, which does not work favourably in the making and implementation of education policy. Another identified impact of this is the entrenching of corruption in the misappropriation of resources meant for basic education needs in several communities in Nigeria. In all, access to basic education during the military era in Nigeria suffered a huge set back occasioned by inconsistent policies and corruption.

¹¹⁶ RNO Ogbonna 'Education laws in Nigeria' in Basic Text on Education Management 390 available online at http://www.nou.edu.ng/NOUN_OCL/pdf/pdf2/PED%20410.pdf (accessed August 2013). It is observed that ordinarily this should not have been the case as the respect for military hierarchy was in place in the Nigeria of 1988. However, the opinion of Ogbonna suggests the obvious lack of interest in the military hierarchy on issues pertaining to education as they were more involved in matters of defence and corruption to entrench themselves in power. This view is further supported by the fact that it was during this era that the country experienced severe brain drain and maltreatment of teachers in all spheres of the Nigerian education sector.

¹¹⁷ Ogbonna (n 105 above).

4.6 Compliance of Nigerian education law and policy with global and regional human rights standards

With the above analysis, it is important to look at the extent to which Nigerian laws and policies pertaining to education meet the laid-out benchmark for basic education in global and regional human rights laws.

The first area of non-compliance is the lack of access, starting from the colonial era. Access to basic education was clearly hindered as a number of Nigeria children could not access education largely due to the unavailability of educational facilities sufficient to accommodate the teeming population.¹¹⁸ Another closely-related hindrance to issues of access is that of acceptability. This was evidenced in the reluctance to access Western education in the north where several Moslems feared the conversion of their wards to the Christian faith. This occasions the continued existence of the disparity in the statistics of education in the northern region of Nigeria and the rest of the regions in the country.

Regarding access, the present level of poverty and corruption in Nigeria ensures that the country's population of out of school children is one of the highest in the world. The lack of educational facilities, educational materials and means of accessing educational infrastructures remain issues that the present educational laws and policies in the country are yet to find a solution to. Despite the fact that the federal and state governments presently engage in a serious drive for educational development, the lack of political will to ensure the stemming of corrupt practices still looms large in achieving access to basic education beyond threshold level.

Secondly, while human rights law accords the right to education a justiciable right status, the main legal instrument of Nigeria, CFRN 1999, still treats education as a mere fundamental

¹¹⁸ Paras 61-62(a) of the UN Committee on the Rights of the Child: Concluding Observations: Nigeria available at <http://www.refworld.org/docid/43f3053c0.html> (accessed 17 September 2013).

objective of state principle. This is perceived to be a major clog in the wheel of realising the right to basic education in Nigeria. It is reiterated that a constitution as the legal authority should provide unequivocally for the legal duties that are placed on governments as the custodians of the rights of citizens and inhabitants of its territory. As will be advanced in chapter five, the justiciability of the economic, social and cultural rights goes a long way to ensure that there is a checks-and-balances system in place to monitor the realisation of such rights, such as education, water, food and shelter, albeit on a progressive basis.

Thirdly, the failure of the academic curriculum to empower the Nigerian child, to lead the child out, and to make the child useful to the community is a major deficiency in the various educational policies that have graced the landscape of Nigeria. It is either that the curricula were laden with content that remained unacceptable, or they were laden with content that contained teachings that were at variance with the religious or cultural beliefs of recipients.

While this thesis does not subscribe to the teaching of harmful cultural practices, it argues that a large part of curriculum content of the basic education syllabus in Nigeria either reinforced stereotypes against the girl child,¹¹⁹ discrimination and ethnicity, or showed a large paucity in the acquisition of literacy and numeracy skills.

Fourth, considering the lack of recognition of the local peculiarities of various communities in Nigeria, largely occasioned by means of livelihood, the colonial educational policy was not fashioned in such a way so as to accommodate the peculiarities of various groups. The emergence of education styles, such as the nomadic and fishermen models of schools, came at a very late stage in the educational history of the country. This occasioned a big gap in

¹¹⁹ 'The Nigerian girl currently lags behind in terms of education. The overall adult literacy rate among the males was 79.3 per cent while that of females was 63.7 per cent in 2010.' See the report 'Nigeria's path to sustainable development through green economy country report to the Rio + 20 Summit June 2012' 39 available at <http://sustainabledevelopment.un.org/content/documents/1023nigerianationalreport.pdf> (accessed 13 September 2014).

education that is enormous to be filled.¹²⁰ The present efforts by the government to establish *Almajiri* model type of schools is an initiative that is long overdue. It, however, remains to be seen to what extent the political will is able to ensure proper implementation.

Fifthly, while human rights law places an obligation on both the government and the individual to ensure the realisation of the right to access of basic education, the law and policy in Nigeria lay a greater emphasis on the legal implications on individuals.¹²¹ As already pointed out, the various laws, like the UBE Act, stipulates serious punishments facing parents and guardians who do not ensure the attendance of school by their pupils but, in the same vein, does not hold governments responsible for not ensuring access and completion rates, influenced by several factors already discussed.¹²²

Sixthly, due to a lack of proper planning, Nigerian law and policy have failed to comply with the budgetary obligation towards the realisation of the right to education. The impact of budgetary decisions will be discussed in detail later in this research. However, it is important to reiterate that the budgetary commitment to education on the part of government still falls below acceptable standards. While it is conceded that substantial amounts of funds have been voted towards the realisation of the right to basic education, a large portion of these funds has been mismanaged either by the executive at both federal and state levels or by other officials with the responsibility of implementing the allocations. Consequently, while it may be argued that Nigeria in time past has tried to cover the *lacuna* of poor financing by providing funds, it has been alleged that the funds are in most cases diverted. In this regard, Ezekwesili points

¹²⁰ Present statistics show that 60 per cent of children in urban areas attend secondary school, compared with 36 per cent of those in rural areas. See the report (n 108 above).

¹²¹ The Delta State of Nigeria commissioned the EduMarshal, with the responsibility of apprehending children out of school and prosecuting their parents. While this may sound laudable, it is to be noted that other factors that are responsible of keeping children out of school in most circumstances are linked to the state yet there is no judicial means of seeking redress.

¹²² See eg 'Ekiti warns parents against withdrawing wards from schools' available at <http://www.ngrguardiannews.com/national-news/132654-ekiti-warns-parents-against-withdrawing-wards-from-school> (accessed 13 September 2013).

out that ‘some governors used the funds earmarked for recruiting teachers under the UBE scheme to hire thugs and praise singers’.¹²³ It is, therefore, the state’s failure to ensure the monitoring of budgetary allocation that has remained a clog in the wheel of the realisation of the provision of access to basic education in Nigeria.

Finally, the laws during the military regime in Nigeria were not teacher-friendly. The military era, ensured that there was no respect for the right to a fair hearing, which led to the dismissal of several teachers. The frequency of strike actions occasioned by the poor remuneration of teachers, and the very stringent implications of the SAP regime ensured that the education system in terms of law and policy fell short of international standards in Nigeria.

Therefore, while it may be lauded that the development of law and policy in terms of education in Nigeria has been gradual, although slow, it has the potential of initiating a drive towards the realisation of the right to basic education. The positives in the law and policy framework in the educational landscape of Nigeria include, but are not limited to, the present targeted national teachers’ quality assurance approaches, and strategic plans for providing adaptable education.¹²⁴

As set out in the administrations of education presently in Nigeria:¹²⁵

Under Priority Policies for the Development of Education, the Transformation Agenda will be implemented to promote primary enrolment of all children of school age, irrespective of the income profile of the policies, engage in the provision of infrastructure such as; classrooms across all levels, so as to ease over-crowding, increase access and reduce pupil/teacher ratio and enhance the efficiency, resourcefulness and competence of

¹²³ O Ezekwesili ‘Governors diverted UBE funds to hire thugs, praise singers for 2007 polls’ *ThisDay* 22 May 2013.

¹²⁴ See generally K Singh ‘Report of the Special Rapporteur on the Right to Education: Normative action for quality education, May 2, 2012, A/HRC/20/21’ available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21_en.pdf (accessed 13 September 2013).

¹²⁵ n 108 above.

teachers and other educational personnel through training, capacity building and motivation.

4.7 Conclusions

The foundation of education in Nigeria was highly modelled on the British. The advent of the British was not sudden, but rather laden with the many faces of religion, trade and educational amenities. The direct impact of the British influence was felt in the lifestyle of Nigerians as the colonists introduced education appropriate to support the colonial government. This meant that the curriculum for educating the Nigerian child was aimed at achieving usefulness for the purposes of driving the desires of the colonial masters and not in any way achieving the laid-down goals of education as set out in human rights law.

The British style of education challenged religion and converted pupils to same for access and support to education. This approach facilitated the disparity in education between the various regions of the country. While Islamic education thrived in the north, the British-styled education thrived in the south, but with the influence of the British in the south, educational development grew more in the south compared to the poor state of education in the north.

The existence of education policies in colonial Nigeria, starting from 1842 till 1946, were all British-specific and failed to take the peculiarities of Nigerians into consideration. The post-independence Nigeria remained on the same footing as poor planning and negative policies, climaxed by the military flavour in governance in Nigeria, occasioned a great retard in the growth of education in Nigeria.

While several educational policies have existed in Nigeria after independence, the policies have either not been properly implemented or not well designed to meet the goals and objectives of the average Nigerian. The change from one system of education to another

attests to the instability. Currently, the present UBE scheme in Nigeria is a reintroduction of the previously-failed scheme of the UPE. One may therefore conclude that, even though on the policy front, a *lacuna* exists in terms of quality and appropriateness of curricula. The lack of proper implementation remains a major pitfall to the impact of policy on driving the realisation of basic education in Nigeria.

On the legal front, the constitutional development in Nigeria is argued to have forestalled the development of education as a right. However, recent developments relating to the legal framework offer hope as far as proper implementation is concerned. It is important, however, to note the dire need to review the place of the right to education under the CFRN and to elevate it to have the status of a fundamental human right. The UBE Act and the CRA are currently deemed to be a sufficiently innovative basis on which the adjudication of the right to education can be pursued in order to seek enforcement of what the CFRN 1999 terms a mere objective of state obligations. The chapter also contemplated a situation of inconsistencies between the UBE Act and The CFRN and established the need for a review of the CFRN to give full support the UBE Act.

Also clearly identified are some pointers that may be responsible for the non-realisation of the rights of the child in Nigeria, especially with the lack of capacity of the judiciary to engage in a pragmatic way with economic social and cultural rights, personal beliefs and orientation of people, and also the impact of corruption. The poverty level in African states and in Nigeria, in particular, ensures that the ‘impediment of the Nigerian child to grow in a developing country is difficult ... this ensures that it is uneasy for most parents to give their children a normal nutrition, drinkable water and access to education’.¹²⁶ The current collaborative efforts to inject funds to help fight the menace of lack of access to education

¹²⁶ DF Sow ‘The rights of children in the African judicial systems rights’ in E Verhellen (ed) *Understanding children’s rights* (1996) 496 Collected papers presented at the first International Interdisciplinary Course on Children’s Rights.

and to reduce the number of out of school children is one that is worthy, but hopefully the corruption monster does not rear its head.¹²⁷

Finally, the historical perspective on law and policy pertaining to Nigerian education has continued to experience a metamorphosis which needs political will and innovative and proper implementation, to adapt to the Nigerian system and evolve positively towards the realisation of the rights to access to basic education of the Nigerian child.¹²⁸

¹²⁷ Recently, the sum of \$500 million was injected into the Nigerian education sector towards reducing the out-of-school children menace. The Nigeria and Global Partnership for Education has boosted educational development in the country with \$500 million to serve as additional resources to support the development of universal basic education in Nigeria, available at <http://sunnewsonline.com/new/cover/nigeria-global-partnership-boost-education-with-500m-2/> (accessed 13 September 2013).

¹²⁸ According to the report, the transformation agenda of the past PDP government in Nigeria, led by President Dr Goodluck Ebele Jonathan, includes, but is not limited to, Boarding Schools (102 in number) completed or nearing completion under the Almajiri Education Programme spread across all the six geo-political zones of Nigeria. This will help in mainstreaming the Almajiri system with the Basic Education Programme. Construction of model girls and special programmes of campaigns to enhance access to girl-child education in the south-eastern part of Nigeria. Programmes in place for children of nomads, migrant fishermen and street children with emphasis on developing their talents so that they can be economically productive. Female Teachers Trainees scholarship Scheme (FTTS) targeted at female teachers from rural communities who, on completion of their studies, will remain in the communities and teach in these rural schools. Teacher and school leadership development programmes aimed at sponsored overseas training for science teachers, professional development programmes organised by National Teachers Institute, Universal Basic Education Commission and Tertiary Education Trust Fund and Training for Head Teachers, principals and Vice-Principals to enhance their leadership activities. See generally Nigeria's path to sustainable development through green economy country report to the Rio + 20 Summit June 2012, 79 available at <http://sustainabledevelopment.un.org/content/documents/1023nigerianationalreport.pdf> (accessed 13 September 2014).

Chapter 5

Comparative analysis of jurisprudence and legislation governing the right of access to basic education

The realisation of the right to basic education is a tripartite function. It requires the role of the legislature in putting adequate laws in place either in terms of policies and more particularly constitutionally. The Executive must in turn ensure the will to ensure the realisation and implementation of the legislative outcomes without limitation and budgetary excuses; the judiciary in turn plays the arbiter role in ensuring the proper interpretation and compliance of all the laws and implementation process all geared towards ensuring that the right to a basic education are not compromised in any way.¹

5.1 Introduction

This chapter analyses the extent and manner in which legislative policies, executive implementation and the judiciary have been able to help in advancing the right of access to basic education, considering that there is a proven gap in using existing national laws, policies and international legal obligations of the Nigerian government to promote, fulfil and protect the right of access to basic education. To achieve this, the chapter will analyse legislation and jurisprudence from other jurisdictions. Mainly, the jurisdictions that are analysed are South Africa's and India's. In addition, the jurisprudence from quasi-judicial bodies in the African human rights system will also be perused alongside some decisions from the United Kingdom. The chapter also discusses the role of NGOs in advocating the right of access to basic education in both countries.

The grounds for considering South Africa and India are based on the similarities between the two countries and Nigeria, already stated in chapter 1, especially in light of the legal

¹ A Skelton 'How far will the courts go in ensuring the right to a basic education?' (2012) 396 *SAPL* available at [http://repository.up.ac.za/bitstream/handle/2263/31762/Skelton_How\(2012\).pdf?sequence=1](http://repository.up.ac.za/bitstream/handle/2263/31762/Skelton_How(2012).pdf?sequence=1) (accessed 220 April 2014). See also generally A Skelton 'Leveraging funds for school infrastructure: The South African "mud schools" case study' available at http://repository.up.ac.za/bitstream/handle/2263/41581/Skelton_Leveraging_2014.pdf?sequence=1 (accessed 7 July 2015).

framework, the roles of NGOs and the judiciary. It is important to restate the similarities evident in the advent of Western education in both South Africa and India. As was the case with the evolution of Western education in Nigeria, South Africa shares the same history with the influence of both missionaries and colonialists evident.² India, as a Commonwealth nation, has a fair share of influence of the British in its education style and system. Also, India shared the notion of non-justiciability of the right to education, like Nigeria, yet India managed to develop jurisprudence in this area. The role of the British as the progenitors of Western education informs the brief discussion of some cases from the British jurisdiction to show the recognition of the role of the judiciary in helping the realisation of the right to education.

In addition, the author's visit to India in December 2013 provided him with information on the situation of the role of courts in India in protecting the right to education, while he is resident in South Africa during the period of the research.

According to a UNESCO report, Nigeria ranks the number one country with more out of school children. In 2008 India was ranked third, but in the 2011 report is ranked eleventh; South Africa is not ranked among the first ten countries. With respect to poor performance regarding access to basic education,³ Nigeria has gone from about 5 million to 10 million in recent rankings.⁴ It is therefore analysed from the legal prism if the courts via the law have played a role in ensuring access to education in both India and South Africa.

The need to examine the role of the judiciary is premised on the fact that the judiciary has the 'ability to ensure the interpretation of the right to access of basic education as well as other rights firmly aided by the expectation of the judiciary defending the core values which are

² See generally C Simbo 'Defining the term basic education in the South African Constitution: An international law approach' (2012) 16 *Law, Democracy and Development*.

³ See the UNESCO Institute for Statistics Edustats, October 2012.

⁴ UIS Fact Sheet, June 2013 available at <http://www.uis.unesco.org/Education/Documents/fs-25-out-of-school-children-en.pdf> (accessed 21 February 2014).

part of world jurisprudence and part of the evolving constitutional development'.⁵ The UN Special Rapporteur on the Right to Education, capturing the role of the judiciary in advancing the right to education, stated:⁶

The role of adjudication is to ensure that the right to education as an internationally recognised right as established by numerous treaties and legislation is respected, protected and fulfilled. Its most basic tenets, free and compulsory primary education for all, the progressive realisation of secondary and tertiary education, and the immediate non-discrimination in their application, are universally recognised.

The effectiveness of the role of the judiciary in ensuring the realisation of the right to education is seen from the ground-breaking case of *Brown v Board of Education*⁷ in the United States of America. Be it as it may, *Brown* continues to elicit numerous criticisms and support, but the jurisprudence has helped in enshrining the rights in education which has its core value towards the respect of human dignity and avoidance of inequality and discrimination. Dell succinctly captured the importance of *Brown* by stating that 'the goals in school desegregation suits remained the effective use of the Brown mandate to eliminate state sanctioned segregation'.⁸ The case of *Brown* and several others will be examined in the chapter to ascertain the viability of advocating that Nigerian courts must engage with the issue of the realisation of the right to basic education.

The chapter proceeds firstly by examining the legal framework of basic education in South Africa and India, enumerating some noticeable challenges and then examining the judicial jurisprudence in advancing the realisation of the right to basic education in both jurisdictions.

⁵ A Sachs 'Social and economic rights: Can they be made justiciable?' (2000) 1388 53 *SMU L Rev*.

⁶ K Singh 'Report of the Special Rapporteur on the Right to Education, justiciability of the right to education' A/HRC/23/35, 10 May 2013, para 13.

⁷ *Brown v Board of Education* 347 US 483, 1954.

⁸ DA Bell Jr 'Brown v Board of Education and the interest-convergence dilemma' (1980) 529 *Harvard Law Review* 518 1979-1980.

5.2 Basic education - A South African perspective

The basis for the realisation of the right to access to basic education in South Africa is the Constitution.⁹ It provides: ‘Everyone has the right to a basic education, including adult basic education.’¹⁰ The provision for the right to a basic education is enshrined in chapter two of the Bill of Rights and eliminates the question of its justiciability. The need to bridge the gap created in the education of black South Africans entrenched by apartheid rule is informative in the recognition of education within the Bill of Rights of the South African Constitution. The further ambit of the concept of ‘everyone’ within the South African jurisdiction, meaning everyone within the country, is also a laudable one. Thus, access to basic education does not discriminate between citizens and non-citizens.

An identified challenge in South Africa is the scope of basic education and that of equal education, noting the disparity in the education of black and white South Africans as perpetuated by apartheid rule.¹¹ This challenge is also evident in Nigeria as the restriction on years, as obtainable in Nigeria, may be used as a hindrance to the realisation of quality basic education.¹² This is against the backdrop of factors, ranging from poverty to cultural limitations that may inhibit the early commencement of basic education. Consequently, the age restriction in South Africa, like India, may pose some challenges to the achievements of the purpose of basic education. It is thus the postulation of this thesis that basic education must be pursued irrespective of the age of the child or individual.¹³

⁹ Constitution of the Republic of South Africa, 1996.

¹⁰ Sec 29(1) South African Constitution.

¹¹ V Calderhead ‘The right to an ‘adequate’ and ‘equal’ education in South Africa: An analysis of s 29(1)(a) of the South African Constitution and the right to equality as applied to basic education. Section 27 and equal education’ (2011) 13 available at <http://www.section27.org.za/wp-content/uploads/2011/04/The-Right-to-a-Basic-Education.pdf> (accessed 2 April 2014).

¹² In the majority of disadvantaged communities in Nigeria, children access school at a very late stage of their lives and can easily be deemed to be ruled out in the scope of basic education.

¹³ To take care of this challenge, the notion of adult basic education also exists, but it is not within the scope of this research. However, to avoid the challenges that this may portend, basic education should be seen as

It is the position of the research not to concede the fact that the recognition of basic education as compulsory and that of tertiary education to be subject to progressive recognition is an important one, considering the challenges of resources in most African countries. This position is in line with the provision of the ICESCR. Article 2 thereof provides:

- (1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
- (2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

Consequently, the cogent efforts to ensure that access to education is fully entrenched as a right in African countries, especially in Nigeria, must be sustained by engaging in both legislative and collaborative initiatives. It is argued that ‘basic education does not relate to the number of years of education to which a child is entitled but rather to the adequacy of the education’.¹⁴ Consequently, the best interests of the child must be taken into account in the concept of basic education and not the age of the child.

the point when an individual is able to engage meaningfully with society. For more insight into adult basic education, see generally J Lauglo ‘World Bank Africa Regional Office Human Development Sector 2001. Engaging with adults: The case for increased support to adult basic education in sub-Saharan Africa’ Africa region human development working paper series, World Bank, Washington, available at http://siteresources.worldbank.org/AFRICAEXT/Resources/engage_adults.pdf (accessed 23 April 2014).

¹⁴ This view is expressed by Berger and Wolman and is re-echoed by Skelton. See Skelton (n 1 above) 403-404.

The emergence of the term ‘basic education’ within the South African jurisdiction is rooted in the work of the ‘technical committee that supported the 1993 negotiations that led to the interim Constitution’.¹⁵ Calderhead opines that the couching of the section on basic education in the South African Bill of Rights is a direct offshoot of the influence of the provisions of various international law instruments, particularly with respect to the World Declaration on Education.¹⁶

In restating the purpose of basic education in South Africa, Calderhead echoes the provisions of the White Paper on Education and Training,¹⁷ drawing a direct link with the purposes obtainable in international law. In giving credence to this approach, the South African Constitution provides that recourse must be had to international law in the interpretation of the provision on the right to education.¹⁸ A direct significance of this is that, when faced with issues bordering on the right to education, the provisions of international law on the right to education will take precedence over South African law and policies.¹⁹

This is a sharp contrast with the position in Nigeria, where recourse is singularly had to the constitutional provision that treats the right to access of basic education as a mere fundamental principle of state objective. The general consensus in both India and South Africa is enshrined in the judiciary, which insists that the ‘state refrains from engaging in acts that are capable of depriving an individual the minimal core decencies of life’.²⁰ The drive towards the realisation of the right to education stems more from the ‘growing acceptance all over the world that certain core fundamental values of a universal character should penetrate

¹⁵ Calderhead (n 11 above).

¹⁶ As above. See generally C Simbo ‘Defining the term ‘basic education’ in the South African Constitution: An international law approach’ (2012) 16 *Law, Democracy and Development*.

¹⁷ White Paper on Education and Training Notice 196 of 1995 Department of Education, Parliament of the Republic of South Africa, Cape Town, 15 March 1995, WPJ/1995 <http://www.education.gov.za/LinkClick.aspx?fileticket=855fT9w3A2U%3D&tabid=191&mid=484> (accessed 26 February 2014).

¹⁸ See sec 39(1)(b) of the South African Constitution.

¹⁹ Calderhead (n 11 above) 9.

²⁰ Sachs (n 5 above).

and suffuse all governmental activity, including the furnishing of the basic conditions for a dignified life for all'.²¹

In addition to the above, South Africa, as a signatory to all major global and regional law instruments that provide for the right to basic education, strives to keep to its obligations. Apart from the legal provisions, there is also legislation providing for the right to basic education.²² The Department of Basic Education (DBE) is saddled with the responsibility to enhance the realisation of the right to basic education.²³

While the position of basic education is lauded in South Africa, scholars have reservations on some major challenges that still face the sector. The right to basic education and ensuring its quality in South Africa is a major concern. For instance, it is on record that:²⁴

The attempts of students from sprawling informal settlements and poor townships and rural areas to link poverty to the obstacles that prevent them from accessing and receiving quality education has become a feature of community struggles in the past year in South Africa.

From the above, it is clear that a major challenge is that of content, which is directly linked to quality. The reality of the need to ensure that the content of basic education is of a quality nature and to ensure that within the scope, the best interests of the child are enhanced and protected continues to be a huge source of concern in the South Africa.²⁵ This challenge is

²¹ As above.

²² See generally <http://www.education.gov.za/DocumentsLibrary/Legislation/Acts/tabid/185/Default.aspx> (accessed 26 February 2014); South African Schools Act 84 of 1996 available at <http://www.education.gov.za/LinkClick.aspx?fileticket=808cFmkP8U4=> (accessed 26 February 2014).

²³ The DBE is tasked with providing primary and secondary education. See generally <http://www.education.gov.za/TheDBE/AboutDBE/tabid/435/Default.aspx> (accessed 26 February 2014).

²⁴ CA Spreen & S Vally 'Education rights, education policies and inequality in South Africa' (2006) 353 *International Journal of Educational Development* 26.

²⁵ For divergent comments and opinions on the state and quality of basic education in South Africa, see generally K Wilkinson 'Why the matric pass rate is not a reliable benchmark of education quality' available at <http://africacheck.org/reports/why-the-matric-pass-rate-is-not-a-reliable-benchmark-of-quality-education/> (accessed 26 February 2014); S van der Berg, S Taylor & M Gustafsson 'Improving education quality in South Africa. Report for the National Planning Commission September 2011' available at <http://resep.sun.ac.za/wp-content/uploads/2012/10/2011-Report-for-NPC.pdf> (accessed 26 February 2014); S Woolman & B Fleisch *The Constitution in the classroom: Law and education in South Africa 1994-2008* (2009).

further expressed in the fact that the ambit of basic education as envisaged by section 29(1) is directly tantamount to ensuring quality education.²⁶ Consequently, the task of ensuring quality and quantity in South Africa still looms large.²⁷

Another factor is that of the issue of separation of powers. The balancing of the responsibility expected of the various arms of government has been a challenge which to a large extent is posited in this research by reason of the current case law from South Africa to be settled. This is because the fear of breaching the separation of power concept has also been laid to rest in some of the roles courts have played in South Africa. Consequently, the status of socio-economic rights generally in South Africa has found grounding in the understanding that rights are indivisible in nature. It is believed in the South African jurisprudence that, although ‘socio-economic rights are not universally accepted as fundamental rights, they are at least to some extent justiciable; and at the very minimum can be negatively protected from invasion’.²⁸

In South Africa, while it is accepted that the executive and the legislature have inherent powers to administer the states resources, it is noted that the role of the judiciary is also very important. As argued by Mubangizi, ‘[i]t is mainly through judicial enforcement that the realisation and enjoyment of socio-economic rights takes place’.²⁹ This position is echoed by Brand when he asserts that the judiciary can effectively drive the protection of economic, social and cultural rights through its ability to interpret legislation.³⁰

²⁶ Calderhead (n 11 above) 161-164.

²⁷ Simbo (n 16 above). Simbo queries the act of awarding marks by the *Umalusi* unexplained manner of adding marks to matric students. It is stated: ‘There seems to be an unwelcome practice by *Umalusi* of adjusting final marks for matriculants ... without justifying such adjustments.’

²⁸ *Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) in JC Mubangizi ‘The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation’ (2006) 2 *African Journal of Legal Studies* 5.

²⁹ As above.

³⁰ D Brand ‘Introduction to socio-economic rights in the South African Constitution’ in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005)1-15.

In Nigeria, the judiciary also wields the same power and exercises it by the doctrine of judicial precedence while exercising its interpretative role of legislations. However, the dearth of jurisprudence on economic, social and cultural rights, especially the right of access to basic education, raises concern, driving the hope that the outcome of this thesis will engineer a turnaround for the better.³¹

Thus, it is a safe conclusion to assert that ‘the Constitutional Court of South Africa can and has played an important role in the judicial enforcement of socio-economic rights in South Africa’.³² According Sachs J:

I think that just about everyone agree that shelter, education, nutrition, clean water, and basic health services should be universally available. That is no controversy... what is controversial is whether claims to such decencies should be regarded as enforceable fundamental rights in the constitutional order in a way similar to civil and political rights.³³

The situation in India presents an interesting and similar context. While the directive principles of state policies existed, the India Supreme Court have gone on to ‘use the directives of state policy as a means of interpreting the justiciable rights with accusations that they smuggled socio-economic rights in through the back door’.³⁴ This position seems to be supported by Viljoen, when he reiterates the fact that the inclusion of economic, social and cultural rights as directive principles in the Constitution must have some effect.³⁵ Viljoen goes further to opine that ‘directive principles are to serve as part of public policy to guide

³¹ See generally I Imam ‘The myth of judicial activism in Nigeria: Making sense of Supreme Court judgments’ available at <http://unilorin.edu.ng/publications/imami/THE%20MYTH%20OF%20JUDICIAL%20ACTIVISM%20IN%20NIGER%20N0%202.pdf> (accessed 26 February 2014); AO Obilade *The Nigerian legal system* (1979). As canvassed by Imam, the ability of the court to deviate from existing decisions provides the court with an opportunity of laying down new precedents to be followed and relied on (see Imam above 5). CA Obiozor ‘The constitutional vesting of judicial powers in the judicature in Nigeria. The problem with section 6(6)(d) of the Constitution 1999’ (2010) *Nigeria Institute of Advanced Legal Studies (NIALS) Law and Development Journal* 218-230.

³² Mubangizi (n 28 above).

³³ Sachs (n 5 above).

³⁴ As above.

