

THE IMPLEMENTATION OF THE RIGHT TO  
EDUCATION IN SOUTH AFRICA AND NIGERIA

ELIJAH ADEWALE TAIWO

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THE IMPLEMENTATION OF THE RIGHT TO  
EDUCATION IN SOUTH AFRICA AND NIGERIA

By

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**DECLARATION**

In accordance with Rule G4.6.3, I hereby declare that the above-mentioned thesis is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

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## **DEDICATION**

To

My late Mother and Grandmother

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“Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home, a friend, abroad, an introduction, in solitude, a solace and in society an ornament. It chastens vice, it guides virtues, [and] it gives at once, grace and government to genius. Without it, what is man? A splendid slave, a reasoning savage.”

- Joseph Addison as quoted by Okechukwu Ikejiani (ed) *Nigerian Education* (1964) 19.

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## LIST OF ABBREVIATIONS

ABET:	Adult Basic Education and Training.
ACHPR:	African Charter on Human and Peoples' Rights.
ACRWC:	African Charter on the Rights and Welfare of the Child.
ASUU:	Academic Staff Union of Universities.
AU:	African Union.
AUT:	Association of University Teachers.
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women.
CESCR:	Committee on Economic, Social and Cultural Rights.
CHE:	Council on Higher Education.
CRC:	Convention on the Rights of the Child.
CRC Committee:	Committee on the Rights of the Child.
ECCDE:	Early Childhood Care, Development and Education.
ECD:	Early Childhood Development.
ECHR:	European Convention for the Protection of Human Rights and Fundamental Freedoms.
ECOSOC:	United Nations Economic and Social Council.
EFA:	Education for All.
ESCR:	Economic, Social and Cultural Rights.
ESA:	Education Sector Analysis.
FET:	Further Education and Training.
GDP:	Gross Domestic Product.
GEC:	General Education Certificate.
GER:	General Enrolment Rate.

GET:	General Education and Training.
GNP:	Gross National Product.
HE:	Higher Education.
HIV/AIDS:	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome.
HOD:	Head of Department of Education.
ICCPR:	International Covenant on Civil and Political Rights.
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ILO:	International Labour Organisation.
ISCED:	International Standard Classification of Education.
JAMB:	Joint Admission and Matriculation Board.
JSS:	Junior Secondary School.
MDGs:	Millennium Development Goals.
MEC:	Members of the Executive Councils.
NAUT:	National Association of University Teachers.
NBTE:	National Board for Technical Education.
NCCE:	National Commission for Colleges of Education.
NCE:	National Certificate in Education.
NECO:	National Examinations Council.
NGOs:	Non-Governmental Organisations.
NHRC:	National Human Rights Commission.
NQF:	National Qualification Framework.
NSAs:	Non State Actors.
NUC:	Nigeria University Commission.



OAS:	Organisation of American States.
OAU:	Organisation of African Unity.
OECD:	Organisation for Economic Co-operation and Development.
PTA:	Parent Teachers Association.
SAHRC:	South African Human Rights Commission.
SAQA:	South African Qualifications Authority.
SIWES:	Students Industrial Work Experience Scheme.
SNE:	Special Needs Education.
SSCE:	Senior School Certificate Examinations.
SSS:	Senior Secondary School.
TVE:	Technical and Vocational Education.
TVET:	Technical and Vocational Education and Training.
UBE:	Universal Basic Education.
UBEC:	Universal Basic Education Commission.
UDHR:	Universal Declaration of Human Rights.
UN:	United Nations.
UNCESCR:	United Nations' Committee on Economic, Social and Cultural Rights
UNESCO:	United Nations Educational, Scientific and Cultural organization.
UNICEF:	United Nations Children's Fund.
UPE:	Universal Primary Education.
VEIs:	Vocational Enterprise Institutions.
WAEC:	West African Examinations Council.

## **STYLE OF REFERENCING**

In accordance with the faculty's requirements, the style of referencing used in this thesis is the *Stellenbosch Law Review Style Guide*, 2008.

## SUMMARY

The thesis examines the right to education in South Africa and Nigeria. It presents the right to education as an empowerment right which is given a wide recognition in a number of important international and regional human rights instruments as well as in national constitutions. It asserts that the right to education is a right with a multiplying effect in the sense that where it is effectively guaranteed, it enhances the enjoyment of all other rights and freedoms, and when it is denied, it precludes the enjoyment of many other human rights. The thesis examines the provisions of relevant international and regional human rights instruments to assess the adequacy of a framework that applies to South Africa and Nigeria's obligations regarding the right to education. It argues that those instruments impose obligations on all the States to make primary, secondary and higher levels of education available, accessible, acceptable and adaptable to all in their territories. It argues that by having ratified those international agreements in which the right to education is protected, both South Africa and Nigeria assume obligations under international law, enjoining them to realise the right to education and to respect freedoms in education.

The study adopts a comparative approach and relies on primary and secondary sources of data; the data is subjected to an in-depth content analysis. The focus of the comparison is on whether the South African's position regarding the right to education can inform Nigeria's interpretation of the right to education. The reason being that the Nigerian Constitution does not provide for the right to education as a basic right as exists in South Africa. The Nigerian Constitution categorised the right to education under "fundamental objectives and directive principles" which are non-justiciable. In this sense, the thesis argues that the legal classification of the right to education, to a large extent, affects its realisation in Nigeria. It suggests that an important area where Nigeria could learn from South Africa is the issue of justiciability and constitutionalising the right to education as well as other socio-economic rights.

In terms of implementation, the thesis submits that despite the international obligations and commitments to provide education for all, there is a significant gap between what is stipulated and the practical realities in the two countries. It argues that the right to education is more than a mere school attendance, how well a learner progresses in school is equally important. It posits that the high failure rates and the progressive slide in students' performances in schools

examinations as shown in the study illustrate the poor quality and falling standard of education in the two countries. South Africa enjoys one of the highest rates of formal school enrolment of any developing country, yet the link between access and success is also weak in the South African schools just as in Nigerian schools. Inadequate planning, poor implementation of policies, lack of adequate resources and commitments are identified as the prime factors hampering the implementation of the right to education in both countries. Solving these problems and making the right to education realisable call for a renewed government commitments and investment of appropriate human and financial resources on education. This also requires a strong political will as well as concerted efforts of all the various actors in the educational sector in the two countries.

**KEY WORDS:** Constitution; Directive Principles; Education; Human Rights; Implementation; International Commitments; International Obligations; Socio-economic Rights; Nigeria; South Africa.

# Chapter One

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## General Introduction

“Everyone has the right to education...”<sup>1</sup>

### 1 Background and Rationale for the Study

Since the Second World War, there has been a global emphasis on human rights, which led to the passing of the Universal Declaration of Human Rights and the signing of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. These have been reflected in regional human rights treaties and human rights guarantees contained in national constitutions.<sup>2</sup> The Universal Declaration of Human Rights (UDHR), 1948, the International Covenant on Civil and Political Rights (ICCPR), 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 constitute the International Bill of Rights. Collectively, they provide for the right to education at global level.<sup>3</sup>

The UDHR for instance states that the right to education is for all people and states further that elementary education shall be free and compulsory while higher education shall be accessible to all on the basis of merit.<sup>4</sup> The ICESCR in its articles 13 and 14 recognised the right of everyone to education thereby categorising it as a social,

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<sup>1</sup> Art 26(1) of the Universal Declaration of Human Rights 1948.

<sup>2</sup> Govindjee “Lessons for South African Social Assistance Law from India: Part 1-The Ties that Bind: The Indian Constitution and Reasons for Comparing South Africa with India” 2005 26(3) *Obiter* 575-576.

<sup>3</sup> See art 26, UDHR; arts 13 & 14, ICESCR, and art 19(2), ICCPR which though not expressly providing for the right to education, but the provision of the article is wide to encompass the right to education. Tracing the origin of the right to education, Dlamini submits that “the idea of a right to education can be traced back to the traditional concept of the natural duty of parents to take care of and bring up their children. This parental responsibility gradually and increasingly became associated with furthering the development and needs of children instead of conforming to the wishes of the parents. Emphasis has shifted towards formal education as an indispensable part of upbringing. Today this right is considered as primarily the right of all children to be educated. The duty to provide education has shifted from parents to society. Owing to the possibility of parents failing to exercise this power because of ignorance or selfishness, compulsory education, funded by the state up to a minimum age, has become the norm.” See Dlamini “Culture, Education, and Religion” in Van Wyk, Dugard, de Villiers & Davis *Rights and Constitutionalism: The New South African Legal Order* (1994) 573 581.

<sup>4</sup> Art 26 of the UDHR 1948.

economic and cultural right. The right to education is, however, a peculiar one, defying precise classification either as a civil and political right or as a social, economic and cultural right.<sup>5</sup> According to Smith, the right to education straddles the division of human rights between civil and political rights and economic, social, and cultural rights, embodying elements of each.<sup>6</sup> It forms part of both covenants and, indeed, all core human rights treaties.<sup>7</sup> Thus, the right to education represents an interface between civil and political, and economic, social and cultural rights.<sup>8</sup> This accounts for its wide recognition in a number of important international and regional instruments.<sup>9</sup>

Scholars have distinguished three generations of human rights, namely, the first generation rights of civil and political rights, the second generation rights of economic, social and cultural rights, and the third generation rights of group or peoples' rights.<sup>10</sup> The classification of a right into one of the three generations is useful in ascertaining the legal claims of the holder of the right and the corresponding obligation of the State.<sup>11</sup> Hodgson observes that the way in which the right to education is framed in various international and regional human rights instruments suggests that the right partakes of the qualities of both

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<sup>5</sup> It is for this reason described as a hybrid right. See Khoza (ed) *Socio-Economic Rights in South Africa* 2ed (2007) 416.

<sup>6</sup> Smith *Textbook on International Human Rights* (2005) 311.

<sup>7</sup> Tomasevski "Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004" 2005 *Human Rights Law Review* 205 224.

<sup>8</sup> See Tomasevski *Annual Report of the Special Rapporteur on the Right to Education* (Annual Report 2001) 11 January 2001, E/CN.4/2001/52 para 6; Tomasevski 2005 *Human Rights Law Review* 224.

<sup>9</sup> See art 10 of the Convention on the Elimination of Discrimination Against Women (CEDAW) 1979; arts 23, 24 and 29 of the Convention on the Rights of the Child (CRC) 1989; art 17 of the African Charter on Human and Peoples' Rights (ACHPR) 1981; African Charter on the Rights and Welfare of the Child 1990; the UNESCO Convention Against Discrimination in Education 1960; the World Declaration on Education for All-Meeting Basic Learning Needs, adopted by the World Conference on Education for All on 9 March 1990; European Convention 1953; American Declaration of the Rights and Duties of Man 1948 among others. Apart from the human rights law, other laws such as refugee law and humanitarian law, migration law and trade law equally regulate education. See Tomasevski 2005 *Human Rights Law Review* 224.

<sup>10</sup> See Hodgson *The Rights to Education* (1998) 71; Dlamini submits that "the distinguishing feature between first-generation rights on the one hand and second and third-generation rights on the other is that the traditional civil and political rights are aimed at the protection of the citizens against arbitrary actions of the state. They do not impose any positive obligation on the government, but merely require the government to refrain from interfering with certain rights and freedoms of individual. Consequently, they are freedoms from and not freedom to. Social, economic and cultural rights, on the other hand, postulate the obligations of the state to provide or at least to create the conditions for access to those facilities which are now considered essential for modern life, for example, sufficient nutrition, housing, health care and education." See Dlamini *Human Rights in Africa: Which Way South Africa?* (1995) 5-6.

<sup>11</sup> See Nowak "The Right to Education" in Eide, Krause & Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 189-211 196.

the first and second generations of human rights.<sup>12</sup> He submits that the right to education nicely illustrates the distinction between liberty rights (restraining interference by others including the State) and welfare rights (requiring the State to provide certain goods and services).<sup>13</sup>

Although the right to education has been variously classified as an economic, social and cultural right,<sup>14</sup> it should be noted, however, that this right cuts across other categories of rights. All human rights are clearly interdependent and interrelated and the right to education epitomises the indivisibility and interdependence of all human rights.<sup>15</sup> It is hardly possible to ensure full implementation of political rights without the right to education.<sup>16</sup> The right to education cannot, therefore, be classified in a watertight compartment. It is a mixed right which has elements of all the categories of rights. In this regard, the Committee on Economic, Social and Cultural Rights (CESCR) once observed:

“[The right to education] has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realisation of those rights as well. In this

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<sup>12</sup> He posits that the right to education is primarily a second generation right in the sense that it is recognised by article 28(1) of the Convention on the Rights of the Child (CRC), 1989 and article 13(1) and (2) of the ICESCR, art 13 (1) & (3) of the Additional Protocol to the America Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art 4(a) of the Convention against Discrimination in Education among others. He submits that as a second generation right, the right to education is based on the socialist philosophy that human rights can only be completely guaranteed by positive State action. Consequently, the right to education obliges a State to develop and maintain a system of schools within its available resources. He argues further that the right to education as formulated in international and regional instruments can also be considered a first generation right to the extent that they impose a duty on the State to respect the parental right to ensure education and teaching is in conformity with their own religious and moral convictions. See Hodgson *The Rights to Education* (1998) 72-73.

<sup>13</sup> Hodgson *The Rights to Education* 72. See also, Nowak “The Right to Education” in *Economic, Social and Cultural Rights* 196; see for example, Art XVIII of the Universal Islamic Declaration of Human Rights, which states that “[e]very person has the right to...education...consistent with the resources of the community.” Similarly, Art XII of the America Declaration of the Rights and Duties of Man refers to “the resources that the state or the community is in a position to provide” in context of the right to education and its implementation; see also, arts 4 & 28 of the CRC, arts 2(1) & 13 of the ICESCR, and arts 1 & 13 of the Additional Protocol to the America Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

<sup>14</sup> See arts 13 & 14 of the ICESCR.

<sup>15</sup> Tomasevski *Education Denied: Costs and Remedies* (2003) 195.

<sup>16</sup> Similarly, children cannot truly enjoy their rights to education if they do not have adequate food, shelter and health care. Thus, many human rights can be considered as multidimensional. The right to education could be qualified as a social and a cultural right as well as a civil right. See Donders & Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 2; see also, Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 357; Beiter *The Protection of the Right to Education by International Law* (2006) 43.

respect, the right to education epitomises the indivisibility and interdependence of all human rights.”<sup>17</sup>

However, for the contention that the right to education imposes positive duties and obligations on the States, (as opposed to negative obligations of most civil and political rights), this study shall adopt the classification of the right to education as a social, economic and cultural right.<sup>18</sup> This classification, as well as the position taken in this study is for the sake of convenience and acknowledges the universality, indivisibility, interdependence and interrelatedness of all human rights.<sup>19</sup>

Between 1976 (when the ICESCR was ratified) and 1990 when the Convention on the Rights of the Child (CRC), 1989 entered into force, a series of international covenants and conventions were promulgated which provide a comprehensive legal basis for the protection of the right to education.<sup>20</sup> The CRC, for example, contains a comprehensive set of legally enforceable commitments concerning the right to education.<sup>21</sup> The Convention reaffirms the right of every child to free and compulsory primary schooling, and states

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<sup>17</sup> See Committee on Economic, Social and Cultural Rights, General Comment No. 11 (Twentieth Session, 1999) [UN Doc. E/2000/22] Plans of Action for Primary education (Art 14 ICESCR) [Compilation, 2004, pp. 60-63] para 2.

<sup>18</sup> This position, however, has support in constitutional jurisprudence. Malherbe for instance notes as follows: “Section 29 of the 1996 Constitution, which provides for several education rights, is one of the so-called social and economic rights guaranteed in the South African Constitution.” See Malherbe “The Constitutional framework for pursuing equal opportunities in education” 2004 22(3) *Perspectives in Education* 9 12; see also Heyns & Kaguongo “Constitutional Human Rights Law in Africa” 2006 22(4) *SAJHR* 673 699; similarly, Chapman submits that “the right to education is one of the most affirmed economic, social and cultural rights.” See Chapman “Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefit of Science” in *Human Rights in Education, Science and Culture* 122.

<sup>19</sup> The 1993 Vienna Declaration states as follows: “[a]ll human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” See the Vienna Declaration and Programme of Action, 1993, para 5. It is observed that the principle of interdependence, interrelatedness and indivisibility of human rights has been considered fundamental from the very establishment of the United Nations, and is an inherent part of the notion that the rights adopted by the United Nations are universal. It is asserted that this was implicit in the UN Charter, adopted in 1945, and is reflected more clearly in the Universal Declaration of Human Rights, 1948. The Declaration was conceived as a normative system of interrelated rights, and not a menu from which states could pick and choose. The principle of the interdependence and indivisibility of the rights was repeated in at the Tehran World Conference on Human Rights in 1968 and again in Vienna in 1993 where nearly all independent States assembled for the second World Conference on Human Rights. See Eide “Interdependence and Indivisibility of Human Rights” in *Human Rights in Education, Science and Culture* 11-12.

<sup>20</sup> Details of those instruments will be discussed in chap 2.

<sup>21</sup> See arts 28, 29, 30 & 31 of the CRC.



further that higher levels of education shall be accessible to all without discrimination of any kind.<sup>22</sup> It also protects the child from exploitative work that might interfere with his education.<sup>23</sup> Similarly, the African Charter on Human and Peoples' Rights (ACHPR) 1981 states that "every individual shall have a right to education."<sup>24</sup>

At the national level, both the South African and the Nigerian Constitutions recognise the right to education. The Constitution of the Republic of South Africa, 1996 for instance provides that everyone has the right to a basic education, including adult basic education;<sup>25</sup> and to further education which the state, through reasonable measures, must make progressively available and accessible.<sup>26</sup> The Constitution provides further that everyone has the right to receive education in the official language or languages of his/her choice in public educational institutions,<sup>27</sup> as well as the right to establish and maintain independent educational institutions.<sup>28</sup> In Nigeria, the "right" to education is guided by section 18 of the Constitution of the Federal Republic of Nigeria (CFRN), 1999 which provides that Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.<sup>29</sup> The section states further that government shall strive to eradicate illiteracy and shall, as when practicable, provide free education at all levels.<sup>30</sup>

In this study, an attempt shall be made to compare the right to education in South Africa and Nigeria. The focus of the study shall be on whether the South African's position regarding the right to education can inform Nigeria's jurisprudence on the interpretation of the right to education. The reason for this is to be found in the fact that the Nigerian Constitution does not provide for the right to education as a basic right as exists in South Africa. The Constitution categorises the right to education under "fundamental objectives

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<sup>22</sup> Both South Africa and Nigeria have ratified this Convention.

<sup>23</sup> See art 32 of CRC.

<sup>24</sup> Art 17 of the ACHPR.

<sup>25</sup> S 29(1)(a) of the South African Constitution 1996.

<sup>26</sup> S 29(1)(b) of the South African Constitution 1996.

<sup>27</sup> S 29(2) of the South African Constitution 1996.

<sup>28</sup> S 29(3) of the South African Constitution 1996.

<sup>29</sup> S 18(1) of the CFRN 1999.