³⁵ F Viljoen *International human rights law in Africa* (2012) 551.

the authorities and agencies ... to achieve these principles progressively legislative or otherwise but only enforcement is outlawed'.³⁶

Seeking to enshrine not just the right to education, but all other economic, social and cultural rights, in chapter 4 of the Nigerian Constitution³⁷ would not be an easy task to accomplish as even South Africa faced the same challenges during the drafting of its current Constitution. As posited further by Sachs J, '[t]he great battle was not so much over whether social and economic rights should be incorporated, but over how they should be incorporated: as justiciable rights in the ordinary way, or as mere directives of state policy'.³⁸ The positive is that, despite the challenges, economic, social and cultural rights are contained in the South African Bill of Rights, and the South African Constitution is today lauded as one of the most progressive in the world. The thesis takes into consideration the huge economic demands that this entails considering the population of Nigeria but, considering the obligation of Nigeria under article 2 of the ICESCR, it is encouraged. Another challenge that is taken into consideration here is the lack of political will. This, however, is surmountable if the corruption must be curbed.

In addition, an important standard worthy of emulation is the content of the right to basic education within the South African jurisdiction. As succinctly put by Calderhead:³⁹

The point here is that it may well be a mistake to equate the content of the right with what government has either enacted or chosen to set out in white papers ...s 29(1)(a) on the other, support a position which refuses to defer to government's contentions regarding the scope of the right.

³⁶ Viljoen (n 35 above) 552.

³⁷ This is the chapter that houses the rights that are generally perceived to be justiciable.

³⁸ Sachs (n 5 above).

³⁹ Calderhead (n 11 above) 16.

It is also important to note that there is no limitation of the right to basic education, even subject to the limitation clause found in the South African Constitution.⁴⁰ Skelton is of the view that:⁴¹

s29 (1) (a) guarantees the right to a basic education and not merely access to the right; the State must provide education, and not merely to take reasonable legislative and other measures within available resources, to achieve the progressive realisation of this right.

In buttressing this view point, it has been held that:⁴²

To understand the nature of the right to ‘basic education’ under section 29(1) (a) unlike some of the other socio-economic rights this right is immediately realisable. There is no internal limitation requiring that the right to be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’.

Despite the above *dictum*, it is important to reiterate that in the event of remedial awards by the court,⁴³ the executive has opportunities of contributing to ensure the realisation of the right.⁴⁴

⁴⁰ Sec 36 of the South African Constitution provides for a limitation of the rights provided for in the Bill of Rights. However, Calderhead opines that this position does not extend to the right provided in sec 29(1)(a). See generally Calderhead (n 11 above) 36. See also *Augusto v Electoral Commission* 1999 (3) SA 1 (CC). In this case, the Constitutional Court found that government’s inability to fulfil a particular right will not be a sufficient basis for the government to invoke the limitation clause of the Constitution.

⁴¹ Skelton (n 1 above); A Skelton ‘The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent education case law’ (2013) 3 *De Jure*.

⁴² *The Governing Body of the Juma Musjid Primary School v Essay (Centre for Child Law as Amicus Curiae)* 2011 7 BCLR 651 (CC) para 37.

⁴³ Sec 172 of the South African Constitution provides for the remedy powers of the courts. It provides: ‘(1) When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. (2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court [para (a) substituted by sec 7 of the Constitution Seventeenth Amendment Act of 2012]. (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct. (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court. (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

Thus, unlike in Nigeria, where it is legislation that is the fulcrum of the realisation of the right to basic education,⁴⁵ the Constitution is the fulcrum in South Africa. It is, therefore, believed that this provides a strong basis for the litigation bordering on the realisation of the right to basic education within the South African jurisdiction, and Nigeria should emulate this.

However, the questions that beg for an answer are whether the courts have played any significant role in this regard, and to what extent the courts should embark in pursuit of the realisation of the right to basic education. In answering these questions, a major challenge, as envisaged by Skelton, is establishing the ambit of basic education and the propriety of the court delving into issues of quality. However, Skelton posits that:

Even if we have not established what a basic education consists of, the fact that some children enjoy a dramatically better standard of education would certainly be simple to demonstrate, based on infrastructure, conditions, class sizes, and indicators such as test scores.⁴⁶

Consequently, the courts are empowered to make a comparison in terms of equality in ensuring that the provision of basic education is devoid of all signs of inequality.⁴⁷ This situation is still very prevalent in Nigeria with the unequal treatment and provision of education to areas classified as hard to reach areas in Nigeria.⁴⁸

It is important to note that the ‘judicial power of the Constitutional Court to strike down laws as invalid if they are in conflict with the Constitution is an essential part of a constitutional democracy’.⁴⁹ This consequently empowers the judiciary in the exercise of its oversight function on both the legislature and the executive in the implementation of execution of laws

⁴⁴ Skelton (n 1 above).

⁴⁵ The UBEC ACT 2004 is the law that enshrines the protection of the right to basic education in Nigeria.

⁴⁶ Skelton (n 1 above).

⁴⁷ Calderhead (n 11 above) 47.

⁴⁸ The Mbamili region of Anambra State represented in the Anambra West Local Government area represents one of such localities that can benefit from the jurisprudence in this case. During the course of the LLD research, the author took a tour of the entire local government producing a documentary on the state of basic education in the region.

⁴⁹ Calderhead (n 11 above) 393.

and policies that hinge on the realisation of the right to basic education. It is also noted that, in line with the doctrine of the separation of powers, the judiciary is expected to exercise sufficient limits and caution by ensuring that it does not violate or go overboard in adhering to the doctrine of separation of power, as espoused in the case of *Premier, Mpumalange v Executive Committee of State-Aided Schools, Eastern Transvaal*.⁵⁰

5.3 Basic education - An Indian perspective

At independence, the right to education was provided for in the Indian Constitution as a mere fundamental objective of state principles.⁵¹ Article 45 provides for education: ‘The state shall endeavour to provide within a period of ten years from the commencement of the Constitution for free and compulsory education for all children until they complete the age of 14.’ The challenge of placing an age restriction on the realisation of basic education is already espoused above.

From the period leading up to 1947, the state of education remained abysmal in India, but current statistics show some hope in the growth of the percentage of children able to access basic education.⁵² Presently, article 21(A) of the Indian Constitution recognises the right to basic education as a fundamental right. Article 21(A) provides that ‘[t]he state shall provide free and compulsory education to all children of the age of 6 to 14 in such a manner as the state may by law determine’.

⁵⁰ 1999 (2) SA 91; 1999 BCLR 151.

⁵¹ N Singal ‘Inclusive education in India: International concept, national interpretation’ (2006) 351 *International Journal of Disability, Development and Education*.

⁵² UNICEF statistics show that presently only about 1,6 million Indian children are out of school. See <http://www.uis.unesco.org/Education/Documents/fs-25-out-of-school-children-en.pdf> (accessed 8 April 2014). While Nigeria ranks as the number one country with the highest number of out of school girls, India is ranked third, while South Africa is not in the worst 10 categories. See <http://www.worldbank.org/education/edstats> VI Issue 2 (accessed 8 April 2014).

The statistics on children who are able to access basic education differ from one region to another. While Southern Nigeria boasts of greater access to basic education than the northern region, in India it is said:⁵³

The Indian scenario is too complex and varied to be effectively captured through aggregate national figures in relation to the availability of schooling facilities across the country and their optimum use for educating all children. At one end of the spectrum, there is Kerala with practically every child completing elementary school and transitioning to secondary school; and almost every school having at least five teachers and five classrooms. At the other end, there is Bihar where only one out of two children in the relevant age group is in school; the majority of children entering school fail to complete an elementary cycle; many schools are understaffed; and teachers are often untrained and given little academic support.

The above captures the challenges of quality which are also akin to the situation in both Nigeria and South Africa. The difference remains that in both South Africa and India, the progressive improvement in the level of access and quality has some judicial flavor and is not just left to the whips of the political class.

The task of realising and enhancing the right to access of basic education in India became a national project as early as 1960. According to Govinda and Madhumita, three factors are crucial to achieving the goal, namely:⁵⁴

- i. increased direct involvement of the central governments in strengthening the infrastructure and delivery of elementary education;
- ii. new dimension to multi-layered planning and implementation framework;
- iii. social mobilisation.

The interplay of the three identified factors is conceded in this research to be pivotal to ensuring the realisation of the right to access of basic education. For instance, it is important

⁵³ R Govinda & M Bandyopadhyay 'Access to elementary education in India. Country analytical review' (2008) 3 *National University of Educational Planning and Administration*.

⁵⁴ As above.

that the Federal Ministry of Education (FME) in Nigeria drives the policy on basic education more concerted and not just leave it for implementation by the various local state boards. It is discouraging to have the FME claim that funds mapped out for the realisation of Universal Basic Education (UBE) in Nigeria are yet to be accessed⁵⁵ and yet no administrative procedure is in place to hold officials saddled with this responsibility responsible for a failure to perform their duties. In India, it is noted that, while the state governments still remain involved in the provision of basic education, the 1986 Indian National Policy on Education⁵⁶ places a huge onus on the federal government to ensure compliance with the education policy. It provides:⁵⁷

While the role and responsibility of the states in regard to education will remain essentially unchanged, the *Union Government would accept a larger responsibility* to reinforce the national and integrative character of education, to maintain quality and standards (including those of the teaching profession at all levels), to study and monitor the educational requirements of the country as a whole in regard to manpower for development, to cater to the needs of research and advanced study, to look after the international aspects of education.

The structure of education in India is divided into the 10-2-3 system. The first 10 years represents ‘a broad-based general education for all pupils’.⁵⁸ In this structure, the first 8 years represent the basic education paradigm and is ranged between the ages of 6-14. In addition, the basic education bracket is divided into two broad perspectives, with the first 5 years termed ‘lower primary and the last 3 ‘upper primary’.⁵⁹ It is noted that some variation exists

⁵⁵ L Akinboade ‘FG blasts states for not accessing N41 billion UBE fund’ <http://www.vanguardngr.com/2014/01/fg-blasts-states-accessing-n41-billion-ube-fund/#sthash.fEiv8Oj0.dpuf> (accessed 30 April 2014).

⁵⁶ Indian National Policy on Education, 1986 available at http://www.ncert.nic.in/oth_anoun/npe86.pdf (accessed 30 April 2014).

⁵⁷ Indian National Policy on Education, 1986 sec 3.13 available at http://www.ncert.nic.in/oth_anoun/npe86.pdf (accessed 30 April 2014) (my emphasis).

⁵⁸ Indian National Policy on Education (n 56 above).

⁵⁹ As above.

with some of the various states adopting different patterns in order to suit the specific needs of their regions.⁶⁰

Currently in Nigeria, as shown in chapter one, the state of Osun has evolved its own system which is at variance with the national system. However, there is to examine the manner in which this administrative process is managed to ensure convergence with the rest of the academic calendar in Nigeria.⁶¹ It is important that the role of the Federal Ministry of Education is well defined to enable it has the requisite oversight function over the various policies on education advanced by the various states in Nigeria.

Schools in India are run by government, private organisations and NGOs. The Education Guarantee Scheme (EGS) is a scheme that is put in place to ensure that the education of children in the hard to reach areas is achieved.⁶² A sharp contrast with the situation in Nigeria is that the government-run schools continue to provide greater quality and are more accessed by the majority of children in India.⁶³ This is not the case in Nigeria as most parents presently send their children to privately-run education institutions. The effect of this is that the quality in the government-run schools has dropped significantly. Neglect and infrastructural depreciation and poor quality of teachers are added disadvantages.

Also, the reliance on persuasion rather than compulsion has been shown to achieve greater results in India as opposed to the Nigerian situation, where some states have resorted to the use of force in ensuring attendance.⁶⁴ The Indian government, with the support of NGOs, operates both the EGS and also the Alternative and Innovative Education (AIE) schemes. The

⁶⁰ Govinda & Bandyopadhyay (n 53 above); Singal (n 51 above).

⁶¹ See generally <http://osun.gov.ng/education/delineation-of-schools/> (accessed April 22 2014).

⁶² Govinda & Bandyopadhyay (n 53 above).

⁶³ As above. A contrary view is shared by RC Gretchen, BR Betsy & M Karthik 'A profile of the Indian education system' (2006) 4 paper prepared for the New Commission on the Skills of American Work Force.

⁶⁴ N Juneja 'Constitutional amendment to make education a fundamental right issue for follow-up legislation' 23-24 available at <http://www.nuepa.org/Download/Publications/Occasional%20Paper-33njuneja.pdf> (accessed 8 April 2014).

main objectives of the model are to fashion a workable means of ensuring that education is adaptable in all senses.⁶⁵

The role of the Indian courts, like their South African counterparts, in bolstering the frontier of access to basic education cannot be overlooked. The Indian Supreme Court has found that education is a fundamental right that must be treated as such and not just a mere fundamental objective of state principle. In the case of *UnniKrishina JP v State of Andhra Pradesh & ords*,⁶⁶ the Court found that the right to education was akin to the right to life. This case and a number of other cases will be discussed in detail in the latter part of this chapter. In the following section, the Indian Education Act, which is a follow-up to the constitutional requirement for education, is discussed.

5.3.1 The right of children to free and compulsory education in India (RTE ACT)⁶⁷

With the wording of article 21(A) of the 86th amendment of the Indian Constitution, requiring that education be treated as a fundamental right and no longer as a fundamental objective of state policy, the need for defining the ambit of the phrase ‘by law’ became necessary. This led to the enactment of the RTE Act.⁶⁸ The Act provides for access to a neighbourhood school until a child attains the age of 14.⁶⁹ This provision, it is argued, enhances access to basic education in terms of the 1-3km distance advocated under international human rights law.⁷⁰ It further provides for the exclusion of all forms of fees by a child.⁷¹

⁶⁵ Govinda & Bandyopadhyay (n 53 above).

⁶⁶ SC 2178 (1993).

⁶⁷ Act 35 of 2009.

⁶⁸ The RTE Act is available at <http://eoc.du.ac.in/RTE%20-%20notified.pdf> (accessed 8 April 2014).

⁶⁹ Sec 3(1).

⁷⁰ G Betcherman, J Fares, A Luinstra & R Prouty ‘Child labour, education, and children’s rights’ Social Protection (2004) Discussion Paper Series, 18, available at <http://www.ilocarib.org.tt/projects/childlabour/library/educationchildrenrights.pdf> (accessed 14 April 2014).

⁷¹ Sec 3(2).

The Act places responsibilities on parents, teachers and governments; it respects the rights to education of a child, shielding them from discrimination, degrading and inhuman treatment.⁷² By virtue of the Act, the central government of India reserves a greater responsibility of ensuring compliance on the provision of education in India.⁷³ With the coming into place of the RTE, it is heart-warming to note that India has⁷⁴

moved forward to a rights-based framework that casts a legal obligation on the Central and State Governments to implement this fundamental child right as enshrined in the Article 21A of the Constitution, in accordance with the provisions of the RTE Act.

While the push for a greater number of children accessing education in India remains high, it is also to be noted that, like Nigeria and South Africa, India continues to face the challenges of quality and examination malpractices, as already referred to in chapter three. Apart from the issue of quality, discrimination is another major challenge that plagues the seemingly worthy approach to the access of basic education in India.⁷⁵

Regarding the education of Children with Disabilities (CWD), India has adopted a dual approach solution to this: Special and Integrated Schooling.⁷⁶ However, in compliance with their treaty obligation under human rights law,⁷⁷ India is gradually concentrating efforts towards ‘focusing on educating children with disabilities in the mainstream, this has gathered further momentum as a result of a range of developments at the international and national level’.⁷⁸ India, like Nigeria, continues to struggle with the use of terminology to describe

⁷² Secs 15-17. Note that ch IV of the Act specifically includes the protection of the rights of the child.

⁷³ Ch 7.

⁷⁴ Right to education <http://mhrd.gov.in/rte> (accessed 8 April 2014).

⁷⁵ Singal (n 51 above).

⁷⁶ As above.

⁷⁷ See generally the Salamanca Declaration of 1994 and also the CRPD.

⁷⁸ Singal (n 51 above).

inclusive education. However, it is noted that the need to embrace the solution to the challenge of quality is currently a more important issue.⁷⁹

5.4 South Africa and India - Ahead of Nigeria?

With particular reference on the structure to basic education in South Africa and India analysed above, a peculiar thread is identified. In both countries, unlike in Nigeria, the right to education has metamorphosed from a mere fundamental objective of state principles to being a fundamental human right. The constitutional recognition of the right to education as justiciable has thus encouraged the development of the jurisprudence on issues relating to education.

This has also enhanced the participation of NGOs in engaging in public interest litigation (PIL) and the role of the National Human Rights Commissions of South Africa and India. It is thus safe to conclude that in both legislative and judiciary participation in enhancing access to basic education, India and South Africa are ahead of Nigeria.

The next section of this chapter will discuss some landmark decisions from both jurisdictions with a hope of ascertaining the veracity and importance of recognising education as a fundamental right will have in enhancing access in Nigeria. Also discussed in the section will be select decisions of courts from other jurisdictions, apart from South Africa and India, with the jurisprudence from African human rights institutions. This is done with a view to broadening the scope from which Nigeria should adapt in the bid to realise the right to basic education.

⁷⁹ M Hansungule & AC Onuora-Oguno 'Beyond nomenclature: Special education or inclusive education: advocating quality basic education in Nigeria' presented at the Global Alliance for Justice Education GAJE, India 2013; Singal (n 51 above).

5.5 Jurisprudence on the right to education - South Africa, India and select jurisdictions

Since this section is committed to deciphering the wisdom in encouraging the justiciability of the right to basic education in Nigeria, it is paramount to determine the question of principle set forth in *Brown*⁸⁰ and to ascertain the impact of the judicial involvement on economic and social rights, such as education.

The *Brown* case⁸¹ was predicated on the aspiration to ensure the American Declaration of Independence that ‘all men are born equal’. Following on the several amendments, notably the 14th Amendment, the situation of African Americans remained gloomy as their rights in education; not to be discriminated against remained entrenched.⁸² The *Brown* case represents a ‘consolidation of several cases which though hinged on different facts had a central issue of state sponsored discrimination based on race’ as the underlying basis for discrimination.⁸³ After years of inability to reach a decision; in 1954 Justice Warren read the lead judgment that found that ‘separate but equal has no place in public education’.⁸⁴

Since the decision in *Brown*, reactions to the potency of courts getting involved in issues concerning education have continued to be discussed.⁸⁵ Interest on the veracity of the

⁸⁰ *Brown v Board of Education* (n 7 above).

⁸¹ A brief summary of the facts of the case is hinged on the inability of a mother to send her child to a school which was a distance from their home. However, she was not allowed by state law to send the child to the school which was close by her home as this was exclusively for white children.

⁸² <http://www.uscourts.gov/educational-resources/get-involved/federal-court-activities/brown-board-education-re-enactment/history.aspx> (accessed 9 April 2014).

⁸³ The cases are listed as *Brown v Board of Education of Topeka*; *Briggs v Elliot*, *Davis v Board of Education of Prince Edward County (VA)*, *Boiling v Sharper* and *Gebhart v Ethel*. See generally <http://www.uscourts.gov/educational-resources/get-involved/federal-court-activities/brown-board-education-re-enactment/history.aspx> (accessed 9 April 2014).

⁸⁴ <http://www.uscourts.gov/educational-resources/get-involved/federal-court-activities/brown-board-education-re-enactment/history.aspx> (accessed 9 April 2014).

⁸⁵ See generally JT Patterson *Brown v Board of Education: A civil rights milestone and its troubled legacy* (2001). It must also be stated that, despite the fact that the United States of America does not have the right to access of basic education enshrined in its Constitution, the political will to ensure that every child is not deprived of this is encouraging. Interactions had with colleagues during the American Society of International Law 109 Annual meeting in Washington DC April 8-11 show that the level of commitment by the various states in America seemingly forecloses the need for legislation on this.

decision of the court has been captured by Bell Jnr when he argues that '[b]lack children could possibly be achieving quality education had they remained in black schools segregated from the whites'.⁸⁶ According to Bell:⁸⁷

Demographic patterns, white flight, and the inability of the courts to effect the necessary degree of social reform render further progress in implementing *Brown* almost impossible.

Considering the basis for the decision in *Brown*, as captured by Warren J, it is opined that despite the criticisms and seeming shortfalls in the implementation of *Brown*, enhancing equality in the education sphere is central to ensuring that education achieves the objective of upholding human dignity. In the words of Warren:⁸⁸

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

It is, however, agreeable that the role of the courts is germane and pivotal to ensuring that the right to access of basic education is achieved. While there was a genuine pitfall in the implementation of the decision of the *Brown* case, the recommendation of Mbazira is important. According to Mbazira:⁸⁹

⁸⁶ Bell (n 8 above).

⁸⁷ As above.

⁸⁸ http://www.ushistoryatlas.com/era9/USHAcom_PS_U09_brown_R2.pdf (accessed 9 April 2014).

⁸⁹ C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 118.

An effective remedy is therefore one that embraces and considers the problems that are likely to be encountered at the implementation stage. The court should look at the end results of its remedy and consider its long term effectiveness.

Effectively, the flaws in the manner and pattern of the US court in *Brown* not laying down cogent and definite means of realising the judgment should not in any way be a discouraging factor. It is important to follow Mbazira's approach by ensuring that remedies called for by courts are not impossible and do not place overtly unachievable responsibilities on the shoulders of the executive.

In the following cases discussed, it will be shown how the South African Constitutional Court and the Indian Supreme Court have tried to achieve this balance in the several decisions they have issued. In some of the cases, the bargain model has been encouraged by the courts to ensure that the resultant effect of the litigant's aspiration is eventually met over a period agreeable to all parties in a pending suit.⁹⁰

5.5.1 South African jurisprudence on education

Despite the historical context of education in South Africa, South Africa has made tremendous legislative and judicial gains in ensuring enhanced access to basic education. The cases analysed below capture the fact that the judiciary in South Africa and India have taken poignant steps to assist enhanced access to basic education. Summarily, the judiciary has played a role in ensuring the elimination of all forms of discrimination in education, ensuring that policies are followed actively to necessitate proper realisation, ensuring that the role of teachers is enhanced by remuneration worthy of their calling, ensuring that the rights of the child trump all other rights in upholding the best interests of the child, and ensuring that the central government's supervisory roles are well entrenched so as to provide a check for the actions of provincial and local authorities. Finally, the judiciary has also ensured that the right

⁹⁰ For discussion of the bargain model in litigation of ESCR, see Mbazira (n 89 above) 183.

to a basic education elicits both a positive right from the government and a negative obligation; making this both a horizontal and vertical responsibility.

*i. The Head of Department: Department of Education, Free State Province v Welkom High School & Harmony High (the Welkom case)*⁹¹ (Access to basic education and the Constitution)

The *Welkom* case hinges on the administrative role of a school governing board as provided for under the South African Schools Act 84 of 1996.⁹² It is also noted that the case is a consolidation of separate cases involving different schools, in the instant case, Welkom and Harmony High Schools. As provided for by the Act, the principal and the School Governing Board (SGB) has the responsibility to lay down the moral rules for the school and make such other decisions as it may deem fit.⁹³ The case further addresses the question of non-discrimination and equal access of education of the girl child, especially on such circumstances as occasioned by gender and sex issues.

In the instant case, Rampai J of the Free State High Court found that the Head of Department acted *ultra vires* in insisting that a school principal carries out orders that are contrary to the rules as adopted by the school governing body. He found:⁹⁴

For as long as the pregnancy policy remains in force, the first respondent is interdicted and restrained from directing the school principal to act in a manner contrary to the policy adopted by the school governing body.

The fact of the case deals with the adoption of a pregnancy policy for learners by the Welkom and Harmony High School boards. The said policy was purportedly adopted in accordance with 'National Department of Education's Measures for the Prevention and Management of

⁹¹ Case 766 & 767/2011.

⁹² <http://www.education.gov.za/LinkClick.aspx?fileticket=808cFmkP8U4=> (accessed 30 April 2014).

⁹³ Sec 20.

⁹⁴ Para 2(a) amended High Court Order.

Learner Pregnancy, which were published in 2007 and intended to assist public schools in managing learner pregnancies as and when they occurred'.⁹⁵

The first instance was the decision suspending access to education of a pregnant learner from 2010 to 2011 after said leave of absence would have been observed by the learner towards the term of the pregnancy and nurturing the baby. On appeal from the parents to the Minister for Basic Education in the Free State and the Human Rights Commission of South Africa, the principal of the school was instructed to rescind the expulsion decision of the learner.

In the second instance, the Harmony school policy of not allowing pregnant learners to have access to school in the same year of pregnancy was also in issue and the principal was asked to rescind the decision by the Head of Department of Basic Education. It is instructive to note that the principals had been advised to absorb the learners pending such a time as the court decision is determined.⁹⁶ Following the decision of the High Court, the South African Human Rights Commission was subsequently admitted as *amicus curiae* alongside the Centre for Child Law.⁹⁷

The main argument as advanced by the *amicus* was on the discriminatory nature of the policy against pregnant learners. Hinged on the provision of the Schools Act to promote the interests of the school and to enhance quality learning experiences of learners, the matter was set forth for appeal. Hinging their argument on the doctrine of collateral challenge, the SGB argued that it was open to pregnant learners to challenge the validity of the policy against them and not that of Members of Executive Council for Education (MEC). MEC in its position sought to enforce its constitutional obligation to protect the right to a basic education of learners as provided under section 29 of the Constitution.

⁹⁵ Para 3.

⁹⁶ This position further reinforces the role the court can play in ensuring that interim measures are put in place and followed in the bid to ensure that no child is deprived of the right of access to basic education.

⁹⁷ Para 7.

The Supreme Court of Appeal found that a public officer could only make decisions as it is empowered by the law. In the instant case, the Head of Department for Education (HOD) was not legally empowered to revoke the decisions of the SGB. However, it could seek other options open to it to review an administrative decision via the court. Contrary to the opinion of the Supreme Court of Appeal, the Constitutional Court opined:⁹⁸

In *Ermelo* the Supreme Court of Appeal held that the function of determining a language policy for a school belonged to the governing body of the school alone and the HOD had no power whatsoever to revoke that function under the Schools Act and his only remedy was judicial review. This Court disapproved of that view and reasoning. In the present case the Supreme Court of Appeal also adopted the reasoning that the power to determine a learner pregnancy policy belonged to the school governing body alone and that the HOD's remedy, if he was unhappy about it, was a judicial review to have the policy set aside. Just as this Court disapproved of that reasoning in *Ermelo*, I am of the opinion that in the present matter that reasoning should also be rejected.

Thus, while upholding the laid-down administrative procedure, a violation of the constitutional right to access basic education was found by the decision of the principal despite acting in line with the SGB policy. In the words of the learned judge, it was stated:

I find that these policies *prima facie* violate constitutional rights and thus order that they be reviewed in the light of the considerations set out in this judgment. Further, I order the respondent schools to engage meaningfully with the Free State HOD in the process of revising their pregnancy policies and to furnish copies of the revised policies to this Court.

The *Welkom* case thus advances the centrality of the right in education. It must be noted that administrative bureaucracies should not be relied on to limit or encroach on the right to education. This decision and reasoning can be expanded to cover prompt decisions by administrators on matters that will affect access to education. It is my conviction that the

⁹⁸ Para 263. WELKOM case <http://www.saflii.org.za/za/cases/ZACC/2013/25.html> (accessed 16 April 2014).

reasoning in this case will assist in the Nigerian situation where several bottlenecks stand in the way of ensuring access to education; for instance claims of states not accessing funds set aside for UBE, simply implies that access would have been limited and inhibited. With the ratio in the present case, it is assumed that the FME may take steps to act swiftly to ensure continuous provision of educational materials and infrastructures where and when needed.

- ii. *Member of the Executive Council for Education in Gauteng Province, Head of Department: Gauteng Department of Education, District Director Johannesburg East D9: Gauteng Department of Education v Governing Body of the Rivonia Primary School Ms Cele, Mr Mackenzie Ms Drysdale (Rivonia case)*⁹⁹ (Right of Access)

The *Rivonia* case captures the challenge presented by limited economic resources available to the different class groups in South Africa. The gap created by apartheid and huge income differences brings to the fore the challenge in fulfilling the constitutional provision enshrined in section 29 of the South African Constitution. It also captures the salient importance of having the best interests of the child in mind when determining the use of economic resources in realising the right to a basic education. The *Rivonia* case further espouses the responsibilities of authorities¹⁰⁰ saddled with the obligation to provide education and the desire of parents to ensure that education of their children is not denied on any basis. Apart from the parents, the Centre for Child Law, the Suid-Afrikaanse Onderwysersunie and Equal Education were admitted in the case as *amici curiae*.

The summary of the facts of the *Rivonia* case deals with the non-placement of a learner who was interested in Grade 1 placement in a school near Johannesburg. Citing filled quota that was set at 120 people by the school authority, the learner was placed on a waiting list. The parents of the learner, not being satisfied with the decision of the school governing board and

⁹⁹ Case CCT 135/12 [2013] ZACC 34.

¹⁰⁰ Gauteng Department of Education; Member of the Executive Council for Education in the Province of Gauteng; Head of the Department of Education in the Province of Gauteng; District Director Johannesburg East D9.

the various government authorities, lodged a complaint with the Gauteng HOD. The Gauteng HOD subsequently ordered that the admission policy of the school be overturned and that the child be admitted, but this was refused by the school principal. The learner was eventually placed in the school by the Gauteng HOD.

The school approached the High Court to contest the contravention of section 5(5) of the South African Schools Act that empowered the school's governing body to take decisions on administrative needs of the school. The court found in favour of the Gauteng HOD, stating that it had the powers to determine the admission capacity of the school and ensuring that the right to a basic education of a child is not denied. However, on appeal, the Supreme Court of Appeal found otherwise, stating that the actions of the Gauteng HOD were arbitrary. The decision of the Supreme Court of Appeal was hinged on the reasoning that¹⁰¹

it would be inappropriate for the Department to be vested with a power to use the additional capacity at Rivonia Primary, because that capacity had been created through additional funds raised by the Rivonia Governing Body. It would be a disincentive for parents to contribute to school funds if the increased capacity created by these funds could be used to accommodate more learners than the Rivonia Governing Body wanted to admit.

In the Constitutional Court, the Court in its wisdom distilled that the prime role of a school's governing board was to 'give effect to the constitutional right to education'.¹⁰² It further recognised the role of the Minister of Basic Education to provide some form of uniformity in the administration of running of basic education.¹⁰³ This is notwithstanding the role various tiers of government have in the administration of education.¹⁰⁴

¹⁰¹ Para 25.

¹⁰² Para 35.

¹⁰³ Para 38.

¹⁰⁴ As is the case in Nigeria, the involvement of local, state and federal governments in education administration should therefore ensure that the minister at the central level shows some form of control over the administration of basic education notwithstanding the administrative decisions of the states and local governments.

The Constitutional Court examined issues of procedural fairness and co-operation between the parties in the case. It reached varying conclusions in the different roles wrongly played by the parties. The Constitutional Court distilled a very crucial issue, ‘the best interests of the child and the impact of the relief sought¹⁰⁵ by the school’.¹⁰⁶ Consequently, based on the best interests of the learner, the Constitutional Court upturned the decision of the Supreme Court. It found that the question of access to education should be handled based on the best interests of a child over and above other administrative and procedural flaws that arise out of uncooperative situations between schools.

The *Rivonia* case also raises interesting perspectives to issues surrounding the administration and realisation of access to basic education. As in the *Welkom* case, the courts upheld the best interests of the child high and above administrative clogs. In the Nigerian instance, it is advanced that the case will also assist in eliminating lack of political will or religious restrictions that affect access to basic education. *Rivonia* will also be instrumental in ensuring that the consistent impasse suffered during the various spates of strikes in the Nigerian education sector will be eliminated.

iii. *Juma Masjid Primary School and Others v Essay NO and Others (Right of availability)*

The *Juma Masjid* case¹⁰⁷ deals with the question of availability. In this case, a public school operating on a private property was successfully evicted by the owners of the property, Juma Masjid Trust. The basis of the case was grounded on the failure of the MEC for Kwazulu-Natal to conclude a proper tenancy agreement. The court of first instance rightly found that the right of the trustee to own property was constitutional but it went further to weigh the

¹⁰⁵ The school had requested that the child be placed in another school pending when the governing board deems it fit to admit the learner to the Rivonia School.

¹⁰⁶ Para 76.

¹⁰⁷ 2011 (8) BCLR 761 (CC).

right to property and the best interests of the child in terms of section 29 of the Constitution, read with section 28 of the Constitution.

The Juma Musijid School was established as a public school with Islamic flavour in 1957 with some expenses paid by the trustee with an understanding of possible refunds by the MEC. Part of the establishing agreement included a clause 14 which was subsequently not adhered to.¹⁰⁸ Following several notices and breached understanding by the MEC on concerns of the trust, relating to rentals and costs incurred, the trust approached the High Court for redress.

The High Court upheld the application of the trust and consequently sanctioned the eviction order against the respondents. The decision of the High Court was grounded on common law and also a failure to keep to tenancy obligations. The High Court further found:¹⁰⁹

The Trust owes no constitutional obligation to the first respondent or to the learners at the school. It has its own constitutional rights to property recognised in terms of section 25 of the Constitution. The obligation to provide compulsory education is an obligation of the Department of Education.

Furthermore, the High Court found that relief from the parents could only be sought against the MEC and not the owners of the property, insisting that closure and eviction of the school from the private property did not constitute a closure of the school as MEC could make alternative arrangements to relocate the school to another premises.

The decision of the High Court was contested by MEC on the premises that the trust was carrying out a public function in line with the South African Promotion of Administrative Justice Act (PAJA).¹¹⁰ It was further argued that the best interests of the learners were not

¹⁰⁸ Para 11.

¹⁰⁹ Para 21.

¹¹⁰ South African Promotion of Administrative Justice Act available at <http://www.justice.gov.za/legislation/acts/2000-003.pdf> (accessed 30 April 2014).

properly taken into consideration. The MEC consequently prayed for the suspension of the eviction order until MEC was able to find alternative solutions.

The Constitutional Court delineated the core issue of negative responsibility on individuals, precedence of the best interests of the child and property rights.¹¹¹ The Constitutional Court laid down the basis of core content of the right to a basic education as envisaged within the Constitution. In its wisdom, it restated that:¹¹²

a ‘basic education’ under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in section 29(1) (a) may be limited only in terms of a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. This right is therefore distinct from the right to ‘further education’ provided for in section 29(1) (b). The state is, in terms of that right, obliged, through reasonable measures, to make further education ‘progressively available and accessible.

In addition, the Court restated the obligation of South Africa under regional and global international law instruments.¹¹³ It thus upheld the significance of basic education stressing the challenges of inadequacy which ultimately affect access to basic education. In addition, the guilt of any parent or person that obstructs access to basic education of a child was highlighted by the Court.¹¹⁴ The Court consequently found that, while the MEC had failed in its positive obligation to provide, promote, protect and fulfil the right to basic education of a child, the trust also had a negative responsibility to ensure that the access to basic education of the child is not obstructed.

¹¹¹ Para 31.

¹¹² Para 37.

¹¹³ Para 40.

¹¹⁴ Para 44.

In reaching this decision, the Constitutional Court read the provisions of section 8 of the South African Constitution¹¹⁵ in line with section 29, finding that the purpose of section 8(2) is¹¹⁶

not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right.

The decision of the High Court was set aside as it did not take into full consideration the best interests of the child. While still granting that the trust takes possession of its property, time was given for MEC to make alternative arrangements to ensure that access to education of the learners are not compromised.

iv. *The Centre for Child Law and others v The Minister of Basic Education and Others*¹¹⁷
(Availability)

The underlying principle in this case is the importance of the availability of teachers as core components of realising the right to basic education.¹¹⁸ Primarily, the case concerns the fundamental right to education of children in public schools, especially in the Eastern Cape province of South Africa. The applicants in this case sought a compelling order on the respondent to ensure the availability of sufficient teachers for schools. In order to achieve this, the remuneration of teachers, the employment of teachers and administrative support for teaching and non-teaching staff are well entrenched.

¹¹⁵ Sec 8 of the Constitution deals with the application and binding nature of the Bill of Rights. It provides: ‘(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.’

¹¹⁶ Para 58.

¹¹⁷ Case 1749/2012.

¹¹⁸ Para 12.

A core aspect of the case includes the role of national government to ensure that the provincial and local councils do all in their power to ensure that constitutional obligations are met.¹¹⁹ In addition, the sacking of about 4 000 teachers attributed to a lack of management was also a basis for contention. Other negative effects that hampered access to education were blamed on lack of funds for programmes on transport, feeding and nutrition.¹²⁰

It was alleged that the Eastern Cape Department failed to carry out its obligation effectively by providing for an ‘effective and efficient budgeting to support pedagogic cum administrative processes in schools’.¹²¹ This was captured in the failure to provide funding for the operations of the schools and shortage of teachers in schools.¹²² The effect of the totality of the facts stated above was that the realisation of the right to a basic education was not only breached, but other fundamental rights were contravened.¹²³

The learned trial judge found that efficient measures must be in place to ensure that budgetary issues do not obstruct the execution of the constitutional rights of the respondents, especially pertaining to the realisation of the right to education. In the *dictum*, the Court opined:

- i. The respondents are obliged to ensure the post establishments for both non-teaching and teaching staff for 2013 for public schools and fill same.¹²⁴

¹¹⁹ See sec 100 of the Constitution: ‘(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and (b) assuming responsibility for the relevant obligation in that province to the extent necessary to (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) maintain economic unity; (iii) maintain national security; or (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.’ Para 6.

¹²⁰ Para 13.

¹²¹ Para 15.

¹²² Para 17.

¹²³ Para 21.

¹²⁴ Para 34.

- ii. Appoint educators on a temporary basis pending the permanent appointment of all vacant substantive posts ...;¹²⁵
- iii. Pay salaries of all educators which the respondents have failed to pay;¹²⁶
- iv. Reimburse all funds spent by schools in paying educators hired privately that have provided the required services.¹²⁷

The judgment thus captures another important role of the judiciary in ensuring that the objectives that are set out by the executive and the legislature are implemented. Efficiency and implementation therefore provide a means via which the right to education must be realised. This case provides an avenue for individuals who are saddled with the responsibility of implementing policies to be held responsible when they fail to do so. Also, the case can provide a leverage to tackle challenges of corruption that is already identified to be one of the major obstacles to the realisation of the right to basic education. It is therefore advanced that an official who fails by omission or commission to ensure that budgetary obligations or administrative responsibility are upheld could be held liable by the law.

- iv. *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* (Access)

The Western Cape Forum comprises of several NGOs working on education for disabled persons. This case considers the issues of economic obligations and the role of education of children with disabilities. The applicants challenged the disparity based on financial support for the education of children with disabilities as opposed to children without disabilities. Furthermore, the distinction between funding and eventual access to education of children with severe disabilities differed from access to education of children with mild disabilities; this was also advanced by the state as a basis for differential funding of the schools.

¹²⁵ Para 35(3).

¹²⁶ Para 35(4).

¹²⁷ Para 6.

While the government accepted the challenges on which the case was grounded, they contended based on the entrenchment of disparity as an offshoot effect of apartheid. In addition, the government further argued a gradual improvement and increase of the number of children able to access education as a reason for inability to increase funding of private NGOs supporting the education of children with disabilities. Furthermore, the usefulness of education to the learners in question was also put forward as it was argued that education could actually do them no good. According to Murungi, the instant case brought to the fore varying obligations of the state to promote, fulfil and honour its treaty obligations; especially the provisions of article 24 of the Convention on the Rights of Persons with Disabilities (CRPD).¹²⁸

The Court in its wisdom rightly scaled the obligation and onus to provide and ensure the realisation of the constitutional right to a basic education to be more on the state as against the obligation on individuals and NGOs.¹²⁹ The Court found that ‘it is unreasonable for a private entity ... to be forced to bear the burden which should be borne by the state’.¹³⁰ The reasoning here resonates with the *dictum* of the Court in the case of *Juma Musijid* discussed above. Furthermore, the reliance on White Paper 6 on inclusive education,¹³¹ which did not contemplate the education of children with severe disabilities, was rejected by the Court in respect of the treaty obligations of South Africa. Particularly, the provision of article 23 of the CRC provides:¹³²

A mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-

¹²⁸ N Murungi ‘The duty to provide basic education for children with severe and profound intellectual disabilities’ http://reference.sabinet.co.za/webx/access/electronic_journals/esrrev/esrrev_v12_n3_a4.pdf (accessed 17 April 2014).

¹²⁹ Para 24.

¹³⁰ As above.

¹³¹ <http://www.dhet.gov.za/LinkClick.aspx?fileticket=gVFccZLi%2FtI%3D&tabid=191&mid=484> (accessed 17 April 2014).

¹³² Para 20.

reliance and facilitates the child's active participation in the community.

The reasoning of the Court in this case is advanced inherently capable of ensuring collaboration between private agencies involved with the education of persons with disabilities. In Nigeria, some disability homes face extinction because of challenges of funds. Thus, the courts in Nigeria could play a vital role by not requesting that states fund the groups, but in finding ways of integrating and monitoring partnership in this way.

The Court further relied on the provisions of the African Children's Charter,¹³³ the revised European Social Charter¹³⁴ and the Optional Protocol of the CRPD to arrive at a conclusion. Leaning on the reasoning in the *Paul O Donoghue v The Minister for Health, Minister for Education & Others*,¹³⁵ the Court construed the obligation on the government to ensure the provision of education for any child to mean and include 'achievement of fullest potentials'. Thus, the constraint of economic and competing national needs was rejected by the Court.¹³⁶

The courts went further to link the budgetary obligation of the government to the question of equality between all individuals. In this way, any concentration on a group of individuals on the circumstances of birth and physical condition was construed to be tantamount to discrimination and denial of equality in access to basic education.¹³⁷

In holding the Western Cape government liable for a breach of their obligation to fulfil the access to basic education of children, the Court rightly put forward the provision of interim measures towards, ensuring that the realisation of the right to basic education is achieved. This approach as already advocated, provides the court with an opportunity to monitor the

¹³³ Arts 11 & 13.

¹³⁴ Art 15.

¹³⁵ (1993) IEHC 2.

¹³⁶ Para 26.

¹³⁷ Para 27.

progress and steps taken by the executive to realise the constitutional rights of the affected learners.

v. *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay and Others* ¹³⁸
(Acceptability)

The nose ring case represents the position of courts on the rights to education. In this case, the elimination of any form of discrimination based on the grounds of religion was rejected. In the instant case, the learner, Sunali Pillay, wore a nose ring to school in line with her religious obligation. However, as had been established by the SGB, learners were not allowed to wear such ornaments to school. The mother of the learner subsequently took the matter to court, alleging unfair discrimination based on her choice of religion.

The court of first instance found in favor of the school, while the High Court found in favour of the learner. The decision to stop the learner from wearing her religious ornament was declared void as it was contrary to the South African Constitution, notwithstanding the argument of the respondent that enforcing the claimed right of equal treatment by Pillay would eventually amount to discrimination against other learners, and that the act of wearing of a nose stud was voluntary.

When confronted with the case in the Constitutional Court, Justice Lang, in delivering the lead judgment, opined that¹³⁹

the rule prohibiting the wearing of jewelry had the potential for indirect discrimination because it allowed certain groups of learners to express their religious and cultural identity freely, while denying that right to others.

¹³⁸ Case CCT 51/06.

¹³⁹ Media Summary available at <http://www.saflii.org/za/za/cases/ZACC/2007/21media.pdf> (accessed April 18 2014).

The question of discrimination resonates in several community schools in Nigeria. Religion-based discrimination and ethnic based are top among this. The resultant effect is a lack of zeal to access education institutions by learners from poor communities.¹⁴⁰

5.5.2 Indian jurisprudence on education

The role of the courts in India in driving the right to access of basic education can be summed up in these words:¹⁴¹

The Indian Supreme Court has created major reforms in the protection of human rights. Taking a judicial activist role, the Court has put itself in a unique position to intervene when it sees violations of these fundamental rights.

The role of the courts has, however, not been without some criticism as it has been argued to be able to subject the judiciary to ‘judicial excess and rather not a beacon of hope for the oppressed’.¹⁴² As already argued, the role of the judiciary in the South African situation has shown that the fears of the judiciary engaging in overarching decisions are expellable. An important point to note is the willingness of the Indian judiciary to adjudicate on the right to access of basic education even before the recognition in article 21(A) of the Indian Constitution. While it is the author's opinion that the specific mention of the right to education as against other economic, social and cultural rights is linked to the pivotal and the intrinsic nature of education, scholars like Killander perceive it as incidental.¹⁴³

Against this backdrop, the following cases from the Indian jurisdiction are examined.

¹⁴⁰ This was part of the information gathered by the author during his tour of the Anambra West local government area education institutions in 2012. It was observed that children from the area (mostly poor) avoided school because they were abused as never doing well by teachers. The same response was also gathered by the author in 2008 during his research on access to education of indigenous people in Uganda with a particular focus on the Batwa. See generally AC Onuora-Oguno ‘Access to education of indigenous people in Uganda. A case study of the Batwa’ unpublished LLM thesis, University of Pretoria, 2008, available at <http://repository.up.ac.za/bitstream/handle/2263/8005/azubike.pdf?sequence=1> (accessed 24 April 2014).

¹⁴¹ A Rosencranz & M Jackson ‘The Delhi Pollution case: The Supreme Court of India and the limits of judicial power’ (2003) 224 28 *Colum J Envtl L* 223.

¹⁴² As above.

¹⁴³ During an interaction between M Killander and M Hansungule, Centre for Human Rights, 2 April 2015.

i. *Society for Unaided Private Schools of Rajasthan VUOI & Another*¹⁴⁴ (Affordability)

This case dealt with the applicability of the application or otherwise of the RTE Act 2009 with unaided non-minority schools in India. The courts, in considering the legality of the RTE Act to ensure equality in education, established the role of parents, teachers, pupils and ultimately the government as major actors. In addition, the vital role of basic education was well articulated stressing the issues of access to ‘neighbourhood schools’. In interpreting the wording of the Act, the court opined that:¹⁴⁵

The word ‘Free’ in the long title to the 2009 Act stands for removal by the State of any financial barrier that prevents a child from completing 8 years of schooling. The word ‘Compulsory’ in that title stands for compulsion on the State and the parental duty to send children to school. To protect and give effect to this right of the child to education as enshrined in Article 21.

From the above diction of the court, it is decipherable that the onus to protect, promote and fulfil the right to education of a child is hinged both horizontally and vertically. It enunciates the importance of quality education in equal terms to all children. Furthermore, the court found that all forms of hindrance in terms of fee or for fee education must be abhorred to ensure the full realisation of the child’s right to education. In this respect, the role of the government to ensure that religious discrimination advanced to be present in Nigerian schools (especially among the privately-owned religious institutions) will come under the watchful eye of the law.

The provisions of sections 5 and 6 of the RTE Act further espoused definite obligations on the Indian government to ensure the access component of basic education by ensuring that such schools are within a reasonable distance from the community. A time line is envisaged to ensure that the progressive realisation of measurable steps is implemented by a well-

¹⁴⁴ Writ Petition (C) 95 OF 2010.

¹⁴⁵ Writ Petition (C) 95 of 2010. 3 available at <http://www.lawyerscollective.org/files/Right%20to%20Education.pdf> (accessed 22 April 2014).

structured follow-up mechanism. It is based on realising these measures that the court, as advanced in the thesis, is recommended to act as the unbiased arbiter between the institutions, individuals and parents.

In the event where schools that are unaided take responsibility for children, the government is statutorily mandated to ensure the reimbursement of such expenditures to the tune of monies spent on per child basis.¹⁴⁶ Consequently, the court found that provisions that ousted support for some minority schools were contrary to the Constitution and also the RTE Act.¹⁴⁷ The decision in this case resonates to some extent the decision in the *Western Forum* case in South Africa. The role of the government as the sole responsibility owner in ensuring the implementation and the realisation of the right to a basic education cannot be overlooked despite the involvement of private juristic bodies in the education industry.

Thus, the role of the court in the case enunciates the interpretative role of the court in giving an elaborate definition of the meaning and the scope of both law and policy that touches on the right to education. Consequently, it dispels the fears that the court would interfere with obligations or tasks that are not properly suited within their competence.

ii. *Mohini Jain v State of Karnataka*¹⁴⁸ (Access)

This case, although not dealing with basic education, strictly brings to the fore two pivotal comments on the right to education: first, the elimination of fees capable of hindering access to education; second, and the elimination of discrimination in education. However, it must be underscored that the role of higher education, in itself, albeit progressive, is determined by the calibre of people churned out from the basic education sector. This, as opined in the thesis, has a direct impact on the availability of well-skilled teachers that are engaged in the

¹⁴⁶ Sec 12(2) RTE Act.

¹⁴⁷ See the provisions of the RTE Act secs 12(1)(c) & 18(3).

¹⁴⁸ 1992 AIR 1858, 1992 SCR (3) 658.

delivery of quality basic education. Capturing the pivotal role of higher education and primary education, Dlamini Zuma argues that ‘no country can develop based on primary education alone’ arguing for a holistic reconceptualisation of the entire education paradigm in Africa.¹⁴⁹

In the instant case, the petitioner, Miss Mohini Jain, was obligated to pay an amount of money to enable her to gain access to study for the MBBS degree. The said amount was over and above what was tenable and payable by students from Karnataka. Consequent upon her parents’ failure to make tuition payments and provide bank guarantees, admission was denied. It was argued by the respondent that the distinction was a meritorious one as students were placed on ‘government seats’ depending on grades obtained.¹⁵⁰

In the Court's wisdom, some questions were set down for the determination:¹⁵¹

- i. ‘right to education’ guaranteed to the people of India under the Constitution? If so, did the concept of ‘capitation fee’ violate same?
- ii. Whether the charging of capitation fee in consideration of admissions to educational institutions was arbitrary, unfair, unjust and as such violated Article 14 of the Constitution?

Considering the provisions of the right to education under the Indian Constitution, the court’s finding from the perspective of the dignity of man being inviolable was premised on the opinion that education was the bedrock of achieving dignity. The court found that¹⁵²

it was with that hope that Articles 41 and 45 were brought in Chapter IV of the constitution. An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him...

¹⁴⁹ NC Dlamini Zuma, Chairperson of African Union Commission lecture ‘The role of research universities such as the University of Pretoria in the development of Africa’ lecture delivered at University of Pretoria, 24 April 2014.

¹⁵⁰ Para 659.

¹⁵¹ Para 660.

¹⁵² Para 667(f).

The above decision was further predicated on the fact that ‘it is the duty of the state to respect and protect the right to education’.

It is noted that, despite the fact that at the time of the instant case, the right to education was contained as a mere fundamental of state objective which was deemed non-justiciable. The courts were courageous enough to advance that the inclusion of the right in the Constitution was not a ‘mere pious provision’.¹⁵³ The court went further to state strongly that:¹⁵⁴

The ‘right to education’, therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.

The charging of capitation fees was eventually declared to be null and void,¹⁵⁵ a violation of the constitutional right to education and a commitment by the government not to sell education. It was stated that ‘[c]apitation fee is nothing but a price for selling education. The concept of “teaching shops” is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage.’¹⁵⁶ The question that also begs for an answer is whether the concept of ‘teaching shops’ are obtainable within the Nigerian education sphere. Following the analogy drawn by Zuma above, it is important to note that the argument of which is more important may be one of the egg or chicken argument. With the existence of ‘teaching shops’ at the tertiary level in Nigeria, the quality of teachers that are churned out to engage in basic education is increase in quantity but with pure lack of quality.

¹⁵³ Para 667(h).

¹⁵⁴ Para 668(e).

¹⁵⁵ Para 672(g).

¹⁵⁶ Para 670(c).

iii. *Unnikrishnan JP v State of Andhra Pradesh*¹⁵⁷ (Access and pivotal nature of education)

This case brought to the fore the inalienable nature of rights. The case enunciates further the intrinsic nature of the right to education as encompassing even the right to life. The case called for the interpretation of articles 41¹⁵⁸ and 45¹⁵⁹ of the Indian Constitution in line with article 21¹⁶⁰ thereof.

The case was a consideration of the legality of charging capitation fees. Recalling the wisdom of the court in the *Mohini Jahin* case, it is worth noting that the charging of any fees has the capability of limiting access to education, especially considering the level of poverty in developing states, and Nigeria in particular. However, the distinction between higher education and basic education was also drawn by the court. Importantly, it must be underscored that the pivotal nature of education was held to be paramount and not violable.

In articulating the role the court must play in the realisation of the right to education, it was stated that the court ‘must monitor the progressive realisation’ as advanced in article 45 of the Constitution, and ensure it is followed up.¹⁶¹ In this wise, it is also encouraging to note the diction of the court in comparing fundamental rights and fundamental directives of state objectives:¹⁶²

¹⁵⁷ 1993 AIR 217, 1993 SCR (1) 594.

¹⁵⁸ The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

¹⁵⁹ The state shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

¹⁶⁰ The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine.

¹⁶¹ Para 713(e). In paras 716(d)-(f), the court absolves itself of attempting to show priority. However, this position is assumed not coherent with the particular importance attached to basic education as contained in the ICECSR and also as seen in the South African situation. Importantly, however, the role of the court in ensuring that the argument of progressive realisation is not rhetoric is lauded and should also be seen to guide the judiciary in Nigeria in ensuring that economic, social and cultural rights are achieved over stipulated periods.

¹⁶² Para 719(h).

Since fundamental rights and directive principles are complementary to each other, there is no reason why this fundamental right cannot be interpreted in this manner.

This position, finds some credence in the arguments of Viljoen in his discussion of the supposed roles of fundamental objectives of state principle already canvassed in this thesis.¹⁶³

With cases discussed from both the South African and Indian courts, it is important to discuss the jurisprudence of supra-national judicial and quasi-judicial bodies. The discussion of these institutions within the African human rights system is important as it provides a leeway through which the right to basic education may be pursued within the African system, even if the Nigerian judicial system does not open up to the channel to advance same.¹⁶⁴

As already discussed, the ECOWAS Court has upheld and reiterated the importance and justiciability of the right to education in the *SERAP v FGN case*. Consequently, discussed in the following section of the chapters are the jurisprudence of the African Commission and the Committee on the Rights and Welfare of the Child in Africa.

5.6 Challenges to the access to basic education - The African human rights response

5.6.1 Expert Committee on the Rights and Welfare of the Child (Committee)

- i. *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine Pour La Defense Des Droits De L'homme (Senegal) v Government of Senegal*¹⁶⁵(Access and best interests of the child)

This case borders on a complaint instituted based on a claim by parents on their inability to send their children to government schools and rather send them to assumed Quranic schools. It was advanced by the complainants that over '100 000 children aged between 4 and 12' are

¹⁶³ Viljoen (n 35 above) 551.

¹⁶⁴ AC Onuora-Oguno 'Seeking solace from a distance, jettisoning national courts: Reliance on supra-national judicial bodies to realise economic, social and cultural rights (ESCR)' paper presented at the American Society of International Law Conference, 8-11 April 2015, Washington DC, United States of America.

¹⁶⁵ Communication 001/Com/001/2012.

routinely forced by their instructor's *marabouts* to engage in street begging.¹⁶⁶ It was submitted before the Committee that the Act, having lasted over a long period, contravened the Penal Code of Senegal and also a failure to rely on article 74 of the respondent state Constitution; should ground the admissibility of the case before the Committee. The present communication was subsequently found admissible by the Committee, stating:

The African Committee of Experts on the Rights and Welfare of the Child notes and concludes that the communication submitted by the authors has fulfilled all the admissibility conditions as laid down in the Committee's Guidelines on Consideration of Communication; and it is accordingly declared admissible.

While the admissibility of the communication is founded on grounds of compliance with the procedure of submitting communications before the court, it is envisaged that the decision on the merits will advance the responsibility of the state to protect the right to education of the *talibe*s in Senegal. This anticipation is hinged on the fact that access to basic education must be protected and promoted by states, ensuring that funds do not inhibit a child's ability to access schools in African states. The challenge of funds is linked to the effort of eradicating poverty in African states. Poverty is identified to be a major premise on which children are either unable to enrol or drop out of school. According to Molokwu:¹⁶⁷

Extreme poverty and hunger are major problems that the Nigerian government has not been able to solve. Past governments between 1972 and now have mounted at least eight projects that were meant to alleviate poverty...The link between poverty, hunger and human development is very significant. Indeed, poverty and hunger are the exact opposite of human development. All the attributes of human development are deprived by poverty. Poverty is lack of job. Poverty is hunger, poor health, low education, low self-esteem, lack of adequate housing, lack of land, inability to cloth oneself/family low economic status.

¹⁶⁶ Para 2-3.

¹⁶⁷ N Molokwu 'The challenges of reducing poverty in Nigeria: Repositioning home economics for sustainable education' (2010) available at <http://www.educationforsustainabledevelopment.org/papers/202.doc> (accessed 25 April 2014) (my emphasis).

Thus, the decision in the instant case is eagerly awaited. However, the fact that the case is considered admissible before the Commission must encourage individuals, the Nigerian Bar Association (NBA) and other NGOs to approach the Committee with various issues hinging on the obligation of the Nigerian government to the provision of basic education.

iii. *Nubian Minors v Kenya*¹⁶⁸ (Access, availability and acceptability)

In this case, the Nubian children faced severe challenges which, among others, included discrimination and inability to access basic education. Hinged on the alleged violation of articles 3 and 6 of the African Children's Charter, the Nubian children were denied access to equal education within Kenya. Article 3 provides:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 6 provides:

- (1) Every child shall have the right from his birth to a name.
- (2) Every child shall be registered immediately after birth.
- (3) Every child has the right to acquire a nationality.
- (4) States Parties to the present Charter shall undertake to ensure that their constitutional legislation recognise the principles according to which a child shall acquire the nationality of the state in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other state in accordance with its laws.

Despite the finding of the Kenyan Human Rights Commission (KHRC) that the act of the government was nothing but 'an institutionalised discrimination',¹⁶⁹ the ultimate effect of this

¹⁶⁸ Communication 002/2009.

¹⁶⁹ Kenyan National Human Rights Commission 'An identity crisis? A study on the issuance of national identity cards in Kenya' available at <http://citizenshiprightsinafrica.org/docs/KNHRC-ID-Report-2007.pdf> (accessed 25 April 2014).

action was that the Kenyan government ‘fails to provide equal access to education and healthcare, condemning Nubian children to a life of poverty’.¹⁷⁰

The violation and entrenchment of denial of education was enunciated on the fact that ‘the number of schools provided for the Nubian children and poor funding of their education amounted to a denial of access to education’.¹⁷¹

The African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) found, among other things, that the Kenyan government must ensure that a swift response to the issues that affected the access to education of the Nubian children were addressed. Importantly, these provisions must be ‘administrative, short and long term in nature’.¹⁷² A core component of the decision of the Committee as advanced in the instant case is that:¹⁷³

A state may not be able to justify a policy that encourages disparity or double standards in the provision of essential services. Considering the fact that registration at birth is crucial for the enjoyment of many other services, the Nubian children would seem to have been implicitly excluded from benefiting from some of the essential services they ordinarily should have been entitled to.

From the two cases discussed above, it is clear that the African Children’s Committee is open to advance the realisation of issues hinged on the best interests of the child. It therefore projects a fertile place for NGOs and other parties interested in public interest litigation to

¹⁷⁰ <http://www.ihrda.org/2011/03/kenya-violates-african-children%E2%80%99s-charter-as-nubian-children-suffer-discrimination-and-statelessness/> (accessed 25 April 2014).

¹⁷¹ Para 65.

¹⁷² E Durojaye & EA Foley ‘Making a first impression: An assessment of the decision of the Committee of Experts of the African Children’s Charter in the Nubian Children communication’ (2012) 12 *African Human Rights Law Journal* 567.