<sup>30</sup> S 18(3)(a)-(d) of the CFRN 1999; In furtherance of these constitutional mandates, the Government launched the Universal Basic Education (UBE) Programme in 2004. The UBE Act 2004 and the Child's Rights Act 2003 provide the legal framework for the implementation of the UBE Programme, which makes basic education free and compulsory. See s 2(1) of the Compulsory, Free, Universal Basic Education Act, 2004. In terms of section 15(1) of the Child's Rights Act, 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.

and directive principles of the state policy” which, according to section 6(6)(c) of the Constitution, are non-justiciable.<sup>31</sup>

## 2 Statement of Problem

Many years after the adoption of the UDHR and several other international, regional and national instruments which guarantee the right to education, the realisation of this right remains elusive especially in the developing countries.<sup>32</sup> According to Dall, more than 100 million school-age children still have no access to any kind of basic education service across the globe.<sup>33</sup> He states further that 960 million adults are still illiterate while more than one third of the world’s adults have neither access to printed knowledge or technical skills to help them adapt to their societies’ social and economic conditions.<sup>34</sup> In addition, millions of children and adults fail to complete the basic education programmes they start, and millions more enter schools, but do not learn enough to meet their basic learning needs.<sup>35</sup>

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<sup>31</sup> See *Archbishop Anthony Olubunmi Okogie & Others v Attorney General of Lagos State* (1981) 1 NCLR 218; *Uzuokwu v Ezeonu II* [1991] 6 NWLR (pt 200) 708; Olowu “Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees” (2006) 69(1) *Saskatchewan Law Review* 39-78 56-60; Olowu “The Right to Social Security in Nigeria: Taking Up the Gauntlet” (2007) 1(2) *CALS Review of Nigerian Law and Practice* 91-107 101. However, the recent decision of the ECOWAS Court in *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit No: ECW/CCJ/App/0808 delivered on 27/10/2009) is to the effect that Nigerians have the right to education. It is submitted that the court did not decide this in terms of the 1999 Nigerian Constitution but rather in terms of Art 17 of the African Charter on Human and Peoples’ Rights. It held: “[t]he directive principles of state policy of the Federal Republic of Nigeria are not justiciable before this Court as argued by second defendant and the fact was not contested by the plaintiff. And granted that the provisions under the directive principles of state policy were justiciable, it would be the exclusive jurisdiction of the Federal High Court, being a matter solely within the domestic jurisdiction of the Federal Republic of Nigeria...” *SERAP v Federal Republic of Nigeria*, para 17.

<sup>32</sup> As UNESCO recently observed, “at the dawn of the century 875 million of the world’s citizens are illiterate. One out of every five children aged 6-11 in developing countries- an estimated 113 million- is not in school, 60 percent of them are girls. Nine countries- Bangladesh, Brazil, China, Egypt, India, Indonesia, Mexico, Nigeria and Pakistan (E9)- are home to 70 per cent of the world’s illiterates. Girls and women are most at risk. In South Asia an estimated 60 per cent of women are illiterates. Worldwide, one woman in four cannot read. In South Asia and Sub-Saharan Africa, less than three out of four pupils reach Grade 5. The HIV/AIDS pandemic threatens to wipe out much of the progress made in boosting literacy and general education levels. Up to 10 per cent of teachers are expected to die in the worst-affected African countries. See UNESCO *Education for All: An Achievable Vision* (2000) 3.

<sup>33</sup> Dall “Children’s Right to Education: Reaching the Unreached” in Himes (ed) *Implementing the Convention on the Rights of the Child* (1995) 143.

<sup>34</sup> 143.

<sup>35</sup> 143.

In Coomans' account, almost two-thirds of the world's illiterates are women.<sup>36</sup> He submits that the number of out-of-school children and illiterate adults is increasing in sub-Saharan Africa. Even for those that attend school, it is not evident that the education they receive is of good quality. He concludes that theory and rhetoric on the one hand and practice and reality on the other, as far as education is concerned, are poles apart.<sup>37</sup> Corroborating this, Paul submits thus: "[m]ost educational commentators and most of the general public seem to agree on at least one thing: the schools are in deep trouble. Many graduates, at all levels, are characterised as lacking the abilities to read, write and think with a minimum level of clarity, coherence and a critical/analytical exactitude..."<sup>38</sup> The foregoing captures the enormity of the problem globally.

The South African Constitution expressly provides for the right to education.<sup>39</sup> At almost 5.5 per cent of gross domestic product, South Africa is seen as having one of the highest rates of government investment in education in the world.<sup>40</sup> Despite these commitments, and all-inclusive educational policies developed by the Department of Education, it is observed that many schools in the country fall far short of the basic requirements for adequate education.<sup>41</sup> According to Berger, most schools, especially those in rural areas, lack the resources to provide students with the education they need to participate effectively in a democratic capitalist society.<sup>42</sup> Pupil-to-teacher ratios in most rural schools are as high as 51 to 1, while many school buildings are in weak condition

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<sup>36</sup> See Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its realisation" in *Human Rights in Education, Science and Culture* 183.

<sup>37</sup> 183.

<sup>38</sup> Paul "McPeck's mistakes" in Scheffler, Howard & McPeck (eds) *Teaching Critical Thinking* (1990) 102.

<sup>39</sup> See s 29 of the Constitution. Formal education in South Africa is categorised according to three levels namely, General Education and Training (GET), Further Education and Training (FET) and Higher Education (HE). See *the 2006/07 South African Yearbook* 195: <http://www.gcis.gov.za/docs/publications/yearbook/2007/chapter8.pdf> (accessed 17-09-2008).

<sup>40</sup> See *the 2006/07 South African Yearbook* 195; South Africa has one of the highest rates of government investment in education in the world it allocates the sum of R122.8 billion to education in its 2008/09 budget. See <http://www.info.gov.za/aboutsa/education.htm> (accessed 26-8-2009); the 2008 budget also allocates R121.1 billion to education. See Tucker "Every Child in School, Every Day" *Education Law Project* (Centre for Applied Legal Studies, Johannesburg): <http://www.law.wits.ac.za/cals> (accessed 15-09-2008); See also, OECD *Reviews of National Policies for Education: South Africa* (2008) 24, which puts South Africa education spending at over 5% of Gross Domestic Product (GDP); UNESCO puts the South Africa GDP at 5.4 per cent. See UNESCO *Global Education Digest 2009: Comparing Education Statistics Across the World* (2009) 176.

<sup>41</sup> Berger "The Right to Education under the South African Constitution" 2003 103 *Columbia Law Review* 614 661.

<sup>42</sup> 619-620.

require repairs. Also, most schools do not have safe drinking water within walking distance, have no toilets or telephones, and are badly overcrowded.<sup>43</sup> The 2001 Census, which revealed that 4.5 million South African aged 20 years and older did not have a formal education and that another 4 million people had primary schooling only, corroborates this position.<sup>44</sup>

In his reflections on meaningful access to education in South Africa, Jansen submits that though South Africa enjoys one of the highest rates of formal enrolment of any developing country, access does not result in success for more than 50 per cent of children.<sup>45</sup> It is observed that very few children who start school actually finish the 12 years of formal education while those who write the final examination at the end of 12 years often do not pass or do not pass well enough to enter university.<sup>46</sup> He submits that there is a massive failure to achieve among young learners in literacy and numeracy in early grades and accordingly concludes that links between access and success is very weak in South Africa's schools.<sup>47</sup> The result of the National Senior Certificate Grade 12 examinations for 2009, released in January 2010, further justifies this conclusion.

These results reflect a drop in students' performance in South African schools.<sup>48</sup> The national pass rate of the National Senior Certificate examinations for 2009 was 60.7%. This shows a consistent decline of 2% per year from the 2008 and 2007 pass rates. The breakdown of the 2009 result across Provinces illustrates general decline. The Free State result declined by 2.4%, and the pass rates in the Western Cape and North West Provinces declined by 2.7% and 0.5% respectively; the pass rate in Limpopo declined by 5.4% and that of the Northern Cape by a staggering 11%; Gauteng's pass rate also shows a decline of

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<sup>43</sup> 619-620.

<sup>44</sup> *The Right to Education, 5<sup>th</sup> Economic and Social Rights Reports Series 2002/2003 Financial Year*, South African Human Rights Commission (21 June 2004) xiii.

<sup>45</sup> Jansen "Reflections on Meaningful Access to Education" in Pendlebury, Lake & Smith (eds) *South African Child Gauge 2008/2009* (2009) 7-8.

<sup>46</sup> 8.

<sup>47</sup> 8.

<sup>48</sup> In her address at the released of the result, the Minister of Basic Education asserts: "...the results I place before you today continue to suggest that we have not yet turned the corner in education. We have not yet reached the quality learning outcomes that we are striving for as a nation. The education system continues to be plagued by obvious weaknesses that act as barriers to the performance of our learners. We must continue to intensify our efforts to address these weaknesses." See Statement by the Minister of Basic Education, Mrs Angie Motshekga, MP, on the announcement of the National Senior Certificate Grade 12 Examination results for 2009 at the Media Centre, Union Buildings, Pretoria on 07 January 2010; available at [http://www.news24.com/Content/SouthAfrica/News/1059/dfaaa691ee6e44529f716638cd4ba931/07-01-2010-08-27/Matric\\_results\\_Ministers\\_full\\_speech](http://www.news24.com/Content/SouthAfrica/News/1059/dfaaa691ee6e44529f716638cd4ba931/07-01-2010-08-27/Matric_results_Ministers_full_speech) (accessed 7-01-2010).

4.6 % while Mpumalanga registered the poorest performance with a pass rate of 47.9%, and a decline of 3.9%. Only KwaZulu-Natal Provincial results show an improvement in the pass rate of 3.5% up from 57.6% in 2008 to 61.1% in 2009 while the Eastern Cape maintained a 50% pass rate in both years.<sup>49</sup> These figures show a consistent drop in the national pass rate since 2007, a trend which is worrisome given that the National Senior Certificate is an important indicator of the quality of a country's education system.<sup>50</sup>

In Nigeria, inadequate planning combined with poor government policies led to drastic reductions in government spending/budget on education. The consequences of this include poor teachers' salaries, degradation of education facilities at all levels and strikes in the universities and schools.<sup>51</sup> The 2008 UNESCO Education for All (EFA) Global Monitoring Report on Sub-Saharan Africa gave a frightening figure of about 33 million children of school age still not enrolled in school in the region.<sup>52</sup> In this figure, Nigeria, together with other six countries, reportedly had more than 1 million out-of-school children.<sup>53</sup> This is further corroborated by the 2008 UNICEF Report,<sup>54</sup> which observed that Nigeria is lagging behind in the Millennium Development Goals' (MDGs) aim to ensure

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<sup>49</sup> See Statement by the Minister of Basic Education on the announcement of the National Senior Certificate Grade 12 Examination results for 2009.

<sup>50</sup> The Minister expressed her unhappiness over this development thus: "I wish to state directly that even though this shift is marginal, I am most unhappy with the decline in the national pass rate and indeed in the overall pass rate of just over 60%. The National Senior Certificate is an important indicator of the quality of our education system, and as a country we cannot afford to allow our young people to achieve results that are in the main average or below average." See Statement by the Minister of Basic Education on the announcement of the National Senior Certificate Grade 12 Examination results for 2009.

<sup>51</sup> Igbuzor "The State of Education in Nigeria" A Keynotes Address delivered at a Roundtable organised by Civil Society Action Coalition on Education for All (CSACEFA) Abuja on 3 July 2006: <http://www.dawodu.com/igbuzor14.htm> (accessed 14-08-2008). According to the 2005 Millennium Development Goals Report, literacy level in Nigeria has steadily and gradually deteriorated, especially within the 15 to 24 years group age bracket. The report states further that by 1999, the overall literacy rate had declined to 64.1 per cent from 71.9 per cent in the year 1991. The trend was in the same direction for male and female members of the 15 to 24 years group age bracket. Among males, the rate declined from 81.35 per cent in 1991 to 69.8 per cent in 1999, while the decline among the female was from 62.49 per cent to 59.3 per cent during the same period. Nigeria Millennium Development Goals 2005 Report, National Planning Commission, Abuja (2005) 14.

<sup>52</sup> UNESCO Education For All Global Monitoring Report, Regional Overview: Sub-Saharan Africa (2008) 2; <http://www.efareport.unesco.org> (accessed 14-08-2008).

<sup>53</sup> Others are Burkina Faso, Cote d'Ivoire, Ethiopia, Kenya, Mali and Niger.

<sup>54</sup> See Victor "Nigeria Lagging Behind in MDGs- UNICEF" *The Punch Newspaper* 2008-08-12; <http://www.punchng.com/Articl.aspx?theartic=Art20080812273179> (accessed 12-08-2008).

that children everywhere in the world are able to complete a full course of good quality education at all levels by 2015.<sup>55</sup>

The 2009 UNESCO Education for All Global Monitoring Report gave an even worse report on the state of education in Sub-Saharan Africa and in Nigeria in particular. According to this report, Sub-Saharan Africa accounts for 47 per cent of out-of-school children worldwide and Nigeria accounts for one in nine of those children.<sup>56</sup> The DFID document on Education in Nigeria puts the actual number of children out-of-school in Nigeria at around 7 Million.<sup>57</sup> In the same vein, the poor results in the Senior School Certificate Examinations (SSCE) conducted by the West African Examinations Council (WAEC) and the National Examinations Council (NECO) in May/June 2009 are clear indications of a progressive slide in the Nigerian educational system. This poor pattern was repeated in the 2010 May/June Examinations recently released by WAEC with only 24.94 per cent of the candidates passing in English and Mathematics.<sup>58</sup>

According to the analyses of the examination bodies, most schools and students posted horrible results. For instance, in the 2009 May/June NECO result only about 10.53 per cent of the candidates passed with five credits or higher scores in subjects including English Language and Mathematics, the acceptable basic standard for admission into tertiary institutions.<sup>59</sup> About 24.15 per cent of the candidates made five credits in the examination but without two tertiary requisites subjects, namely English and Mathematics.<sup>60</sup> Similarly, WAEC analysis shows that only 25.99 per cent of the candidates that wrote the May/June examinations in 2009 got the requisite basic qualification grades of five credits and above, including English and Mathematics.<sup>61</sup> Earlier in 2008, out of the

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<sup>55</sup> The world adopted eight Millennium Development Goals in 2000. These goals represent a common vision for reducing poverty by 2015 and provide clear objectives for significant improvement in quality of people's lives. Learning and education are recognised as the heart of all development and consequently, of this global agenda. <http://www.un.org/Pubs/chronicle/2007/issue4/0407p37.html> (accessed 13-08-2008).

<sup>56</sup> See UNESCO Education for All Global Monitoring Report 2009 available at [http://www.unesco.org/education/gmr2009/press/GMR2009\\_RO\\_SSA.pdf](http://www.unesco.org/education/gmr2009/press/GMR2009_RO_SSA.pdf) (accessed 8-08-2009).

<sup>57</sup> See DFID Document on Education in Nigeria available at: [http://www.dfid.gov.uk/document/publications/PSA/E\\_Nigeria.pdf](http://www.dfid.gov.uk/document/publications/PSA/E_Nigeria.pdf) (accessed 8-08-2009).

<sup>58</sup> See Uwadiae "WASSCE Result: Only 24.94 % Obtain Credits in English, Maths" *The Punch* (2010-08-20) 37.

<sup>59</sup> See "Mass Failure in WAEC and NECO Exams" *The Guardian* of 19-10-2009 available online at: <http://www.nigeriamasterweb.com/paperfrmes.html> (accessed 19-10-2009).

<sup>60</sup> See "Mass Failure in WAEC and NECO Exams" *The Guardian* of 19-10-2009 available online at: <http://www.nigeriamasterweb.com/paperfrmes.html> (accessed 19-10-2009).

<sup>61</sup> See "WASSCE: Huge Resources, Poor Performance" *The Punch Newspaper* (2010-03-19) 36.

1,369,142 candidates who wrote the May/June examinations, only 188,442 candidates, representing 13.76 per cent, achieved credit pass in five subjects.<sup>62</sup> These results are certainly discouraging. It is observed that the phenomenon of mass failure in secondary school examinations has been a recurring feature of the Nigerian education system of the last ten years.<sup>63</sup>

With the enormous failure rates in both countries (and in Nigeria in particular), coupled with other problems associated with education being experienced in the two countries, the nature and the content of the right to education, as well as the framework for implementing the right to education (both nationally and internationally) call for a critical evaluation. Rishmawi observed that measuring the progress in realising economic, social and cultural rights poses problems.<sup>64</sup> She asserts that this does not only require an assessment of current programmes and performance, but also a determination on whether a State is moving expeditiously towards the goal of full implementation, using the full extent of available resources.<sup>65</sup> The ICESCR stipulates the obligations of the States parties to ensure full realisation of the rights recognised under the Covenant.<sup>66</sup> According to the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, “a failure by a State Party to comply with an obligation contained in the International Covenant on Economic, Social and Cultural Rights is, under international law, a violation of the International Covenant on Economic, Social and Cultural Rights.”<sup>67</sup>

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<sup>62</sup> 36.

<sup>63</sup> In this regard, the National President of All Nigerian Confederation of Principals of Secondary Schools (ANCOPSS), Adeniyi Falade noted: “the dwindling performances in the national and sub-regional examinations by Nigerian schools started about 10 years ago, painting a gloomy picture of public schools occasioned by neglect and the desperation of students just to pass examinations” *The Punch Newspaper* (2010-03-19) 36-37; “Mass Failure in WAEC and NECO Exams” *The Guardian* (2009-10-19).

<sup>64</sup> Rishmawi *The Nature of States Parties Obligations (A Commentary on the United Nations Convention on the Right of the Child)* (2006) 33 para 87.

<sup>65</sup> Rishmawi *The Nature of States Parties Obligations* para 87.

<sup>66</sup> See art 2(1) of the ICESCR 1966 which provides as follows: “[e]ach 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.”

<sup>67</sup> See “The Limburg Principles on Implementation of the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 122 para 70. Relating this to the right to education, Beiter submits that the failure of a state to comply with the right to education as laid down in international agreements amounts to a violation of international law, entailing the international responsibility of the states. See Beiter *The Protection of the Right to Education* 2 & 3.

A pertinent issue, therefore, is how to determine the actual nature of the States Parties' obligations under the ICESCR. What are the indicators to determine when a violation of economic, social and cultural rights has occurred? The approach of the United Nations' Committee on Economic, Social and Cultural Rights (UNCESCR) is helpful in this regard. In an effort to monitor the States Parties' obligations under the ICESCR, the Committee has developed the concept of "minimum core obligation."<sup>68</sup> The concept of minimum core content with regard to the right to education has been elaborated upon by the Committee.<sup>69</sup> According to the Committee, in the context of article 13 of the ICESCR, this core includes:

"[A]n obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with 'minimum educational standards' (art.13 (3) and (4))."<sup>70</sup>

Brand and Russell observe that minimum state obligation is one of the more difficult and controversial concepts in economic, social and cultural rights, bridging the gap between fundamental entitlements and scarce resources.<sup>71</sup> They, however, define minimum core content as "the nature or essence of a right." That is, the essential element or elements without which a right loses its substantive significance as a human right and in the absence of which a State Party should be considered to be in violation of its international obligations.<sup>72</sup> It is described as a "floor" below which conditions should not be permitted to fall.<sup>73</sup> Roithmayr opines that the question of whether the Constitution guarantees some "core content" of the right to education is no doubt, a subject of significant controversy in South African jurisprudence.<sup>74</sup>

The South African Constitutional Court has, however, declined to define the concept of "minimum core" as part of the jurisprudence on socio-economic rights in a number of

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<sup>68</sup> See the Committee on Economic, Social and Cultural Rights (CESCR) General Comment No.3 "The Nature of States parties Obligations (art 2, para 1)" 14/12/90 para 10.

<sup>69</sup> At its 21<sup>st</sup> Session, 15 November - 3 December 1999.

<sup>70</sup> See CESCR General Comment No 13 E/C.12/1999/10 of 8 December 1999 para 57.

<sup>71</sup> Brand & Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) 14.

<sup>72</sup> 15.

<sup>73</sup> 15.

<sup>74</sup> Roithmayr "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education" 2003 19(3) *SAJHR* 382 402.



cases that has come before it on the subject.<sup>75</sup> In *Government of the Republic of South Africa v Grootboom*,<sup>76</sup> the Court expressed reluctance to take up the question of a “minimum core”, choosing instead to determine whether the government had undertaken “reasonable measures” or whether its actions had otherwise been reasonable. The Court did hold that there may be cases where it could be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.<sup>77</sup> It, however, rejected the notion of a minimum core obligation.<sup>78</sup> A similar approach was adopted in *Minister of Health v Treatment Action Campaign (No.2)*.<sup>79</sup> In this case, the Constitutional Court assessed the scope of the government’s duty to distribute Nevirapine to pregnant mothers in order to prevent mother-to-child transmission of HIV. Although the court found that the government had a duty to distribute the drug, it expressly declined to find that this duty existed as part of a minimum core right to health care.<sup>80</sup>

This approach has been severally criticised by academic writers and scholars.<sup>81</sup> Currie and de Waal maintain that by sidestepping the issue of establishing a minimum core obligation, the Court has refrained from holding that certain positive obligations in terms of the socio-economic rights may be immediately complied with or are immediately enforceable.<sup>82</sup> Liebenberg also argues that the Court’s rejection of a minimum core is unconvincing.<sup>83</sup> She posits that the importance of determining a minimum core obligation should be seen in its purpose of protecting vulnerable people from serious social and

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<sup>75</sup> See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign (No.2)* 2002 (5) SA 721 (CC); See also Roithmayr 2003 19(3) *SAJHR* 403.