¹⁷³ Durojaye & Foley (n 172 above) 575.

test the many challenges confronting the realisation of the right to access of basic education in Nigeria.¹⁷⁴

In addition, as a quasi-judicial body, the Committee has further crystallised the role that national human rights institutions can play in ensuring the positive implementation of administrative measures, policy and legal directive towards the realisation of the right to education.¹⁷⁵

5.6.2 African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (African Commission) is another quasi-judicial body within the African human rights structure. The Commission is saddled with the responsibility of interpreting the rights contained in the African Charter. While conceding the indivisibility of human rights, the African Commission has faced some challenges in its development of economic, social and cultural rights within the African human rights system.¹⁷⁶ The African Charter, being the basic document that stipulates the functions of the African Commission, saddles it with the responsibility of providing both promotional and protective mandates. Article 45 provides that the functions of the Commission shall be:

¹⁷⁴ It is noted that under the communication procedure before the African Commission and the Court, individuals and NGOs are entitled to bring complaints. See generally M Hansungule 'African courts and the African Commission on Human and Peoples' Rights' 250 available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf (accessed 24 April 2014).

¹⁷⁵ Challenges that the implementation of the decision of the Committee has been enunciated and the judiciary remains the ultimate arbiter in the event of disputes and failure to implement decisions. See AG Assefa 'Will Nubian children have to go to the African Court?' available at <http://africlaw.com/2012/04/13/will-nubian-children-have-to-go-to-the-african-court/> (accessed 24 April 2014); Durojaye & Foley (n 172 above) 576-578. Katema has argued that seeking non-legal means for the resolution of developmental rights will have better results if not done legally, especially under authoritarian rule. However, it is important to note here that, with the increase in democratic rule within African states and Nigeria especially, the courts should remain the last arbiter for the dispensation of justice. See generally W Katema 'How are rights claimed under an authoritarian rule?' A case study of Operation Murambatsvina (clear the filth) in Zimbabwe (2005) available at [file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/Washington%20Katema%20HD S.pdf](file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/Washington%20Katema%20HD%20S.pdf) (accessed 28 April 2014).

¹⁷⁶ M Ssenyonjo 'The economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter' (2011) 29 *Netherlands Quarterly of Human Rights* 358-397.

- (1) to promote the human and peoples' rights and in particular:
 - (a) to collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments;
 - (b) to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation;
 - (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
- (2) Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
- (3) Interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African Organisation recognised by the OAU.
- (4) Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

It is based on this that the Commission is well positioned to entertain complaints from individuals and other recognised entities.

The application of the African Charter in Nigeria was enunciated in the case of *General Sani Abacha v Gani Fawahinmi*.¹⁷⁷ The court found that, while the Constitution of Nigeria was the supreme law despite the obligation to respect international treaty obligations, the effect of the domestication of the African Charter¹⁷⁸ with Nigerian law makes it directly applicable. It further opined that Nigeria was no longer at liberty to neglect the obligations under the African Charter. Consequently, it is opined in this thesis that the right to education as provided by the Charter should be enforceable in Nigeria.

¹⁷⁷ (2000) FWLR (pt 4) 533 585-586.

¹⁷⁸ Ratification and Enforcement Act Cap A9 LFN 2004 as amended.

Based on the above reasoning, the thesis proceeds to discuss in the following section the jurisprudence of the African Commission that can assist the building of the jurisprudence in Nigeria. It is noted here that the African Charter is part and parcel of Nigerian law by virtue of the Laws of the Federation of Nigeria, 2004 as amended.

i. *Zimbabwe Lawyers for Human Rights, Human Rights Trust of Southern Africa v The Government of Zimbabwe Forced Evictions Hopley - Porta Farm and Hatcliffe Communities*¹⁷⁹
(Access and availability)

This case, while not dealing specifically with the realisation of the right to education, inferred it implicitly. The case was about the forced eviction of some indigenes residing in the Porta farm area. The complainant in the case sought the African Commission to hold the government of Zimbabwe liable for violating the right to education, among other rights. It was argued by the complainant that the natural consequence of the eviction was that evicted children would be unable to access school. They further claimed that the planned relocation of the Caledonia farm violated their rights to access basic amenities as amenities like schools, health care, and sanitary facilities were not available at the proposed site of relocation.

It was the African Commission's finding that forced evictions should be done in line with General Comment 4.¹⁸⁰ Paragraph 8(b) thereof provides for 'availability of services, materials, facilities and infrastructure'; education lacking in this respect consequently aided the decision of the Commission. It can be inferred, therefore, that governments must ensure that in all developmental initiatives, the provision of educational infrastructure is crucial and important. This also suggests the importance of access to educational institutions within a reasonable walking distance. The point here is that the Commission is disposed to entertain issues hinged on questions of access to education directly or indirectly if approached.

¹⁷⁹ Communication 314/05.

¹⁸⁰ ESCR Committee General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant), 13 December 1991, E/1992/23, available at: <http://www.refworld.org/docid/47a7079a1.html> (accessed 29 April 2014).

- ii. *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaïre*¹⁸¹ (Acceptability)

This complaint was hinged on the alleged persecution of any group of people based on their religious beliefs, in this instant case, the Jehovah's Witness group in Zaïre. The allegation spanned from the exclusion from 'persecution of the Jehovah's Witnesses, including arbitrary arrests, appropriation of church property, and exclusion to access education'.¹⁸² The Commission, besides the referral of the grave human rights violations to the Assembly of Heads of States, also embarked on an on-site visit.¹⁸³ Subsequently, a violation of the right to education as enshrined in article 17 of the African Charter was found against Zaïre. In the wording of the Commission, '[t]he closure of universities and secondary schools as described in Communication 100/93 constitutes a violation of article 17'.¹⁸⁴

An important inference from the above case would, for instance, be the closure of all primary schools in Anambra State of Nigeria discussed in chapter three of this research and also the various closures of schools in Nigeria. In Anambra State, learners were unable to attend school for an academic session, thereby jostling the academic progress of pupils. This suggests that if various institutions that have the capacity of seeking such redress are enlightened on the mechanisms available, more and proper accountability can be advanced in ensuring that the right to basic education is realised in Nigeria.

¹⁸¹ Communication 25/89, 47/90, 56/91, 100/93 (1995) available at http://www1.umn.edu/humanrts/africa/comcases/25-89_47-90_56-91_100-93.html, <http://www1.chr.up.ac.za/index.php/browse-by-institution/achpr-commission/266-drc-free-legal-assistance-group-and-others-v-zaire-2000-ahrhr-74-achpr-1995.html> (accessed 29 April 2014).

¹⁸² Para 3.

¹⁸³ Para 6.

¹⁸⁴ Para 48.

iii. *Kevin Mgwanga Gumne et al v Cameroon*¹⁸⁵ (Acceptability)

This communication was rooted on several grievances that were traced to the 1961 independence of Cameroun. The Southern Cameroun alleged several violations leading up to marginalisation by the French-speaking area of the country. This violation spanned from economic to political marginalisation. It was further alleged specifically that¹⁸⁶

the Francophones have monopolistic control of the Ministry of National Education. That the Respondent State has underfunded primary education in Southern Cameroon, it failed to build new schools, understaffed primary schools, and it is closing all teacher training colleges. They allege further that the Respondent State ‘Cameroonised’ the GCE from the University of London, leading to mass protests which forced government to create an independent GCE Board. That, upon unification, diplomas awarded by the City & Guild, a technical education institution based in England, were replaced by the Certificat d’Aptitude Professionnelle (CAP) and the BAC Technique. These measures have resulted in persistent high levels of illiteracy in many areas in Southern Cameroon.

Cameroun in its response to the complaint refuted the claimant’s claim, stating that it had on some occasions expended more funding on the region than other regions. In addition, the state argued that its non-recognition of the Bameda University of Technology was purely based on the fact that it did not meet the stipulated requirement.¹⁸⁷

The decision of the African Commission in this communication was that it did not find the government of Cameroun to be in violation of the right to education. However, it is important to note that this decision was not hinged on the inability of the Commission to determine the

¹⁸⁵ Communication 266/2003 (2009) available at http://www.achpr.org/files/sessions/45th/communications/266.03/achpr45_266_03_eng.pdf (accessed 29 April 2014).

¹⁸⁶ Para 10.

¹⁸⁷ Para 146.

scope of the right to education.¹⁸⁸ The Commission's decline to find a violation was found on the complainant not using the provisions of Rule 119(3):¹⁸⁹

All explanations or statements submitted by a State party pursuant to the present Rule shall be communicated, through the secretary, to the author of the communication who may submit in writing additional information and observations within a time limit fixed by the Commission.

The Commission in its *dictum* found that:¹⁹⁰

Concerning the alleged refusal to grant authorisation for the registration of the Bamenda University of Science and Technology, the Respondent State stated that the said university did not fulfill conditions for establishment of private universities. The Complainant did not show whether the criteria were met by the Bamenda University of Science and Technology or not. The Commission reiterates that for it to make finding on any allegations, the Parties have to provide it with the necessary information. Rule 119 of the Rules of Procedure of the Commission, (which govern this communication) require parties to furnish explanation or statements, including additional information.

The Complainants should have done so under Rule 119 (3) of the Rules of Procedure. The Commission allowed Parties to make oral submission in this particular case. The Complainants did not substantiate the allegations. For the above reasons, the African Commissions finds that there is no violation of Article 17(1) of the Charter.

It is assumed that had the complainant adhered strictly to the available rules of procedure, the decision of the Commission could have been different. It is important, therefore, that proper training and capacity building for any individual or institution wishing to engage the mechanism of not just judicial or quasi-judicial bodies be seen as paramount. As this is not the responsibility of the state, it behoves bodies like the Nigerian Bar Association and the

¹⁸⁸ It is argued by Ssenyonjo that this could be the case for the failure in the present communication. See M Ssenyonjo 'The economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter' (2011) 29 *Netherlands Quarterly of Human Rights* 379. It must be taken into account that the provision of article 60 of the Charter allowing the Commission to draw inspiration from international law on human rights from both the African system, the UN system and other regional human rights systems. See Viljoen (n 35 above) 215.

¹⁸⁹ http://caselaw.ihrda.org/doc/1995_acmhpr_rop/view/#119 (accessed 29 April 2014).

¹⁹⁰ Paras 148-149.

CSO community to ensure that they are armed with the requisite knowledge of the process of litigating issues hinged on public interest.

Thus, the African Commission, from the cases discussed above, shows a willingness to engage on the alleged violation of the right to education as enshrined in the African Charter. As rightly argued by Ssenyonjo, '[t]he approach by the Commission is in line with the developments towards increased justiciability of ESC at both international and domestic levels'.¹⁹¹ The African Commission's approach has been 'that of progressive and generous interpretation, relaxing traditional standing requirements, minimising the effect of claw-back clauses and reading into the Charter some important economic rights'.¹⁹² Finally, on the importance of engaging the Commission on an interpretation of the provision of economic, social and cultural rights, especially the right to education, Viljoen advances that '[t]he Charter does not base fulfilment of any of its provisions dependent on available resources or progressive realisation'. In addition, he posits that despite the reliance on the argument of progressive realisation, it is not applicable to a definite and instant realisation of the right to education.¹⁹³ This interpretation has been advanced earlier in this chapter as applicable in South Africa and thus should provide a positive direction for Nigerian authorities towards its pursuit of the realisation of the right to basic education.

5.6.3 The African Court on Human and Peoples' Rights

The African Court is the first judicial body established by the African Union. Recently, the Court has been empowered to have a criminal chamber that will adjudicate on international criminal law. The major mandate of the Court is to complement the African Commission. Article 2 of the Court Protocol provides:

¹⁹¹ Ssenyonjo (n 188 above) 384.

¹⁹² Viljoen (n 35 above) 296.

¹⁹³ As above.

The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights (hereinafter referred to as 'the Commission') conferred upon it by the African Charter on Human and Peoples' Rights (hereinafter referred to as 'the Charter').

The protective mandate of the African Commission is as provided in article 45(2) of the African Charter targeted towards ensuring that the rights provided in the Charter are respected and remedies are granted when violations occurs. The jurisdiction of the Court is as provided in article 3 of the Protocol, which provides:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

From the foregoing, it can be inferred that, since the sources of laws applicable before the Court are 'the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned',¹⁹⁴ that the chances of the Court adjudicating on the right of access to basic education is high. It is noted, however, that while access to the Court as stipulated under article 5(3), which provides:

The Court may entitle relevant non-governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.

The limitation of the provision of article 36(6),

[a]t the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration

still presents some challenges.

¹⁹⁴ Art 7 of the Protocol to the African Court.

However, it is envisaged that with the complementary role of the African Commission, the possibility of testing the disposition of the Court towards the right to access of basic education and other economic, social and cultural rights is promising.

5.7 Lessons from the United Kingdom

Concern for the quality of education in the United Kingdom has been a priority over the years,¹⁹⁵ necessitating the drafting of the White Paper on Schools Achieving Success.¹⁹⁶ The questions surrounding education law range from ‘liability of truant children; parents’ right to redress and before which body, funding of schools and religious owned institutions and the legal rights of disabled pupils and pupils with learning disability’.¹⁹⁷

The White Paper laid emphasis on the literacy and numeracy ability of the child,¹⁹⁸ and the continued sustenance of the ability of the child through secondary education.¹⁹⁹ According to Ruff, ‘[t]he content of education law has increased the level and impact of litigation on issues hinged on education by using judicial reviews and specialist tribunals’.²⁰⁰

The need to encourage the involvement of Nigerian courts on issues of education is important, as this will ensure the timely dispensation of administrative responsibilities of individuals. The use of judicial review of decisions taken by various authorities on matters that affect access to education would be encouraged.²⁰¹ Various tribunals, like the Special Educational Needs Tribunal (SENT), have entertained several cases in Britain on matters

¹⁹⁵ See generally D Gillard ‘Education in England: A brief history’ <http://www.educationengland.org.uk/history/chapter10.html> (accessed 30 April 2014).

¹⁹⁶ Cm 5230 available at http://planipolis.iiep.unesco.org/upload/UK/UK_Schools_achieving_success.pdf (accessed 30 April 2014).

¹⁹⁷ A Ruff *Education law, text, cases and materials* (2005) 1.

¹⁹⁸ Para 1.3.

¹⁹⁹ Para 1.4.

²⁰⁰ Ruff (n 197 above) 12.

²⁰¹ Ruff 29.

hinging from school admissions, discrimination and exclusion policies.²⁰² Consequently, following the steps of colonial influence, Nigeria should effectively constitutionalise the right to education and empower the courts expressly to adjudicate on matters that hinge on issues of education.

Discussed in the following section are a few cases from within the United Kingdom.

i. *Mandla v Dowell Lee*²⁰³ (Acceptability)

The case deals with the wearing of turbans and cutting of hair in line with the customary practice of the Sikhs. As in with the South African nose ring case, this case raised issues of discrimination and equality. The court, considering the Race Relations Act of 1976, found:²⁰⁴

Gurinder Singh cannot comply with the school rules without becoming a victim of discrimination.

ii. *Wandsworth London Borough Council v A* (2000)²⁰⁵ (Availability)

This case deals with the protection of teachers from the actions of parents. The headmaster of the school had barred a parent from interfering with the professional conduct of teachers in the school. The decision was taken based on the provisions of section 547 of the Education Act of 1996. The case brings to the fore the importance of professionalism of teachers in Nigeria and elevating their dignity in labour. While the case was not favourably considered by the court, it is important to point out that this was hinged on the fact that the headmaster

²⁰² Ruff 1.

²⁰³ (1983) 2 AC 548 available at http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm (accessed 30 April 2014).

²⁰⁴ <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Mandla.pdf> 3 (accessed 30 April 2014); http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm (accessed 30 April 2014).

²⁰⁵ RLR 257.

failed to give the parent a fair hearing. The positive aspect from the case remains the fact that abusive attitude of teachers by parents can be curtailed.²⁰⁶

iii. *Nwabudike v Southwark London Borough (Availability)*

The case represents the responsibility placed on teachers and school authorities to ensure the safety of pupils within the school vicinity. While in the instant case it was found that the school was not liable for negligence having taken necessary steps to ensure the protection of students, it presents a form of checks and balances for school authorities and their employees to ensure that necessary measures are adopted to ensure the safety of children within the school premises. Interestingly, the recent abduction of over 250 girls from a school in Chibok, North-East Nigeria²⁰⁷ presents a good example. In these circumstances, who should the parents of the girls hold liable? Are they able to approach the courts for redress?

From the foregoing jurisprudence examined, the lessons that Nigeria can learn can be classified into three. The first is that the judiciary can lean on the innovative means relied on by their counterparts in India to circumvent the limitation of the challenge of non-justiciability. Secondly, the legislature should take a bold and definite step to recognise the right to access of basic education as a fundamental right, as done in India and also in South Africa. Thirdly, NGOs should engage the legal frameworks both at the national, regional and global levels to build jurisprudence toward getting the judiciary to play a definite role in enhancing access to basic education.

²⁰⁶ Ruff (n 197 above) 30; M Fordham *Judicial review handbook: Case synopses short case summaries* (2008) 11.

²⁰⁷ Chibok abductions: Nigeria girls taken abroad' available at <http://www.bbc.com/news/world-africa-27206449> (accessed 30 April 2014); Issues in the Chibok schoolgirls abduction available at <http://nigeriamasterweb.com/paperfrmes.html> (accessed 30 April 2014).

5.8 Conclusion

This chapter concludes by echoing the position of Skelton when she opines:²⁰⁸

The legal claim that the right to a basic education is immediately enforceable does not wave a magic wand ... the delivery of basic education to all...there are huge backlog in infrastructure, there is an ever increasing demand for more schools and classrooms amongst a socially and geographically mobile population, there are concerns about quality.

From the various decisions emanating from the South African, Indian and other jurisprudence, it is discernable that the role of the courts in driving the realisation of the right to basic education is very paramount. The recognition of the right to education in the South African and Indian Constitutions is an example worthy to be emulated by Nigeria in its quest towards realising the right to basic education.

The courts in South Africa and India have contributed immensely in developing the jurisprudence on education. The role of the judiciary, according to Skelton, is captured thus:²⁰⁹

The courts have played an important role in the progress being made with regard to children's right to a basic education in South Africa. Measured against the interlinked principles of availability, accessibility, acceptability and adaptability, the case law of the past few years has shown some significant advancement...the courts have outlined State and private responsibilities in not hampering the right to basic education.

On the regional basis, the African Commission and the African Children's Committee have further relied on the African Charter and other international law instruments to develop the jurisprudence on the subject.

Importantly, the cases discussed in the chapter show the role of individuals, NGOs, academic institutions and national human rights institutions towards engaging with judicial and quasi-

²⁰⁸ A Skelton 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent education case law' (2013) 4 *De Jure*.

²⁰⁹ As above.

judicial institutions in driving the right to education. Finally, the cases discussed have not overtly upheld claims against states or individuals, but rather followed the due process of interpreting laws, policies and legislation toward providing a direction in the quest of realising the right to education. Consequently, the engagement of the Nigerian judiciary in the pursuit of this right is paramount.

In the next chapter, the thesis will examine how various institutions in Nigeria will be strengthened towards meeting the obligations of Nigeria. Prime among the institutions to be discussed are the National Human Rights Institution of Nigeria, the Nigerian judiciary, the Nigerian Bar Association, the Nigerian Education Research Council; the Nigerian Union of Teachers; the Nigerian Teachers Institute and, finally, the Federal Ministry of Education and the state ministries of education.

Chapter 6

Strengthening institutions - Realising the right to basic education in Nigeria

6.1 Introduction

This chapter examines how the institutional frameworks in Nigeria can be strengthened so as to initiate changes and make progress towards the realisation of the right to access of basic education in Nigeria.²¹⁰ The institutions to be looked at include the judiciary; NGOs with particular reference to the Nigerian Bar Association (NBA), the legislature, the National Human Rights Commission of Nigeria (NHRC), the Nigerian Teachers' Institution (NTI), the Ministry of Education (MoE), the Nigerian Educational Research and Development Council (NERDC), the Teachers' Registration Council of Nigeria (TRCN) and the Universal Basic Education Commission (UBEC). It will also examine the trend of budgetary allocation to the education sector and examine the effect of implementation and non-implementation. Finally, the chapter will explore the potential of non-judicial avenues for realising the right to basic education.

The importance of examining the role and how these institutions will assist in the realisation of the right to education is grounded in the reasoning of the specific roles each of them ought to play in the quest. The judiciary and the NHRC represent judicial and quasi-judicial organs that have the responsibility of interpreting the various policies and legislation that pertain to basic education. The legislature represents the law-making organ of governance in Nigeria.

The possibility of the legislature pushing for a constitutional recognition of the right to education within chapter four of the proposed revised Constitution of Nigeria will also be explored. The role NGOs can play is also examined by looking specifically at the NBA. The NBA represents the institution whose members have the legal recognition to approach the

²¹⁰ The institutions mainly discussed here are the ones at the federal level, though mention may also be made of state institutions.

ordinary courts in Nigeria as legal counsel to challenge legislation and to pursue the rights of individual's.

NERDC, NTI, TRCN and MoE represent the professional institutions that are saddled with the responsibility of driving the administration of education in Nigeria, ensuring the quality of teachers and to review of the curriculum content of education in the country. The UBEC remains the only institution with the responsibility of organising and monitoring the realisation of the right to basic education in Nigeria.

To achieve the purpose of this chapter, the various legal frameworks setting up the institutions will be discussed. This is done with the intent of ascertaining what shortcomings exist within the legal basis of the institutions. Suggestions on how the mentioned institutions can be strengthened will subsequently be advanced. The chapter will rely heavily on the qualitative aspect of the methodology of this research with extensive interaction with individuals, institutions and agencies already identified. Focus group discussions, round table discussions, field trips and e-mail conversations will also provide information on the recommendations to be advanced as a means of strengthening the institutions.

6.2 Legal institutions

I. The judiciary

The judiciary is saddled with the duty of interpreting legislation and, in so doing; they protect the rights of the individual. As the third arm of government, the role of the judiciary in realising any human right is central. This position as advanced by Donnelly is reiterated by Olowu, when he examines the challenges of the effect of non-justiciability of constitutional provisions. This position is taken noting that the realisation of human rights will mainly be

won at the national level despite the reliance on international law instruments.²¹¹ Thus, the role the judiciary plays in interpreting policies and law that will impact on the realisation of education in Nigeria is very important. The judiciary has the role of interpreting the laws of a state and also its treaty obligations under regional and global laws. In Pas's analysis, the judge has definite roles to play in ensuring that a state is bound to respect its treaty obligations.²¹² This informs the need to examine how the Nigerian judiciary can assist and ensure that Nigerian laws complies with the provisions and its obligations under international and regional human rights laws in terms of ensuring the right to basic education.

The Nigerian judicial institution is provided for in the CFRN 1999 in chapter seven. Generally, the various courts in Nigeria are divided into superior and inferior courts. The superior courts are courts that are listed in the CFRN while the inferior courts are the ones that are not listed. The use of terms 'superior' and 'inferior' does not in any way suggest negatives; however, it suggests the jurisdiction of the various courts. The superior courts include the following: the Supreme Court;²¹³ the Court of Appeal;²¹⁴ the Federal High Court;²¹⁵ the High Court of the Federal Capital Territory;²¹⁶ the Shari'a Court of Appeal;²¹⁷ and the Customary Court of Appeal.²¹⁸ At state level, they include the High Court of a State;²¹⁹ the Shari'a Court of Appeal of State;²²⁰ and Customary Court of Appeal of State.²²¹

²¹¹ D Olowu 'Human rights and the avoidance of domestic implementation: The phenomenon of non-justiciable constitutional guarantees' (2006) 69 *Sask L Rev* 39.

²¹² See generally P Wouter 'International human rights law and its relation with national law: Monism, dualism and the self-executing character of human rights' in E Verhellen (ed) 'Understanding children's rights' collected papers presented at the first international interdisciplinary course on children's rights, University of Ghent (1996) 290.

²¹³ Secs 230-236 CFRN 1999.

²¹⁴ Secs 237-248.

²¹⁵ Secs 249-254.

²¹⁶ Secs 255-259.

²¹⁷ Secs 260-264.

²¹⁸ Secs 265-269.

²¹⁹ Secs 270-274.

²²⁰ Secs 275-279.

²²¹ Secs 280-284.

The Supreme Court is the apex court in Nigeria and has jurisdiction in all matters that come on appeal except in certain circumstances where it has original jurisdiction. The Appeal Court is next in the order of hierarchy. It has both original jurisdiction and entertains matters on appeal from the lower courts. The Federal High Court is of co-ordinate jurisdiction, with the State High Court, save for the specific provisions as contained in section 251 of the CFRN. The Federal High Court should have jurisdiction to entertain complaints relating to education. It is provided that the court shall have exclusive jurisdiction on matters relating to the ‘administration or management of the federal government or any of its agencies’.²²²

Furthermore, it is provided that the Federal High Court shall:²²³

- (q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;
- (r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies ...

While the CFRN’s vesting of exclusive jurisdiction on the Federal High Court seems to exclude the other courts from entertaining matters that may be hinged on education, it is noted that the State High Court may assume jurisdiction over matters that are related to rights to education. The concern is, therefore, why the above provisions are not used to test the judicial will in developing jurisprudence on the realisation of the right to basic education in Nigeria. The role of the NBA and NGOs are therefore important as judges cannot assume the duty of litigation as opposed to their constitutional duty of adjudication.

²²² Sec 251(p).
²²³ Secs 251(q) & (r).

ii National Human Rights Commission of Nigeria (NHRC)

The NHRC, established by the NHRC Act,²²⁴ has the core responsibility of promoting and protecting human rights in Nigeria. In addition, the NHRC²²⁵

serves as an extra-judicial mechanism for the enhancement of the enjoyment of human rights. Its establishment is aimed at creating an enabling environment for the promotion, protection and enforcement of human rights. It also provides avenues for public enlightenment, research and dialogue in order to raise awareness on human rights issues.

Established during the military regime of General Sanni Abacha, the early days of the NHRC were not without challenges.²²⁶ From the core mandates of the NHRC, it is informative to question to what extent the NHRC has advanced the frontiers of realising the right to basic education in terms of its public enlightenment; dialogue and, more so, enforcement. It must be recalled that part of the aspiration of setting up the NHRC was to ensure and encourage ‘extra-judicial realisation of human rights’. Furthermore, in its Preamble, it is reiterated that the NHRC is created in²²⁷

furtherance of the above objectives and in its determination to provide a forum for public enlightenment and dialogue on and to limit controversy and confrontation over allegations of human rights violation by public officers and agencies and to reaffirm the sacred and inviolable nature of human and other fundamental rights.

²²⁴ National Human Rights Commission Act, 2010 Cap N46 LFN 2004.

²²⁵ <http://www.nigeriarights.gov.ng/the-commission> (accessed 1 May 2014).

²²⁶ KR Salman ‘The effectiveness of the Nigerian National Human Rights Commission in human rights protection’ unpublished PhD thesis, available at http://www.rksalman.com.ng/publications/RK_Salman_PhD_Thesis_Abstract.pdf (accessed 1 May 2014).

²²⁷ National Human Rights Commission Act 1995 Supplement to Official Gazette Extraordinary 28, Vol 82, 6 October 1995 Part A.

The judicial powers of the NHRC are also recognised and understood by its officials as they have at various times pledged to collaborate with other judicial institutions to drive the realisation of human rights.²²⁸

The enabling Act of the NHRC provides that the Commission shall:²²⁹

- (a) deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, the African Charter, the United Nations Charter and the Universal Declaration on Human Rights and other international treaties on human rights to which Nigeria is a signatory;
- (b) monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendations to the Federal Government for the prosecution and such other actions as it may deem expedient in each circumstance;
- (c) assist victims of human rights violations and seek appropriate redress and remedies on their behalf;
- (d) undertake studies on all matters relating to human rights and assist the Federal Government in the formulation of appropriate policies on the guarantee of human rights;
- (e) publish regularly reports on the state of human rights protection in Nigeria.

The wording of section 5 (a) suggests that the NHRC has the foothold to rely on the already discussed regional and global human rights instruments. However, it seems that the NHRC has yet to explore this option of assisting the Nigerian child in realising the right to basic education. A perusal of the annual report of the NHRC does not provide any information on the use of the mechanisms to pursue the realisation of the human right to basic education.

²²⁸ This commitment was made by the Secretary-General of the NHRC during a visit to the ECOWAS Court. See 'The National Human Rights Commission of Nigeria (NHRC) to partner with ECOWAS' available at http://www.courtecawas.org/site2012/index.php?option=com_content&view=article&id=161:nationa-human-rights (accessed 1 May 2014).

²²⁹ Sec 5.

In its 1999 report, the NHRC reiterated the resolve to embark on enhanced promotional activities that will be centred on ‘human rights, education and enlightenment in Nigeria and acquaint both the political and bureaucratic functionaries of the government on the need to respect human rights of Nigerians in the execution of their duties’.²³⁰ The implementation of this resolve seems not have been effected as the activities embarked on by the NHRC could be described as not having been effective.²³¹ The position of non-effective sensitisation follows the paradigm that no specific mention of achievements was reported in the subsequent annual report of the NHRC pertaining to social rights, such as the right to education. A further perusal of the claimed educational *cum* promotional activities of the NHRC shows a heavy concentration of activities in the Federal Capital Territory (FCT) Abuja. A visit to the NHRC office in Ilorin, Kwara state, presents no better information on the activities of the NHRC.

The majority of young lawyers interacted with during the 2014 Nigerian Bar Association conference in Abuja show little knowledge of the mandate of the NHRC. It is important, therefore, that the NHRC will liaise with institutions like the Nigerian Law School (NLS) to include the study of the functions and mandate of the NHRC in its curriculum. The same approach is recommended for the Council of Legal Education (CLE) and the National University Commission (NUC). The need for this is suggested as it will provide emerging lawyers with knowledge on how to explore the options of enhancing the realisation of the responsibilities of the NHRC.

The NHRC in its 2010 national strategic work plan resolved to ‘pursue a pilot research on the provisions of facilities in public schools that meet the need of children with disabilities

²³⁰ Annual Report of NHRC 1999 18.

²³¹ Personal conversation with A Beredugo, held at the University of Pretoria, 2014. Beredugo is a doctoral candidate with a particular interest in the functioning of the NHRC. See generally, AJ Beredugo *The role of national human rights institutions in advancing the implementation of socio-economic rights* unpublished LLD thesis, Centre for human rights, University of Pretoria, 2014.