<sup>76</sup> 2001 (1) SA 46 (CC).

<sup>77</sup> *Government of South Africa v Grootboom* para [42].

<sup>78</sup> Para [95].

<sup>79</sup> 2002 (5) SA 721 (CC).

<sup>80</sup> *Minister of Health v Treatment Action Campaign (No.2)* para 34.

<sup>81</sup> Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 163-164.

<sup>82</sup> Currie & de Waal *The Bill of Rights Handbook* 5 ed (2005) 584-585. See also, Fredman *Human Rights Transformed, Positive Rights and Positive Duties* (2008) 84-87.

<sup>83</sup> Liebenberg “South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?” 2002 *Law, Democracy & Development* 159; Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence” 2003 *SAJHR* 1; Liebenberg “Towards a Transformative Adjudication of Socio-Economic Rights” 2007 (1) *Speculum Juris* 41-59 41-44; Hagenmeier “Defining the Minimum Essential Levels of Socio-economic Rights: The Role of Comparative Analysis in Delimiting the Minimum Core of Socio-economic Rights” (2008) 22(2) *Speculum Juris* 90-103 100-103.

economic threats, and that without the recognition of this basic core standard other rights in the Constitution will have a hollow ring.<sup>84</sup> Conversely, Kende submits that those criticisms, though seemingly powerful, are mistaken, and lack perspective in the sense that the critics claim too much.<sup>85</sup> He asserts that South Africa is one of the only few countries whose highest court treats socio-economic rights with the same reverence as civil and political rights.<sup>86</sup>

It is submitted that the court's rejection of the notion of minimum core obligations could be regarded as a setback for the development of a transformative jurisprudence on socio-economic rights. In a later work, Liebenberg has however, made her position clearer on this issue by submitting that notwithstanding the rejection of the notion of minimum core by the South African courts, but if the courts embrace a sufficiently substantive approach to reasonableness review, the adjudication of socio-economic rights claims can become an important forum for courts to nudge both government and private actors to be more responsive to the voices and needs of the poor and marginalised.<sup>87</sup> It is noteworthy to mention that the concept of "minimum core" has never been articulated upon in Nigerian constitutional jurisprudence, perhaps due to the obvious problem of the non-justiciability of most socio-economic rights in the country.

A serious obstacle to the implementation of the ICESCR (to which the right to education is inclusive) is the issue of "available resources". Article 2(1) of the ICESCR recognises this limitation as it obliges each State party to take steps to the maximum of its "available resources" with a view to achieving progressively the full realisation of the

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<sup>84</sup> Liebenberg 2002 *Law, Democracy & Development* 159; see also Pieterse "The Transformative Nature of the Right to Education" 2004 4 *TSAR* 700 704; Berger 2003 *Columbia Law Review* 632; Pieterse "Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care" (2006) 22 *SAJHR* 473 491; Bilchitz "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance (2002) 119 *SALJ* 484.

<sup>85</sup> Kende *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 262; Davis describes the critics as "naïve and somewhat arrogant" for arguing that the Court should have blindly followed the United Nations proposed approach. See Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards Deference 'Lite'" (2006) 22 *SAJHR* 301 315 & 318. It is noted, however, that foreign scholars almost uniformly praise the court's decision. See Klaaren "A Remedial Interpretation of the Treatment Action Campaign Decision" (2003) 19 *SAJHR* 455 459.

<sup>86</sup> Kende *Constitutional Rights in Two Worlds* 262; see also, de Vos "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness" (2001) 17 *SAJHR* 258; Wesson "Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court" (2004) 20 *SAJHR* 284 298.

<sup>87</sup> Liebenberg 2007 (1) *Speculum Juris* 59.

rights recognised in the Covenant.<sup>88</sup> Both the South African and the Nigerian Constitutions have similar phrases in their respective sections on the right to education. Section 29(1)(b) of the South African Constitution provides that the State “through reasonable measures, must make progressively available and accessible”, the right to further education. Malherbe notes that this limitation clause recognises that the enjoyment of the right to further education largely depends on the availability of the financial and other resources of the State.<sup>89</sup> Similarly, section 18(3) of the Nigerian Constitution also provides that Government shall, “as and when practicable” provide free, compulsory and universal primary education.<sup>90</sup>

Himes argues that the history of the inclusion of those qualifying phrases, as well as the literal interpretation of their meaning, has raised fears that they could become convenient excuses for justifying implementation performance falling well short of what might be reasonably expected.<sup>91</sup> It is argued further that this and similar phrases could serve as “escape clauses” which a State may use to avoid its obligations under relevant instruments.<sup>92</sup> These phrases, therefore, call for a critical evaluation and this study shall analyse these clauses to determine the extent to which they impact on the realisation of the right to education in South Africa and Nigeria. Although lack of adequate resources constitutes a potential limitation on the realisation of the right to education in the world over, it is submitted, however, that this should not be used as an excuse by the States for failing to comply with minimum core obligations in respect of a particular right.

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<sup>88</sup> Several other documents provide for this and similar limiting clauses. See art 28(1) of the CRC which provides that “State Parties recognised the right of the child to education, and *with a view to achieving this right progressively...*”; art 13(2)(b) & (C) of the ICESCR which provides *inter alia* that the States parties to the present Covenant recognise that, with a view to achieving the full realisation of the right to secondary and higher education “...by the progressive introduction of free education.”

<sup>89</sup> See Malherbe “The Constitutional Dimension of the Best Interests of the Child as applied in Education” 2008 2 TSAR 267 275-276; Malherbe “The Constitutional Framework for pursuing Equal Opportunities in Education” 2004 22(3) *Perspectives in Education* 9 19.

<sup>90</sup> However, it is observed that the fact that the right to education entails positive duties, and thus leaves many policies options to states, makes it difficult for states to know exactly what is expected of them to guarantee the exercise of this right. Beiter *The Protection of the Right to Education* 3.

<sup>91</sup> Himes (ed) *Implementing the Convention on the Rights of the Child* 2-3; see for example *Minister of Health v Treatment Action Campaign (No.2)* 2002 (5) SA 721, para 34 where the Constitutional Court relying on similar provision in sections 26 and 27 of the Constitution held that: “the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core is provided to them...”

<sup>92</sup> Himes (ed) *Implementing the Convention on the Rights of the Child* 240.

### **3 Aims and Objectives of the Study**

The study seeks to examine the right to education as guaranteed in the various national, regional and international human rights instruments as well as its implementation in South Africa and Nigeria. It also aims to examine the South African constitutional jurisprudence on the right to education in order to assess whether some guidance may be obtained to address Nigerian problems on the subject. The specific objectives of this study, however, are:

- To examine the right to education in South Africa and Nigeria with a focus on equal educational opportunities for all; and
- To analyse the existing legal frameworks for the implementation of the right to education in the two countries and to propose effective means through which the right to education can be better achieved should the existing legal frameworks prove to be inadequate.

### **4 Research Motivation/ Significance of the Study**

The right to education is described as an empowerment right.<sup>93</sup> This is because the right to education is necessary for the exercising and enjoyment of other rights.<sup>94</sup> The enjoyment of a number of civil and political rights, such as freedom of information and the right to vote depends on a minimum level of education.<sup>95</sup> Also, economic, social and cultural rights, such as the right to choose work or to take part in cultural life can also only be exercised meaningfully once a minimum level of education has been achieved.<sup>96</sup> Education enables an individual to think critically about life; to examine seriously possible courses of action and to make rational choices based on such examination.<sup>97</sup> As earlier pointed out, the relationship between the right to education and other rights shows the interdependency and

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<sup>93</sup> As an empowerment right, it provides the individual with control over the course of his or life, and in particular, control over (not merely protection against) the state. See Donnelly & Howard "Assessing National Human Rights Performance: A Theoretical Framework" (1988) 10 *Human Rights Quarterly* 214-248 215; see also, Coomans "The Core Content of the Right to Education" in *Exploring the Core Content of Socio-Economic Rights* 160.

<sup>94</sup> See Beiter *The Protection of the Right to Education* 28; Fredman *Human Rights Transformed* 216.

<sup>95</sup> See Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation" in *Human Rights in Education, Science and Culture* 183 185.

<sup>96</sup> Veriawa & Coomans "The Right to Education" in Brand & Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 57.

<sup>97</sup> See Beiter *The Protection of the Right to Education* 29.

indivisibility of all human rights.<sup>98</sup> This interdependency is significant for a nation's development since lack of basic education affects an individual's quality and standard of life.<sup>99</sup> Education prepares learners for life, politically and economically.<sup>100</sup> It also serves a positive social function in helping to build values such as tolerance and respect for human rights.<sup>101</sup> Thus, the importance of education in society cannot be over-emphasised.<sup>102</sup>

As evident in the various human rights instruments guaranteeing the right to education, the importance of education cut across national, regional and global levels, it is universal. For instance, in *Brown v Board of Education of Topeka*,<sup>103</sup> the United States of American Court stressed the importance of education in these words:

“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 that must be made available to all on equal terms.”

According to Devenish, “education is of seminal importance as far as human rights are concerned, since it liberates people from the bondage of ignorance, superstition and fear. It

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<sup>98</sup> According to Dlamini, education is a good example of how various categories of rights are interdependent. As democracy requires informed participation in the political process, education is indispensable for such informed participation. Illiteracy therefore undermines democracy. See Dlamini “Culture, Education, and Religion” in *Rights and Constitutionalism* 573 581; see also, Beiter *The Protection of the Right to Education* 29-30.

<sup>99</sup> See Brand & Russell (eds) *Exploring the Core Content of Socio-Economic Rights* 160.

<sup>100</sup> Malherbe asserts this in the following words: “the virtues of education in preparing learners for life, for meaningful interaction with other human beings, for constructive civic and political involvement, and for successful economic participation stand beyond reason.” See Malherbe 2004 22(3) *Perspectives in Education* 10.

<sup>101</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 412.

<sup>102</sup> Alluding to this fact, the Committee on Economic, Social and Cultural Rights commented as follows: “Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.” See CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The Right to Education (art. 13 ICESCR) [Compilation, 2004, pp. 71-86] para 1.

<sup>103</sup> 347 US 438 (1954).

gives to them dignity and self-confidence and is a basic right, on which the materialization of many other rights depend.”<sup>104</sup> Education is of cardinal importance for meaningful human existence, it enables a person to fully participate and function in society.<sup>105</sup> In the same vein, Bekker asserts that the right to vote, freedom of expression, freedom of information, freedom of association, labour rights and the right to participate in the cultural life of one’s community are all linked to the right to education.<sup>106</sup> These rights can only be meaningfully exercised in the context of a certain minimum level of education having been achieved.<sup>107</sup> The importance of education lies in the fact that it develops the human mind to think critically about issues; it equips people with the knowledge that enables them to acquire certain skills and expertise.<sup>108</sup> It is submitted that education is a good example of how various categories of rights are interdependent.<sup>109</sup> Education is fundamental to human existence; it also constitutes the process through which human beings develop to full humanity.<sup>110</sup>

From the available data, it appears that a comparative study on the right to education in South Africa and Nigeria has never been conducted. This, no doubt, makes this study unique and very significant. The study hopes to provide the policy makers with meaningful assessment of the right to education with a view to improving on the implementation strategy regarding the right to education in South Africa and Nigeria. Beyond the concept of minimum core, the CESCER has not managed to develop a comprehensive methodology

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<sup>104</sup> Devenish “Aspects of the Right to Education in the Constitution” 1998 2 *De Jure* 224 224-225.

<sup>105</sup> Devenish 1998 2 *De Jure* 225; According to Dlamini, the importance of education lies in the fact that it develops the human mind to think critically about issues. Education is fundamental to human existence. It is the process through which human beings develop to full humanity or maturity. This development is acquired through the acquisition of knowledge which makes a difference in human condition. See Dlamini “Culture, Education, and Religion” in *Rights and Constitutionalism* 581.

<sup>106</sup> See Bekker *Compilation of Essential Documents on the Right to Education [part 1]* available at [http://www.chr.up.ac.za/centre\\_projects/socio/compilation2part1.html](http://www.chr.up.ac.za/centre_projects/socio/compilation2part1.html) (accessed 3-09-2008).

<sup>107</sup> Bekker *Compilation of Essential Documents on the Right to Education [part 1]*.

<sup>108</sup> Dlamini “Culture, Education, and Religion” in *Rights and Constitutionalism* 581; see also, Sithole “The Learner’s Perception of a Human Rights Culture in South African Education” in De Groof et al (eds) *Promoting a Human Rights Culture in Education* (1999) 85 86. In *Van Vuuren v Kruger* 1993 4 SA 842 (A) at 852, talking on the problem of HIV/Aids, a South African court articulated on the importance of education in the following words: “[i]n the absence of a cure or vaccine, the only way to stop the spread of this deadly disease is the prevention of the infection in the first place. This is clearly the task of education which is the only current tool available to combat the Aids epidemic.”

<sup>109</sup> For example, democracy requires informed participation in the political process; education is indispensable for such informed participation. Illiteracy no doubt undermines democracy.

<sup>110</sup> Dlamini “Culture, Education, and Religion” in *Rights and Constitutionalism* 581.

by which States' compliance with "progressive realisation" can be measured.<sup>111</sup> The study will examine this issue with the aim of developing literature in this area.

## 5 Research Questions

To achieve the stated aims, the study will investigate the following questions:

- Is the right to education adequately guaranteed under South African and Nigerian law?
- Are the existing legal frameworks for the realisation of the right to education in the two countries adequate?
- What steps need to be taken to improve on the implementation strategies of the right to education in South Africa and Nigeria within the context of regional and international human rights standards?

## 6 Research Methodology

Method is a specific research technique utilised by the researcher to do research on a particular problem.<sup>112</sup> This study will compare the right to education in South Africa and Nigeria.<sup>113</sup> According to Hayden, to "compare" is to examine two or more entities by putting them side by side and looking for similarities and differences between or among them.<sup>114</sup> It is acknowledged that the primary purpose of any exercise in legal comparison is the creation of new knowledge.<sup>115</sup> In this regard, Kung defines the comparative legal method of research as "a unique, systematic and jurisprudential strategy applied, by virtue

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<sup>111</sup> Dugard observes that the rights protected under the ICESCR require positive implementation in accordance with the availability of resources, which renders them less capable of judicial determination. For this reason no provision is made for inter-state claims or individual complaints, as with the ICCPR. Instead, a supervisory body, the Committee on Economic, Social and Cultural Rights receives national reports. Unfortunately, many states have failed to submit such reports and there is little that the Committee could do to enforce compliance. See Dugard "International Human Rights" in *Rights and Constitutionalism* 177.

<sup>112</sup> Oosthuizen, Botha, Roos, Rossouw, & Smit (eds) *Aspects of Education Law* 4 ed (2009) 10.

<sup>113</sup> It is acknowledged that comparative law is a method of study; in fact, de Cruz asserts categorically that comparative law is neither a branch of law, nor a legal body of rules but rather, a method of study. See generally, de Cruz *Comparative Law in a Changing World* (1995) 3-5; Venter *Constitutional Comparison* (2000) 16-17.

<sup>114</sup> Hayden *Introduction to International Education* (2006) 4; According to Watson, "comparative law then, as an academic discipline in its own right, is a study of the relationship, above all the historical relationship, between legal systems or between rules of more than one system." See Watson *Legal Transplants* (1973) 9.

<sup>115</sup> According to Venter, comparative law also an aid to legislative process; an instrument of interpretation of the law; a vehicle for teaching law, and a means of promoting legal unification. See Venter *Constitutional Comparison* 19.

of similarities and differences between the diverse legal systems, to acquire new understanding regarding the specific topic...”<sup>116</sup> Various scholars have justified a comparative study as serving many useful purposes.<sup>117</sup> Some important constitutional provisions on the Bills of Rights, particularly on the right to education in South Africa and Nigeria, will be examined with the purpose of analysing their similarities and differences. According to Russo, the primary source of information when carrying out legal research is the law itself.<sup>118</sup> The traditional method of legal research is a systematic investigation involving the interpretation and explanation of the law.<sup>119</sup> In this regard, it is imperative that legislation and case law are analysed to determine how courts have interpreted statutory law in applying legal principles.<sup>120</sup> The study will follow this method by investigating how courts and other human rights bodies have interpreted statutory provisions, national constitutions, conventions, declarations and other human rights instruments on the right to education so as to identify the legal principles that have evolved on the subject. The comparative analysis shall help in determining the extent to which South Africa and Nigeria have drawn from the jurisprudence of international human rights in order to implement the right to education in their territories.

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<sup>116</sup> Kung *An International Perspective on the Fundamental Human Rights of Educators* (2006) 7.

<sup>117</sup> Sacco says that a comparative evaluation of different countries concerning the same or similar issues is also of great value for drafting of legislation or recommending a law reform. See Sacco “Legal Formant: A Dynamic Approach to Comparative Law” 1991 *African Journal of Comparative Law* 1 4; Hervey justifies a comparative study by saying that it is a potent instrument for a better understanding of one’s domestic legal system. See Hervey *Justifications for Sex Discrimination in Employment* (1993) 17; Bogdan equally asserts that realisation has come in the recent time that a lawyer like any other professional cannot limit his attention only to what occurs within the borders of his own country. He argues as follows: “The importance of learning from the experience of other countries is obvious within the fields of natural science, medicine, and technology. The same compelling need to make use of the experience of others should also be recognised within the legal field.” See Bogdan *Comparative Law* (1994) 20 & 29. Also, David and Brierley asserts: “[t]o enclose legal science within the boundaries of one nation, and to pretend to explain or develop it without taking into account foreign thought and experience, is to limit both the possibilities of knowledge and the sphere of action of the jurist. No more than history, economics, political science or sociology, can law- a social science- be properly studied from a purely national point of view. Juridical nationalism is provincialism, and irreconcilable with a truly scientific spirit; it impoverishes and indeed is dangerous to the development and even the application of a national law.” See David & Brierley, *Major Legal Systems in the World Today* (1968) 8.

<sup>118</sup> Russo “Legal Research: The ‘Traditional’ Method” in Schimmel (ed) *Research that Makes A Difference: Complementary Methods for Examining Legal Issues in Education* NOLPE Monograph Series Kansas, No.56 National Organisation on Legal Problems of Education (1996) 34.

<sup>119</sup> 34.

<sup>120</sup> See van Vollenhoven & Glenn “Learners’ Right to Freedom of Written Expression” 2004 24(2) *South African Journal of Education* 148-152 148.



The study shall rely on both primary and secondary sources of data. The primary data to be used include the Constitution of the Republic of South Africa, 1996, the Constitution of the Federal Republic of Nigeria, 1999, legislation and enactments, case law from the two countries, the United Nations and African Union treaties, documents and declarations relevant to the topic. The secondary data to be relied on include journal articles, law texts, documents and reports collected by government agencies, the human right bodies/commissions, the United Nations' specialised agencies on education such as UNESCO, Non-Governmental Organisations (NGOs), and other electronic sources on socio-economic rights and the right to education in particular. This data is the subject of an in-depth content analysis.

As Mubangizi asserts, for human rights to be successfully protected and implemented, there should be a meaningful interplay between international human rights standards and domestic or national standards.<sup>121</sup> To determine the content of the right to education, the General Comment 13 of the UNCESCR provides guidance. The General Comment provides that while the exact standard of the right to basic education may vary according to conditions within a particular country, education must meet four features, namely; availability, accessibility, acceptability and adaptability.<sup>122</sup> These four features constitute the yardsticks on which this study shall base its assessment of the right to education in South Africa and Nigeria.

## **7 Comparing Nigeria and South Africa: the Justifications for Comparison**

As mentioned above, the study will compare the right to education in South Africa and Nigeria with the purpose of ascertaining their similarities and differences. Working on these similarities and differences will be helpful in ascertaining the common core of the subject in the two countries. Engaging in a kind of comparative study such as this has its own practical value in this age of globalisation. Apart from acquiring knowledge on a particular subject, the concept of universal education within the concept of the MDGs makes this comparative study a worthwhile exercise.<sup>123</sup> Also, the process of interpreting

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<sup>121</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Political Guide* (2004) 32.

<sup>122</sup> See CESCR *General Comment No.13* para 6.

<sup>123</sup> Hutchison & Wiggan "Introduction: The Intersections of Globalisation, Education, and the Minority Experience" in Wiggan & Hutchison (eds) *Global Issues in Education: Pedagogy, Policy, Practice and the Minority Experience* (2009) 1-19 17.

and giving meaning to human rights norms can be understood as a dialogic process which includes a range of national and international actors.<sup>124</sup> This is one of the more positive features of globalisation, where the meaning accorded to fundamental human rights norms can be influenced by a cross-cultural dialogue extending across national boundaries.

As Roach observed, “a globalised world is one where people, including judges, engage in multiple and ongoing conversations that cross borders. It is a world characterised by a sense of openness, modesty, and willingness to learn from others.”<sup>125</sup> It is observed that courts around the world are frequently confronted by many of the same difficult issues and the judicial world is becoming a global village where judges in different jurisdictions are increasingly looking to a wide variety of sources to interpret their own human rights provisions.<sup>126</sup> The universal nature of human rights and human rights guarantees have also contributed to the globalisation of the judicial world in the field of human rights.<sup>127</sup> Thus, comparative law constitutes an indispensable instrument for a renewed study of one’s legal science; it helps a researcher to know, understand and penetrate his/her own national law. It gives a researcher who studies his/her own national law the perspective necessary to understand its contours.<sup>128</sup>

A comparative study stimulates knowledge and contributes to an understanding between people in general.<sup>129</sup> It makes it possible for a jurist to see his/her own legal system from a new point of view and to obtain a better understanding of the function and values of well-known legal phenomena.<sup>130</sup> In today’s complex society, law-makers as well as legal

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<sup>124</sup> Liebenberg “Reflections on Drafting a Bill of Rights: A South African Perspective” in *Constitution in Transition: Academic Inputs for a new Constitution in Zimbabwe* (2009) 15.

<sup>125</sup> Roach “Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience” (2004-2005) 40 *Texas International Law Journal* 537-576 538.

<sup>126</sup> Govindjee 2005 26(3) *Obiter* 575; L’Heureux-Dube “Human Rights: A Worldwide Dialogue” in Kirpal, Desai, Subramaniam, Dhavan & Ramachandran (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (2000) 214 215; see also, Taiwo, “Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions- Some Lessons for Nigeria” (2009) 34(1) *Journal For Juridical Science* 89-115 93-94.

<sup>127</sup> The issue of globalisation and universal nature of human rights have equally made comparative studies necessary in our contemporary world. Govindjee alludes to this fact when he submits that courts around the world are frequently confronted by many of the same difficult issues and the judicial world is becoming a global one where judges in different jurisdictions are increasingly looking to a wide variety of sources to interpret their own human rights provisions. See Govindjee 2005 26(3) *Obiter* 575-579; see also, L’Heureux-Dube “Human Rights: A Worldwide Dialogue” in *Supreme But Not Infallible* 225; Kende *Constitutional Rights in Two Worlds* 4.

<sup>128</sup> David & Brierley *Major Legal Systems in the World Today* 8.

<sup>129</sup> See Bogdan *Comparative Law* 27.

<sup>130</sup> 28.

scholars are often faced with difficult problems to which knowledge of laws and rules from other jurisdictions may offer appropriate solutions. In this regard, the Constitution of the Republic of South African, 1996 obliges a court or tribunal to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>131</sup> It sets out the general approach to be followed when interpreting the Bill of Rights.<sup>132</sup> In the South African context the comparative method is legitimate and is sanctioned by the Constitution.<sup>133</sup>

In terms of the provision of section 39 the South African Constitution, a court or a tribunal must consider international law and may consider foreign law.<sup>134</sup> The provision endorses a valued-based approach to the interpretation of the Bill of Rights and indicates the openness of the Constitution to international and comparative law sources in the interpretation of the Bill of Rights.<sup>135</sup> The provision obliging the court to interpret any legislation or Bill of Rights consistently with international law has put the South Africa judiciary in a good position in terms of supporting a comparative-friendly approach. For instance, in *S v Makwanyane*,<sup>136</sup> and *S v Williams*,<sup>137</sup> the South African Constitutional Court did extensive research (on the universally recognised fundamental right to life and the right to be free from cruel and inhuman punishment respectively) to shed light on the interpretation of these rights in the South African context. In both cases, the Court looked for guidelines in foreign law and cases and specifically, in *S v Williams*, a Namibia and a Zimbabwean case on corporal punishment were consulted.<sup>138</sup>

Similarly, in *Bhe v Magistrate Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the Republic of South Africa*,<sup>139</sup> the South African Constitutional Court relied

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<sup>131</sup> See s 39(1)(a)-(c) of the Constitution.

<sup>132</sup> See s 39(1)(a)-(c) of the Constitution.

<sup>133</sup> Brand *Financial Constitutional Law: A Comparison Between Germany and South Africa* (2006) 6.

<sup>134</sup> See s 39(1)(b) & (c) & s 233 of the Constitution; see also, *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC), Sachs J, para [149].

<sup>135</sup> See Liebenberg in *Constitution in Transition: Academic Inputs for a new Constitution in Zimbabwe* 15; see also, Joubert & Prinsloo *The Law of Education in South Africa* 2 ed (2009) 36.

<sup>136</sup> 1995 (6) BCLR 665 (CC).

<sup>137</sup> 1995 (7) BCLR 861 (CC).

<sup>138</sup> The Constitutional Court also used the comparative method in several instances during the certification process. See for example, *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), paras 50, 71-73, 89-90 & 112-113.

<sup>139</sup> 2005 1 BCLR 1.

heavily on the Nigerian case of *Augustine N Mojekwu v Caroline MO Mojekwu*<sup>140</sup> on the issues of primogeniture and gender discrimination. Although, unlike the South African Constitution, the Nigerian Constitution does not expressly oblige a court or a tribunal to consider international and foreign laws, however, Nigerian courts have also recognised the importance of a comparative venture. Thus, in *Augustina Chinyelu Ugo v Dr. Roy Pedro Ugo*,<sup>141</sup> the Nigerian Court of Appeal observed thus: “[t]his world has become a global village where the rule of law and justice as they affect human relations are universal.”<sup>142</sup>

The foregoing underscores the importance of this comparative study.

Though South Africa and Nigeria are different in term of political climate, social values and traditions, the economies of the two countries as well as demographic factors are also different. The underlying legal system of South Africa is a Roman-Dutch-English hybrid of civil code and common law,<sup>143</sup> while the Nigerian underlying legal system is based on English common law. Also, the South African Constitution is structured differently from the Nigerian Constitution; nevertheless, these two countries are comparable because of their common historical link. They both have strong connections to the British legal tradition, and the common law, being former British colonies. Economically and politically, South Africa and Nigeria constitute regional superpowers accounting for more than half of Sub-Saharan Africa’s domestic product.<sup>144</sup> The two countries also share common human rights-related problems. While South Africa emerged from a long period of apartheid system, Nigeria, on the other hand, transited from autocratic dictatorship of a long military rule.

In addition, the two countries drafted and adopted their Constitutions at relatively the same time and with some similar features.<sup>145</sup> For instance, the preambles to the two Constitutions are similar in their championing of the ideals of “democratic values, social justices and

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<sup>140</sup> [1997] 7 NWLR (pt 512) 283.

<sup>141</sup> [2008] 5 NWLR (pt 1079) 1.

<sup>142</sup> Adekeye, JCA (as she then was) at 24. In the same vein, Adediran also submits thus: “[t]oday, the world is a global village, which means that the study and research in law can no longer be restricted within one’s country. The tendency therefore is how to explore avenues where the law is generally made available to aid any resident of the country, coming from any part of the globe.” See Adediran *Essays on Tribunals and Inquiries in Nigeria* (2004) 117.

<sup>143</sup> Kende *Constitutional Rights in Two Worlds* 5.

<sup>144</sup> 5 fn 24; see also, LaFraniere “World Bank Reports Progress in Sub-Saharan Africa” *New York Times* (2007-11-15) A3.

<sup>145</sup> While South Africa enacted her own constitution in 1996, Nigeria enacted hers in 1999.

fundamental human rights.”<sup>146</sup> The two countries enshrine the concept of constitutional supremacy in their respective Constitutions.<sup>147</sup> The concept of human rights is paramount in the two Constitutions. While the South African Constitution provides for these rights as a “bill of rights” in its chapter 2, its Nigerian counterpart provides for it as “fundamental rights” in chapter IV. In order to protect constitutional democracy and enhance human rights protection in their territories, both the South African and Nigerian Constitutions, in addition to the regular courts, establish specific human rights institutions such as the South African Human Rights Commission and the Nigerian National Human Rights Commission.<sup>148</sup>

Notwithstanding these similarities, there are some obvious differences in the two Constitutions relevant to the topic at hand. The Bill of Rights in the South African Constitution embraces both civil and political rights as well as social, economic and cultural rights as justiciable rights. For this reason, the South African Constitution has been described as “the most admirable constitution in the history of the world.”<sup>149</sup> The Nigerian Constitution, on the other hand, only provides for civil and political rights in chapter IV as justiciable rights. Socio-economic and cultural rights are, on the contrary, provided for in chapter II as mere “fundamental objectives and directive principles of state policy” which are non-justiciable.<sup>150</sup> In order to adequately promote human rights in the country, in

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<sup>146</sup> The preamble to the 1999 Nigerian Constitution provides *inter alia*: “We people of the Federal Republic of Nigeria having firmly and solemnly resolved ... to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and justice, and for the purpose of consolidating the Unity of our people...”

<sup>147</sup> See s 2 of the 1996 South African Constitution as well as s 1 of the 1999 Nigerian Constitution.

<sup>148</sup> See s 184 of the 1996 South African Constitution and National Human Rights Commission Act Cap N46 Laws of the Federation of Nigeria (LFN) 2004.

<sup>149</sup> Sunstein “Designing Democracy, What Constitutions Do (2001) 261; See also, Kende *Constitutional Rights in Two Worlds* 4. It is observed that the South African Constitution’s framers surveyed the world’s constitutions for the best ideas. Sarkin explains that the framers relied heavily on Canada and German constitutional developments, as well as international human rights principles. See Sarkin “The Effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions” (1998) 1 *U. Pa. J. Const. L.* 176 181.

<sup>150</sup> S 6(6)(c) of the Constitution excludes the provision of the “fundamental objectives and directive principles of state policy” in chapter II of the Constitution from the matters which courts have jurisdiction. Commenting on this in respect of the defunct 1989 Nigerian Constitution, Agbede posits as follows: “It should be observed that the bill of rights as contained in the 1989 constitution, like its predecessors, provides for protection against restraints. In effect it is concerned with the idea of human rights in the negative sense... To that extent Nigerian Bill of Rights falls short of the standard which obtains in international document on the issue. Although Chapter II of the constitution contains a number of the positive human rights provisions even if in vague form but as they are not justiciable, they hold no comfort or promise for the ordinary citizens in need of such rights. However, it seems inappropriate that section 19

addition to the South African Human Rights Commission, the South African Constitution establishes additional human rights institutions such as the Office of the Public Protector, the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities and the Commission on Gender Equality, among others.<sup>151</sup> Nigeria, on the other hand, only establishes the Human Rights Commission and the Public Complaint Commission.<sup>152</sup>

The South African Constitution takes a further step by establishing the Constitutional Court as a court with final jurisdiction on issues involving the interpretation, protection and enforcement of the Constitution.<sup>153</sup> Under the South African judicial arrangement, it is possible to approach the Constitutional Court directly from any court in certain exceptional circumstances.<sup>154</sup> In Nigeria, the duties of interpretation, protection or enforcement of the Constitution are vested in the High Court and all appeals on these issues must pass through the Court of Appeal without giving allowance to any exceptional circumstances as in the South African constitutional arrangement. As earlier noted, the South African Constitution provides for court interpretative directions. It states that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom. The Constitution also obliges a court to consider foreign and international law.<sup>155</sup> No such progressive interpretative directions are found in the Nigerian Constitution.

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[now in s 18 of the 1999 Constitution on educational objective] should not have been made justiciable even in a modified form..." See Agbede "The Rule of Law and the Preservation of Individual Rights" in Ajomo & Owasanoye (eds) *Individual Rights Under the 1989 Constitution* (1993) 35. In the same context, Aguda submits: "[f]or completeness of treatment it is necessary to make a few points ... The third point is that on the face of it the Constitution does not give any legal right to individuals in so far as the Fundamental Objectives and Directive Principles of the State Policy are concerned." See Aguda "Judicial Attitude to Individual Rights in Nigeria" in *Individual Rights Under the 1989 Constitution* 68.

<sup>151</sup> See s 181 of the South African Constitution.

<sup>152</sup> See s 315 of the Nigerian Constitution.

<sup>153</sup> See s 167 of the South African Constitution.

<sup>154</sup> Section 167(6) of the Constitution provides: "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court- (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court." With this provision, it means that in some cases, a matter may not necessarily pass through the Supreme Court of Appeal before it is finalised. Thus, Rule 18 of the Constitutional Court Rules provides for "direct access" to the court as an extraordinary procedure in circumstances where the applicant can show "compelling reasons" that is in the interests of justice. See of the Constitutional Court Rules GN R1675, published in GG 25726/21-10-2002.

<sup>155</sup> S 39 of the Constitution.

Apart from non-justiciability of some fundamental rights in the Nigerian Constitution, some constitutional law concepts are given pronounced attention in the South African, unlike the position in Nigeria. In this category is the concept of *locus standi*.<sup>156</sup> While the concept of *locus standi* is given a wider provision under the South African Constitution, the Nigerian Constitution still maintains the restrictive common law position on the concept.<sup>157</sup> Such similarities and differences make these two countries comparable. However, it is important to bear in mind Bogdan's warning on comparative studies that comparison often becomes apparent after an extensive research work based on the initial assumption. According to him, "[w]hether two legal rules, which at first view appear to be comparable, in fact deal with the same problem will often not be apparent until one has begun the comparison. Consequently, one frequently begins with a working hypothesis that they are comparable."<sup>158</sup>

## **8 Assumptions**

This study is based on some assumptions or fundamentals. The first assumption is that socio-economic rights are *normative*, that is, they are standards or principles deemed to be binding on members of a group, guiding and regulating acceptable behaviour in a society. Secondly, this study assumed that contrary to the international, regional and national provisions on the right to education, everyone does not enjoy the right to education in South Africa and Nigeria. It is assumed further that there are measures which governments could take to effectively realise the right to education in the two countries. The study also assumed that the legal rules in South Africa and Nigeria as well as the constitutional provisions of the two countries are comparable.

## **9 Expected Outcome of the Study**

The theme of this study centres on the nature, meaning and scope of the right to education as well as corresponding States obligations. However, the main challenge to the international bill of rights is the implementation of the standards enshrined in the human

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<sup>156</sup> See section 38 of the 1996 South African Constitution.

<sup>157</sup> This issue has been canvassed in detail elsewhere. See Taiwo "Enforcement of Fundamental Rights and the Standing Rules under the Nigerian Constitution: the Need for a more Liberal Provision" (2009) 9(2) *African Human Rights Law Journal* 546-575; see also, s 46 of the 1999 Nigerian Constitution.

<sup>158</sup> Bogdan *Comparative Law* 59.

rights covenants. It is observed that the rights guaranteed in the ICESCR are too frequently neglected or violated in all parts of the world. The study will examine these problems and obstacles impeding the effective implementation of the right to education in South Africa and Nigeria. It is expected that the outcome and results of this study would raise the awareness of policy-makers in the two countries with the hope of equipping them with adequate knowledge that will be helpful in improving policies conducive to the realisation of the right to education. It is expected that the research findings will further sensitise and mobilise NGOs and other human rights bodies towards advancing the right to education in the two countries. Given its comparative content, it is also hoped that the study will fill a major gap in literature, particularly in charting the course for the promotion and protection of the right to education in Africa.

## **10 Definition and Meanings of Major Terms**

It is important at this stage to examine the meanings of certain key terms and concepts which are used in this study. Before embarking on such exercise, it is equally important to bear in mind that precise definition of most legal terms is always impossible. In this regard, Okunniga once admonished: “[n]obody, including the lawyer, has offered, nobody, including the lawyer is offering, nobody, including the lawyer, will ever be able to offer a definition of law to end all definition. This is not advocating pessimism. It is because the nature of law makes it very pliable when it comes to the problem of definitions.”<sup>159</sup> Giving meanings or definitions to most legal concepts is always difficult and controversial and, as such, precise definitions may not, always be feasible in this work. The problem of lack of accurate definition of legal concepts is generally acknowledged. Thus, meanings of the major terms used in this thesis namely; “human rights”, “constitution”, “directive principles” and “education” are examined bearing in mind the above observations.

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<sup>159</sup> See Okunniga *Transplants and Mongrels and the Law: the Nigerian Experiment* (Inaugural Lecture Series 62 delivered at University of Ife, Nigeria on 17 May 1983) 1.



## 10 1 Human Rights/Fundamental Rights

Human rights are usually referred to by various names such as “fundamental rights”, “basic rights”, “natural rights” and sometimes, “common rights.”<sup>160</sup> The term “human rights” defies a single acceptable definition from writers, jurists and scholars. The reason is that the theoretical foundations of human rights vary over the years depending on the prevailing school of thought at the time.<sup>161</sup> The term is a dynamic one, and is subject to change and expansion. While the concept is widely and generally acknowledged, there is, however, considerable confusion as to the basis of human rights law. Shaw posits that the question of what we mean by the term “right” is itself controversial and the subject of intense jurisprudential debate.<sup>162</sup> In this sense, Udombana also submits that the notion of rights has been a subject of much legal and philosophical speculation; it defies definition.<sup>163</sup> The reason for the elusiveness of definition is that such questions as rights are intrinsically ambiguous.<sup>164</sup>

Thus, the term “right” may be used to describe a variety of legal relationships, each invoking different protections and producing variant results.<sup>165</sup> In the same vein, Baxi asserts that the term “human rights” is deeply problematic; it straddles several universes of discourse.<sup>166</sup> At their foundation, human rights are a set of moral principles about how

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<sup>160</sup> According to Saharay, “fundamental rights” are the modern name for what have been traditionally known as “natural rights.” See Saharay *The Constitution of India: An Analytical Approach* 3 ed (2002) 32. However, Mubangizi submits that while these phrases do not mean one and the same thing, nevertheless, they are usually used interchangeably and sometimes rather confusingly. See Mubangizi *The Protection of Human Rights in South Africa* 2.

<sup>161</sup> The natural law school for instance regards human rights as those conferred by God. This school of thoughts further argues that human or made-made laws must conform to it in order to be valid. But due to reformation and the decline of the role played by the Church in the state affairs, there came the positivists who secularised the notion of human rights; they thereby removed the issue from the realm of supernatural and metaphysics. However, human rights are defined as those which have become part of a positive legal system derived either from the will of a state or command of the sovereign ruler. See Barau “Towards Effective Promotion and Protection of Human Rights in Northern Nigeria” in Osinbajo, *et al* (eds) *Human Rights, Democracy & Development in Nigeria* (1995-1996) 313 314-315.

<sup>162</sup> Shaw *International Law* 4 ed (1997) 196.

<sup>163</sup> Udombana *Shifting Institutional Paradigms to Advance Socio-Economic Rights in Africa* (2007) 9.