(CWD)’. The aim of the research was to influence government policies as it affects CWD. However, the outcome of this research is yet unavailable. The NHRC’s aspiration to push the FGN to treat economic, social and cultural rights as fundamental rights is reiterated thus:²³²

The former are justiceable rights, ie citizens could go to court to enforce them if denied. The latter rights are however non-justiceable, ie these sets of rights are not enforceable in the court. They are aspirations attainable if and when the state has the resources. However, the Commission believes the two sets of rights are both fundamental and complementary. This is because the right to life, for instance, is meaningless without gainful employment or food to sustain life in the first place. The Commission has made a strong case for the upgrading of economic, social and cultural rights to fundamental rights. Human rights are interdependent, interrelated, indivisible and universal

The above resolve seem not to be a proactive one as the NHRC to date has not found the FGN liable for the violation of such rights as the right to education. The NHRC is therefore encouraged to follow in the steps of the South African Human Rights Commission (SAHRC) and IHRC and seek to enhance the jurisprudence on the right to a basic education.

It can be inferred that the NHRC continues to face the challenges of being swayed by the political class. However, in a bid to describe the NHRC, Odinkalu presents it as follows:²³³

It is not an opposition party, it is not the Salvation Army and it is not a government promotion agency.

While the above captures the supposed nature of the NHRC, it is opined that the NHRC should be the hope of the common man, but it has failed to provide solace in this respect. This is because, by virtue of its mandate, the NHRC should indeed provide succour for the common man by advancing both civil and social rights.

²³² <http://www.nigeriarights.gov.ng/your-rights> (accessed 3 June 2014).

²³³ Interview monitored on Channels TV, 19 April 2014. Human Rights Act, 1993 (amended 2006).

The need and importance of strengthening the NHRC can be deciphered from the words of Odinkalu as stated above. The Commission must therefore proceed on the premise of knowing that its mandate is to serve the peoples of Nigeria and not to serve as a government agency. Learning from the mandate and operations of the IHRC,²³⁴ the NHRC will be further strengthened to advance the realisation of human rights. For instance, the IHRC is empowered to ‘enquire *suo motu* or on a petition presented to it by a victim or any person on his behalf or on a direction of order of any court’.²³⁵ In addition, the IHRC is also empowered to ‘intervene in any proceeding involving any allegation of a violation of human rights pending before a court with the approval of such court’.²³⁶ Furthermore, the IHRC has a premise of undertaking initiatives to ensure that human rights are realised by the actions of the IHRC when the Act provides for an unqualified mandate. It reads ‘such other functions as it may consider necessary for the protection of human rights’.²³⁷

A similar provision is also found in the South African Human Rights Commission (SAHRC) Act.²³⁸ In reiterating the constitutional mandate of the SAHRC, it is provided that the SAHRC shall ‘take steps and secure appropriate redress where human rights have been violated’.²³⁹ The provisions of the IHRC and the SAHRC is argued to have positioned them to actively engage in seeking redress for violations of the right to education in India and South Africa while holding public officers that have the responsibility of ensuring the implementation of education policies liable, mandated to ensure compliance and ensure fairness in procedural issues bordering on education.

The NHRC must therefore show some resolve to follow suit in this step. To achieve this, it is suggested that the NHRC can lean on the overarching provision of its Act that provides ‘do

²³⁴ Human Rights Act (n 24 above).

²³⁵ Indian Human Rights Act, 1993 (amended 2006) sec 12(a).

²³⁶ Indian Human Rights Act, sec 12(b).

²³⁷ Indian Human Rights Act, sec 12(j).

²³⁸ The Commission was inaugurated on 2 October 1995 under the Human Rights Commission Act 54 of 1994 and as provided for by the Constitution of the Republic of South Africa Act 200 of 1993.

²³⁹ SAHRC Act 54 of 1994, sec 2(c).

such other things as are necessary or expedient for the performance of its functions under this Act'.²⁴⁰ However, it seems that the NHRC might be curtailed in its judicial activities as it appears to be more geared towards only promotional activities. This position is envisaged as that the NHRC is required to make recommendations to the FGN when it finds any violations.

To be able to make these findings, the NHRC must commence entertaining matters hinged on the right to basic education. More sensitising is needed to the public for them to be aware to pursue the protection, fulfilling and promotion of the right to access basic education.

Furthermore, the NHRC Act empowers it to:²⁴¹

Refer any matter of human rights violation requiring prosecution to the Attorney-General of the Federation or of a state as the case may be.

The snag with the above provision is that, considering that the state most often than not is the subject of a violation of rights cannot be a judge in its own case. The rationale here is that, if basic education is construed as a human right, the government must be held responsible, and this cannot be achieved by referring same back to the government. Holding the government accountable for snags in the provision of basic education comes with treating same as a human right concern. Tomasveski opines:

The human right approach priorities law in holding governments accountable for their pledges, individually and collectively...once a pledge becomes a human right obligation; failure to attain agreed ends by specified means becomes a violation, to be redressed by compensating the victims and ensuring that it does not happen again.²⁴²

Thus, the NHRC should make definitive findings and statements on the subject of basic education. Besides the above reasoning, subjecting the finding of the NHRC to executive

²⁴⁰ NHRC Act sec 5(a).

²⁴¹ NHRC Act sec 5.

²⁴² K Tomasevski *Education denied - Costs and remedies* (2003) 101.

review will also ensure the non-fulfilment of state obligations. This is because, considering the challenges of lack of political will by states, the FGN will be unwilling to prosecute defaulters, especially if they are linked to the political class.

The NHRC can also borrow a leaf from the IHRC and SHRC by actively exploring its judicial mandates as it is able to embark on inquiry as a judicial body.²⁴³ However, the exercise of these duties by the NHRC is criticised by some lawyers. According to Olatoke, the NHRC powers to conduct judicial hearings or issue statements that are aimed to have judicial flavours are flawed as it is not empowered by the Constitution to act as a judicial body.²⁴⁴ The status of the IHRC is not in doubt as it is provided by the enabling statute that '[e]very proceeding before the Commission shall be deemed to be a judicial proceeding'.²⁴⁵ The relationship between the courts of India and the IHRC is also well stipulated with the power of the IHRC to transfer cases to other courts in India that may also have jurisdiction to handle such complaints brought before it.

Furthermore, the need to empower the NHRC is also advocated by FIDH when it found:²⁴⁶

The NHRC does not have sufficient institutional safeguards, investigative powers or authority to compel authorities to respond to its queries. It is also reported that, while its investigative mechanism looks effective, its functioning is compromised by a serious lack of capacity and resources.

Consequently, so much is still desired to strengthen the NHRC to aid the realisation of the right to basic education in Nigeria. According to Ojukwu, the NHRC will only realise its potential when lawyers engage it and aid it in building jurisprudence that will help the

²⁴³ NHRC Act sec 6.

²⁴⁴ J Olatoke (Senior Advocate of Nigeria) conversation during the session on Nigerian National Human Rights Commission, Nigerian Bar Association annual national conference, 24-29 August 2014, Owerri.

²⁴⁵ Indian Human Rights Act, 1993 (amended 2006) sec 13(5).

²⁴⁶ FIDH (2010) *Nigeria: Defending human rights: Not everywhere, not every right* International Fact-Finding Mission Report.

advancement of social rights.²⁴⁷ It is therefore argued that the NHRC must activate and engage the provisions of section 6 (g):

Liaise and co-operate, in such manner as it considers appropriate, with local and international organisations on human rights with the purpose of advancing the promotion and protection of human rights.

It is opined here that, while no clear examples are available on the circumstances in which this provision has been relied on to drive realisation of economic, social and cultural rights, the NHRC should, based on this, co-operate with other institutions discussed in this research with the aim of alleviating the non-availability of access to basic education in Nigeria.

6.3 Legislative institutions

i. Nigerian legislature

The Nigerian legislature operates in a bicameral format, with the Senate and House of Representatives.²⁴⁸ The major function of the National Assembly is to²⁴⁹

make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

The process of review of the Constitution of Nigeria lies with the legislature initiating and overseeing the process. In keeping with its responsibilities, the legislature is also empowered to enact laws to administer all spheres of the existence of the state. As the second arm in the separation of power matrix, the legislature is to ensure that policies and laws that will promote smooth operations and realisation of good governance are put in place.

²⁴⁷ T Ojukwu, Director Monitoring National Human Rights Commission, speaking during a session titled 'Is the National Human Rights Commission another court - A review of the scope of the National Human Rights Act' held at Owerri during the 2014 NBA annual conference, raised the challenges that still confront the Commission in realising its mandate, but stressed the need that the NBA needs to sensitise its members and encourage them to engage the Commission. Responding to questions from the author on the NHRC embarking of promotional activities hinged on basic education or other social rights, the Director responded that the institution, while not having done so at present, hoped to carry out such activities provided the necessary legal scope and institutional funding existed to enable the NHRC make its presence felt all over the federation.

²⁴⁸ Sec 4(1) CFRN 1999.

²⁴⁹ Sec 4(2).

Presently, Nigeria is in the process of amending the CFRN 1999, but the legislature has not deemed it important to follow progressive nations like South Africa in recognising the right to a basic education as a fundamental right. The importance of this is advanced in the manner that:²⁵⁰

Rights-based education necessitates two changes: Human rights ought to be moved from margins to the core of the many policies that shape education and the universality of the right to education ought to be trashed into universal human rights obligations.

When this perspective is taken by the Nigerian legislature, it is envisaged that accountability will increase, especially with the implementation and management of various policies already on the ground. Moreover, it is important that the Nigerian legislation follows suit in ‘the globalisation drive of constitutionalising social rights and enshrine the right to education as a fundamental right in the CFRN’.²⁵¹

The excuses from the MoE, that the realisation of the right to basic education is hampered because of the refusal to access funds, could be addressed by the legislature. The role the legislature has to play in ensuring that all policies and laws enacted in respect of basic education is enormous. There is a serious need to revise and review all existing legislation and statutory basis of institutions to empower them to be able to meet the need and drive for the realisation of the right to basic education. For instance, UBEC needs to be empowered by a review of its statute to empower it to have more powers to pursue the implementation of the various policies and Act that will enhance its functioning.

If the legislature reviews and shows the political will to enshrine access to basic education as a fundamental right in Nigeria, it will push the frontiers of its realisation. The CFRN is

²⁵⁰ Tomasevski (n 33 above) 4.
²⁵¹ Olowu (n 2 above) 39, 49.

crucial in the quest to enhance the realisation of basic education in Nigeria. As advanced by Olowu:²⁵²

Constitutionalism has become a veritable platform for developing a coherent social choice theory and in formulating a rights-based response to the interactions of individual preferences amidst social pressures.

In addition, it is important to appreciate that there is a need to move away from questions of a political approach to issues of social rights and perceive social rights as the only means of advancing human dignity and respect.²⁵³ Thus, the Nigerian legislature must attempt to review the legislation and enabling status of all institutions involved in the education sector in Nigeria with a view to empowering them to achieve the goals.

6.4 Executive institutions

i. The Federal Ministry of Education (MoE)

The MoE is the body that is saddled with the responsibility of running the affairs of the education sector in Nigeria. In the recent past, the education ministry has been plagued with a leadership crisis which culminated in the removal of Prof Ruqayat Lawal and Wisom Wike, made to act as a supervisory minister for a long period before the appointment of a substantive minister.²⁵⁴

The MoE has a set-out mandate, which is to²⁵⁵

formulate and co-ordinate a national policy on education
Collect and collate data for purposes of Education Planning and
Financing. Prescribe and maintain uniform standards of
education throughout the country. Control and monitor the

²⁵² As above

²⁵³ According to Olowu, '[i]t is safe to suggest that the dividing line among states and within states today is no longer about economic or political ideology; rather, it is much more about humanity, human survival and the preservation of human dignity'; Olowu (n 2 above) 39, 50.

²⁵⁴ Ibrahim Shekarau was appointed Minister for Education of Nigeria on 7 July 2014. His appointment has been criticised by a cross-section of the polity seeing the appointment as one for political appeasement rather than that of a competent professional.

²⁵⁵ <http://www.nigeria.gov.ng/2012-10-29-11-06-51/executive-branch/93-federal-ministry-of-education/116-federal-ministry-of-education> (accessed 9 July 2014).

quality of education in the country. Harmonise educational policies and procedures of all the States of the Federation through the instrumentality of the National Council on Education. Effect co-operation in educational matters on an international scale and develop curricula and syllabuses at the national level.

An analysis of the mandate of the MoE brings to the fore its inability to enforce certain needful measures towards ensuring the full implementation of its policies. For instance, the relationship between the MoE and the State MoE has not enjoyed harmony and thus the realisation of basic education is at its lowest ebb. The lack of co-operation is seen in the claims by the Minister of Information,²⁵⁶ that most states that belong to the opposition parties in the country have intentionally failed to access funds made available for education in intervention.²⁵⁷

In addition, the friction between the NTI and the NUT also portrays the inability of the MoE to harmonise all the agencies which are under the MoE.²⁵⁸ It is important, therefore, to seek legislative strengthening of the MoE to empower it to call erring SMOE to order in the event policies have not been adhered to. As part of its mandate, the MoE should control and ensure quality education in Nigeria. It is suggested that the use of the law would provide a veritable means through which this could be achieved. Partnering with CSOs and the NBA to seek legal redress against erring administrators and some, in my view, will lead to more efficiency in the execution of education policies in the country.

ii. Universal Basic Education Commission (UBEC)

UBEC has the responsibility of ensuring the implementation of the UBE Act discussed in chapter three of this thesis. Looking at the mandate of the Commission, its supervisory role

²⁵⁶ Labaran Maku.

²⁵⁷ Reaction of the Minister for Information during the presentation of education score cards by the present government of Dr Ebele Goodluck Jonathan monitored on Channels TV Nigeria, 3 July 2014.

²⁵⁸ Twenty-four parastatals are under the MoE dealing with various levels of education. The UBEC, NUT, NEDRC and NTI are also under the MoE. For a detailed list, see <http://www.nigeria.gov.ng/2012-10-29-11-06-51/executive-branch/93-federal-ministry-of-education/116-federal-ministry-of-education> (accessed 9 July 2014).

seems not well defined and the powers that it can wield not certain. For instance, while ascertaining the reality of inability of millions of Nigerian children, especially the ones in hard to reach areas to have access to basic education, UBEC blames this on the issues of lack of access and failure to access funds by authorities in the states. In 2014, UBEC states:²⁵⁹

As at 14th April, 2014, the sum of N48.79 billion Matching Grants remained un-accessed by SUBEBs.

The question that therefore calls for investigation is what powers UBEC have in holding the individuals responsible to access these funds liable. Does the lack of access to these funds have an effect on the realisation of the right to basic education in Nigeria?

Unfortunately, the functions of the Commission do not provide it with powers to hold erring individuals failing to drive the implementation of UBEC policy accountable. The functions of UBEC are to -²⁶⁰

- (a) formulate the policy guidelines for the successful operation of the universal basic education programme in the Federation;
- (b) receive block grants from the Federal Government and allocate to the States and Local Governments and other relevant agencies implementing the Universal Basic Education in accordance with an approved formula as may be laid down by the Board of the Commission and approved by the Federal Executive Council; Provided that the Commission shall not disburse such grant until it is satisfied that the earlier disbursements have been applied in accordance with the provisions of this Act;
- (c) prescribe the minimum standards for basic education throughout Nigeria in line with the National Policy on Education and the directive of the National Council on Education and ensure the effective monitoring of the standards;

²⁵⁹ Universal Basic Education Commission (UBEC) Communiqué issued at the end of the 12th quarterly meeting of UBEC Management with Executive Chairmen of State Universal Basic Education Boards (SUBEBs) held 28 April-1 May 2014, at Disney Hotel And Resort, Onitsha Road, Owerri, Imo State, available at <http://ubeconline.com/Pre/COMMUNIQUE%20ISSUED%20AT%20THE%20END%20OF%20TWELFTH%20QUARTERLY%20MEETING%20AT%20OWERRI.pdf> (accessed 4 June 2014).

²⁶⁰ UBEC Act 2004 as amended, sec 9.

- (d) enquire into and advise the Federal Government on the funding and orderly development of basic education in Nigeria;
- (e) collate and prepare after consultation with the States and Local Governments, and other relevant stakeholders, periodic master plans for a balanced and coordinated development of basic education in Nigeria including areas of possible intervention in the provision of adequate basic education facilities which include -
 - (i) proposals to the Minister for equal and adequate basic education opportunity in Nigeria;
 - (ii) the provision of adequate basic education facilities in Nigeria; and
 - (iii) ensure that the Basic National Curricula and Syllabi and other necessary instructional materials are in use in early childhood care and development centres, primary and junior secondary schools in Nigeria;
 - (j) carry out in concert with the States and Local Governments at regular intervals, a personnel audit of teaching and non-teaching staff of all basic education institutions in Nigeria;
 - (g) monitor federal inputs into the implementation of basic education;
 - (h) present periodic progress reports on the implementation of the universal basic education to the President through the Minister;
 - (i) co-ordinate the implementation of the universal basic education related activities in collaboration with non-governmental and multi-lateral agencies;
 - (j) liaise with donor agencies and other development partners in matters relating to basic education;
 - (k) develop and disseminate curricula and instructional materials for basic education in Nigeria;
 - (l) establish a basic education data bank and conduct research on basic education in Nigeria;
 - (m) support national capacity building for teachers and managers of basic education in Nigeria;

- (n) carry out mass mobilisation and sensitisation of the general public and enter into partnerships with communities and all stake-holders in basic education with the aim of achieving the overall objectives of the Compulsory Free Universal Basic Education in Nigeria;
- (o) carry out such other activities that are relevant and conducive to the discharge of its functions under this Act; and
- (p) carry out such other functions as the Minister may, from time to time, determine.

Also, the dependence of UBEC on the Minister of Education creates some attendant challenges as it remains tied to the apron of the executive and may be unable to seek redress against the executive or even the legislative in the event of their contributing to the factors that affect the provision, monitoring and implementation of access to basic education.

Against this backdrop, it is advanced by this thesis that UBEC must be empowered to seek redress against the executive and legislative arms of government acting as catalysts in inhibiting the realisation of the right to basic education. In addition, UBEC must liaise with institutions like the NHRC and the NBA to assist it in legally eliminating obstacles that inhibit its mandate, especially as it pertains to officials not implementing policies or other acts of commission and omission.

Another contrast in this respect is that UBE Act provides for the liability of parents and guardians stipulating punishments for their failure or omission of not sending their children to school.²⁶¹

However, it is argued that the legislature did not take into consideration the sociological aspect of insisting that parents must be held liable for not sending their children to school. This is because several sociological factors like child labour, domestic labour and poverty

²⁶¹ UBE ACT, sec 2.

have been identified as major setbacks to access to education.²⁶² By virtue of the provision of article 20(2) of the African Children's Charter, the state is encouraged to support the efforts of parents to ensure that the parental responsibilities towards the best interests of the child are realised. Consequently, the need to ensure that parents are fully involved in the functioning of the UBEC is paramount. This is advanced on the premise that 'education has to be adapted to each child rather than that child forced to adapt to whatever schooling has been designed for them'.²⁶³ Considering the challenges of child labour occasioned by high levels of poverty, Tomasveski proposes that if children are²⁶⁴

required to work in the household, the school schedule has to be adapted to the seasonal and daily rhythm of family life. Since poor families depend on the work of each member of the family for their survival, combining school and work often proves necessary.

Consequently, the practice of arresting children or parents to ensure compulsory education is not the best possible means of realising the right to basic education, especially when the schools are not protective of the best interests of the child and protecting the rights in the education of the child. Indeed, it is reiterated:²⁶⁵

Coercing children into attending school where they may be bullied or bored does not make them learn ... enforcement of school attendance can lead to recalcitrant children to prison; prisons are not even in law slanted towards learning.

²⁶² EG Reuben, ES Odey & AU Egodi 'Nigeria's Universal Basic Education (UBE) policy: A sociological analysis' (2012) 2 *American International Journal of Contemporary Research*. It is also noted that some state governments in Nigeria have embraced the meals-for-schools initiative that has helped to increase the number of children accessing schools. This, however, in the author's opinion, is not sufficient as it is important that the government must strive harder towards the realisation of goal 1 of the Millennium Development Goals. If poverty is reduced by empowering parents, then it will be easier for children not to be needed in the informal and menial jobs that the families depend on to survive.

²⁶³ Tomasevski (n 33 above) 154.

²⁶⁴ As above.

²⁶⁵ As above.

In addition, magistrate's courts are empowered to hear complaints against parents who violate the provision of the Act. It is provided:²⁶⁶

The Magistrate's Court or any other State Court of competent jurisdiction shall have jurisdiction to hear and determine cases arising under section 2 of this Act and to impose the punishment specified.

It is therefore the proposition of this thesis that the above provision can be interpreted widely by UBEC or other institutions interested in public interest litigation to seek redress for officials who fail to perform the acts. A question that may arise here is if the government and UBEC can be held liable based on this provision. Can corrupt officials of both the UBEC and the State Universal Basic Education Board (SUBEB) be answerable to the courts in the face of corrupt practices? The SUBEB represents UBEC at state level and is supposed to bridge the gap between the policies from the MoE and the states. According to Sote, Aramide & Gbotoso:²⁶⁷

State Universal Primary Education (SUBEB), an offshoot of UBEC in the states, is established to address the inequality opportunity at the basic level... the programme was introduced... to remove distortions and inconsistencies in basic education delivery and reinforce the implementation of the National Policy on education as well as to ensure access, equity and quality of basic education throughout the country.

Two important ambits deciphered here is the accountability of parents and the relationship between UBEC and SUBEB. It is observed that emphasis on punitive measures against parents is over-conceived. It must be understood that the realisation of the right to basic education encompasses more than parents' failure to drive it. In Tomasveski's analysis, she opines:

²⁶⁶ UBE ACT, sec 6.

²⁶⁷ A Sote, KA Aramide & A Gbotoso 'Evaluation of State Universal Basic Education Board (SUBEB) libraries in selected states in South-West Nigeria' available at <http://www.webpages.uidaho.edu/~mbolin/sote-aramide-gbotoso.htm> (accessed 5 June 2014).

The right to education involves four key actors: The government as the provider, the child as the bearer of the right and duty to comply with compulsory education requirements, the child's parents who are the first educators and professional educator's teachers.²⁶⁸

The import of the above suggests that the UBEC should be able to hold the parents, government and teachers responsible for acts of commission and omission that frustrate the realisation of the right. While it is accepted that the parent as the primary caregiver has quantum responsibility in ensuring that the child has access to basic education, it must be recalled:²⁶⁹

The rationale behind the right to education parental choice is not to legitimate denial of their children's right to education. In a conflict between parental choice and the best interests of the child, the rights of the child are protected.

A balance, therefore, of parental responsibility is advocated in the functioning of UBEC. Recalling that SUBEB has a great role to play in realising the mandate of UBEC, the relationship between the two bodies must be enhanced towards realising the right. The pivotal role the relationship between UBEC and SUBEB is further echoed by Tsafe when he opines that 'UBE programmes can only be implemented by close collaborative partnerships between UBEC and SUBEBs'.²⁷⁰ This relationship seems not to be working positively, as the SUBEB is yet unable to deliver quality in the basic education sector with no visible intervention from UBEC. Indeed, it has been found that SUBEB²⁷¹

have not been able to perform important role of collecting, processing, storage and making available accessible information materials to support teaching and learning.

²⁶⁸ Tomasevski (n 33 above) 35.

²⁶⁹ Tomasevski 55.

²⁷⁰ AK Tsafe 'A critical analysis of universal basic education on its implementation so far' (2013) 2 *Scientific Journal of Pure and Applied Sciences* 27.

²⁷¹ Sote *et al* (n 58 above). Another interesting view on the strengthening of UBEC is as advanced by Ujah & Arikpo, by canvassing the strengthening of the goal of UBE via a viable non-formal education sector in Nigeria; see generally MU Ojuah & AB Arikpo 'Role of Non-Formal Education (NFE) under Universal Basic Education (UBE) Law in Nigeria' (2011) 1 *Journal of Educational and Social Research* .

Tsaf identifies a positive impact of the existing relationship between UBEC and SUBEB in the aspect of teacher employment, when he restates that employment of teachers has been enhanced by ‘absorption from UBEC when SUBEB is on able to absorb them’.²⁷²

A further strengthening of UBEC would then entail the creation of a legal unit in UBEC that will be furnished with the responsibility of litigating and prosecution of individuals or bodies inhibiting the realisation of the right to basic education in Nigeria. In the event that this is not possible because of the rigidity of amendment, UBEC can seek collaboration with the human rights division of the NBA or Clinical Law Units (CLUs) that now exist in several Nigerian universities. This mandate can also be exercised in joint collaboration with the NHRC.

Finally, on strengthening UBEC and how it can contribute to ensuring and guaranteeing the availability of quality teachers in Nigeria, it is opined by scholars in Nigeria that a high percentage of Nigerian teachers in primary schools lack the requisite skills and competence to drive quality basic education.²⁷³ The answer may lie with the efficiency of the Nigerian Teachers’ Institute which the next section addresses. Perhaps the answer may be to seek a link between UBEC and the NTI.

iii. Nigeria Teachers’ Institute (NTI)

Our schools are better, the school environment is also better;
the challenge now is what happens inside the classroom.²⁷⁴

The challenges of quality in the Nigerian education sector have continued to remain a problem to stakeholders in the industry. Factors responsible for the poor quality include a lack of adequate remuneration and the non-commitment of the training cycle. According to

²⁷² Tsafe (n 61 above) 32.

²⁷³ Reuben *et al* (n 53 above) 181; A Adepoju & A Fabiyi ‘Universal Basic Education in Nigeria: Challenges and prospects’ available at <http://uaps2007.princeton.edu/papers/70830> (accessed 5 June 2014).

²⁷⁴ Gov Babatunde Fashola ‘Support our schools’ Initiative seminar reported by channels TV Nigeria on 9 February 2014.

Olateju,²⁷⁵ during an interaction in Lagos, she opines the need to put in place mechanisms to audit the quality of teacher training institutes in Nigeria. In addition, she berates the influx of non-professional teachers into the teaching field in a bid to have employment. It is therefore important that the NTI should periodically organise continuing teacher refresher courses so as to enable the teachers to learn new classroom skills. The Ministry of Education at both the state and federal levels as of necessity also ensures that support is provided for schools to ensure that the quality of teachers is controlled and guaranteed.

A factor identified by Mumuni²⁷⁶ is the poor welfare package of teachers. According to him, in an extensive research carried out by SERAP, teachers' attitudes, which affect quality, are said to be closely linked to the welfare package. Identified is the practice of promoting teachers without an accompanying increase in salary.²⁷⁷ The NTI, therefore, in a bid to ensure full commitment by teachers, should endeavour to put into consideration the social factors that affect teachers.

Furthermore, there is a need for the NTI to ensure that lecturers tasked with producing emerging teachers in the various fields of study are well grounded in such areas. According to Eleri in his findings, what can be best described as the placing of round pegs in square holes, states that:²⁷⁸

This was a development which was cheery in spite of the fact that the academic qualifications of many of them is not directly in special education. Indeed, some of them studied such education courses as: Education Psychology, Guidance and Counselling, Educational Management and the likes. *These lecturers were appointed and assigned the course with the*

²⁷⁵ M Olateju, Executive Director, The Education Partnership.

²⁷⁶ Executive Director SERAP.

²⁷⁷ Interview granted to Silver Bird Television Nigeria by Adetokunbo Mumuni, Executive Director of SERAP, 10 August 2014.

²⁷⁸ NOE Eleri 'Teaching effectiveness in elements of special education in NCE - Awarding institutions in Nigeria: Influence of teacher qualifications and experience' (2013) 2 *IOSR Journal of Research & Method* 7, 14.

*unjustifiable assumption that they could teach special education effectively.*²⁷⁹

The outcome of the above was the poor performance of students in the courses with a multiplier effect when such teachers are unleashed on pupils.²⁸⁰ This is seen as an important role in ensuring that quality is enshrined in education from the point of teacher training and education.

iv. Teachers' Registration Council of Nigeria (TRCN)²⁸¹

The Teachers' Registration Council of Nigeria (TRCN) is an agency of the Federal Ministry of Education. Its major mandate is to ensure and regulate the registration and control of the teaching profession in Nigeria. The importance of the role of the teacher in education in Nigeria is echoed rhetorically through the various education policies in place in Nigeria. Afe identifies the pivotal role of the teacher to be important in maintaining quality education, be it at the basic or post-basic and tertiary levels.²⁸² To achieve this, Okebukola advances the role faculties of education in Nigerian universities and colleges of education must play.²⁸³ It is in light of the importance of the role of teachers that the TRCN is a core institution that must be strengthened towards enhancing the realisation of the right to basic education in Nigeria.

The major role of the TRCN, as captured by Afe, is the following.²⁸⁴

The National Policy on Education, section 9:8 envisaged the establishment of the Teachers Council and although Decree No 31 of 1993 has established the Council, it has not taken off up till now. When Teachers Registration Council is translated into action so as to have a legally constituted body to handle the

²⁷⁹ My emphasis.

²⁸⁰ Eleri (n 69 above).

²⁸¹ TRCN Decree 31 of 1993 (now TRCN Act Cap T3 of 2004).

²⁸² JO Afe 'Reflections on becoming a teacher and the challenges of teacher education' available at <http://www.nuc.edu.ng/nucsite/File/ILS%202002/ILS-69.pdf> (accessed 22 October 2014). O Aluede & PO Idogho 'Refocusing teacher education for Nigeria's national development: Issues and policies for implementation' (2014) 42 *International Studies in Education Administration*.

²⁸³ P Okebukola *Quality assurance in teacher education: The role of faculties of education in Nigerian universities* Committee of Deans of Education of Nigerian Universities, 2005.

²⁸⁴ Afe (n 73 above).

issues of training, registration and discipline of teachers then teaching would be fully professionalised.

With the TRCN Act in place, the question is whether the much-anticipated role of the TRCN is being realised and if it is aiding the role of the teacher in ensuring and improving access to quality basic education in Nigeria.

Aluede provides the response to the above when he observes the slow pace of the implementation of the provisions of the Act. According to him, the TRCN Act, in the first place, showed signs of failing by the non-appointment of a registrar to run the affairs of the Council. In addition, Aluede also opines that the lack of awareness among teachers remains the biggest challenge of the implementation and functioning of the TRCN.²⁸⁵

In addition, Aluede further proposes enhanced collaboration between the NUT and TRCN to ensure that the organisational goal of the agency is realised. In his words, Aludedede is of the following view:²⁸⁶

I suggest that the National Union of Teachers should partner with the Teachers Registration Council of Nigeria with a view to making the Code of Ethics' and Standards for Teachers available to the majority of our teachers, so that they can have a better understanding of their professional responsibilities.

To realise the potential of the TRCN, it is important to ensure that teachers are actively and adequately empowered to be involved in the processes governing the provision of education. More importantly, the need to ensure the participation of teachers in curriculum development

²⁸⁵ O Aluede 'The teacher matters: Strategies for making the teaching profession more relevant in the Nigerian educational system' available at <http://www.krepublishers.com/02-Journals/IJES/IJES-01-0-000-09-Web/IJES-01-1-000-09-Abst-PDF/IJES-01-01-039-09-013-Aluede-O/IJES-01-01-039-09-013-Aluede-O-Tt.pdf> (accessed 24 October 2014).

²⁸⁶ As above.

by way of wide consultation will eliminate the challenges of wrongful implementation of the curriculum when developed.²⁸⁷

It is, therefore, deducible that the envisaged overall effect of establishing the TRCN is to professionalise the teaching profession with a prospect of bringing it to par with bodies like the NBA. The TRCN Act empowers the Council to both register and deregister a teacher on the basis of a violation of a laid-down professional code of conduct. This, however, has not been attained as the operations of the Council are still widely unknown or utilised among Nigerian teachers. To curb this challenge, Adelabu, identifying problems faced by teachers in Nigeria, has identified issues of a lack of remuneration and adequate allowance compensation as reasons dousing the motivation of teachers to deliver. Premised on this, he advances the need for greater synergy to be formed between the various teachers' related agencies.²⁸⁸

Consequently, like the NBA, the TRCN must be empowered by enhanced funding to aid its awareness and publicity among teachers. The professionalisation of the teaching profession will definitely aid greater respect for teachers in all spheres of Nigerian education. The effect of this will be enhanced service provision.

v. Nigerian Educational Research and Development Council (NERDC)

The position of the NERDC in Nigerian education is a pivotal one. This is because the NERDC's core responsibility is to formulate education policies that will be generally acceptable and adaptable to the education sector in Nigeria. The NERDC was formed in 1988 and established by Act 53 Laws of the Federation of Nigeria (LFN). The NERDC is a composition of four different agencies responsible for comparative education, language

²⁸⁷ KO Oloruntegbe 'Teachers' involvement, commitment and innovativeness in curriculum development and implementation' *Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS)* 2 (6): 443-449.

²⁸⁸ MA Adelabu 'Teacher motivation and incentives in Nigeria' available at http://www.eldis.org/vfile/upload/1/document/0709/Teacher_motivation_Nigeria.pdf (accessed 24 October 2014).

centres and book development centres.²⁸⁹ While the achievements of the NERDC are laudable, especially in the areas of their collaboration with agencies like the National Emergence Management Agency (NEMA) to develop a Disaster Risk Reduction (DRR) in Basic and Post-Basic Education Curricula in Nigeria, so as to promote the culture of building national and community resilience to disasters,²⁹⁰ much is still desired of the institution. The NERDC has also taken steps to include curricula targeted at stamping out from society the trafficking of girls.²⁹¹

Despite the above, the missing link in the activities of the NERDC is that of awareness and implementation. The activities of the NERDC remain limited to mainly tertiary institutions. According to some teachers interacted with during the field trip, knowledge of the functions of the NERDC and their activities proved to be outside the knowledge of teachers interacted with. This calls for an obvious synergy between NERDC and the NTI to ensure that teachers' training curriculum is tailored along this line to aid teachers to protect children from exploitation. This view is strongly supported by Jude Manu,²⁹² when he states that 'sound policy and initiative of various institutions remain at the level of conceptualisation and development and never get to the point of implementation among teachers and students alike'.²⁹³

In addition, Okorie and Akubuilu have found that, despite the fact that:²⁹⁴

²⁸⁹ <http://nerdc.ng/> (accessed 24 September 2014).

²⁹⁰ D Selby & F Kagawa 'Disaster risk reduction in school curricula: Case studies from thirty countries 190' UNICEF available at <http://www.unicef.org/education/files/DRRinCurricula-Mapping30countriesFINAL.pdf> (accessed 24 September 2014).

²⁹¹ NERDC, NAPTIP collaborate to infuse trafficking in persons issues into school curricula, available at <http://nerdc.ng/news-details/nerdc,-naptip-collaborates-to-infuse-trafficking-in-persons-issues-into-school-curriculum>. (accessed 24 September 2014).

²⁹² Department of Early Childhood Care and Education, Alvan Ikoku Federal College of Education, Owerri.

²⁹³ These views were expressed during a focus group discussion held in Owerri, 5 August 2014.

²⁹⁴ EU Okorie & F Akubuilu 'Towards improving quality of education in chemistry: An investigation into chemistry teachers' knowledge of chemistry curriculum' (2013) 1 *International Journal of Emerging Science*

[t]eachers are drivers of the education system and ought to teach students based on their knowledge, understanding and interpretation of the curriculum philosophy, objectives, content and the recommended pedagogical approach to its implementation. However, the obtainable is that ‘there are indications that much of the problems emanate from the classrooms. There are reports of inappropriate pedagogical approach adopted by teachers in the classroom.

The above fact is further supported as teachers’ knowledge of the NERDC curricula is poor.

Okorie and Akubuilu, speaking about teachers, found that:²⁹⁵

They know that the NERDC SSS Curriculum for Chemistry provides for the contents, performance objectives, teachers’ and learners’ activities, teaching and learning materials; and evaluation guides. However, 10% of teachers are not familiar with the new curriculum; 15% of the teachers are not knowledgeable about the unique structure of the curriculum.

Thus, the development of curricula by the NERDC and not engaging in effective capacity building of teachers to ensure proper interpretation must be filled if the quality of education is to be ensured.

6.5 synergy towards strengthening institutions: realising basic education in Nigeria

The relevance of economic, social and cultural rights is central to ensuring human dignity. However, the commitment of states to their enforcement and implementation has remained rhetoric.²⁹⁶ The continued ‘sad state of affairs’ in Nigeria regarding the right of access to basic education is based on the continued neglect of the substantial nature of economic, social and cultural rights and wavering budgetary allocations.²⁹⁷

and Engineering (IJESE) available at <http://www.ijese.org/attachments/File/v1i9/I0367071913.pdf> (accessed 24 September 2014).

²⁹⁵ As above.

²⁹⁶ SC Agbakwat ‘Reclaiming humanity: Economic, social, and cultural rights as the cornerstone of African human rights’ (2002) 5 *Yale Hum Rts & Dev LJ* 177.

²⁹⁷ As above.

The basis for the continued neglect of economic, social and cultural rights in Nigeria and other sub-Saharan African countries has hinged on economic challenges and the lack of political will to follow through on state obligations under international law.

However, the challenges are far beyond the question of financial challenges and more on political will. Despite the clear challenge of economics, the failure of governance, as showcased by inept leadership and corruption, remains more problematic. As identified by Agbakwat:²⁹⁸

One cannot deny the reality of Africa's grim economic situation, which remains a significant constraint on the financial abilities of African states. Although blame is often placed on this economic situation, the lack of political will and the corruption of the ruling elite have also played a large role in preventing an equal emphasis on enforcement of ESCR as of civil and political rights.

Not overcoming the challenge of inept and corrupt leadership has dire consequences for the realisation of economic, social and cultural rights and, in this case, the right of access to basic education in Nigeria. Agbakwat is of the opinion that:²⁹⁹

Corrupt leaders steal by rejecting policies that would better spur development and promote ESCR in favor of policies that bring greater profits their way through businesses, investments, or unscrupulous cohorts. The interests of the people are pursued only to the extent that they coincide with the selfish interests of those in power ...

In addition, a further challenge identified is the lack of promotional activities.³⁰⁰ Institutions like the NHRC, NTI and UBE, among others, have persistently failed to embark on sufficient promotional activities to enable the general populace to become aware of their mandates. Consequently, the approach of increasing the promotional mandate of all the institutions

²⁹⁸ As above.

²⁹⁹ As above.

³⁰⁰ As above.

discussed is advocated. This is based on the fact that this will aid co-operation among all stakeholders.

The judiciary is identified to be in a position to aid the synergy through this channel. This is enunciated by Christiansen when she posites that:³⁰¹

While acknowledging the inability of judicial action to fully remedy endemic social injustice, the courts can nonetheless empower popular movements, non-governmental organisations, and activists with their rulings.

This approach will build a synergy between the various institutions already discussed. In addition, it will enhance the participation of NGOs and other public interest and religious organisations. This will further bolster the fronts of promotion of awareness and public sensitisation as the public will be well aware of their rights.³⁰² If co-operation is achieved, it will inform other suggested means of ensuring the realisation of the right to basic education. This is by relying on the doctrine of a minimum threshold.³⁰³

The doctrine of minimum threshold deals with ensuring that the deprived and minority areas that are lagging behind in the access to education in Nigeria receive a greater boost in ensuring that the level of access to education in such areas is enhanced. Presently in Nigeria, the continued development of the *Almajiri* education system is a step in the right direction, but requires the elimination of the clogs of corruption and lack of political will. The minimum core threshold has been found to be ineffective in holding states responsible for

³⁰¹ EC Christiansen 'Using constitutional adjudication to remedy socio-economic injustice: Comparative lessons from South Africa' (2008) 13 *UCLA J Int'l L & For Aff* 369, 402.

³⁰² See generally the *Berea Township* case Case CCT 24/07, available at <http://www.saflii.org/za/cases/ZACC/2008/1.html> (accessed 29 September 2014). In this case, community engagement was enhanced by the ruling of the court that encouraged the government to liaise with the inhabitants of 51 Olivia Road, Berea township, and 197 Main Street, Johannesburg, on their planned eviction. If this level of co-operation becomes manifest in Nigeria, then communities and other public interest bodies will be able to demand the meeting of set minimum core thresholds from governments. See generally EC Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court' available at <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1141&context=pubs> (accessed 7 July 015).

³⁰³ Agbakwat (n 87 above).

providing resources below the set out acceptable standards.³⁰⁴ In this regard, Nigeria will be expected to have a minimum facility standard for all its basic educational institutions that is able to aid the quality of education. When this is done effectively, the political practice of celebrating when amenities are provided will be eliminated as the populace will be aware that this is an obligation required by government.

With the foregoing, an important basis of ensuring the strengthening of the agencies involved in the education sector in Nigeria is to ensure proper funding. The place of funding in education is not one that is subject to controverted interpretation. For instance, the importance of ensuring that funding of the girl child's education is well captured in the African Women's Protocol. The Women's Protocol provides in article 10(3):

States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

Education as a social right falls within this category envisaged by the Protocol. Article 12 of the Women's Protocol provides in very certain terms the importance of encouraging state parties to strive towards the realisation of the right of the girl child to education.

Having examined the basis of empowering institutions saddled with the responsibility of ensuring that the Nigerian child's access to basic education is realized, especially from the legal and policy frameworks, it is imperative to discuss other means of achieving results. The approaches examined include the analysis of Nigerian budgetary education, among other approaches. With the above strategies in place, budget as a core means of realising the right to basic education is discussed next.

³⁰⁴ As above.

i. Budgetary allocation to basic education in Nigeria

The need to inject funds into the Nigerian education system has in recent times received some political commitment from the executive arm of government.³⁰⁵ Speaking during the Nigerian Economic Summit with the theme ‘Transforming Education through Partnership for Global Competitiveness’, the then President Goodluck Jonathan reiterated the need to ensure that ‘Nigerian children not only have unfettered access to education, but also receive quality education that propels them to contribute meaningfully to societal progress’.³⁰⁶ However, it is noted that this can only be achieved not only by concentrating on policy formulation, but also by enhancing budgetary allocation and rigorous implementation of same. Adequate budgetary consideration will aid in eliminating the ‘problem of access to schools which is composed of physical access, quality access and economic access’.³⁰⁷

The importance of an enhanced budgetary allocation is hinged on the fact that every nation operates on the basis of stipulated budgets to enable it set out goals and modalities of achieving same. Technically, a budget has been defined as:³⁰⁸

a plan for saving, borrowing and spending... as a financial or quantitative statement prepared and approved prior to a period of time of the policies to be pursued during those periods... as a plan quantified in monetary terms, prepared and approved prior to a defined period of time usually showing planned income to be generated and/or expenditure to be incurred during that period and the capital to be employed to attain a given objectives.

The occurrence within the Nigerian education sector, however, shows that more often than not, approved budgetary sums are not fully utilised. For instance, in a United States analysis

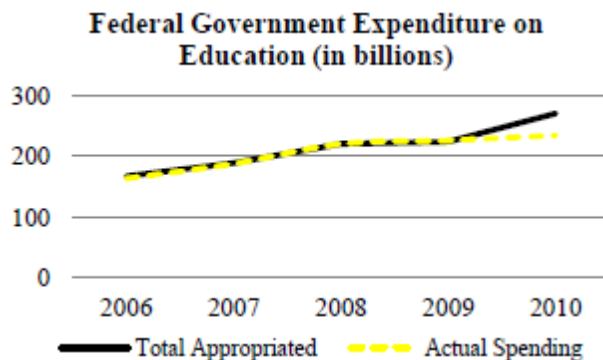
³⁰⁵ National Universities Commission Bulletin 24 March 2014, Volume 9 No 12.

³⁰⁶ As above.

³⁰⁷ TS Gyang ‘Human resources development in Nigeria: The roadmap for vision 20:2020’ (2011) 2 *International Journal of Economic Development Research and Investment* 76.

³⁰⁸ O Michael ‘Adequacy of budgetary allocation to educational institutions in Nigeria’ (2012) 3 *Pakistan Journal of Business and Economic Review* 143.

of the FGN funding of education in Nigeria, a continuous shortfall in the implementation of the education budget was identified, as shown in the figure below.³⁰⁹



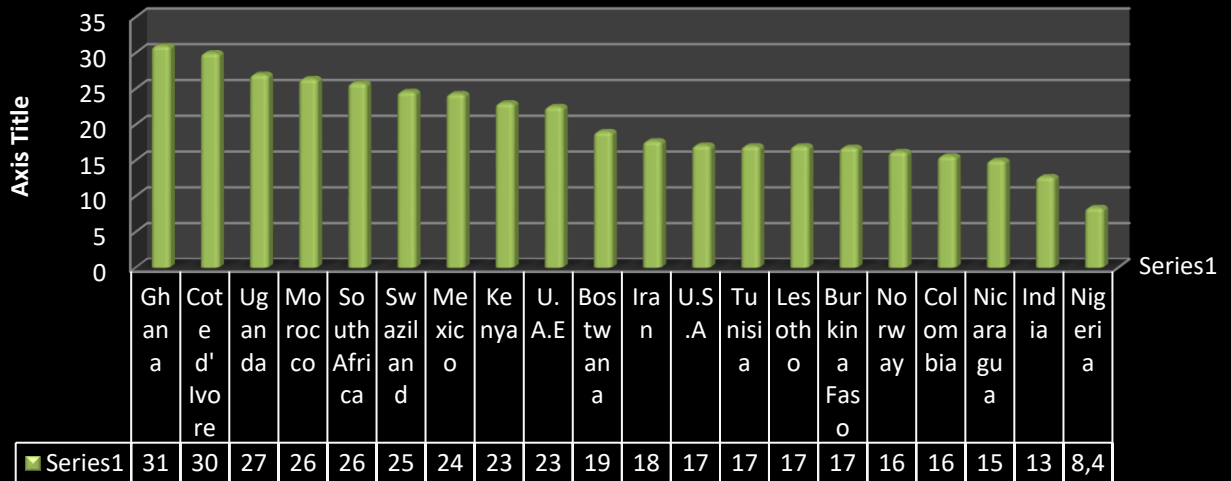
The difference between the appropriated sum and actual spending is worthy of note. It is reiterated that the MoE have accused states of not accessing funds meant to drive UBE. Nigeria government in the recent times claim to have improved allocation to education however, Nigeria's expenditure still fall short of that of South Africa.³¹⁰ The graph below shows that Nigeria ranks lowest in its budgetary allocation in Africa.³¹¹

³⁰⁹ Education Fact Sheet in Nigeria available at <http://photos.state.gov/libraries/nigeria/487468/pdfs/JanuaryEducationFactSheet.pdf> (accessed 25 September 2014).

³¹⁰ A Abayomi 'Education budget and its implications (Analysis)' retrieved from <http://www.vanguardngr.com/>, cited in Michael (n 99 above).

³¹¹ See figures as presented in PJ Kpolovie & IE Obilor 'Adequacy-inadequacy: Education funding in Nigeria' (2013) 2 *Universal Journal of Education and General Studies* available at <http://www.universalresearchjournals.org/ujegs> (accessed 28 October 2014).

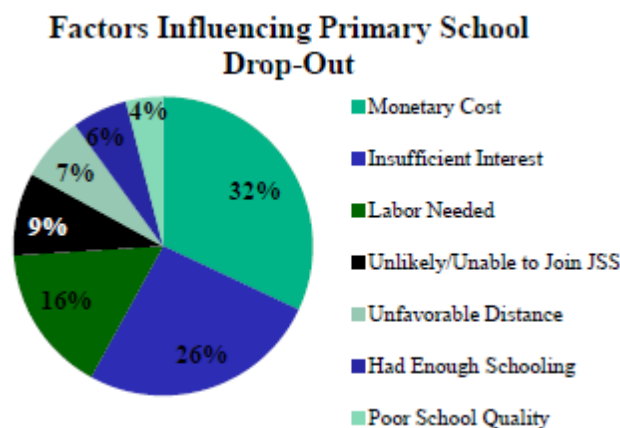
Annual Budgetary Allocations of 20 World Bank Sampled countries to Education (2012)



The shortfall in education funding goes an extent in showing the level and attitude towards the realisation of basic education. As aptly posited by Tomasveski:

The hierarchy of expenditures is indicative of the commitments to human rights or the lack thereof by any state.³¹² Without access to remedies, human rights would be depleted of their core function, to provide safe guards, against the abuse of power by the state.³¹³

It is important to note that the level of funding and the proper utilisation of same has a direct impact on the level of the development of any sector in a country.³¹⁴ This is largely because it has also been found that the high level of lack of access and non-completion experienced in Nigerian basic education is as a result of a paucity of funds. This is shown in the chart below: identifying monetary cost as a prime factor affecting basic education:³¹⁵



³¹² Tomasevski (n 33 above) 108.

³¹³ As above.

³¹⁴ Kpolovie& Obilor (n 102 above).

³¹⁵ 'Education Fact Sheet in Nigeria' available at <http://photos.state.gov/libraries/nigeria/487468/pdfs/JanuaryEducationFactSheet.pdf> (accessed 25 September 2014).

Nigeria continues to fall short of the 26 per cent recommendation bench mark by UNESCO for funding of education and continues to inhibit the realisation of education.³¹⁶ Invariably, it is advocated that³¹⁷

in individual countries, budgetary allocations have to be adjusted to the requirements of international human rights law that is converted from discretionary into obligatory allocations.

Thus, spending on education in Nigeria should be seen as a matter of statutory obligation in terms of meeting the standard and not otherwise. Adewale *et al* have opined that '[t]he phenomenon of allocating a declining fraction of below 2 per cent of the GDP to education poses a serious danger to the country's long-term growth and development prospects',³¹⁸ and until this is curbed by adequate budgetary provisions, access to education in Nigeria will remain on the back foot.³¹⁹

The challenge facing the higher funding of sectors like the military above education is aided by the recent challenges that have bedeviled the Nigerian education sector, especially with the activities of the *Boko Haram*. The present situation in most sub-Saharan African countries shows:

Budgetary allocations frequently show that military expenditure exceeds the allocation for education, that debt repayments exceeds investments in development, that education funding...or bureaucracy soaks up most of the funds intended for teaching and learning.³²⁰

The reality of the above is very true for Nigeria, as most funds earmarked are dedicated to other sectors above the education sector. Where funds are allocated, allegations of corruption,

³¹⁶ See eg TM Adewale, KO Ajayi & OA Enikanoselu 'Trends in the federal government. Financing education in Nigeria' available at http://herp-net.org/REVITALIZATION_OF_AFRICAN_HIGHER_EDUCATION/Chapter%202.pdf (accessed 25 September 2014).

³¹⁷ Tomasevski (n 33 above).

³¹⁸ Adewale *et al* (n 107 above).

³¹⁹ Kpolovie & Obilor (n 102 above).

³²⁰ Tomasevski (n 33 above).

mismanagement or debt settlement get a large allocation, neglecting the enhancement of basic education.³²¹

The interrogation of the budget question is important because the nearness of 2015 and the millennium declaration aspiration clearly fall short of being realised. The need to interrogate the possible means of achieving the EFA has assumed greater attention. Fredriksen is of the opinion that of the numerous challenges confronting the realisation of the right to education, ‘the need to deliberately break the trend would be achieved with higher budgetary priority for the basic education sector’.³²² He is of the opinion that:³²³

In many SSA countries, EFA can only be reached by 2015 if Governments give EFA high budgetary priority and implement the reforms needed to establish credible education programs, i.e., programs that are financially sustainable, of high technical quality, and that can politically and socially be implemented in the national context.

Towards achieving this, the funding of education through aid has increased in the recent past,³²⁴ especially anchored on aid funds because of the commitment to realising MDGs. However, the need to drive domestic funding for education, to maximise such funds and to ensure proper use and disbursement is seen as key to improving access to education in countries like Nigeria.³²⁵

³²¹ Michael (n 99 above).

³²² B Fredriksen ‘Education for all African children by 2015: What will it take to keep the promise?’ (2002) 4 Paper prepared for the Forum on Cost and Financing of Education in Nigeria.

³²³ B Fredriksen ‘Education for all African children by 2015: What will it take to keep the promise?’ (2002) 5 Paper prepared for the Forum on Cost and Financing of Education in Nigeria.

³²⁴ For an analysis to aid basic education, see generally DW Chapman & JJ Quijada ‘An analysis of USAID assistance to basic education in the developing world, 1990–2005’ (2009) 268 *International Journal of Educational Development*. During the week of celebrations of her 17th birthday, Malala Yousafazi, a Pakistani child rights activist, visited Nigeria and donated \$200 000 towards enhancing the rights of the girl child to access basic education in Nigeria. This is aside from the numerous donations from other foreign agencies towards the same goal and aspirations.

³²⁵ V Turrent & M Oketch ‘Financing universal primary education: An analysis of official development assistance in fragile states’ (2009) 357 *International Journal of Educational Development*.

An already identified challenge to the utilisation of funds allocated to education is that of the hydra-headed corruption. While the allocation of funds to the basic education sector in Nigeria has fluctuated over the years,³²⁶ it has been argued that:³²⁷

The problem starts with lack of clear vision which leads to misplaced priority, inequality, poor policy choices and corruption. This coupled with inadequate control mechanisms and internal checks usually result in channelling of resources for sub-optimal purposes and non-attainment of the desired education objectives.

Funding is also argued to be crucial especially towards teacher education. This consequently requires enhanced funding for the NTI and federal colleges of education in the country.³²⁸

According to Ajoku:³²⁹

There is a need to encourage students that embark on teaching practise, this will be achieved by adequate remuneration for both students and supervisors. In most instances, because of the financial challenges, the program is not fully adhered to...we cannot divorce adequate funding of the education sector and output in the education sector.³³⁰

This challenge is further highlighted by Osafo-Kwako and Apampa in a research for the Centre for the Study of Economies in Africa (CESA), where the effect of a lack of adequate funding for teacher education was highlighted. They opined that:³³¹

³²⁶ According to Nuhu & Muhammad, '[t]here has been a consistent decline from 47.18 percent in 2000 to 37.67 percent in 2001 and then 19.0 percent in 2002; an average of 13.98 percent between 2003 and 2004 and 19.26 percent in 2005'. See generally P Nuhu Ya'u & UM Muhammad 'Funding and the challenge of teacher education In Nigeria' (2010) 9 paper presented at the 3rd zonal conference of the Colleges of Education academic staff union held at FCE (T), Gombe; Michael (n 99 above).

³²⁷ Nuhu
Ya'u & Muhammad (n 117 above); see also N El Rufai 'State budgets, wrong priorities, pathetic outcomes' *Premium Times* 3 August 2012 available at <http://www.premiumtimesng.com/opinion/93852-state-budgets-wrong-priorities-pathetic-outcomes-2-by-nasir-ahmad-el-rufai.html> (accessed 10 July 2014).

³²⁸ Nuhu Ya'u & Muhammad 9 (n 117 above).

³²⁹ MOU Ajoku Department of Education Psychology, Abia State University, Uturu, Abia State.

³³⁰ These views were expressed during a focus group discussion held in Owerri, 25 August 2014.

³³¹ P Osafo-Kwako & S Apampa 'Nigeria: Country assessment research background paper on the political economy of the budget process' (2009) 11, available at [file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/Nigeria_Budget_Process_070109\[1\]%20_MK_.pdf](file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/Nigeria_Budget_Process_070109[1]%20_MK_.pdf) (accessed 25 September 2014).

A major area of concern has been inadequate staffing levels to support development of Nigeria's educational system. The pupil/teacher ratio declined from about 40 in 2001 to 35 in 2005 for primary schools. However, increased pupil enrolment will require additional investments to increase staffing levels and number of classrooms.

Furthermore, to be able to achieve the full potential of aid directed towards basic education in Nigeria, there is a need to eliminate claims of negligent refusal to access funds as well as corruption in the basic education sector.³³² It is also important to resolve 'the issue of how to share financial responsibility for primary education across levels of government'.³³³

Increased funding and aid is predicated on a perceived Fast Track Implementation (FTI), which is supposed to ensure that state commitment to the realisation of education is not strangled by the paucity of funds.³³⁴ It remains, therefore, to interrogate the level of seriousness Nigeria has shown with its continued reluctance to engage the law as a tool in ensuring compliance and proper implementation of policies. Berating the lack of commitment to education funding, Kpolovie and Obilor found:³³⁵

The sectorial allocations to education should at least follow the same trend if the growth in education (expansion in school enrolment) should accommodate the population growth of the country. But this is not so; what we have is budgetary allocation trend that is grossly abusive to Nigeria and Nigerians, a trend that has no relationship whatsoever with that of the population growth and expansion of school intakes ...

³³² Nigeria is said to have committed about US \$135.0 million in 2005 alone on education. However, recent statistics show that it has the highest number of out of school children. The effect of corruption on ensuring that funds meant to implement policies is enormous. This has led to the opinion that '[i]n a corrupt environment, resources for human capital and other needed investments, such as in infrastructure, health and education, are often diverted ... However, corruption, low capacity, and weak institutions at the sub-national level hinder their ability to design and implement appropriate public policies.' See N Okonjo-Iweala & P Osafo-Kwaako 'Nigeria's economic reforms: Progress and challenges', particularly 12, 17 & 21 available at <http://www.brookings.edu/research/papers/2007/03/23globaleconomics-okonjo-iweala> (accessed 12 October 2014).

³³³ Adewale *et al* (n 107 above).

³³⁴ P Rose 'Is there a "fast-track" to achieving education for all? (2005) 381 *International Journal of Educational Development* 25.

³³⁵ Kpolovie & Obilor (n 102 above).

It is therefore very important that budgetary allocations to the education sector are carefully implemented, and not just for the public to bask in the euphoria of good budgets that remain on paper.³³⁶ Consequently, the divide between capital and recurrent expenditures must be harnessed to ensure a measurable standard in the perceived progressive realisation of the right to basic education in Nigeria.³³⁷

6.6 Non-governmental organisations

The Nigerian Bar Association (NBA) is a non-profit, umbrella professional association of all lawyers admitted to the Nigeria Supreme Court, as Solicitors and Advocates. It is engaged in the promotion and protection of human rights, the rule of law and good governance in Nigeria.³³⁸ As already shown in chapter five, NGOs play a pivotal role in bringing actions centred on the right to access of basic education before courts in South African and other jurisdictions. In addition, cases before sub-regional bodies have also been initiated by NGOs. Thus, the role of NGOs operating in Nigeria to aid the quest for judicial involvement and enhancing access to basic education cannot be questioned. In this section, therefore, the NBA is discussed as a pivotal NGO which can effectively contribute to the development of the jurisprudence of education law in Nigeria. Interactions with key members of other NGOs are also reflected in this chapter as a means of enhancing the involvement of NGOs in the quest to realise the right to access of basic education.

The NBA, as a body corporate with status to sue and be sued, has so far not initiated any matter of public interest before the courts in Nigeria. Individual legal practitioners also have failed to institute matters hinged on the right to basic education of their own accord. According to Chidimma Ofor-Ndubuisi, ‘lawyers are more interested in matters that will

³³⁶ According to a budgetary analysis by Statisense, the total budget since 1999 is 35.133 trillion with education taking 3.128 trillion representing 8.28% of the total budget. In addition, education had the lowest allocation of 4.4% in 1999 and 10.43% in 2006. See <http://www.slideshare.net/statisense/budgetary-allocation-to-education-sector> (accessed 25 September 2014).

³³⁷ Kpolovie & Obilor (n 102 above).

³³⁸ <http://www.nigerianbar.org.ng/> (accessed 5 June 2014) (my emphasis).

fetch them money’ but also quick to reiterate the lack of knowledge in matters of education law.³³⁹ Omaka is of the opinion that the legal scope limits the role the Nigerian lawyer and judge can play in the area of using public interest litigation (PIL), but blames the lack of awareness on the limited tools available that could aid the realisation of the right to education via the courts.³⁴⁰ This view is further shared by JVC Okoli,³⁴¹ when he restates that most lawyers are conversant with municipal laws and have little knowledge of various international law instruments that could be relied on to actively engage the courts.