<sup>164</sup> 9.

<sup>165</sup> Sometimes, the term is used in the strict sense of a right-holder’s claim to something, with a correlative duty in another. It is used at the other times to indicate a privilege or liberty to do something. Still on other occasions, it stands for immunity from having one’s legal status altered by another person’s act. The word may refer to a power to alter the legal relations -rights and duties- of others. See Udombana *Shifting Institutional Paradigms* 9.

<sup>166</sup> Moral philosophers signify by it a set of ethical imperatives that contribute to making the basic structure of society and state to be and remain overall “just.” International lawyers regard the term as a set of norms and standard produced judicially (as having some sort of binding effect on the behaviour of states and

people should treat each other, particularly, how people should be treated by the state authorities.<sup>167</sup> Also, Palmer argues that the concept of human rights straddles the boundaries of moral, political and legal discourses. It is the central element in a normative system that recognises that every human person has an equal right to claim conditions of human existence, such as liberty and personal autonomy or integrity of the person, without which it is impossible to maintain the fundamental dignity of human kind.<sup>168</sup>

According to Raj, human rights are those minimal rights that individuals need to have against the State or other public authority by virtue of their being members of the human family.<sup>169</sup> The concept is founded on the ancient doctrine of natural rights based on natural law. Ever since the beginning of civilisation, the shortcomings and tyranny of ruling powers have led people to seek higher laws. The concept of a higher law binding human authorities was evolved, and it came to be asserted that there were certain rights anterior to society.<sup>170</sup> These are superior to rights created by human authorities, universally applicable to people of all ages in all regions, and are believed to have existed prior to the development of political societies. These rights are considered as mere ideologies and there are no agreed catalogue of them and, indeed, no machinery for their enforcement until they are codified into national constitutions as judicially enforceable bill of rights.<sup>171</sup> Mubangizi submits that while the term “human rights” is relatively a contemporary one, the concept is not, especially when considering that theologians, philosophers and political theorists alike have been discussing these ideals for centuries. It is generally believed that the concept of human rights has its origin in religion, humanitarian traditions and the increasing struggle

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regional and international organisations). Architects and administrators of regional governance (such as the African Union, European Union) regard “human rights” promotion and protection as symbolic of the syndrome of shared sovereignty. For national power-elites, “human rights” provides vocabularies of legitimating of governance. For those who regard practices and structures of governance as deeply unjust or morally flawed, “human rights” represents a rallying cry against oppression and sites for practices of “counter-power.” See Baxi “Voices of Suffering, Fragmented Universality, and the Future of Human Rights” in McCorquodale (ed) *Human Rights* (2003) 159-162.

<sup>167</sup> See Galligan & Sandler “Implementing Human Rights” in Halliday & Schmidt (eds) *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in National Context* (2004) 23.

<sup>168</sup> Palmer *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2009) 11.

<sup>169</sup> Raj “Awakening of Human Rights” in Nirmal (ed) *Human Rights in India* (2000) 1.

<sup>170</sup> 1.

<sup>171</sup> See Basu *Human Rights in Constitutional Law* (1994) 5-6.

for freedom and equality in all parts of the world.<sup>172</sup> It is safe to say that an interest in human rights is as old as civilisation itself.<sup>173</sup>

For the purpose of this study, the definition of human rights as propounded by Dlamini shall be adopted. According to him, human rights are “the rights which all human beings have or should have equally by virtue of being human irrespective of race, gender, age, noble or ignoble descent, social class, national origin or ethnic or tribal affiliation; and regardless of wealth or poverty, occupation, talent, merit, religion, ideology or other personal idiosyncrasy.”<sup>174</sup> These rights are inalienable and cannot be transferred, forfeited or lost by having been usurped or by failure to exercise or assert them, for whatever length of time. They are fundamental because they are important and life, dignity and other high human values all depend on them.<sup>175</sup> They are often set out in the fundamental law of the country, for example in the bill of rights in a constitution.

## 10 2 Directive Principles

A phenomenon that has been evident in international and constitutional law since World War II is the provision for certain social, economic, cultural, and other directive principles or aims in constitutional and other documents.<sup>176</sup> It is not uncommon for modern-day Constitutions to contain a chapter dealing with fundamental rights (providing for civil and political rights and for some social and economic rights) as well as a chapter dealing with directive principles of state policy in which the social and economic ideals of the states are formulated.<sup>177</sup> It is submitted that the purpose of the inclusion of the directive principles in modern Constitutions is to serve as a guideline for social justice according to which future governments would have to respond, develop policies, and set priorities.<sup>178</sup> Owing to their

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<sup>172</sup> Mubangizi *The protection of Human Rights in South Africa* 4.

<sup>173</sup> 7; see also, United Nations *Human Rights: Questions and Answers* (1987) 4.

<sup>174</sup> Dlamini *Human Rights in Africa: Which Way South Africa?* (1995) 3.

<sup>175</sup> 3-4; Dlamini “The Administrative Law of a Typical South African University” (1994) 37-38.

<sup>176</sup> de Villiers “Social and Economic Rights” in *Rights and Constitutionalism* 599-628 614.

<sup>177</sup> 614-615; see also, Miamingi “Inclusion by Exclusion? An Assessment of the Justiciability of Socio-Economic Rights under the 2005 Interim National Constitution of Sudan” (2009) 9(1) *African Human Rights Law Journal* 76-102 77.

<sup>178</sup> Bartholomeu *The Irish Judiciary* (1971) 12.

non-justiciability, the value of the directive principles is that they place moral and political, rather than legal obligations on the state.<sup>179</sup>

It is opined that the directive principles “puts the State under certain duties, but they are duties of imperfect obligation since they cannot be enforced or regarded by any court of law, and are only directions for the guidance of Parliament.”<sup>180</sup> Justiciability and enforceability are the key distinguishing characteristics separating fundamental rights from directive principles.<sup>181</sup> While fundamental rights are justiciable and enforceable,<sup>182</sup> directive principles are neither justiciable nor enforceable.<sup>183</sup> Writing on the directive principles, de Villiers submits as follows:

“They [directive principles] constitute the moral and political soul of the Constitution and are in essence ‘letters of instruction’ to all future governments. The principles cannot, however, be regarded as having no practical significance by the state. They place a constitutional, albeit not a justiciable, duty upon all levels of government to undertake social and economic reform by determining that the principles shall be fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”<sup>184</sup>

### 10 3 Constitution

The constitution is a basic and fundamental charter that outlines the governmental structure; it allocates powers and duties of the government, establishes basic decision-making procedures, and places limitations upon governmental activities.<sup>185</sup> The constitution is the fundamental organic law by which a state or nation is governed. Its object is to establish the essential foundation and the general framework of government and to provide the body of rules and maxims in accordance with which the powers of sovereign are

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<sup>179</sup> de Villiers “Social and Economic Rights” in *Rights and Constitutionalism* 615 & 618; see also, Kagzi *The Constitution of India* (1989) 933.

<sup>180</sup> *Comyn v Attorney General* IR (1950) 142.

<sup>181</sup> Pointing out the difference in the two sets of rights under the Indian Constitution, Singh and Shukla state as follow: “a fundamental right as defined in the Constitution, differs from a non-fundamental right in one vital respect; a fundamental right (subject to the qualifications defined in the Constitution itself) is inviolable in the sense that no law, ordinance, custom, usage or administrative order can abridge or take away a fundamental right. A law which violates any of the fundamental rights is void. They are binding on the Legislature as well as the Executive. A fundamental right cannot be taken away even by a constitutional amendment if it forms the basic structure of the Constitution.” See Singh & Shukla *Constitution of India* 9 ed (1995) A-42.

<sup>182</sup> See sec 46 of the 1999 Nigerian Constitution.

<sup>183</sup> See sec 6(6)(c) of the 1999 Nigerian Constitution.

<sup>184</sup> See de Villiers “Social and Economic Rights” in *Rights and Constitutionalism* 619.

<sup>185</sup> Saharay *The Constitution of India* 1.

habitually exercised.<sup>186</sup> It is the original law by which a system of government is created and set up, and to which the branches of government must look for all their powers and authority.<sup>187</sup> It is also described as “the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be.”<sup>188</sup>

In *Nafiu Rabi'u v The State*,<sup>189</sup> the Nigerian Supreme Court stated that “the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, our being a plural, dynamic society...”<sup>190</sup> The constitution is an organic instrument which confers powers and also creates rights and limitations. It is the supreme law in which certain principles of fundamental nature are established.<sup>191</sup> All agencies and organs of government derive their powers either directly from the Constitution or indirectly from laws enacted thereunder.<sup>192</sup> The constitution of a country constitutes, therefore, an important composite document which apportions rights and imposes obligations on the people who are subject to its operation.<sup>193</sup>

#### 10 4 Education

According to Smith, one reason why education does not lend itself to precise definition is that it is very susceptible to time and place.<sup>194</sup> He posits that for any definition of education to be satisfactory, it has to relate education closely to the social structure, the economy and politics of the particular country.<sup>195</sup> Describing education, he submits thus: “I call, therefore, a complete and generous education that which fits a man to perform justly, skilfully, and magnanimously all the offices, both private and public...”<sup>196</sup> The term education has been variously defined. It has been defined both in a broad sense as well as in a narrow sense. In a broad sense, education encompasses “all activities by which a

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<sup>186</sup> Weaver *Constitutional Law and its Administration* (1946) 1-2.

<sup>187</sup> Saharay *The Constitution of India* 1.

<sup>188</sup> *India Cement Ltd v State of Tamil Nadu* AIR 1990 SC 85 par 16.

<sup>189</sup> (1981) 2 NCLR 293.

<sup>190</sup> Sir Udo Udoma, JSC at 326; see also *Bronik Motors Ltd v Wema Bank Ltd* (1983) 6 SC 158.

<sup>191</sup> See *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Others* [2002] 9 NWLR (pt772) 222 at 418.

<sup>192</sup> See *Attorney-General of Ondo State v Attorney-General of the Federation* (supra) at 418.

<sup>193</sup> See *Dapianlong v Dariye* [2007] 27 WRN 1 at 79, per Onnoghen, JSC.

<sup>194</sup> Smith *Education in Great Britain* (1949) 1.

<sup>195</sup> 2.

<sup>196</sup> 2.

human group transmits to its descendants a body of knowledge and skills and a moral code which enable that group to subsist.”<sup>197</sup> In this sense, education is primarily concerned with the transmission to the younger generation of the skills necessary to effectively undertake the tasks of daily living and with the inculcation of the social, cultural, religious and philosophical values held by the particular community.<sup>198</sup> In this sense, education implies “the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitude and knowledge.”<sup>199</sup> UNESCO has defined the term “education” to mean “all types and levels of [formal] education, [including] access to education, the standard and quality of education, and the conditions under which it is given.”<sup>200</sup> Talking philosophically, John Newsom described education as a political issue, for it is concerned with a child’s relationship to the world both as a child and as a future adult.<sup>201</sup> He posits: “to deny a child the best education for his particular needs is to deprive him of something as essential to his proper growth as any of the things which help him to grow to his full physical stature. Education is inextricably entangled with some other things, for it is as short-sighted to provide model homes and a balanced diet and to forget the mind and spirit as it is to provide educational opportunities for the undernourished and ill-housed.”<sup>202</sup> It is submitted that although children are the main beneficiaries, the right to education belongs to all individuals.<sup>203</sup> On the other hand, education has been defined in a narrow sense to refer to formal or professional instruction imparted within a national, provincial or local education system, whether private or public.<sup>204</sup> It is generally in this sense that the term “education” is used in most international instruments to refer to formal institutional instruction.<sup>205</sup> The distinction between education in a wide and in a narrow sense has also been drawn by the European

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<sup>197</sup> See M’Bow “Introduction” in Mialaret (ed) *The Child’s Rights to Education* (1979) 11.

<sup>198</sup> Hodgson *The Human Right to Education* 3.

<sup>199</sup> See Art 1(a) of the Recommendation Concerning Education for International Understanding, Co-Operation and Peace and Education Relating to Human Rights and Fundamental Freedoms 1974. See also, Hodgson *The Human Right to Education* 3.

<sup>200</sup> Art 1(2) of the UNESCO Convention against Discrimination in Education 1960.

<sup>201</sup> Politics according to him is not only the science and art of government, but the deeper study of man’s relation with other men in society. See Newsom *The Child at School* (1950) 12.

<sup>202</sup> 15.

<sup>203</sup> See art 26(1) of the UDHR which provides that everyone has the right to education.

<sup>204</sup> M’Bow “Introduction” in Mialaret (ed) *The Child’s Rights to Education* 11.

<sup>205</sup> Hodgson *The Human Right to Education* 4.

Court of Human Rights in *Campbell and Cosans v United Kingdom*.<sup>206</sup> The court states: “[education in a wider sense refers to] the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction [education in a narrower sense] refers in particular to the transmission of knowledge and to intellectual development.”

The term “education”, as used in this study, refers mainly to only formal teaching or instruction in specialised institutions such as primary (elementary), secondary (intermediate), higher and adult levels of instruction.<sup>207</sup> However, given that education is an interactive process; it goes beyond merely attending educational institutions and as such, the right to education should be understood in the sense of a right to be educated.<sup>208</sup>

## **11 Limitations of the Study**

This study has some limitations. It will not be possible to deal in details with the philosophical or pedagogical content of education in South Africa and Nigeria as that would make the subject unwieldy for effective analysis. While some of these issues will be referred to in passing, the focus will be on the normative content of the right to education and its implementation in the two countries. Bearing in mind that the study itself is comparative, I consider it prudent not to extend the discussions to include a detailed examination of all other socio-economic and cultural rights, although casual reference will be made to them as much as they are relevant and practicable to do so. Many issues dealing with the implementation of the right to education in any particular country are more of a policy, financial or pedagogical nature, and these issues are obviously outside the scope of this study. Also, the right of educators to strike to enforce their demands in collective bargaining process may impact upon children’s right to education. This issue will only be touched upon in this work rather than actually providing a thorough legal analysis, the reason being that a detailed analysis of the issue would involve a discussion of the labour law principles, which is beyond the scope of this study.

Another limitation worth mentioning is that limited literature is available on the right to education in Nigeria. Unlike in South Africa, professional and academic literature which

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<sup>206</sup> Judgment of 25-02-1982, Publications of the European Court on Human Rights, Series A, Vol. 48, para 33.

<sup>207</sup> Hodgson *The Human Right to Education* 4.

<sup>208</sup> Beiter *The Protection of the Right to Education* 20.

clearly defines what the right to education is and what constitutes a violation does not yet exist in large volume in the country. Similarly, Nigeria lacks strong and vocal non-governmental organisations (NGOs) constituency for the right to education. Further, Nigeria is a country with a weak data-collection system, and as such, it does not have the capacity to provide all the necessary data which this study may require.<sup>209</sup> Noting this problem, Odinkalu submits as follows: “Nigerian jurisprudence on economic and social rights is at best episodic, sparse, and incoherent. There is an inadequate material for any serious quantitative analysis and the jurisprudence, apart perhaps from that concerning the domestic jurisdiction of universities, hardly profits rigorous analysis.”<sup>210</sup> This limitation, however, will not pose a serious problem in view of the availability of abundant resources on the subject in South Africa as well as under the various international and regional instruments to which both countries are signatories.<sup>211</sup>

## **12 Thesis Layout/Structure of the Thesis**

The thesis has eight chapters. Following this chapter, which is the general introduction, is chapter 2 which discusses laws and policies relating to the right to education. Issues covered in the chapter include the international and regional instruments on the right to education. At the national level it examines both the South African and Nigerian Constitutions which guarantee the right to education, other national legislation as well as national education policies. In chapter 3, the right to primary education is discussed and its application in both countries is compared. Chapter 4 examines the right to secondary education in South Africa and Nigeria, again comparing both regimes, while chapter 5 discusses the right to higher education in South Africa and Nigeria. Some fundamental

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<sup>209</sup> It is accepted that data-collection systems in developing countries often lack the capacity to collect a wide range of good-quality and reliable data. See Chapman “Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefit of Science” in *Human Rights in Education, Science and Culture* 115.

<sup>210</sup> Odinkalu “The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights” in Gauri & Brinks (eds) *Courting Social Justice (Judicial Enforcement of Social and Economic Rights in the Developing World)* (2008) 183-223 219.

<sup>211</sup> Coomans posits that over the years a number of studies have been published regarding what the realisation of the right to education entails. See Coomans “Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation” in *Human Rights in Education, Science and Culture* 183 184.



concepts on higher education, such as academic freedom and institutional autonomy, are discussed and compared in terms of their recognition in the two countries.

Chapter 6 discusses the rights in education in general as well as some fundamental issues on the right to education such as, language of instructions in schools; religious/cultural rights; discipline in schools and the right to dignity; non-discrimination and equality principle, freedom of association and the right to establish independent/private schools. Chapter 7 focuses on the implementation of the right to education by examining the implementation strategies at the global, regional and national levels. It points out the limitations, problems and challenges impeding the effective implementation or realisation of the right to education in South Africa and Nigeria. Chapter 8 is the general conclusion and it contains some recommendations on how to ensure an effective implementation of the right to education in South Africa and Nigeria. The chapter concludes with a summary of the entire thesis.

# Chapter 2

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## Laws and Policies Relating to the Right to Education

“The priorities of...governments can in general be determined through an examination of their legislation and other policy documents. Such documents are regarded as the most important pronouncements of government.”<sup>1</sup>

### 1 Introduction

This chapter discusses laws and policies regulating the right to education in South Africa and Nigeria. Government policies consist of a range of issues which encompass a broad sweep of political, economic, social, cultural, scientific and other areas in which government chooses to intervene.<sup>2</sup> As examined in chapter one, the right to education is one of the most widely recognised human rights which are given recognition at the global, regional and national levels. This right has also received recognition in most African constitutions.<sup>3</sup> While many States protect the right to education in their constitutions in the form of a fundamental right, enforceable at law, others do so in form of a “directive principle of state policy”, which constitutionally obliges the government but is unenforceable.<sup>4</sup> In this first category is the Constitution of the Republic of South Africa (CRSA), 1996 which expressly provides for the right to education as a fundamental right in its chapter 2 while the Constitution of the Federal Republic of Nigeria (CFRN), 1999 falls into the second category. The Nigerian Constitution in its chapter II provides for the right to education in a form of directive principle of the state policy.

This chapter seeks to accomplish two goals: first, to describe international, regional and national instruments that comprise the corpus of human rights law on the right to education. Secondly, to provide a comprehensive picture of the current state of the law on the right to

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<sup>1</sup> Motala & Pampallis “Educational Law and Policy in Post-Apartheid South Africa” in Motala & Pampallis (eds) *Education and Equity: The Impact of State Policies on South African Education* (2001) 14.

<sup>2</sup> 14.

<sup>3</sup> Heyns and Kaguongo observed that the right to education has received recognition in 45 African Constitutions. See Heyns & Kaguongo “Constitutional Human Rights law in Africa” 2006 22(4) *SAJHR* 673 699.

<sup>4</sup> See Miamingi “Inclusion by Exclusion? An Assessment of the Justiciability of Socio-Economic Rights under the 2005 Interim National Constitution of Sudan” (2009) 9(1) *African Human Rights Law Journal* 76 77.

education as well as the impact of those laws on the right to education in South Africa and Nigeria. The chapter starts with some discussion on the International Bill of Human Rights, and this is followed by an examination of the relevant instruments introduced by the United Nations (UN) specialised agencies on the right to education as well as those instruments specifically protecting vulnerable groups. Thereafter, regional instruments relevant to the right to education will be examined and, finally, national instruments on the right to education in South Africa and Nigeria are examined.

The instruments under each of the headings mentioned above will be discussed in chronological order. It is important to note that while it would not be possible to examine every single piece of legislation on the right to education, an attempt shall be made to examine the most significant enactments. Those considered to be less significant for the topic of this study shall be mentioned only in passing.