It is, therefore, advanced that the NBA as a vibrant institution must advance the frontiers of testing the provisions of Nigerian law, using both its global and regional treaty obligations. Leveraging on the Continuing Legal Education (CLE) programme of the NBA, lawyers must be tutored on how to engage international law instruments. Another aspect of this is to revisit the curriculum of the Council of Legal Education in the Nigerian Law School and the various faculties of law in universities. The human rights curriculum must be focused not on the traditionally-accepted straightjacket of the non-justiciability of economic, social and cultural rights, but also on examining the innovative ways through which these rights can be pursued before the courts in the country.

6.7 The collective responsibility approach

This section of the thesis proceeds on two fronts. The first is as advanced by Hansungule for prominent African individuals to shun corruption and to strive to give back to the community by engaging their wealth by supporting education initiatives. Akinola’s perception supports the proposition of Hansungule. According to Akinola, collective responsibility has the ability

³³⁹ E-mail interaction on 8 July 2014.

³⁴⁰ A Omaka, Dean, Faculty of Law, Ebonyi State University, Abakaliki, Nigeria (e-mail interaction of 11 September 2014).

³⁴¹ Legal practitioner interacted with during the Nigeria Bar Association National Conference, Owerri, 24-29 August 2014.

to fill in gaps of social and infrastructural decays in the various communities.³⁴² The second is further premised on the non-legal means of realising economic, social and cultural rights. It is reiterated that education is a fundamental condition for an informed society; an essential means of enhancing the spread of knowledge and the foundation for the efficient application and distribution of natural resources.³⁴³ Consequently, basic education aims at delivering a foundation programme of learning that equips the pupil with the capacity to engage in some form of lifelong enterprise.³⁴⁴

Thus far in the research, several factors have been identified as affecting the poor situation of the right to education in Nigeria. This includes, but is not limited to, corruption and a lack of proper framework and strong institutions.³⁴⁵ Equally, it must be underscored that globalisation has occasioned an unfortunate over-reliance on Western education as opposed to informal education. Consequently, there is a need for a response so as not to disadvantage the African community considering issues of political economy. As already noted in this research, Western education is a narrow and exotic substance that has left states with an educational legacy that was elitist and alienating.³⁴⁶

Consequently, Hayes argues that the reliance on formal education and neglect of the cultural and traditional characteristics of indigenous peoples and minorities contributes to the large dropout rate and non-success story of education of indigenous peoples and minorities the world over.³⁴⁷ It is, however, paramount that the community embrace government's efforts, although limited, to evolve a lasting and workable legacy of education in Nigeria. Thus, in

³⁴² SR Akinola 'Coping with infrastructural deprivation through collective action among rural people in Nigeria' (2007) 32 *Nordic Journal of African Studies* 30–46.

³⁴³ F Faller 'Universal primary education in sub-Saharan Africa: Achievable or impossible target' in F Nwaonu (ed) *Millennium Development Goals: Achievement and prospects of meeting the targets in Africa in universal primary education* (2008) 37.

³⁴⁴ Faller (n 134 above) 40.

³⁴⁵ J Hays 'Indigenous rights in education: The SAN of Southern Africa in local and global context' in R Hitchcock & D Vinding (eds) *Indigenous peoples' rights in Southern Africa* 229.

³⁴⁶ Faller (n 134 above) 39.

³⁴⁷ Hays (n 136 above).

embracing an African concept of education, it is opined that, considering the ability of the African community to collaborate with other communities, it is still within the ambit of the recent developments for a collective response to the challenge posed by the lack of access to basic education. Akinola describes this thus:³⁴⁸

Community institutions in Africa possessed self-organising capabilities through which community members relate with one another in a rule-ordered relationship, sharing ideas, and using their own initiatives and institutional potentials to address problems of daily existence.

In relying on the collective responsibility model to enhance access to basic education, it is recalled that before the introduction of Western education, there already existed viable indigenous learning systems.³⁴⁹ Education was in the mainstream of day-to-day life. Kaunga is of the firm view that³⁵⁰

education was relevant because it served the needs of communities to survive, to be safe from enemy attacks, and to be in harmony with each other and with nature. Most of all, education mirrored and affirmed the distinct cultural identity of communities.

Parents and communities must therefore not wholly abdicate their responsibility to aid the development of an acceptable model for Nigerian basic education. As also pointed out, the lack of willingness on the part of parents to approach lawyers individually, the NHRC and NGOs to initiate judicial processes to protect their rights to education remains worrisome. It is again echoed here that the African Children's Charter provides for parental responsibility to ensure that the rights of the child are realised. Thus, a collective response is required to advance the best interests of the child. The show of communal willingness is advanced able to eliminate the excuses of government's failure and inability to improve access to education of children purely on the excuse that communities are categorised as hard-to-reach and live

³⁴⁸ Akinola (n 133 above).

³⁴⁹ J Ole Kaunga 'Indigenous peoples' experiences with the formal education system: The case of a Kenya pastoralist' available at <http://www.iwgia.org/sw207.asp> (accessed 30 September 2008).

³⁵⁰ As above.

areas, as the communities are able to demand the minimum threshold expected of the government in its duties.

Involvement of the community will ensure that teachers posted to such areas are well-oriented and informed of the environmental challenges of communities and how to respond to these.³⁵¹ Another impact communal involvement will have is that they will be able to urge the government to embark on skill acquisition workshops. Skills acquired will empower parents to sustain their families without demanding much support from their children, thus encouraging them to remain in school and eliminating the challenges of child labour and reduce non-completion rates in schools. In addition, it is opined that for education to be revamped in Nigerian communities, parents, teachers and pupils³⁵² must all work in perfect harmony to ensure the restoration of the right to education.

6.7.1 Engaging the Elephant in the room toward increasing access to basic education

And let's not forget about the poorest and most marginalised children, particularly girls and those with disabilities, who are still missing out completely – the daily realities of poverty and discrimination combining to prevent them from realising their right to education.³⁵³

The above reality presents a certain obstacle to the realisation of the right of access to basic education in Nigeria. While corruption takes its toll on the available resources committed to education by the government, it is important to concede the fact that economic challenges are present.³⁵⁴ This is done against the backdrop that, despite the eulogising of the benefits of

³⁵¹ Faller (n 134 above) 63.

³⁵² For further reading on the impact of collective responsibility and its possible impact on the outcome of education, see generally VE Lee & JB Smith 'Collective responsibility for learning and its effects on gains in achievement for early secondary school students' (1996) 103 *American Journal of Education Volume*.

³⁵³ European Year of Development Report, available at <https://europa.eu/eyd2015/en/plan-international/posts/financing-right-education> (accessed 25 April 2015).

³⁵⁴ See generally 'Accelerating progress to 2015 Nigeria' available at <http://educationenvoy.org/wp-content/uploads/2013/07/NIGERIA-UNSE-FINAL.pdf> (accessed 25 April 2015).

education, it will only amount to ‘lame-duck if it is not backed up by the necessary funding’.³⁵⁵

As previously stated in chapter four of the thesis, article 2 of the ICESCR advocates international co-operation in the quest to ensure that economic, social and cultural rights are achieved. It is important, therefore, to envisage how the elephants in the room have influenced issues of education.

The role and effect of policies such as SAP in introducing fee-paying education has already been discussed in chapter three. Thus, the role of the World Bank and its capitalist approach to education is criticised. This position is further supported by Sarelin by noting that ‘today there is no commitment to the right to education by international financial institutions such as the World Bank or the International Monetary Fund (IMF)’.³⁵⁶ It is noted, however, that in recent years the World Bank has begun to contribute to education financing in developing countries.³⁵⁷

Consequently, the need to ensure that more funds are contributed without unnecessary conditions is apt in enhancing the realisation of access to education. International non-governmental organisations and other donor agencies are pivotal in the quest to make education available. It is, however, reiterated that the challenge does not stop with donations but with ensuring that the funds donated are effectively managed and utilised to achieve its end point. This, therefore, calls for the prominent role of the various arms of government to

³⁵⁵ European Year of Development Report (n 144 above).

³⁵⁶ SA Sarelin ‘The right to education from a developing country perspective’ available at https://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDIQFjAD&url=http%3A%2F%2Fwww.kios.fi%2Fdownload%2F123&ei=cOA7VZznKo_loASpqIDoDg&usg=AFQjCNGOYWAXLC-II3YufpfzE1mI2jzckg&sig2=ZKNXhPV6PWDZrv6KkA2v8g&bvm=bv.91665533,d.b2w (accessed 25 April 2015).

³⁵⁷ See generally ‘Human rights-based approach for education for all’ 60 available at http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf (accessed 25 April 2015).

ensure appropriate policies, the execution and interpretation of laws towards the promotion and protection of the right to access of basic education in Nigeria.

6.8 Conclusions

It is important that all available means are explored by all stakeholders in Nigeria and beyond to ensure that the right to access of basic education is realised, not minding the means of seeking the remedies, judicial or non-judicial.³⁵⁸ The approach in exploring non-judicial means to realising the right to education may include the design of an acceptable African educational model different from the received *cum* perceived Western style of education.³⁵⁹

It is also concluded that much co-operation needs to be followed through if the situation of education in Nigeria is to be realised. According to Omaka:³⁶⁰

The current ‘partnership’ amongst NUT, NTI, UBE and others seem not to be yielding maximum fruits because they really do not partner but work independently. if they work closely with Nigerian human rights commission, the legal aid council of Nigeria and similar organisations towards making free and compulsory education justiciable the present gains in the education sector would be improved.

The role of NGOs in contributing to the promotional knowledge of the right to access of basic education is an important one. An NGO such as the NBA needs to embark on a rigorous continuous education of lawyers to empower them with tools that will aid them in engaging regional and global human rights instruments in ensuring that the right to education is realised. The need to also enhance the curriculum of the Nigerian Law School and various faculties in the universities to begin to interrogate the *status quo* of seeing social rights as non-justiciable is also a dire need.

³⁵⁸ See generally C Mbazira *You are the ‘weakest link’ in realising socio-economic rights: Goodbye strategies for effective implementation of court orders in South Africa*, (2008).

³⁵⁹ Agbakwat (n 87 above).

³⁶⁰ n 131 above.

The level of judicial activism by Nigerian judges should be enhanced by continuous training so as to enable judges to appreciate the application of regional and global human rights instruments. As rightly pointed out, a judge is empowered to reach decisions on his own citing the basis of such decision, even when same has not been advanced by the lawyer.

The NHRC needs to up its approach to the implementation of its mandate by embarking on its promotional mandates to the public. In addition, it should engage NGOs like the NBA and law schools to great awareness of the roles it is empowered to play. The question of the jurisdiction of the NHRC also needs to be settled by possibly including it as a creation of the Constitution so as to enable it to take far-reaching and enforceable decisions.

The task of the MoE, UBEC, NTI, TRCN and NERDC remains very crucial in realising access to basic education in Nigeria. It is therefore important that the institutions go beyond just mere policy formulation and embark on implementation down to the grassroots levels. The need to ensure that teachers, who are the drivers of the policy, are well equipped with the knowledge of the various policies and curricula formulated is also crucial.

The need to perceive education as a human right well-enshrined and grounded remains a huge expectation from the populace and it is therefore expected that the legislature should take the bold step of moving education from chapter two of the CFRN to chapter 3. This will enable the understanding of the importance of education as a fundamental right and will also erase all uncertainties that confront its justiciability presently.

Finally, the pivotal role of budgetary allocation to education is germane. However, it is identified that Nigeria needs to curb the pitfalls of corruption so as to ensure that the numerous aid funds pumped into the basic education sector is fully utilised. Nigeria is yet to meet the 26 per cent budgetary allocation standard of UNESCO. However, there is a need to ensure that funds are accessed and utilised in a progressive manner to help improve access to

and quality of education. In the same way, there is a need to ensure that teachers' welfare is seriously taken into consideration. It is concluded that the craving for the message of education but shooting the teacher as messenger should be discouraged as it will aid the realisation of quality basic education in Nigeria.

Chapter 7

Conclusions and recommendations

7.1 Introduction

This thesis was set out with the premise of investigating the abysmal state of access to basic education in Nigeria. It sought to discover the factors that have affected access to and acceptability of basic education in Nigeria. In ensuring how to enhance access to quality education, it proposed to interrogate the role the law can play in enhancing the situation and how various institutions can be strengthened to aid the realisation of the right of access to basic education in Nigeria. Informed by the literacy level and the worrisome fact that Nigeria, according to UNICEF and UNESCO, had the highest number of out of school children, the thesis sought to find out the reasons that informed the situation. At the inception of the thesis, the worrisome activities of the terrorist group *Boko Haram* which, when interpreted, means ‘Western education is an abomination’ concentrated more on educational institutions. Thus, the thesis promised to investigate the basis on which certain groups in Nigeria could reject education. The thesis also sought to establish the situation of policy and law of Nigerian education spanning from the pre-colonial era to the present.

In addition, the thesis promised to study the substance if possible of how the right to access basic education could be boosted in Nigeria relying on international human rights laws, co-operation between institutions in Nigeria saddled with the duty of enhancing access to basic education and either promoting or protecting human rights. The envisaged institutions include, but are not limited, to institutions like the Nigerian judiciary, NHRC, NTI, TRCN, FME and CSO/NGO, with particular focus on the NBA. Having examined the institutions, the thesis suggested means by which the institutions could be strengthened to enable them to enhance the right to access of quality basic education in Nigeria.

Beyond access, the thesis examined the quality content of Nigerian basic education by an interrogation of several components, such as the adaptability of curricula and the availability and competence of teachers. Also, it examined the issues of rights to education, looking at access to basic education of the girl child and inclusive education.

The thesis also investigated factors that could be responsible for the poor state of access to basic education in Nigeria apart from the challenges of law and policy. The primary basis of this was based on the finding that the political class claimed to have made provision for structures needed to actualise access to basic education, although these were mere rhetoric.

The identified problems that led to this research include the fact that Nigeria is signatory to several treaties that guarantee the right to access of basic education, has enacted national laws, and formulated policies besides the constitutional guarantees, and yet the state of access to basic education is very poor. Moreover, taking into consideration the MDG commitment of the Nigerian government, the reality of meeting the aspiration of access to basic education remained increasing most unlikely with little or no actual strides made towards this.

These identified problems led to the formulation of the central question of the thesis, which was to interrogate how the right to basic education in Nigeria can be realised by relying on national laws, policies and Nigeria's treaty obligations. Consequent upon this, the position on the right to basic education under Nigerian law and education policies was to be analysed to decide to what extent they conform to international human rights law. Building upon the basis of the legal maxim of *ubi jus ibi remedium*, the thesis examined how victims of the lack of access to basic education can use global and regional human rights laws to enhance access to basic education and, finally, how the institutions identified could be strengthened to enhance the right to access of basic education in Nigeria.

Finally, the thesis sought to bring the novelty of a critical analysis of the situation of access to basic education by engaging the question as a human rights issue, drawing inspiration from beyond the horizon of Nigeria, particularly from South Africa and India.

7.2 Conclusions

7.2.1 Theoretical framework and the human rights nature of education

Establishing the theoretical framework of the thesis and the concept of rights pertaining to education was the main focus in chapter two of the thesis. The arguments of scholars like Wilson were relied on. Wilson argued that no rights should be without a remedy. Scholars like Dembour argued the diverse concepts of rights, while Heyns advanced the struggle theory. Contrary to the theory of Heyns, Donnelly argued that rights are only the ones that accrue free for the rationality of being human. Based on the strength of these scholars' propositions, the thesis examined the possibility of the recent instability in Nigeria as a result of the effect of the lack of access to and acceptability of the present concept of education. This argument was hinged on the pivotal aim of education as envisaged by the UDHR, as education has the potential of preparing an individual to be a responsible member of society.

Besides reliance on the theory of rights by Western scholars, the concept of rights from the African perspective was also examined, recognising the fact that African philosophy is cast in proverbial non-written scripts. The thesis agreed with Mbiti that the concept of rights in Africa was written on the mind and not in books. In supporting this line of thought, an analysis of some proverbs that speak to the interrelated and intertwined nature of rights attested to the existence of rights in the African context. Furthermore, along the African philosophy, Kenyatta opined:¹

¹ J Kenyatta *Facing Mount Kenya* (1979) 128.

With a better understanding of the Africa social structure, an educationalist would be able to adopt a practical theory and method to suit the situation, and to satisfy the African aspiration, so that education, instead of creating confusions, might help to promote progress, and at the same time to preserve all that is best in the traditions of the African people and assist them to create a new culture which, though its roots are still in the soil, is yet modified to meet the pressure of modern conditions.

Subsequently, the thesis concluded that there was the obvious need to ensure that an African *cum* Nigerian educational philosophy must be deliberately evolved to ground acceptance.

It is concluded that the indispensability of the right to access basic education was a fulcrum to realising other human rights and that, besides Western philosophies, Africans had a basis for its own philosophy of education. In addition, it was also found that international human rights law must be engaged so as to protect groups against the actions and omissions of government. Thus, the responsibility of the Nigerian state to ensure the protection, promotion and fulfilment of the right to education was grounded, agreeing with Tomasveski when she posited:²

Redressing imbalances in life without full recognition of the right to education is impossible. Education is an end in itself rather than merely a means for achieving³ other ends ... economics, production of human capital and its purpose is to supply qualified people to meet labour.

Another pivotal finding of this chapter was that the content of education as advanced by Coonmans places both a positive and negative responsibility of the state. This position is supported by the arguments of Beiter and Tomasveski. Hinged on the argument of the scholars above, it was argued that, aside the obligation on the state, the question of the right

² K Tomasevski *Education denied - Costs and remedies* (2003) 32.

³ Tomasevski (n 2 above) 33.

to access basic education as envisaged by human rights law also envisaged both horizontal and vertical obligations.

7.2.2 Theory and philosophy of education in Nigeria

Examining the concept of the 4A theory of education as advanced by Tomasveski, it was argued that the nature of the philosophy of education as advanced by the colonialists was fundamentally flawed. Scholars like Fafunwa and Ikejiani argued that the acceptability and adaptability of education as advanced to Nigerians raised suspicions. While Fafunwa argued from the perspective of religion, Ikejiani argued from the perspective of the content. The philosophy of education that was handed down to Nigeria, in particular, and Africans, in general, had the singular purpose of eroding the dignity of the individual. Arguing in section 2.2.3 of the thesis under the concept of acceptability, the thesis advanced the arguments of Adetutu and Azikiwe to the effect that, despite the fact that some of the values handed down to Africa were positive, there were also negative aspects.

Having perused all the arguments by the scholars, the thesis advances that there is a failure on the part of the Nigerian state to take adequate and cogent steps towards advancing a philosophy and style of education that would suit its citizens. This view was later collaborated by Olateju in chapter 6 of the study, when in an interaction she bemoaned the fact that the underlying principles of Nigerian education are still hinged on the Western philosophy handed down by the British.

Having established the theoretical basis of the thesis, the thesis set out to examine the central question of the research, namely, how the right of access to basic education in Nigeria can be realised by relying on national laws, policies and Nigeria's treaty obligations. In order to achieve this, it was necessary to examine the nature of education law and policy in Nigeria.

7.3 Obstacles to the right to basic education in Nigeria

7.3.1 Introduction

In chapter three, the thesis set out to examine the obstacles to the realisation of the right of access to education in Nigeria. This was necessary considering that, despite the availability of several policies and laws regulating education in Nigeria, the state of access to basic education remains worrisome and poor. This was also necessary because every government in Nigeria continues to make rhetoric claims to its efforts regarding the realisation of the right to access to basic education.

In addition, Adeyemi, Ajayi⁴ and Abbas⁵ all mourn the very poor state of education in Nigeria, especially at the basic level. In a documentary conducted during the course of the conceptual phase of this research, deplorable facilities discovered corroborated the positions of the above sources. Another core aspect discovered was the challenge of quality in both mainstream education and inclusive/special education. The entire identified factor reiterated the findings of Fredriksson on the central point of quality education and its link to teacher quality.⁶

This chapter found that some of the major obstacles affecting access to basic education in Nigeria included the attitude of the political class, legislative challenges, corruption, and ethical and institutional pitfalls. Apart from the above, religious *cum* cultural challenges were also identified to be major musters affecting access to basic education, especially the education of the girl child. The findings on the cultural barrier were hinged on the position of

⁴ K Ajayi & M Adeyemi 'Universal Basic Education (UBE) policy implementation in facilities provisions: Ogun State as a case study' (2011) 2 *International Journal on New Trends in Education and Their Implications* 35-36; T Moja 'Nigerian education sector analysis: An analytical synthesis of performance and main issues' (2000) 10 available at http://siteresources.worldbank.org/NIGERIAEXTN/Resources/ed_sec_analysis.pdf (accessed 24 September 2013).

⁵ IM Abbass 'Community participation in education: Challenges and prospects in Nigeria's democracy' (2012) 2 *European Scientific Journal* March 3.

⁶ See generally U Fredriksson 'Quality education: The teachers' key role' Workshop 4 Education International, available at <http://www.ibe.unesco.org> (accessed 4 December 2013).

authors like Ngugui⁷ and Kenyatta, who both decried the negative influence of education on African religion and philosophy.

7.3.2 Legislative challenges

In discussing the legislative challenges to access to basic education in Nigeria, the shortcomings and inconsistencies of policies in Nigeria were identified to be the major bane of all policies. It was concluded that the absence of proper planning and projection affected all policies that have been put in place. The consequence of this meant that each successive government embarked on its own frolic to try to find a workable policy. Established on the argument of Atoyebi, who echoed Umerzurike, it was reasoned that the ‘propensity to screw up the implementation of policies’ remains a major legislative challenge.

Another legislative obstacle identified is the non-recognition of the right of access to basic education as a fundamental human right in the CFRN 1999. The continued treatment of basic education as a mere objective of state principle and viewed as non-justiciable by a majority of Nigerian legal practitioners remains a challenge. The thesis has, however, argued in line with Viljoen that the provision of state objectives should in actual fact be used as a guide to actualising social rights and not to violate or deny same. It was also argued in chapters 5 and 6 of the thesis that this provision must be reviewed so as to strengthen the roles of the court and other quasi-judicial bodies that have the task of either realising or enhancing the right to basic education.

7.3.3 Institutional challenges

The thesis argued that the strength of institutions responsible for access to basic education has a direct impact on the state of access and quality of education. The importance of effective design and management of learning environments is identified as a major source of

⁷ WT Ngugi *Decolonising the mind: The politics of language in African literature* (1981) 9.

determining the quality of education at the basic level.⁸ Besides the challenge of lack of adequate infrastructure in the Nigerian education system, as was found during the documentary on the Anambra West local government area, government institutions also lack an institutional framework to advance access to basic education.

The gap in the level of co-operation between institutions such as the NTI, NUT, and NERDC, among other institutions, was found to affect the uniform implementation of education policies in Nigeria. The friction between the FME and the various SME and SUBEB was also identified to portend big obstacles to basic education. Particularly the continued trading and shift of blame from the FME to SME, especially where political affiliation deferred was identified. However, this finding led to the argument that the UBEC must be strengthened by a review of its legal framework to hold government officials responsible for acts of commission and omission. It was subsequently argued in chapter six that these institutions can seek collaboration with NGOs and institutions like the NBA and the NHRC in order to realise their respective mandates.

7.3.4 Cultural and religious challenges

At this point, the issue of acceptability was restated. It was noted that there was certainly a negative outcome of cultural and religious undertone to the perception of education. Abass argues the need to ensure community involvement in curriculum development to encompass both religious and cultural affiliation. While the thesis recognises the onerous task considering the multi-ethnic nature of Nigeria, it has advocated the need for the NPE to build on restoring the dignity of every individual community. This position was taken in line with the reasoning on Ngugui in her argument of ensuring that the African mind is refocused.

⁸ GO Udo & AP Chuks 'Effect of design, layout and management of primary school facilities on performance of pupils' available at www.aibuma.org/archive/proceedings/.../Chukwu,%20Nigeria.doc (accessed 24 September 2013).

In addition, Hansungule advanced the need for education to be seen as a communal responsibility by both communities and individuals. His argument is advanced on the need to bolster the scholarship by establishing an educational foundation as found in the West to aid access and availability of education. This involvement of influential members of the communities will ensure the elimination of emerging hostile treatment meted out to teachers and local schools.

The impact on the girl child was regrettably observed, not just in the continued practice of early child marriage of girls and the *almajiri* practice, but with the violence meted out to girls. It is disheartening to note that over 200 Nigerian girls were abducted from a school in Chibok to show the rejection of the education system by the *Boko Haram* sect.

7.3.5 The challenge of language in access to basic education in Nigeria

Closely linked to the cultural and religious challenge is that of language. The main proponent of language in basic education in Nigeria is Fafunwa. He contended that education in foreign language negatively impacted the dignity of Nigerians and could have contributed to its rejection. Nevertheless, this view is countered by experiences shared by some community members interacted with during the course of writing this thesis. They opined that, because of reliance on local language education which was subsequently not well envisioned in the subsequent strata of education saw them lose out in furthering their education. This claim finds support in the literature as articulated by Ogundele, positing that the Nigerian education structure was not prepared to overcome the reliance on English.⁹

The thesis, however, critiqued the overreliance on Igbo, Hausa and Yoruba, which are seen as the major languages. The argument is hinged on the fact that the NPE advanced the three languages as major languages over other minority languages, creating a sense of suspicion

⁹ See generally W Ogundele 'Wipe your feet on it. Yes, it's Kente: Armah's anatomy of colonial education in Nigeria' (2008) 9 *Papers in English and Linguistics* 194-213.

and superiority among the various ethnic divides of the nation. In arriving at this basis, the position of De Varennes that there does not exist such a right as being educated in one language of choice, it is paramount to take into consideration the population of a particular language-speaking group in advising on the propriety of the state having the responsibility to provide learning in their mother tongue.¹⁰ This position is also supported by Beiter when he advanced that states must take definite steps to develop and disseminate education as much as possible on the prevailing language of a people. The *Cyprus v Turkey*¹¹ and the *Belgian linguistic* cases¹² provided the legal basis for the position of the scholar above.¹³

Furthermore, it was advanced that the lack of educational resources in various local languages is not strong enough to be sufficient to ground the neglect of languages as it is never too late to develop educational materials in different languages.

7.3.6 Corruption and ethical challenges

It was the finding of the thesis that teachers' attitude to work formed a major obstacle to the realisation of basic education in Nigeria. As further discovered in interaction with the Executive Director of SERAP, poor remuneration for teachers contributes to this challenge. UNESCO has also advocated the need to ensure that teachers' welfare is paramount in the agenda of government, but this continues to loom large. The thesis argued that it is impossible to embrace the message of education yet neglect the messenger.

¹⁰ F de Varennes 'International and comparative perspectives in the use of official languages, models and approaches for South Africa' (2012). During the presentation of this report, the author was fortunate to interact with De Varennes on the crucial role of language in education, especially with the difficulty it presents. It is De Varennes's opinion that the place of language must be sustained by the government, the economic implications notwithstanding. This he advanced largely on the relationship between dignity and language and the fact that language was a major source of ethnic violence.

¹¹ Application 25781/94.

¹² (No 1) (1967), Series A, No 5 (1979-80) 1 EHRR 241 (No 2) (1968), Series A, No 6 (1979-80) 1 EHRR 252.

¹³ See generally on this subject *Dominique Guesdon v France*, Communication 219, 198, *Herve Barzling v France* Communication 3271 1988.

The most crucial ethical challenge identified is that of corruption. Opinions of Ribadu, Waziri, Ajayi and Adeyemi all advanced and conceptualised the menace of corruption. Sen also advanced the critical negative effect of corruption on the development of Nigerian education. The thesis has aligned itself with the reasoning of Odinkalu who found that corruption is not peculiar to Nigeria and Africans and should therefore not remain the basis of avoiding government responsibilities. This argument was buttressed by advocating the possible role of the NHRC and the NBA in activating the law towards stamping out corruption in Nigerian education. In addition, the role of NGOs like SERAP and the NBA seeking redress before the ECHR was advanced as an important step towards this realisation. In the argument on the strengthening of the UBEC, NHRC it was further argued that making legislative amendments to empower especially the UBEC to bring to justice officials will aid the elimination of this obstacle.

7.3.7 Access to basic education of people living with disabilities

At this stage, the thesis examined the question of education of people with disabilities. This was done against the backdrop of the race for inclusive education as envisaged by article 24 of the CRPD. While the need for inclusive education was acceptable based on international law, the thesis proceeded to argue about the need to embrace quality in education and not to concentrate on inclusive education. This position was adopted as the fine line between the nomenclatures of inclusive or special education in Nigeria. This view was restated on the effectiveness of the jurisprudence of the German Court in the *Integrated Schooling* case.¹⁴

This position notwithstanding, ensuring physical access and protection of the rights to education of persons living with disabilities was advanced in the thesis.

¹⁴ Decision of 8 October 1997.

7.4 Policies and laws regulating basic education in Nigeria

7.4.1 Introduction

The question that informed this section of the thesis was to examine what the position is regarding the right to access to basic education under Nigerian law and education policies and whether it conforms to international human rights law. At this stage, it was necessary to set out the crux of basic education in Nigeria. Relying on the arguments of Obanya and Dueze on the scope and content of basic education, it was found that basic education has a peculiarity of taking the community in which a child was growing up into consideration. This argument validates the position of human rights law that envisages the best interests of the child which, as has been canvassed by Tomasevski, stipulates that the child should be the central focus (object) of education and not the subject.

Zukker, arguing about the need to have a proper education policy, warned of the dangers of an inappropriate education policy.¹⁵ It was argued, however, that any teaching that prepares a child to impact negatively on society is not worthy of being called education. The position of the thesis, however, recognises the need to ensure a proper education policy in all spheres of Nigeria, especially as education is in the concurrent legislative list, noting, however, that the FME reserves the overriding responsibility to monitor the proper implementation of policies.

In addition, it was also found that access to basic education as envisaged by the UPE in 1976 was modelled after the Education for All projects of UNESCO. According to the design, basic education is meant to cover access to education primarily from ages 0-15. However, statistics show otherwise with Nigeria having the highest number of out of school children.¹⁶

Furthermore, it was noted that the instability of education policies and laws has been

¹⁵ MA Zuker *Education law* (2002) 281.

¹⁶ G Brown 'On the road to education for all in Nigeria' <http://gordonandsarahbrown.com/2013/09/on-the-road-to-education-for-all-in-nigeria/> (accessed 10 September, 2013); P Rose 'Spotlight on Nigeria's education crisis' available at <http://efareport.wordpress.com/2013/09/10/spotlight-on-nigerias-education-crisis/> (accessed 10 September 2013).

negatively jostled by the instability in governance that has graced the Nigerian chequered history with sporadic interference of military rules. This fact was revalidated in chapter six of the thesis, when it was found that the budgetary allocation to education in Nigeria was at its lowest during the military regimes. Policies such as SAP, it was found, had a highly negative effect on the Nigerian education sector. Consequently, it was not until 1999, upon the return of democratic rule in Nigeria, that Nigeria embraced the universal basic education policy which is backed by an Act of the National Assembly. The Act, it is argued, despite having some flaws in terms of properly empowering the UBE Commission, holds some promise in enhancing the access to basic education in Nigeria. However, it was also noted that, despite the emergence of democratic rule, the menace of corruption reared its head and also necessitated a huge denial of access and availability. This was consequently validated in chapter three of the thesis, when corruption was found to be a major bane of the Nigerian education sector.

Finally, in establishing the disparities that exist between the various regions of the country and the ever-present spate of violence in the country, it was concluded that the flawed education policies in Nigeria are a possible and strong indicator as various groups have claimed neglect of their rights. The thesis proposes that this could be a revalidation of Heyns's struggle theory. This position was reached based on the failure by Nigeria to develop an acceptable federal plan of education. Hanson, raising alarm over the poor state of education philosophy, found:¹⁷

Admittedly, African education poses a problem of quantity but the question raised by the 'quality' content of education and the nature of the syllabi has the connection a revolutionary significance. Indeed, the African of 1980 will be the product of the syllabi drawn up in 1961. *The type of man who will rule*

¹⁷ JW Hanson 'Developing a federal plan for education' in O Ikejiani (ed) *Education in Nigeria* (1965) 70.

*over the Africa of tomorrow is potentially contained in these curricula’.*¹⁸

7.4.2 Educational policy in Nigeria: Pre-colonial and colonial eras

The finding here showed that education was existent in Nigeria before the advent of colonial rule. Each region had its own style and format of education. This stance is fully supported by Fafunwa, who established the conflict that became evident with the advent of Western education. He argued that Islamic education was strong and developing until the colonial education policy derailed it. The question investigated here was whether the current agitation by *Boko Haram* would find the proper basis for this conflict. While the thesis has not delved into the religious philosophy that underpins the Islamic education philosophy, it argued that the adaptability of education had a strong link to the reaction of the recipients of education. This position is further reinforced by the struggle theory of Heyns which was reiterated. Nevertheless, it is also opined that, had the Nigerian government tried to build an adaptable education philosophy that reinforced the dignity and religion of Northern Nigeria, some of the violence may not have occurred. The position finds credence in the reasoning of Imam, when he found that the British educational policy ‘did not address the aspirations of the people, leading to a clamour for change’.¹⁹ Finally, the policy of education during this era was found to have had no respect for the Nigerian child and also created a salient hatred among the various ethnic divides of Nigeria.

7.4.3 Educational policy in post-colonial Nigeria

It was found that the education policy in Nigeria during the colonial era had an over-reaching effect resulting in the lack of manpower of Nigerian descent. The purport of this, as advanced by Adams, was that post-colonial Nigeria started off with expatriates managing virtually all

¹⁸ My emphasis.

¹⁹ H Imam ‘Educational Policy in Nigeria from the colonial era to the post-independence period’ (2012) 181 *Italian Journal of Sociology of Education*; SC Adams Jr *Nigeria: Where education has not kept pace with politics* (1960) 162-68, *The Phi Delta Kappan* 41:4, content downloaded from 137.215.6.53 on 19 June 2013.

facets of the Nigerian state. Hanson further argues that the central focus of education was failing to realise the place of the individual and put the society as primary target. This position of Adams and Hanson led to the conclusion that both the pre-colonial and colonial education policy failed in locating the Nigerian as the central focus of its existence and thus was a deviation of international human rights law. Furthermore, it is safe to conclude that colonial and post-colonial policies ignored very crucial aspects of the educational need of Nigerians and was designed to ensure that millions of Nigerians would not have access to education. This position was advanced by the Ashby Commission.²⁰

In addition, the emergence of several education policies, such as the 1977 NPE and the 1981 NPE, Nigeria has been unable to fashion a workable design for her education sector. This has seen the pendulum swing from the 8-5-2-3 to the 7-5-2-3 to 6-3-3-4 and, presently, to the 9-3-4 system. This era also saw the interference of the military and various unfriendly policies that scuttled the development of the education policy in Nigeria.

7.4.4 Nigeria legal framework for education

Applicable laws that govern education in Nigeria were identified to include the UBE Act, the CRA and the Constitution. It was discovered; however, while tracing the several constitutional developments in Nigeria, that education had never been recognised as a fundamental right. The pre-independence Constitutions, indeed, did not have provisions relating to education. While the CRA holds promise, it remains to be fully implemented by all the states in Nigeria. The UBE Act remains pivotal and central in giving access to education in Nigeria legal teeth, but continues to face severe challenges to its implementation.

²⁰ Hanson (n 6 above) 22.

7.4.5 Compliance of Nigerian education law and policy with global and regional human rights standards

The premise of the non-compliance of Nigerian education law and policy with human rights law is on access and availability as affected by acceptability. In addition, the failure of the CFRN 1999 to accord the right of access to basic education the status of fundamental right remains a continuing violation.

In addition, the thesis found that the continued lack of quality in education content and curriculum in Nigerian education continues to deviate from the main objective of empowering the Nigerian child. Consequently, it was argued that there was a need for a design of education curriculum to reinforce cultural dignity and community peculiarity in such a manner that negative cultures are dispersed.

In addition, the thesis also found in this chapter that the liability for the violation of education Acts and policies is hinged more on the individual, while not establishing a means of holding the state and its agents responsible for acts of commission and omission. This point, as argued in chapter five, can further be resolved by strengthening the UBEC to be able to seek legal action against individuals and government organs that act in such manner that hinder access to basic education.

Furthermore, it was also found that the impact of the military on budgetary allocations of education was abysmal and therefore derailed the commitment of Nigeria to international human rights standards on the allocation and adequate funding for education. This was consequently elaborated in chapter six of the thesis. It was also found that the various education decrees during the military era in Nigeria were not friendly, thus leading to a brain drain that subsequently affected the training of teachers.

7.5 Comparative analysis of jurisprudence and legislation governing the right of access to basic education

7.5.1 Introduction

The present chapter sought to resolve the question of how victims of the lack of basic education in Nigeria use global and regional human rights to access education. In finding the answer to this, the thesis embarked on a voyage beyond the shores of Nigeria to examine the jurisprudence from other countries. South Africa and India were selected as major case studies. The premise for analysing the situation in the two countries is based on the fact that they are both commonwealth countries; both have diverse ethnic nationalities and have engaged the law through the judiciary in ensuring the realisation of the right to basic education. In addition, India had commenced developing the jurisprudence on access to basic education as a right even while it was still unjusticiable in India.

The propositions of Skelton formed a central premise for examining the role the courts can play and how far they can go to enhance access to education. Relying on the reasoning of Mbazira, the thesis advanced the need for enhanced co-operation between various institutions capable of aiding the realisation of the right of access to basic education. The works of Sachs and Singh also provide pointers that if Nigeria followed the lessons from other jurisdictions, the government and individuals could be held responsible for the failure to enhance access to basic education.

Leaning on the various decisions of the courts in South Africa and India, the thesis advanced the role the Nigerian courts should play in this regard and consequently encourage both the NBA and NHRC to provide legal direction in this regard.

7.5.2 Basic education - A South African perspective and jurisprudence

Calderhead provides an insight into access to an adequate basic training in South Africa. Also, Sachs provides an insight on the premise on which the attitude to basic education of the South African judiciary was built. The thesis gleaned from these positions that, considering the history of South Africa and the impact of discrimination and inequality entrenched by apartheid, the role of the court is pivotal in ensuring that access to basic education is made available and adequate. In addition, the thesis also aligned itself strongly with the thoughts of Mubangizi, that the judiciary remains a strong basis on which economic, social and cultural rights will be realised. This view also finds credence in the position of Brand when he posits that the interpretative role of the judiciary will ensure that legislation is properly interpreted. This synergy was found to be lacking in Nigeria in chapter six because the Nigerian judiciary remains lax in applying international laws, and laying the blame on the inability of NGOs and lawyers to bring matters before the courts.

Examining the various cases in South Africa, like the *Welkom* case, the *Western Forum* case and the *Juma Masjid* case, among others, it was advanced that the Nigerian judiciary had a veritable basis to act as a checks and balances for the executive in ensuring the promotion, protection and provision of the right of access to basic education. The *Text Book* case provides another important perspective, providing direction and ensuring that officials have space to carry out their duties. Most important is ensuring that the courts constrain themselves to issuing remedies that are implementable. This proposition is built on the theory of Mbazira, which the thesis has also agreed with and further argued in chapter six in exploring the non-legal means of strengthening the institutions.

7.5.3 Basic education - An Indian perspective and jurisprudence

The experience in India shows that it was on the same footing with Nigeria as education was initially not a recognised right but a fundamental objective of state principle. However,

recognising the fact that education is an intrinsic right, India has gone ahead to provide constitutional recognition for the right to basic education.

Govinda and Madhumita provided direction on how access to basic education has increased in India, highlighting the role of the federal institution in the implementation of education policy. Consequently, the thesis has gone on to infer that the role of the FME in ensuring proper implementation of NPE is crucial. In addition, it has also been proposed that while the multi-layered approach is important, it has to be done in harmony. This challenge is identified with the existing bickering between the NUT and NTI. In addition, the importance of social mobilisation and cultural *cum* religious support is necessary for communities to appreciate and assist the government in ensuring access to education.

On the jurisprudence, India provides a good innovative paradigm for the Nigerian judiciary. In *UnniKrishina JP v State of Andhra Pradesh & ords*,²¹ the Indian courts equated the right to education to the right to life. The thesis has argued, based on the ratio of the case, that Nigerian courts should follow this innovative means of driving the realisation of the right to education. In addition, the jurisprudence in *Society for Unaided Private Schools of Rajasthan VUOI & Another*²² provides a good jurisprudence for the protection of minority groups in accessing education in Nigeria.

7.5.4 African human rights institutions and bodies

I. Expert Committee on the Rights and Welfare of the Child

While the jurisprudence before the Expert Committee on the Rights and Welfare of the Child is still developing, it provides an interesting paradigm that, as has been argued, should encourage NGOs to approach the Committee to seek redress for the various issues of denial

²¹ SC 2178 (1993).

²² Writ Petition (C) 95 of 2010.

of education. This was argued based on the *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine Pour La Defence Des Droits De L'homme (Senegal) v Government of Senegal*.²³

II. African Commission on Human and Peoples' Rights

*Nubian Minors v Kenya*²⁴ provides a double-barrel approach. In the analysis, the function of the KHRC provides a foundation for the NHRC to follow through on its obligations and mandate in advancing human rights. Secondly, the part of the African Commission should encourage Nigerian NGOs to approach the Commission to assist the growth of the law as it pertains to Nigeria and enhance access to the right to education. Other cases that provided the basis for my conclusions from the African Commission include *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire*, where rights to education was a major bone of contention. Premised on this, the thesis advanced the importance of promoting and accommodating the various religious and cultural beliefs of groups while ensuring that they are still able to access basic education.

Reigniting the arguments of Ssenyonjo and Viljoen, the thesis concluded that Nigeria was barred from continuing to place the right to access of basic education in chapter two of the Constitution. It was concluded that the recognition of the right of access to basic education is instant and not subject to progressive realisation. This conclusion is further supported by the position of Beiter and Tomasveski.

7.5.5 Lessons from the United Kingdom

The United Kingdom was examined primarily because of its role as the colonial powers of Nigeria and because of the Commonwealth affiliation of South Africa, Nigeria and India. It

²³ Communication 001/Com/001/2012.

²⁴ Communication 002/2009.

was found that the present education law provides for the means of redress through judicial reviews and specialist tribunals. The United Kingdom experience, the thesis concludes, provides a basis for Nigeria to follow the positive step of using the law as a veritable tool to drive the realisation of basic education.

Important jurisprudence taken from the United Kingdom is as enshrined in *Mandla v Dowell Lee*²⁵ and *Wandsworth London Borough Council v A* (2000).²⁶ Gleaned from these two cases is respect for religious and customary affiliation and respect and protection of teachers. The thesis suggested that teachers' important role as agents of education must be respected by parents, communities and the state. This will be achieved in terms of ensuring proper remuneration and safety in schools.

7.6 Strengthening institutions - Realising the right to basic education in Nigeria

7.6.1 Introduction

The last chapter of the thesis set out to analyse how the various establishments that were identified to be able to assist the enhancement of quality basic education. Divided into broad areas of the legal and non-legal basis, the question sought to be answered was how institutions can be strengthened to enhance the right to basic education in Nigeria. To achieve this, the author embarked on a study trip, participating in the 54th Annual National Conference of the Nigerian Bar Association, paid visits to various institutions identified and also interacted via phone and e-mail with people in the various sectors. The rationale behind this question was premised on the fact that viable institutions are important for the realisation of rights. The findings here, it is assumed, if followed through will aid the central focus of this research which is to enhance the realisation of the right of access to basic education in Nigeria beyond rhetoric.

²⁵ (1983) 2 AC 548 available at http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm (accessed 30 April 2014).

²⁶ RLR 257.

7.6.2 The judiciary

In the analysis of judicial institutions, the works of Donnelly and Olowu, who argue the impact and effect of non-justiciability of constitutional provisions, were relied on. The thesis advances that relying on the provision of the non-justiciable clause, the judiciary faces some challenge *ab initio*. However, the thesis went on to proffer the need for judicial activism. It relied on the findings as exposed in chapter five that learning from the experiences of other jurisdictions, Nigerian courts could approach the ‘courting’ of the right to education. In addition, it argued, while examining the various jurisdictions of Nigerian courts, that premised on the provisions of sections 251(q) and (r), individuals or NGOs could approach the courts to interrogate actions or inactions of government agencies such as the FME, NTI, TRCN and UBEC.

7.6.3 Nigerian Bar Association

The pivotal role of the NBA is advanced as non-controvertible. Relying on the mandate of the NBA, the thesis advanced the need to promote and protect human rights as core components of the workings of the body. Furthermore, as the body that is able to make court appearances, the involvement of the body to bring matters before the courts of Nigeria is crucial. From interaction with lawyers during the NBA conference, it was gleaned that there was a lack of know-how regarding the various litigation strategies. Apart from the lack of knowledge, the process of engaging various international law mechanisms also seems to be missing. In addition, the general lack of interest by individual members of the body and the perception of the body requires huge motivation for lawyers and the NBA to commence active public interest litigation, especially concerning the right of access to basic education.

7.6.4 Nigerian legislature

The position of Tomasveski formed the central theory on how the legislature can play a role in realising the right of access to basic education. Tomasveski expresses the need to move the question of the right of access to education from the margins to the core. In addition to Tomasveski, the thesis also relied on Olowu to assert the fact that constitutionalism is key to ensuring a choice of social theory. Based on this, it was argued that the importance of the Nigerian legislature moving the right to basic education from chapter 2 to chapter 4 of CFRN 1999 remained a huge step towards the realisation of the right of access to basic education. The rationale for this is that it will do away with all controversy on the status of this right among the legal terrain in Nigeria.

Another pivotal role the legislature can play is to review all the statutes on which institutions like the UBEC, FME and NHRC are founded. When the loopholes are filled, the institutions will function more efficiently in realising their mandates.

7.6.5 National Human Rights Commission of Nigeria (NHRC)

Salman in his analysis of the effectiveness of the NHRC found that the poor record of the NHRC is connected to its history, especially its formation during the days of military regime in Nigeria. However, Ojukwu and Odinkalu canvassed that the NHRC is now better positioned to advance its mandate. Premised on this, the thesis found that the underutilisation of the NHRC lies to a great extent in the poor awareness of the powers and roles the NHRC can play. As a recommendation, it is advocated that a stronger awareness and collaboration between the NBA and the NHRC should be encouraged. Also advanced is the need to lean on the roles of the SHRC and IHRC. The NNHRC can actively seek redress of violations before the courts. A pivotal finding is, as posited by Olatoke, that there is a need to clarify the status of the NHRC by making it a creation of the CFRN.

7.6.6 Universal Basic Education Commission (UBEC)

Lauding the provisions of the UBE Act, it was argued that the concentration of the UBE Act on finding parents and guardians liable and guilty when they fail to send their children to school and not having the power to hold government officials responsible is a shortcoming. Ruben, Odey and Egodi in their analysis, from a sociological perspective, of the effectiveness of UBEC reiterate this argument. Consequently, the need to ensure that the education policy is adaptable is a must if access to education in Nigeria is to be enhanced. This also bolsters the argument of Tomasveski when she opines that the school schedule must be adapted to fit children from the working class.

In advocating greater co-operation, the thesis anchored on the need to resolve the continued conflict between the UBEC and SUBEC on the arguments of Sote, Aramide & Gbotoso, arguing that a proper synergy will assist in filling gaps. However, above all, the thesis suggested that the legislature should empower the UBEC to sue government officials and seek orders against officials who fail to act in a proper way that will enhance the implementation of the policies that will enhance access to basic education in Nigeria.

7.6.7 Nigerian Teachers' Institute (NTI)

The NTI as the body with the core responsibility of ensuring the training of teachers in Nigeria must be empowered. The professionalisation of the teaching profession and enhanced funding, it is opined, will be able to aid the NTI to meet its corporate goals and objectives. While it is conceded and, as shown in the budgetary analysis in chapter six, that during the democratic government more funds have been committed to education; it is noted that quality still looms large. Olateju has proffered the need to put in place an audit mechanism to monitor teacher quality periodically. Relying on the opinions of Mumuni, the thesis has also

stressed the need to enhance the welfare of teachers and discontinue the practice of celebrating the message but neglecting the messenger.

7.6.8 Nigerian Educational Research and Development Council (NERDC)

Saddled with the responsibility of formulating curricula for the nation, the NERDC must be positioned to effectively carry out this task. However, the thesis has argued that a bottoms-up approach must be embraced so that teachers are well equipped to interpret the developed curricula. This argument is further enhanced by the findings of Okorie and Akubuilu when they found that, in most circumstances, teachers are unable to give effective translation to planned policies.

It is therefore necessary that the NERDC must make its presence and its work very evident among teachers and also find means of training teachers in understanding curricula when developed.

7.6.9 Federal Ministry of Education (MoE)

The main purpose of the MoE is to ensure proper data collection and analysis while carrying out policy formulation and implementation. However, there has been constant bickering between the MoE and the SMoE to the effect that basic education suffers. Claims by present and serving ministers of education in Nigeria attest to this controversy. It has become almost settled that the implementation of education policy is carried out in the various states according to political affiliations. The failure of the MoE to provide proper statistics is a basis for the inability to effectively plan and consequently adequate planning is affected. The thesis has thus advocated that the MoE should play the role of a unifying factor between all establishments under it so as to aid the realisation of the right to education. While increased funding for the ministry has been advanced in the thesis, relying on the opinions of Ezekwesili, a former Minister of Education who decried the impact of corruption in the

ministry, the need to curb corruption remains urgent and important. This, as opined in the thesis, can be curbed with the proper empowerment of the UBEC and the interests of other institutions discussed.

7.7 Legal means of strengthening institutions towards realising basic education in Nigeria

In discussing this aspect of the thesis, the author has examined the arguments of Christiansen and Agbakwat. While Christiansen identified that the court may be unable to provide a full remedy for social injustices suffered over the years, Agbakwat argued that the failure of the legislature to empower the courts and other institutions will continue to block legislation that may curb corruption. The thesis therefore advanced the position of Mbazira and that of Skelton that, while the role of the courts is not sacrosanct, it is yet able to drive some improvement. An important perspective gleaned from the literature here suggests that the court can empower institutions and communities to effectively engage with the government in seeking means of resolving challenges to realising the right to a basic education.

Budgetary allocation to basic education in Nigeria

The thesis underscored at this point that from the discussion in chapter two it was settled that Nigeria is still falling short of the 26 per cent minimum standard prescribed by UNESCO on financing education. Also, the prescription of the African Women's Protocol that provides that more funds should be spent on education especially that of the girl child, is yet to be realised in Nigeria. However, it is also argued that the higher spending on the military presently in Nigeria could be justified as the exceptional situation of the menace of *Boko Haram*. An analysis of statistics shows that the budgetary situation of education has fluctuated at various points caused by factors like the military regime and civil wars. The effect of this is an inconsistency in policy implementation. Nigeria continues to remain at the lowest ebb of funding of education among various African countries, as evidenced by

statistics from UNESCO. However, as captured by Ezekwesili, why funding is crucial is that it is important that corruption is curbed, if not eliminated, so as to enable the available funds to be utilised properly.

Premised on the above, the thesis grounded the argument on the fact that the institutions discussed must be refocused, repositioned and strengthened if the realisation of the right of access to basic education is to be enhanced and realised beyond the present rhetoric. On the strength of the conclusions discussed above, the thesis proceeds to make recommendations that are capable of achieving and resolving the central question of this thesis.

7.8 Recommendations

The recommendations made that will enhance the realisation of the right to access to basic education beyond rhetoric in Nigeria are based on the theories relied on at the inception of the thesis. The first is the functional and institutional theory of education;²⁷ the second is the deliberative theory;²⁸ and the classical theory.²⁹

On the functional and institutional theories, it recommends that the various institutions in Nigeria with the ability to help realise the right to education be strengthened. The institutions must also function in such a manner as to ensure that their functional abilities are strengthened. An important component of aiding this quest is to encourage collaboration between the institutions. The primary recommendation here is the need for greater collaboration between the NUT and NTI, FME and SME, TRCN, UBEC and SUBEC. The

²⁷ JW Meyer & FO Ramirez *The World institutionalization of education* (2000).

²⁸ A Fisher *The content of the right to education: Theoretical foundations* Centre for Human Rights and Global Justice Working Paper, Economic, Social and Cultural Rights Series 4 2004.

²⁹ This argument is further based on the interdependence and interrelatedness of rights. Eg, an individual needs basic education to access a right to health or even shelter, which guarantees the individual's right to life. See generally P Laure-Helene 'Rights-based approaches to social protection' available at <http://www.gsdc.org/go/display/document/legacyid/1617> (accessed 10 March 2013).

collaboration with the courts and other actors in the legal terrain will be espoused under the deliberative theory recommendation.

The second recommendation hinges on the proposition of Fisher. Here it is recommended that if the Nigerian judiciary gets involved in the discourse concerning the realisation of the right to basic education, it will enhance access. When the court plays a role, it acts as a central arbiter between not just the other arms of government in the separation of power matrix, but also the public. The courts' involvement will increase the deliberation on education policies and laws as the general public will bring this matter before the courts, either through public interest litigation or relying on international human rights law. The courts will therefore contribute to the dialogue by handing down decisions that would either require the legislature to review laws or enact laws to ensure the realisation of the right of access to basic education. In addition, it is recommended that, while the CFRN 1999 at present envisages the right to education as a mere state objective which is deemed non-justifiable by some lawyers in Nigeria, NGOs, especially the NBA, could rely on the administrative law principle of *mandamus*. This recommendation is based on the fact that every Act of Parliament pursuant to a constitutional provision is enforceable through resort to the courts. Consequently, with the UBE Act presently in place in Nigeria, the courts can be approached to compel government officials and to ensure that basic education is provided to meet the minimum threshold. This is particularly helpful to resolve claims that some states do not access funds from the UBE.

Thirdly, Sen's classical theory approach is recommended. This recommendation is made to hinge on the proposition that if Nigeria recognises basic education as a fundamental right, it will enhance its protection, promotion and fulfilment. It is recommended that in the review of the CFRN, the right to basic education must be moved from the peripheral to the core by placing it in chapter 4 of the Constitution. The impact of doing this would ensure that the

deliberative approach will be enhanced as the courts will have an opportunity to adjudicate on issues concerning education.

The fourth recommendation advanced is a non-legal approach. There is a need for reorientation of all stakeholders in the education industry. Starting from the teachers, attitudes and approaches to work must be improved. This recommendation is made with recognition of the need for the welfare of teachers to be seen as paramount and pivotal in ensuring that teachers' disposition to quality service delivery is reinforced. Apart from the teachers, other government officials saddled with the task of policy formulation, dissemination and implementation must also come to the party. The corruption muster can only be effectively curbed with personal integrity and resolve by the officials, ensuring that budgetary allocations are used for the purpose for which they are advanced.

The fifth recommendation is on the NHRC. It is advanced that the role of the NHRC is very pivotal in realising the right of access to basic education. The controversy surrounding the status of the NHRC will be resolved if it is made a creation of the CFRN.

The sixth recommendation relates to the role the Nigerian Law School and faculties of law in universities should play in ensuring that curricula of teaching prospective lawyers be expanded to educate them on how they can engage with various institutions at the national and international levels. Particularly, it is important to ensure improved knowledge of the mechanisms of the African Commission and the African Children's Committee.

The thesis's final recommendation relates to the role communities would play in ensuring the realisation of the right of access to basic education. Understanding that education is a collective responsibility will aid various communities to support government initiatives. In addition, when communities are aware of the responsibility of the government with regard to providing the right to basic education and the minimum threshold expected, they would be

able to trigger the engagement of both law and institutions in realising the right to basic education beyond rhetoric.

With the above recommendations suggested, the thesis proceeds to present a draft sample of the review of some of the provisions of the legislation examined in the thesis.³⁰

³⁰ See annexures 1, 2 and 3

Annexure 1

Proposed Draft for the Amendment of the Constitution of the Federal Republic of Nigeria

Proposed review of the CFRN

- i. Section 18 of the CFRN 1999 should be moved to chapter four of the Constitution. In addition, a new subsection (4) should be inserted to read:

The provisions of section 18 herein shall be enforced by the statutory bodies mandated by the Act of the National Assembly to ensure the promotion, protection and fulfilment of the right to access basic education.

Annexure 2

Proposed Universal Basic Education ACT (Amendment Bill)

It is hereby proposed that The Universal Basic Education Act should be amended with a proviso reading:

- i. The Executive Secretary of the UBEC shall ensure the enforcement of section 18 of the CFRN in addition to the provisions of the UBE Act.
- ii. A new section 2(5) is proposed to read:
 - a. Any individual, government official whose acts or omissions are responsible for the contravening of section 2(1) above shall be
 - i. charged before a court of competent jurisdiction and shall serve such sentences as the court may find competent.
- iii. Section 4(1) should be amended to read:

Every parent, individual and state official saddled with the responsibility shall ensure that a child receives full-time education suitable to his age, ability and aptitude by regular attendance at school.
- iv. Section 8(2) which now reads:

A member may at any time be removed from office by the President for inability to discharge the functions of his office (whether arising from infirmity of mind or body) or for any fraudulent act or misconduct; should be expunged.³¹

However, it is suggested that a new section 8(2) be introduced to read:

Any member found liable for acts of misconduct, including corrupt practices, shall be investigated by such constituted bodies saddled with fighting corruption or

³¹ This recommendation is made to ensure the autonomy of the UBEC and to allow the members to carry out their duties without fear or favour.

made to face the disciplinary measures prescribed by the Civil Service Commission.

- v. Section 9 of the UBE Act should be revised and a new subsection (q) introduced to read: Seek judicial redress against any officer, the individual who by omission or commission engages in action, inhibiting the access to a basic education; any individual who fails to access and disseminate funds allocated by the Commission within 3 months of such allocation shall be prosecuted before a court of competent jurisdiction.
- vi. Section 10: It is suggested that a new office be created for the office of director legal services whose duty shall solely be to liaise with other relevant stakeholders in ensuring compliance with education law and policy prevalent in Nigeria at every point.

It is also noted and suggested that the current sections 2(1) and 15(1) below are perceived to be contradictory in terms of the wording ‘age’ in section 2(1). It is therefore suggested that the word ‘age’ be removed from the wording to make it in line with section 15(1). The reasoning for this was canvassed in chapter 1 of the thesis, taking note of divergent economic challenges and the time of commencing primary education in the most poverty-stricken areas of the country.

2(1) Every government in Nigeria shall provide free, compulsory and universal basic education for every child of primary and junior secondary school *age*.

15(1) In this Act -

‘Basic education’ means early childhood care and education and nine years of formal schooling.

Furthermore, the proposed bills seeks to introduce a new section on Report and Monitoring.

The new section is to be titled

Reporting and Monitoring Mandate of UBEC

The UBEC is hereby mandated to receive and verify periodic state report from State Basic Education Boards (SUBEB);

- i. For the purposes of the report above, the UBEC issue guidelines and directives on proper reporting guidelines;
- ii. Any SUBEB that fails to report periodic reports to the UBEC shall be subject to prosecution before a court of Competent jurisdiction for violation of the provisions of the UBE Act.

Annexure 3

Proposed National Human Rights Commission (Amendment Bill)

The NHRC should be made an express creation of the CFRN and be saddled with the responsibility of investigating and promoting human rights in Nigeria.

Annexure 4

Proposed Revision of Teachers' Registration Council of Nigeria (TRCN) Act

A new section 1(f) is suggested to be inserted to read:

- i. Ensure that any individual engaged in teaching in the basic education sphere of Nigeria is duly registered with the Council.

The wisdom behind this is to ensure that the teaching profession is elevated to the highest possible professional status like other disciplines, such as legal and medical practitioners. It is also anticipated that this will ensure that only teachers who are recognised by the Council can be engaged by employers of labour.

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