## **2 The Legal Framework for the Right to Education**

Instruments which protect the right to education have been adopted at the global and regional levels. At the global level, instruments have generally been prepared by the UN, while at the regional level instruments have notably been prepared within the European, American and African contexts.<sup>5</sup> The scope of this study will only allow an examination of those instruments prepared and adopted within the African regional level. For the present purposes, the term “instrument” refers to both treaties which, as international agreements, legally bind States parties thereto, and soft-law documents, such as resolutions, declarations or standard rules adopted by international bodies which, although not binding in a legal sense, often bind in a “political” sense.<sup>6</sup> It should also be pointed out that “instruments” at the international/global level include those adopted by the specialised agencies of the UN, notably the United Nations Educational, Scientific and Cultural organisation (UNESCO) and the International Labour Organisation (ILO).<sup>7</sup>

At the global level, the right to education was first given recognition in a series of minority treaties concluded after World War I under the auspices of the League of Nations.<sup>8</sup>

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<sup>5</sup> Beiter *The Protection of the Right to Education by International Law* (2006) 85.

<sup>6</sup> 85 & 155.

<sup>7</sup> 85.

<sup>8</sup> The treaties were concluded as an adjunct to the peace treaties between the Allied and Associated Powers and the defeated nations. These agreements sought to safeguard the religious, linguistic and educational rights of

With the formation of the United Nations, a good number of instruments protecting the right to education have been adopted. The relevant instruments which shall be discussed include the Universal Declaration of Human Rights (UDHR), 1948; the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; the International Covenant on Civil and Political Rights (ICCPR), 1966; UNESCO Convention Against Discrimination in Education, 1960; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1966; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979; the Convention on the Rights of the Child (CRC), 1989; the International Labour Organisation Convention 1989; the World Declaration on Education for All-Meeting Basic Learning Needs, 1990; the African Charter on Human and Peoples' Rights (ACHPR), 1981 and the African Charter on the Rights and Welfare of the Child (ACRWC), 1990. These instruments will now be examined in the order mentioned above.

## **2 1 The International Bill of Human Rights**

At the global level, a clear commitment to protect human rights was stated for the first time in the Charter of the United Nations of 1945.<sup>9</sup> The Charter mentions as one of the purposes of the United Nations "...the international co-operation...in promoting and encouraging respect for human rights and for fundamental freedoms..."<sup>10</sup> The Charter does not by itself expressly guarantee a right to education.<sup>11</sup> , it provides the basis for its subsequent protection by the international bill of rights and other human rights instruments.<sup>12</sup> The UDHR, the ICCPR and the ICESCR constitute the International Bill of Rights, collectively, they provide for the right to

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certain minorities in post-war Europe where national boundaries had been redrawn. The first of such treaties was the Treaty between the Principal Allied and Associated Powers and Poland. This was signed on 28 June 1919 (112 Great Britain Treaty Series 232). Article 8 of the treaty protected the right of Polish nationals belonging to racial, religious or linguistic minorities to establish, manage and control at their own expense schools, "with the right to use their own language and to exercise their religion freely therein." Article 9 obliged the Polish state to provide "...in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given to children of such Polish nationals through the medium of their own language..." See Hodgson *The Human Rights to Education* (1998) 10; See also, Beiter *The Protection of the Right to Education* 24-25.

<sup>9</sup> See Hodgson *The Human Right to education* (1998) 261-262.

<sup>10</sup> See art 1(3) of the UN Charter, 1945. See also, art 55(c) which obliges the UN to promote "...universal respect for, and the observance of, human rights and fundamental freedoms..."

<sup>11</sup> Reference may, however, be made to art 55(b) of the Charter, which requires the UN to promote "...solutions of international economic, social, health, and related problems; and international cultural and educational co-operation..."

<sup>12</sup> See Beiter *The Protection of the Right to Education* 89.

education at the global level.<sup>13</sup> The provisions of these international instruments on the right to education will now be examined.

### **2 1 1 The Universal Declaration of Human Rights, 1948**

The watershed of all human rights instruments is the UDHR. Since the end of the First World War there has been a growing belief that governments alone cannot safeguard human rights, and that these require international guarantee. Thus, the UN was formed in 1945. It has as one of its aims the establishment of an international commitment to protecting human rights on a global scale. The importance of human rights was reflected in and reinforced by the UN Charter.<sup>14</sup> The Charter states in its preamble the fundamental objectives of the organisation, namely “to save succeeding generations from the scourge of war” and “to reaffirm faith in fundamental human rights, in dignity and worth of human person and in the equal rights of men and women.” In article 1(3), the Charter further states that one of the aims of the UN is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”

Article 56 of the Charter states that all members of the UN “pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in article 55 [of the Charter].”<sup>15</sup> In terms of the provisions of article 60 of the Charter, in 1946, the Economic and Social Council (ECOSOC) of the United Nations established a Commission on Human Rights which was entrusted with the task of drawing up an International Bill of Human Rights defining the human rights and freedom referred to in the Charter.<sup>16</sup> The Commission is a subsidiary body of the ECOSOC, one of the UN principal

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<sup>13</sup> See art 26, UDHR; arts 13 & 14, ICESCR, and art 19(2), ICCPR which though not expressly providing for the right to education, but the provision of the article is wide to encompass the right to education.

<sup>14</sup> The Charter was signed on 26 June, 1945.

<sup>15</sup> Art 55 provides: “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relationships among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Levin, however, argues that the provisions of the Charter have the force of positive international law because the Charter is a treaty and therefore a legally binding document. See Levin *Human Rights (Questions and Answers)* 21.

<sup>16</sup> Levin *Human Rights* 24; see also, Dugard “International Human Rights” in van Wyk, Dugard, de Villiers & Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171 172.

organs and the main body for the coordination of the economic and social activities within the UN system.<sup>17</sup>

The first step in this direction was the drafting of the UDHR which was adopted by the UN's General Assembly on 10 December 1948.<sup>18</sup> The Declaration constitutes a significant milestone in the protection of human rights and provides a set of standards and a model for countries to follow. In its preamble, the Declaration states *inter alia* that “the inherent dignity” and “the equal and inalienable rights” of all people are “the foundation of freedom, justice and peace in the world.”<sup>19</sup> It repudiates “barbarous acts which have outraged the conscience of mankind” and encourages “the advent of a world in which human beings shall enjoy freedom from fear.”<sup>20</sup> Further, the Declaration proclaims that “human rights should be protected by the rule of law,” whilst promoting “the development of friendly relations between nations.”<sup>21</sup> The Declaration provides for the right to education in article 26 in these words:

“(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.

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

In terms of the provisions of article 26(1), quoted above, everyone has the right to education and elementary and fundamental education shall be free and compulsory. While elementary education refers to formal schooling for children of primary school age, fundamental education means education for children, youth and adults who did not have the opportunity to undergo or complete primary education, and is offered outside the regular primary education system.<sup>22</sup> Technical and professional education must be made generally available. This refers to education which involves, in addition to acquiring general knowledge, the study of technologies

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<sup>17</sup> See arts 60, 62, 68 & 76 of the Charter.

<sup>18</sup> Forty-eight States voted in favour, none against while eight abstained, and in the list of abstentions are Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Ukrainian SSR, the USSR, and Yugoslavia. See UNGA Resolution 217A (III) of 10 December 1948. See also, Brownlie & Goodwin-Gill (eds) *Basic Documents on Human Rights* 4 ed (2002) 18.

<sup>19</sup> See para 1 of the Preamble to the Declaration.

<sup>20</sup> See para 2 of the Preamble to the Declaration.

<sup>21</sup> Paras 3 & 4 of the Preamble to the Declaration.

<sup>22</sup> Beiter *The Protection of the Right to Education* 90.

and acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life.<sup>23</sup> Higher education should be generally accessible to all on the basis of merit. Higher education refers to all forms of tertiary education.<sup>24</sup> It is submitted that article 26(1) of the Declaration reflects the social aspects of the right to education. It expects the States to attend positively to the realisation of the various levels of education.<sup>25</sup>

Article 26(2) sets out the aims of education as follows: the full development of human personality; the strengthening of respect for human rights and fundamental freedoms; the promotion of understanding, tolerance and friendship among all nations, racial or religious groups; and the furtherance of the activities of the United Nations for the maintenance of peace. In this regard, Beiter submits that the full development of the human personality constitutes the general ethical aim of education.<sup>26</sup> The human personality covers all dimensions of human being, namely, physical, intellectual, spiritual, psychological and social.<sup>27</sup> Article 26(3) guarantees the prior right of the parent to choose the kind of education that shall be given to their children. This article reflects the freedom aspect of the right to education. The State must respect parents' convictions concerning the nature of education which their children should receive. In this context, parents' convictions regarding the ethical, philosophical and religious principles of education and also regarding educational methods must be respected.<sup>28</sup>

The Declaration is, , not a legally binding instrument as such.<sup>29</sup> It was adopted by the UN General Assembly as a resolution having no force of law.<sup>30</sup> Nonetheless, the Declaration has its own importance and cannot be regarded as having merely a historical significance.<sup>31</sup> It has great impact on the development of human rights and remains an important standard reference in the development of national and international human rights norms.<sup>32</sup> More

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<sup>23</sup> 90-91.

<sup>24</sup> 91.

<sup>25</sup> 91.

<sup>26</sup> 92.

<sup>27</sup> 92.

<sup>28</sup> 93.

<sup>29</sup> Brownlie & Goodwin-Gill (eds) *Basic Documents on Human Rights* 18.

<sup>30</sup> See van Wyk, Dugard, de Villiers & Davis (eds) *Rights and Constitutionalism* 173.

<sup>31</sup> Brownlie & Goodwin-Gill (eds) *Basic Documents on Human Rights* 18.

<sup>32</sup> Apart from inspiring the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and several regional human rights conventions, it also serves as a model for national Bill of Rights. It is used by the organs of the United Nations as a standard by which to measure the conduct of states. See van Wyk, Dugard, de Villiers & Davis (eds) *Rights and Constitutionalism* 173.

important is its status as an authoritative guide, produced by the General Assembly, to the interpretation of the UN Charter. In this capacity, the Declaration has considerable indirect legal effect, and it is regarded by some jurists as a part of the “laws of the United Nations.”<sup>33</sup> The process leading to its transformation from a non-binding recommendation to an instrument having a normative character was materialised in 1966 with the adoption of the ICESCR and the ICCPR,<sup>34</sup> which are examined below.

## **2 1 2 The International Covenant on Economic, Social and Cultural Rights, 1966**

The ICESCR is one of the two treaties drafted to turn the principles of the UDHR into a binding instrument.<sup>35</sup> The Covenant was adopted and opened for signature and ratification by the General Assembly on 19 December 1966.<sup>36</sup> The ICESCR is an international agreement which imposes legally binding obligations on the State parties. The preamble to the Covenant recalls the obligation of States parties under the UN Charter to promote human rights, and reminds each individual of his responsibility to strive for the promotion and observance of those rights. It recognises that “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights.” Article 2(1) of the Covenant is fundamental, it provides:

“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.”

In terms of the above provisions, the realisation of the rights guaranteed under the Covenant depends on the availability of resources for their implementation.<sup>37</sup> Article 3 re-affirms the

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<sup>33</sup> Brownlie & Goodwin-Gill (eds) *Basic Documents on Human Rights* 18.

<sup>34</sup> The Economic and Social Council settled upon a dual approach to human rights protection due to the difficulties encountered in expanding the entire Universal Declaration in one text. The Covenants were hailed as the International Bill of Human Rights and introduced amid a wave of international and popular support. See Smith *Textbook on International Human Rights* 2 ed (2005) 45; see also, McChesney *Promoting and Defending Economic, Social and Cultural Rights: A Handbook* (2000) 5; Buergenthal *International Human Rights* 34.

<sup>35</sup> The other one is the International Covenant on Civil and Political Rights 1966 which is examined below.

<sup>36</sup> It entered into force on 3 January, 1976.

<sup>37</sup> It is submitted that positive implementation they required in accordance with the availability of resources renders them less capable of judicial determination. See van Wyk, Dugard, de Villiers & Davis (eds) *Rights and Constitutionalism* 177.



equal right of men and women to the enjoyment of all human rights set out in the Covenant. In its articles 6 to 15, the Covenant recognises a number of rights.<sup>38</sup> The Covenant does not merely list those rights; it also describes and defines them in considerable details and sets out the steps that should be taken to achieve their realisation. Articles 13 and 14 guarantee the right to education. Relevant portion of article 13 states as follow:

- “1. The State Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right:
  - (a) Primary education shall be compulsory and available free to all;
  - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
  - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of primary education; ....”

Under article 13(1), State parties recognise every person’s right to education. The provision proceeds to set out the aims of education. It repeats a similar provision as contained in article 26(2) of the UDHR but makes two additions. Firstly, it refers to the development of human personality and the sense of its dignity. In terms of the preambles of the UDHR, the ICESCR and the ICCPR, human dignity constitutes the source of human rights.<sup>39</sup> Beiter posits that the reference to human dignity in article 13(1) appears, therefore, to require that education must make the individual aware of his/her own inherent worth and of the human rights which accrue to him/her on this basis.<sup>40</sup> Secondly, it states that education should enable all persons to participate effectively in a free society. This aim requires that education must not solely be theoretical, but that it must also teach students how to satisfy their practical needs in life.<sup>41</sup>

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<sup>38</sup> The right to work (art 6); right to the enjoyment of just and favourable conditions of work (art 7); the right to form and join trade unions (art 8); the right to social security, including social insurance (art 9); the right to the family, mothers, children, and young persons to the widest possible protection and assistance (art 10); the right to adequate standard of living (art 11); the right to the enjoyment of the highest attainable standard of physical and mental health (art 12); the right to education (arts 13 & 14) and the right to take part in cultural life (art 15).

<sup>39</sup> Beiter *The Protection of the Right to Education* 95.

<sup>40</sup> 95.

<sup>41</sup> 95.

Article 13(2) elaborates on article 26(1) of the UDHR. Article 13(2)(a) directs that primary education should be compulsory and free to all, article 13(2)(b) states that secondary education should be made generally available and accessible to all while article 13(c) states that higher education should be made accessible to all, on the basis of capacity. With respect to secondary and higher education, accessibility is to be achieved by every appropriate means and, in particular, by the progressive introduction of free education. Article 13(2)(d) requires that fundamental education should be encouraged or intensified as far as possible. In terms of article 13(2)(e), a system of schools at all levels must be developed, a fellowship system must be established while the material conditions of teaching staff must be improved. Article 14 of the ICESCR also provides as follows:

“Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”

The provision of article 14 of the ICESCR quoted above is a guide to the State parties in respect of the realisation of compulsory and free education in their territories. It limits the period in which a State party should draw up a plan of action for the provision of compulsory primary education, free of charge in its territory to two years. It is submitted that by doing so, it confirms that the legal obligation contained in article 13(2)(a) of the ICESCR is “stronger” than the other legal obligations under article 13(2) of the same instrument.<sup>42</sup>

### **2 1 3 The International Covenant on Civil and Political Rights, 1966**

The ICCPR was adopted by the UN General Assembly and opened for signature in December 1966.<sup>43</sup> The Covenant creates binding legal obligations for the States parties.<sup>44</sup> The obligations which the States parties assume by ratifying the Covenant are set out in article 2(1) which provides:

“Each State Party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the right recognised in the present Covenant, without

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<sup>42</sup> See Coomans “Clarifying the Elements of the Right to Education” in Coomans *et al* (eds) *The Right to Complain about Economic, Social and Cultural Rights* (1995) 11-26 14-15; see also, Beiter *The Protection of the Right to Education* 99.

<sup>43</sup> See General Assembly Resolution 2200A (XXI), UN doc. A/6316 (1966). It entered into force a decade after in 1976.

<sup>44</sup> Brownlie & Goodwin-Gill (eds) *Basic Documents on Human Rights* 182.

distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision is supplemented by article 2(2), which requires the State parties “to adopt such legislative or other measures as may be necessary to give effect to the rights” guaranteed by the Covenant whenever such provisions do not already exist in its domestic law.<sup>45</sup> It is submitted that in terms of article 2, each State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the right recognised in the Covenant and that this responsibility (with some exceptions) covers both citizens and non-citizens provided they are within its territory. The task of the States in this respect is twofold: to respect and to ensure. The obligation to respect implies a duty not to restrict the recognised freedoms of the individual, while the obligation to ensure the rights implies a duty to protect the enjoyment of those rights against private parties and other non-state actors, and to create conditions under which the right can effectively be enjoyed.<sup>46</sup>

The main part of the Covenant is Part III which spells out the negative rights of the UDHR. The Covenant does not expressly mention the right to education as part of those rights it guaranteed, but some provisions of the Covenant affords protection to the right to education. Of particular note in this respect are articles 18(4) and 27 of the Covenant. Article 18(4) protects the right to freedom of thought, conscience and religion while article 27 concerns the right of persons belonging to ethnic, religious or linguistic minorities. Article 18(4) provides: “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 above provision corresponds word for word with the later part of article 13(3) of the ICESCR and it addresses the freedom aspect of the right to education. Rather than obligating State parties to take positive steps, it requires them to refrain from acting in a certain manner. It is submitted that the underlying purpose of article 18(4) is to provide parents with a means of protecting their children against indoctrination by the State in public schools.<sup>47</sup> This right is so fundamental that it may not be derogated from even in times of emergency.<sup>48</sup>

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<sup>45</sup> See Buergenthal *International Human Rights* 43.

<sup>46</sup> Eide “Interdependence and Indivisibility of Human Rights” in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* (2007) 24.

<sup>47</sup> Beiter *The Protection of the Right to Education* 103.

<sup>48</sup> See art 4(2) of the ICCPR.

Similarly, article 27 of the ICCPR states: “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or use their language.” The provision of article 27 does not expressly accord a right to education to person belonging to minorities. Such a right may, nevertheless, be implied in the article.<sup>49</sup> The objective of article 27 is that minority culture should survive and flourish. It is submitted that the vitality of minority culture depends significantly on the effectiveness of its transmission from one generation to the next through the medium of education.<sup>50</sup>

## **2 2 Instruments Providing Protection against Discrimination/Instruments Protecting the Vulnerable Group**

The United Nations has adopted a number of important instruments which provide protection against discrimination. Many of these instruments, in addition to discussing discrimination in general terms, also address discrimination in the context of the enjoyment of the right to education. The provisions in each of these instruments relevant to the right to education are examined below.

### **2 2 1 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965**

The UN General Assembly, in an attempt to deal with the problem of racial discrimination, proclaimed the Declaration on the Elimination of All Forms of Racial Discrimination on 20 November 1963.<sup>51</sup> The Declaration is non-binding. It, , enjoins States to make particular efforts to prevent discrimination on the basis of race and to focus their attention in this regard on certain fields. One of the fields mentioned is education. Article 3(1) of the Declaration is directly relevant. It provides: “[p]articular efforts shall be made to prevent discrimination based

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<sup>49</sup> Francesco Capotorti, a former Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, has recognised in his report that article 27 includes a right to respect for minority culture within education system. See Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979) (UN Doc. E/CN.4/Sub.2/384/Rev.1), New York: UN, 1979 (UN Sales No.E.78.XIV.1).

<sup>50</sup> Beiter *The Protection of the Right to Education* 143.

<sup>51</sup> See UN General Assembly Resolution 1904 (XVIII) of 20 November 1963.

on race, colour or ethnic origin, especially in the field of civil rights, access to citizenship, education, religion, employment, occupation and housing.”<sup>52</sup>

In 1965, the ICERD was adopted.<sup>53</sup> It defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, and cultural or any other field of public life.”<sup>54</sup> In pursuance of the undertaking to eliminate racial discrimination, States agree to guarantee civil and political rights and economic, social, and cultural rights in a non-discriminatory manner.<sup>55</sup> In terms of article 5(e)(v) of the Convention, States parties undertake to eliminate racial discrimination in all forms and guarantee enjoyment without distinction of the right to education and training.<sup>56</sup>

Article 2 of the ICERD places positive action on the State parties toward eliminating discrimination. Article 2(1)(c) demands that laws and regulations which have the effect of creating or perpetuating racial discrimination be abolished. It is submitted that this would, for example, cover a law which has the effect of denying access to defined schools to persons belonging to certain racial groups by posing an unreasonable language admission requirement.<sup>57</sup> Article 2(1)(d) envisages that measures which afford protection against racial discrimination by third parties be taken. An example in this respect is that the State law must forbid entrance requirements at the private schools which discriminate on the basis of race.<sup>58</sup> In terms of article 2(2), States parties must take special measures to ensure the adequate development of disadvantaged racial groups for the purpose of guaranteeing them the equal enjoyment of human rights and fundamental freedom.

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<sup>52</sup> See also, art 8 of the Declaration which also provides as follows: “All effective steps shall be taken immediately in the fields of teaching, education and information, with a view to eliminating racial discrimination and prejudice and promoting understanding, tolerance and friendship among nations and racial groups, as well as to propagating the purposes and principles of the Charter of the United Nations, of the Universal declaration of Human Rights, and of the Declaration on the Granting of Independence to Colonial Countries and Peoples.”

<sup>53</sup> It entered into force on 4 January 1969.

<sup>54</sup> See art 1(1) of the Convention.

<sup>55</sup> See art 5 of the ICERD.

<sup>56</sup> See also, art 7 of the ICERD which provides: “States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.”

<sup>57</sup> Beiter *The Protection of the Right to Education* 106.

<sup>58</sup> 106.

## **2 2 2 The Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981**

The UN General Assembly in an effort to address the problem of discrimination on the basis of religion adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief on 25 November 1981.<sup>59</sup> As a mere resolution, the Declaration is non-binding. Article 5 of the Declaration dwells on the rights of parents and their children with regards to moral and religious education. Article 5(2) states:

“Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or guardians, the best interests of the child being the guiding principle.”

This provision confirms the principles that the wishes of parents as regards the education of their children in religious matters are to be respected. It also implies that children shall not be compelled to receive religious instructions in some other belief systems against the wishes of the parents.<sup>60</sup> The wishes of parents may, , not conflict with “the best interests of the child.” Article 5(3) also provides that “[t]he child shall be protected from any form of discrimination on the grounds of religion or belief...” Thus, children may not, for example, be refused admission to a particular school on the basis that they adhere to a certain faith.<sup>61</sup>

## **2 2 3 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 and came to force in 1981.<sup>62</sup> The Convention obliges States parties to take steps to eliminate discrimination against women in the field of education and to ensure that they

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<sup>59</sup> See UNGA Resolution 36/55 of 25 November 1981.

<sup>60</sup> Bekker *Compilation of Essential Documents on the Right to Education [part 1] 2.*

<sup>61</sup> Beiter *The Protection of the Right to Education* 104.

<sup>62</sup> Earlier, in an attempt to deal with the problem of discrimination against women, in 1967, the UN General Assembly proclaimed the Declaration on the Elimination of Discrimination against Women. See UN General Assembly Resolution 2263 (XXII) of 7 November 1967. The Declaration, though non-binding, in its article 9 calls for measures to eliminate discrimination against women in the field of education. It states: “All appropriate measures shall be taken to ensure to girls and women, married or unmarried, equal rights with men in education at all levels...”

enjoy equal rights with men.<sup>63</sup> The Convention condemns discrimination against women and obliges States to ensure that their legal systems guarantee equal rights to women in all spheres of life. In terms of this Convention, discrimination against women may be defined as:

“[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.”<sup>64</sup>

Article 10 of the Convention is directly relevant to discrimination in terms of education.

It provides:

“States parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely;
- (g) The same opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well being of families, including information and advice on family planning.”

In terms of the above provisions, States parties are obliged to take measures to meet the specific educational needs of girls and women, such as the reduction of female student drop-out rates and the organisation of programmes for girls and women who left school prematurely, and access to specific educational information relating to women’s health and family planning. In terms of article 10(c) of the Convention, States parties are explicitly obliged to encourage co-

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<sup>63</sup> South Africa signed the Convention on 29 January 1991 and ratified it on 15 December 1995.

<sup>64</sup> Art 1 of the Convention.

education of boys and girls as a means to eliminate stereotyped ideas about the role of men and women in society.<sup>65</sup>

It is clear from the provisions of article 10 of the CEDAW that States parties have positive obligations which may have drastic effects for those States in which discrimination against girls and women is a structural and systemic characteristic of society and everyday life.<sup>66</sup> The summary of article 10 therefore is as follows: women must have the same access to education as for men. Quality norms concerning education must be the same for women and for men. This applies especially to curricula, examination, teaching staff and school premises and equipment. Co-education should be promoted. Education should be directed to changing stereotyped views of the role of men and women in society.

#### **2 2 4 The Convention on the Rights of the Child (CRC), 1989**

Children are a particularly vulnerable group in society and, on account of their tender age, generally need protection. It is against this background that the United Nations has made an effort to work out the peculiarities of the application of human rights to children.<sup>67</sup> It adopted the Declaration of the Rights of the Child in 1959 and the CRC in 1989.<sup>68</sup> The CRC was adopted by the General Assembly in 1989 and entered into force on 2 September 1990.<sup>69</sup> In article 1, the Convention defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” The Convention protects children against discrimination and asserts their civil, political, economic, social, and cultural rights.<sup>70</sup> It sets out the rights of the child in a comprehensive manner.<sup>71</sup>

The Convention contains extensive provisions with regard to the right to education in its articles 28 and 29. Article 28 of the Convention provides as follows:

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<sup>65</sup> This is a departure from the position under the UNESCO Convention which explicitly allowed separate educational institutions for boys and girls. See art 2 of the UNESCO Convention.

<sup>66</sup> See Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 192.

<sup>67</sup> Beiter *The Protection of the Right to Education* 114.

<sup>68</sup> The Declaration in its Principle 7 contains provision on the right to education in these words: “The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral responsibility, and to become a useful member of society...” This principle confers a general right to education, and also prioritises the realisation of education at the elementary level. Such education must be compulsory and free.

<sup>69</sup> See UN Doc. A/44/49 (1989).

<sup>70</sup> See Van Wyk, Dugard, de Villiers & Davis (eds) *Rights and Constitutionalism* 180.

<sup>71</sup> Art 2 deals with the principle of non-discrimination; art 3 on the best interest of the child; art 6 on the right to life, survival and development, and art 12 on the right to express views and have them taken into account.



- “1. States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular-
- (a) make primary education compulsory and available free to all;
  - (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
  - (c) make higher education accessible to all on the basis of capacity by every appropriate means;
  - (d) make educational and vocational information and guidance available and accessible to all children;
  - (e) take measures to encourage regular attendance at school and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.”

Article 28(1)(a)-(c) addresses the issue of primary, secondary and higher education respectively, and the provisions are comparable to article 13(2)(a)-(c) of the ICESCR. Primary education must be made compulsory and free to all. Secondary education must be made available and accessible to every child while higher education must be made accessible to all on the basis of capacity.

It is submitted that compared to article 13(2)(a)-(c) of the ICESCR, article 28(1)(a)-(c) of the CRC is framed in a weaker terms.<sup>72</sup> It is contended that the use of the word “make” in article 28(1)(a) of the CRC introduces the notion of progressiveness to the obligation with regard to primary education.<sup>73</sup> In the case of the ICESCR, article 13(2)(a) provides that primary education “shall be” compulsory and free to all. Read with article 14, it places a time limit on the implementation of compulsory and free primary education and effectively restricts the extent to which the notion of progressiveness applies to the obligation with regard to primary education under the ICESCR.<sup>74</sup> It is contended further that the CRC accords lower priority to the progressive introduction of free secondary and higher education. The ICESCR mandates the progressive introduction of free secondary and higher education while the CRC only mentions it

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<sup>72</sup> See Hodgson *Human Right to Education* (1998) 46.

<sup>73</sup> Beiter *The Protection of the Right to Education* 116-117.

<sup>74</sup> 116-117.

as a possible measure as regards secondary education and even deletes it as regards higher education.<sup>75</sup> In this regard, Beiter concludes that in certain respects, the standards postulated by article 28(1)(a)-(c) of the CRC constitute a step backwards from those of the ICESCR.<sup>76</sup>

Article 28(1) introduces two new elements compared to those provided for in the ICESCR. Article 28(1)(d) obliges states parties to make educational and vocational information and guidance available and accessible to all children. Article 28(1)(e) requires that States parties to take measures to encourage regular attendance at schools and the reduction of drop-out rates. Also, the provisions of articles 28(2) and (3) of the CRC are novel. Article 28(2) directs states parties to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.” The purport of this provision is to protect the child against cruel, inhuman or degrading disciplinary measures in school. Article 28(3) calls upon States parties to co-operate in matters relating to education. Co-operation is required in particular in “the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods.”

Article 29 of the Convention sets out the aims and objectives of education and also guarantees the liberty of individuals/bodies to establish independent educational institutions. It provides thus:

“1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

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<sup>75</sup> See art 28(1)(b) & (c) of the CRC.

<sup>76</sup> Beiter *The Protection of the Right to Education* 117.

Article 29(1) contains a similar provision as in article 13(1) of the ICESCR. It, , introduces two new aims of education. First, article 29(1)(c) refers to education which develops the respect of the child for various persons, states and cultures. It prohibits degrading references to other states and cultures. At the same time, it entails a positive obligation to ensure that children develop respect for such states and cultures.<sup>77</sup> Secondly, article 29(1)(e) refers to the development of respect for the natural environment. It is submitted that degrading of the natural environment is an acute problem of contemporary time; thus, immediate measures need be taken to prevent further degradation. As a first step, education must inculcate in young persons respect for the natural environment.<sup>78</sup>

Apart from articles 28 and 29, the CRC contains a few other provisions concerning the right to education. Article 32(1) directs States parties to “recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education...” Article 40(4) equally provides that education and vocational training must be available as alternative to institutional care in the context of juvenile justice. More fundamental is the provision of article 23(3) which obliges states parties to ensure that the disabled child has effective access to education and training. The article provides:

- “1. States Parties recognised that the mentally and physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.
2. States Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible and those responsible for his or her care, of assistance for which application is made and which is appropriate to child’s condition and to the circumstances of the parents or others caring for the child.
3. Recognising the special need of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.”<sup>79</sup>

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<sup>77</sup> It is submitted that article 29(1)(c) may be said to convert the general negative prohibition in article 20 of the ICCPR which forbids any advocacy of national, racial or religious hatred into a positive instruction in the context of education.

<sup>78</sup> Beiter *The Protection of the Right to Education* 120.

<sup>79</sup> See also, principle 6 of the UN GA Declaration on the Rights of the Disabled Persons adopted on 9 December 1975 which provides: “Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and skills to the maximum and will hasten the processes of their social integration or reintegration.” See UNGA Resolution 3447 (XXX) of 9 December 1975. See also,

Article 23 is very important in that it is the first binding legal provision which directly addresses the educational rights of disabled children. Nevertheless, it is submitted that article 23 is deficient in the sense that the effect of paragraphs 2 and 3 is such that the right of the disabled child to special care in terms of education is rendered dependent on the State resources being available.<sup>80</sup> Also, the CRC does not impose a legal obligation on the State to promote or to deliver pre-school educational services for disabled children.<sup>81</sup> It is submitted that pre-school education is important for disabled children. It can be used to identify impairment at an early stage and, on that basis, to give the necessary attention to disabled children.<sup>82</sup>

### **2 3 Instruments of the United Nations Specialised Agencies**

This section discusses the protection of the right to education by legal instruments adopted by the United Nations Specialised Agencies. The two specialised agencies examined are the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Labour Organisation (ILO). Specifically, the legal instruments prepared by UNESCO in the execution of its normative function in the field of education will be examined. Primary consideration is given to the Convention against Discrimination in Education, 1960. In the same vein, the ILO has prepared legal instruments which are relevant to the right to education. Of importance are those instruments which seek to outlaw child labour and safeguard the child's educational interest.<sup>83</sup> It should be noted, , that the term "instrument" as used in this aspect refers not only to conventions, but also to soft law documents, principally in the form of recommendations and declaration.

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Principle 2 of the Declaration on the Rights of Mentally Retarded Persons adopted by the UNGA Resolution 2856 (XXVI) of 20 December 1971 which states: "The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential."

<sup>80</sup> Beiter *The Protection of the Right to Education* 133.

<sup>81</sup> See Hodgson *The Human Rights Education* (1998) 158.

<sup>82</sup> Beiter *The Protection of the Right to Education* 133.

<sup>83</sup> See the Convention concerning Minimum Age for Admission to Employment of 1973; the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999; Convention concerning Indigenous and Tribal peoples in Independent Countries of 1989.

### 2 3 1 UNESCO Convention against Discrimination in Education, 1960

UNESCO came into being on 4 November 1946 and in December of the same year it was brought into relationship with the United Nations as a Specialised Agency.<sup>84</sup> UNESCO's main objective is to contribute to peace and security by promoting collaboration among nations through education, science, culture, and communication in furtherance of, among other things, the rule of law, human rights, and fundamental freedoms.<sup>85</sup> It performs five main functions, namely; prospective studies, the advancement, transfer and sharing of knowledge, standard-setting action, providing expertise (technical co-operation), and exchange of specialised information.<sup>86</sup>

Since its inception, UNESCO has been working to advance human rights without discrimination of any kind. As stipulated in its constitution, the organisation is convinced that universal respect for justice, the rule of law and human rights and fundamental freedoms is intimately linked to the maintenance of peace and security.<sup>87</sup> UNESCO has special responsibilities for the rights within its fields of competence, namely education, science, culture and communication. It also works towards the universal acceptance and observance of all human rights through the dissemination of knowledge and the promotion of education on and for human rights.<sup>88</sup>

UNESCO's Strategy on Human Rights, adopted by its General Conference in 2003, defines the organisation's main lines of action for the years to come. These include the mainstreaming of human rights into all programmes and activities of UNESCO, human rights education, standard-setting and monitoring, strengthening partnerships and human rights research.<sup>89</sup> The organisation's research programme seeks to bridge the gap between research outcomes and policy-making with regard to the rights in UNESCO's fields of competence. In developing policy-oriented human rights research, UNESCO works closely with the academic community, national human rights institutions, research and training centres and non-governmental organisations worldwide.<sup>90</sup>

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<sup>84</sup> This was effected by UNGA Resolution 50(I) of 1946.

<sup>85</sup> See art 1(1) of the UNESCO Constitution.

<sup>86</sup> See generally, art 1(2) of the UNESCO Constitution. See also, Smith *Textbook on International Human Rights* 151.

<sup>87</sup> Donders & Volodin (eds) *Human Rights in Education, Science and Culture* xv.

<sup>88</sup> xv.

<sup>89</sup> xvi.

<sup>90</sup> xvi & 3.

Education constitutes the major activity of UNESCO. In education, its priorities are to eliminate illiteracy and to secure basic education for all, to promote education for international education, co-operation and peace and education relating to human rights and fundamental freedoms, and to eradicate discrimination from national education system. Other priorities are to develop technical and vocational education, higher education and adult education, to help train teachers and educational planners and administrators, and to encourage local building and equipping of schools.<sup>91</sup> UNESCO also operates a non-judicial individual communications procedure for violations of education, science, and cultural rights. UNESCO has adopted various international instruments which provide for the rights of individuals. The most fundamental one is UNESCO's Convention against Discrimination in Education (CDE) adopted by the General Conference on 14 December 1960.<sup>92</sup>

The Convention places an obligation on States parties to promote equality of opportunity and treatment with regard to education. This Convention aims to contribute to the elimination of discrimination in education and the promotion of equality of opportunity and treatment for all in education.<sup>93</sup> The Convention is important because it contains an extensive definition of discrimination in education. Article 1 reads:

- “1. For the purposes of this Convention, the term ‘discrimination’ includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
- (a) Of depriving any person or group of persons of access to education of any type or at any level;
  - (b) Of limiting any person or group of persons to education of an inferior standards;

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<sup>91</sup> Beiter *The Protection of the Right to Education* 228-229.

<sup>92</sup> Others are: the Universal Copyright Convention 1952; the Convention for the Protection of Cultural Property in the Event of an Armed Conflict 1954; the Convention relating to the Protection of the World Cultural and Natural Heritage 1972; the Convention on Technical and Vocational Education 1989. UNESCO has also made a number of Recommendations which include the followings: Recommendation against Discrimination in Education 1960; Recommendation concerning Status of Teachers 1966; Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms 1974; Recommendation on the Development of Adult Education 1976; Recommendation concerning the Status of Higher-Education Teaching Personnel 1997 and Revised Recommendation concerning Technical and Vocational Education 2001. The Declarations made include: Declaration on Eradication of Illiteracy in the United Nations Development Decade 1964; Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange 1972; Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International understanding, to the Promotion of Human Rights and Concerning Racialism, Apartheid and Incitement to War 1978; Declaration on Race and Racial Prejudice 1978, and International Charter of Physical Education and Sport 1978.

<sup>93</sup> See Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 190; see also, The UNESCO, *The Right to Education: Monitoring Standard-Setting Instrument of UNESCO* (2008) 3.

- (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or group of persons; or
  - (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.
2. For the purposes of this Convention, the term ‘education’ refers to all types and levels of education, and includes access to education, the standards and quality of education, and the conditions under which it is given.”

Excluded from the scope of the definition of discrimination in education are separate educational institutions for girls and boys, separate education systems for religious or linguistic reasons and private educational institutions.<sup>94</sup> Articles 3 and 4 provide for concrete state obligations to eliminate discrimination in education and promote equality of opportunity and treatment for all. Article 5(1)(a) of the Convention defines the aims of education in terms identical to article 26(2) of UDHR, while article 5(1)(b) guarantees the right of parents to choose for their children private schools as well as the right of parents to ensure that the religious and moral education of their children is in conformity with their own convictions. Article 5(1)(c) provides for a limited recognition of the right of members of national minorities to carry on their own educational activities, use and teach their own language, but under strict conditions inspired by the fear of autonomy or even secession by national minorities.<sup>95</sup>

### **2 3 2 The UNESCO Convention on Technical and Vocational Education, 1989**

The UNESCO Convention on Technical and Vocational Education, 1989 is another important Convention adopted by the UNESCO in the field of education. The Convention recognises that technical and vocational education should meet the global aim of development. It also recognises the right of equal access to technical and vocational education. The Convention provides that the contracting States shall guarantee that no individual who has attained the educational level for admission into technical and vocational education shall be discriminated against, and States shall take “appropriate measures” to enable the handicapped and other disadvantaged groups to benefit from technical and vocational education.<sup>96</sup>

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<sup>94</sup> See art 2 of the Convention.

<sup>95</sup> See generally, Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 191.

<sup>96</sup> Art 2 paras 3 & 4 of the Convention.

### 2 3 3 International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), 1989

The International Labour Organisation Convention (ILO) was created by the Paris Peace Conference under Part XIII of the Treaty of Versailles in 1919. On 14 December 1946, the ILO was brought into relationship with the UN as a specialised agency.<sup>97</sup> The primary function of the ILO is to improve the conditions of labour in its member States.<sup>98</sup> Nevertheless, the ILO has prepared legal instruments which are relevant to the right to education. The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), 1989 is one of such instruments.<sup>99</sup> The Convention No.169 is a revised version of the ILO Convention No.107 on Indigenous and Tribal Populations adopted in 1957.<sup>100</sup> The preamble of this Convention sets its tune and it provides: “[r]ecognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the frame work of the States in which they live...”<sup>101</sup>

The Convention recognises the cultural identity of indigenous groups and subscribes to the need to involve members of indigenous groups in decision making and policy matters that are of their concern. It also seeks to strike a balance between the integration of indigenous groups in society as a whole and their emancipation as distinct groups.<sup>102</sup> Article 29 is also fundamental and it provides: “[t]he imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education of these people.”

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<sup>97</sup> This was effected by UNGA Resolution 50(I) of 1946.

<sup>98</sup> See art 1(1) and the Preamble of the ILO Constitution.

<sup>99</sup> A number of other legal instruments adopted by the ILO which are relevant to the right to education are: the Convention concerning Minimum Age for Admission to Employment 1973 and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999. Others include the Discrimination (Employment and Occupation) Convention No. 111 (1958) (supplemented by Recommendation No. 111); the Paid Educational Leave Convention No. 140 (1974) (supplemented by Recommendation No. 148); the Human Resources Development Convention No. 142 (1975) (supplemented by Recommendation No. 195); and the Vocational Rehabilitation and Employment (Disabled Persons) Convention No. 159 (1983) (supplemented by Recommendation No. 168).

<sup>100</sup> Convention No.107 aimed at the assimilation of indigenous groups into the non-indigenous community and reflected a paternalistic approach. Criticism by the NGOs and indigenous groups led to the revised treaty text. See generally, Donders *Towards a Right to Cultural Identity?* (2002) 208-212.

<sup>101</sup> Para 5 of the Preamble to the Convention.

<sup>102</sup> See Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 193.



Article 26 provides for equal treatment of indigenous peoples with other members of society while article 27(1)-(3) provides for the involvement of members of indigenous groups in the development of education programmes and the right of the indigenous peoples to establish their own educational institutions with the financial assistance of the State. Article 28 deals with the issue of learning the indigenous language for members of these groups, learning the national language and the preservation and promotion of the indigenous languages. Article 31 aims at eliminating through education, prejudice about indigenous groups that exists among people who belong to the majority in the society.

## **2 4 Regional Legal Instruments**

The right to education is also protected in many legal instrument adopted at the regional level.<sup>103</sup> Such instruments have been prepared in the European, American, African and certain other regional contexts.<sup>104</sup> The focus of this study limits the discussions in this part to only those instruments adopted at the African regional level. Thus, the ACHPR and the ACRWC shall be examined.

### **2 4 1 African Charter on Human and Peoples' Rights, 1981**

The ACHPR, also known as the Banjul Charter, was adopted by the Organisation of African Unity in 1981 and entered into force on 21 October, 1986.<sup>105</sup> The Charter recognises the basic civil and political rights as well as economic, social and cultural rights.<sup>106</sup> It also recognises other rights such as the rights to development, self-determination and a satisfactory environment.<sup>107</sup> The Charter further recognises the duties of the individual towards the family,

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<sup>103</sup> For right to education in other regions, see art 2 of the European Union Convention 1952 which states that no person shall be denied the right to education; art 12 of the American Declaration on the Rights of Man 1948; art 26 of the American Convention on Human Rights 1969 which provides for the progressive development of the rights implicit in the economic, social and cultural standard of the Charter of the OAS and art 13 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (San Salvador Protocol) 1988 which also makes broad provision for the right to education.

<sup>104</sup> See in this regard are the Arab/Islamic States and the Commonwealth of Independent States. Instrument adopted include the Universal Islamic Declaration of Human Rights, 1981; Cairo Declaration on Human Rights in Islam, 1990 and Arab Charter on Human Rights, 2004, as well as the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, 1995.

<sup>105</sup> See OAU Doc. CAB/LEG/67/3/Rev.5, 21 ILM 58 (1982). The Organisation of African Unity (OAU) has been re-christened as African Union (AU).

<sup>106</sup> See arts 3-14 on civil and political rights and articles 15-18, on economic, social and cultural rights.

<sup>107</sup> See arts 19-24, on peoples' rights. See also, Dugard "International Human Rights" in Van Wyk, Dugard, de Villiers & Davis *Rights and Constitutionalism* 188.

society, and State.<sup>108</sup> The supervision of the ACHPR is entrusted to the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.<sup>109</sup> The ACHPR says little on the right to education as it devotes only article 17(1) to the right to education. The article provides that every individual shall have the right to education and that every individual may freely take part in the cultural life of his community. It states further that the promotion of the morals and traditional values recognised by the community shall be the duty of the State.

The Charter spells out the basic obligation of the States parties in its article 1 by providing that the States "shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. This obligation is complemented by article 62 which requires the States parties to report biennially "on the legislative or other measures" they have adopted to give effect to the rights the Charter guarantees. In terms of the provisions of article 25, the Charter imposes a "duty" on the States parties "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the...Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood." It is submitted that this provision, if acted upon with imagination by the African Commission on Human and Peoples' Rights and by non-governmental human rights organisations, could prove helpful in developing a useful programme of human rights education in Africa.<sup>110</sup>

#### **2 4 2 African Charter on the Rights and Welfare of the Child, 1990**

The ACRWC which was adopted by the erstwhile Organisation of Africa Unity in 1990 has extensive provisions on the right to education.<sup>111</sup> Article 11 guarantees the right to education and further sets out the purpose of education and the duties of States parties with regard to achieving the full realisation of the child's right to education. The article provides:

“1. Every child shall have the right to an education.

2. The education of the child shall be directed to:

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<sup>108</sup> See arts 27-29. See also, Van Wyk, Dugard, de Villiers & Davis *Rights and Constitutionalism* 189.

<sup>109</sup> The Commission is established by art 30 of the ACHPR and article 45 sets out the functions of the Commission. The Court on the other hand was established by the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III), entered into force on 25 January 2004.

<sup>110</sup> See Buergenthal *International Human Rights* 239.

<sup>111</sup> See OAU Doc. CAB/LEG/24.9/49 (1990). This Charter entered into force on 29 November 1999.

- (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples; rights and international human rights declarations and conventions;
- (c) the preservation and strengthening of positive African morals, traditional values and cultures;
- (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups;
- (e) the preservation of national independence and territorial integrity;
- (f) the promotion and achievement of African Unity and Solidarity;
- (g) the development of respect for the environmental and natural resources;
- (h) the promotion of the child's understanding of primary health care.

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:

- (a) provide free and compulsory basic education;
- (b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all;
- (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;
- (d) take measures to encourage regular attendance at schools and the reduction of the drop-out rates;
- (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children schools, other than those established by public authorities, which conform to such minimum standards as may be approved by the State, and to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child.

5. States parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

6. States parties to the present Charter shall take 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.

7. No part of this Article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

The Charter can be said to be an African counterpart of the Convention on the Rights of the Child. It has similar provisions with articles 28 and 29 of the CRC. In addition to reiterating the aims of education as stated in the CRC, the Charter introduces three new educational aims.

They are: the preservation of national independence and territorial integrity;<sup>112</sup> the promotion of African unity and solidarity,<sup>113</sup> and the promotion of a child's understanding of primary health care.<sup>114</sup> The Charter, unlike the CRC, does not make provision for vocational education. Also, article 11(6) of the ACRWC is new. It requires States parties to take all appropriate measures to ensure that children who become pregnant before completing their education have an opportunity to continue with their education on the basis of their individual ability. This provision is necessary in view of the pattern in most African schools which categorises pregnancy as a disciplinary offence, which usually leads to the expulsion of the pregnant girl from school. This sometimes usually has the devastating effect of precluding the girl from continuing her education.<sup>115</sup>

Apart from article 11, other provisions protecting the right to education include articles 13 and 20 of the Charter. Article 13 deals with handicapped children while article 20 deals with parental responsibilities. Article 13(2) provides that "States parties...shall ensure that the disabled child has effective access to training...in a manner conducive to the child's achieving the fullest possible social integration, individual development and his cultural and moral development." Article 20(2)(a) provides that States parties have the obligation "in accordance with their means and national conditions to take all appropriate measures", "to assist parents...and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing." The above are fundamental provisions on the protection of the child's right to education at the African continent.

## **2 5 National Legislation**

Apart from global and regional instruments, the right to education is also guaranteed at the national level. Both South Africa and Nigeria have comprehensive provisions on the right to education. Thus, statutes, relevant policies and White Papers on the right to education in both countries will be examined in this section. The South African laws and policies on the right to education will be examined first, while discussions on the Nigerian laws and policies on the subject will follow.

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<sup>112</sup> Art 11(2)(e).

<sup>113</sup> Art 11(2)(f).

<sup>114</sup> Art 11(2)(h)

<sup>115</sup> Beiter *The Protection of the Right to Education* 219.

## **2 5 1 South African Statutes on Education**

### **2 5 1 1 The Constitution of the Republic of South Africa, 1996**

The South African Constitution is the supreme law of the country and it binds everybody including the State. Any law, policy or conduct which is inconsistent with the Constitution is invalid.<sup>116</sup> It is observed that the most important policy pronouncement of any legislature is its national Constitution.<sup>117</sup> The Constitution contains directly enforceable rules of law that applies to everybody and affects almost all walks of life.<sup>118</sup> The South African Constitution is an expression of the struggle against apartheid, the need to establish a human rights culture in the country, the struggle for social and economic rights, and the moves to universalise the principles of fairness and justice.<sup>119</sup>

The Constitution has several basic features which are reflected in its preamble and several other provisions. The preamble expresses the fundamental values and purpose of the Constitution as a whole. Four important objectives as stated in the preamble of the Constitution show the importance the Constitution attaches to democracy and the recognition of democratic values as essential for the protection of human rights. The objectives are as follow: (i) to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental rights; (ii) to lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; (iii) to improve the quality of life of all citizens and to free the potential of each person; and (iv) to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Section 1 of the Constitution provides that the Republic of South Africa is a single “sovereign democratic state” founded on four fundamental sets of political values inherent in the democratic body politic, established by the Constitution.<sup>120</sup> First, the Constitution enshrines the pivotal concept and practice of human dignity and promotes the achievement of equality and the advancement of human rights and freedoms. Second, it contains the cognate ideals and practices of non-racism and non-sexism. Third, it entrenches the supremacy of the constitution

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<sup>116</sup> See s 2 of the 1996 South African Constitution.

<sup>117</sup> Montola & Pampallis *Education and Equity* 16.

<sup>118</sup> Malherbe “The Relationship between the State and Higher Education: Issues of Centralisation, Academic Freedom, University Autonomy and Accountability” (*A Paper Prepared for Higher Education South Africa 18 June 2003*) 1.

<sup>119</sup> Montola & Pampallis *Education and Equity* 16.

<sup>120</sup> See Devenish *A Commentary on the South African Constitution* (1998) 33.

and the rule of law. Fourth, it recognises universal adult suffrage, a national voters' register, regular elections and a multi-parties system of democratic government. These values are designed to ensure human dignity and freedom in a political system that is characterised by accountability, responsiveness and openness.<sup>121</sup>

In terms of section 2, the Constitution is the supreme law, any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. By constitutional supremacy, the Constitution is the *grundnorm* and all authority must be exercised by virtue of and in accordance with its provisions. No one is allowed to exercise power or authority outside of the Constitution.<sup>122</sup> The Constitution also embodies certain universally accepted fundamental rights, and civil liberties in its chapter 2. In section 7, the Constitution declares that the Bill of Rights is a cornerstone of democracy in the country. It enshrines the rights of all people in South Africa and affirms the democratic values of dignity, equality and freedom. By section 7(2), the State is obliged to “respect, protect and fulfil the rights in the Bill of Rights.”<sup>123</sup>

The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.<sup>124</sup> It provides a powerful incentive for the development of a human rights culture in South Africa.<sup>125</sup> The provision of the Bill of Rights binds both natural and juristic persons 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.<sup>126</sup> By section 8 of the Constitution, the Bill of Rights also applies both vertically and horizontally. The Bill of Rights in the 1996 South African Constitution is generally seen as one of the most progressive in the world. This is because it contains all categories of human rights that are ordinarily in most international human rights instruments, namely, the so-called first-generation rights which consist of the traditional civil and political rights and second generation rights which consist of social, economic and

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<sup>121</sup> 33 & 44.

<sup>122</sup> See *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) para 194.

<sup>123</sup> Devenish submits that the provision is of “considerable operational significance since it is clear that the Bill of Rights is not just merely a ‘negative enforcement mechanism shielding subjects against the abuse of government power, but that it also imposes a positive duty on the state to protect, promote and fulfil the entrenched rights.’ This gives the South African Bill of Rights a positive dimension which has a considerable significance for the process of transformation required in South Africa...” See Devenish *A Commentary on the South African Constitution* 45.

<sup>124</sup> S 8(1) of the Constitution.

<sup>125</sup> Devenish *A Commentary on the South African Constitution* 46.

<sup>126</sup> S 8(2) of the Constitution.

cultural rights.<sup>127</sup> Those rights as listed in the Constitution are inter-dependent. This was asserted by the South African Constitutional Court when it expressed as follows:

“The Constitution entrenches both civil and political rights and social economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chap 2. The realisation of these rights is also key to the advancement of race and gender equality and evolution of a society in which men and women are equally able to achieve their full potential.”<sup>128</sup>

For our purposes, it is sufficient to mention that these rights have important social and economic ramifications as most of them reflect specific areas of basic needs or delivery of particular goods and services.<sup>129</sup> Furthermore, they tend to create entitlements to material conditions of human welfare.<sup>130</sup> Based on the fundamental provisions it contains, the South African Constitution has been described as a transformative document which aims at redressing the social and economic inequalities of the past.<sup>131</sup>

Like the previous Interim Constitution, the 1996 South African Constitution provides for the right to education. Section 29 of the Constitution which guarantees the right to education provides:

- “(1) Everyone has the right-
- (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
- (a) equality;
  - (b) practicability; and
  - (c) the need to redress the results of past racially discriminatory laws and practices.

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<sup>127</sup> The 1996 South African Constitution provides for both civil and political rights, and socio-economic and cultural rights, it does not make any differentiation between these rights in terms of their traditional division and categorisation. Nor does it provide for any hierarchy of the rights. Accordingly, the South African Bill of Rights contains a number of rights, which appear in no particular order.

<sup>128</sup> *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) par 23.

<sup>129</sup> Mubangizi *Obiter* 118.

<sup>130</sup> See Brand “Introduction to Socio-economic Rights in the South African Constitution” in Brand & Heyns (eds) *Socio-economic Rights in South Africa* (2005) 3.

<sup>131</sup> De Vos “Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness” 2001 *SAJHR* 258 259; Pieterse “The Transformative Nature of the Right to Education” 2004 4 *TSAR* 700 701.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.”

This provision recognises the right to basic education which includes adult basic education as well as further education, which the State, through reasonable measures, must make progressively available and accessible. It is submitted that further education as used in this context encompasses secondary and tertiary levels of education. The section further guarantees some educational rights such as the right to receive education in the official language or languages of one’s choice in public educational institutions; the right to establish independent educational institutions that do not discriminate on the basis of race. All other laws and policies guaranteeing the right to education in South Africa derive their source and validity from the provisions of this section.

### **2 5 1 2 National Education Policy Act, 1996**

The National Education Policy Act 27 of 1996 was enacted to pave the way for bringing the South African education policy in line with constitutional provisions.<sup>132</sup> Section 4(a)(i)-(vii) of the Act is very important and it provides that the policy contemplated in this section shall be directed toward:

- (a) the advancement and protection of the fundamental rights of every person guaranteed in terms of chapter 3 of the Constitution, and in terms of international conventions ratified by the parliament, and in particular the right-
  - (i) of every person to be protected against unfair discrimination within or by an educational institution on any ground whatsoever;
  - (ii) of every person to basic education and equal access to education institutions;
  - (iii) of a parent or guardian in respect of the education of his or her child;
  - (iv) of every child in respect of his or her education;
  - (v) of every student to be instructed in the language of his or her choice where this is reasonably practicable;

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<sup>132</sup> Robinson (ed) *The Law of Children and Young Persons in South Africa* 311.



(vi) of every person to the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions based on a common language, culture or religion, as long as there is no discrimination on the ground of race;

(vii) of every person to use the language and participate in the cultural life of his or her choice within an educational institution.

This Act predates the current 1996 South African Constitution and as such, reference to chapter 3 (which is on the Bill of Rights in the Interim Constitution) should therefore be taken to refer to chapter 2 of the 1996 Constitution which contains the Bill of Rights. The Act protects everyone against unfair discrimination within or by an educational institution on any ground whatsoever. This is very important in view of the country's experience and previous segregation practices that reigned supreme during the apartheid era. It further ensures equal access to educational institutions in the country and guarantees the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions.

### **2 5 1 3 The South African Schools Act, 1996**

With the adoption of a new Constitution, a school system based on inequality and discrimination had to change to reflect the principles of equality and fairness enshrined in the new Constitution. Consequently, a Committee was set up by the Ministry of Education to review the organisation, governance and funding of the schools. The South African Schools Act 84 of 1996 is the result of the recommendations of this committee. The purpose and object of the Act is clearly set out in its preamble. The long title of the Act states that the Act was passed in order: “[t]o provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith.” The Act abolished the previously racially-based education system in the country and provides for a uniform system for the organisation, governance, standard and funding of schools.<sup>133</sup> This Act applies to school education subject to the provisions of the National Education Policy Act.<sup>134</sup>

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<sup>133</sup> See Bray “The South African Schools Act 84 of 1996” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 285.

<sup>134</sup> Act 27 of 1996.

The Act is divided into seven chapters. Chapter 1 deals with the definition of the words used and the application of the Act.<sup>135</sup> Chapter 2 details rules relating, *inter alia*, to compulsory school attendance, exception from such attendance and admission and expulsion from public schools.<sup>136</sup> Chapter 3 deals with the provision and governance of public schools<sup>137</sup> while chapter 4 deals with funding of public schools.<sup>138</sup> The establishment, registration and withdrawal of registration of independent schools and other incidental matters are dealt with in chapter 5.<sup>139</sup> Chapter 6 deals with transitional provisions<sup>140</sup> while chapter 7 contains general provisions.<sup>141</sup>

The Act recognises two types of schools, namely, public schools<sup>142</sup> and independent schools.<sup>143</sup> In terms of section 12(1)-(2) of the Act, the Members of the Executive Councils (MEC) responsible for education are required to provide for public schools for the education of learners out of funds appropriated for the purpose of education by the provincial legislatures. The Act also recognises the right of a person to establish and maintain an independent school at his or her own cost provided that such school is registered with the State.<sup>144</sup> In terms of the Schools Act, three types of public schools may be provided, namely, an ordinary public school, a public school for learners with special education needs<sup>145</sup> and a gender specific school.<sup>146</sup> Where reasonably practicable, education for learners with special education needs may be provided at ordinary public schools provided relevant support services for such learners are made.<sup>147</sup> The Act further obliges the member of the executive council responsible for education in a Province to take all reasonable measures to ensure that physical facilities at public schools are accessible to disabled persons.<sup>148</sup>

In terms of section 3 of the Act, every MEC of a Province responsible for education in that Province must ensure that there are enough schools so that every child who lives in the

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<sup>135</sup> See ss 1- 2.

<sup>136</sup> See ss 3-11.

<sup>137</sup> Ss 12-33.

<sup>138</sup> Ss 34-44.

<sup>139</sup> Ss 45-51.

<sup>140</sup> Ss 52-57.

<sup>141</sup> Ss 58-64; see generally Robinson (ed) *The Law of Children and Young Persons in South Africa* 243; Davel (ed) *Introduction to Child Law in South Africa* 286.

<sup>142</sup> See ss 12-33, SASA.

<sup>143</sup> See ss 45-51, SASA.

<sup>144</sup> See ss 45 and 46(1), SASA as well as section 29(3) of the Constitution.

<sup>145</sup> See s 12(3) of the SASA.

<sup>146</sup> See s 12(6) of the SASA.

<sup>147</sup> See s 12(4) of the SASA.

<sup>148</sup> See s 12(5) of the SASA.

Province can attend school. A learner<sup>149</sup> who has been admitted to a public school is, unless exempted, obliged to attend such school, and every parent must cause every learner for whom he or she is responsible, to attend school from the first day of the school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of 15 years or the ninth grade, whichever occurs first.<sup>150</sup> The Act provides that if a learner who is subject to compulsory attendance is not enrolled at school or fails to attend school, the circumstances of his or her absence may be investigated and appropriate measures taken to remedy the situation by the head of department. Failing such remedy, the said official may issue a written notice to the parent of such learner requiring the parent to cause the learner to attend or be enrolled.<sup>151</sup>

Thus, in terms of the above provisions, an obligation is placed on parents to ensure that children of school age are enrolled at and attend school. A parent or any person who, without just cause, prevents a learner, who is subject to compulsory attendance from attending school, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding six months.<sup>152</sup> In certain circumstances, a learner may be exempted from compulsory school attendance, for example, the Head of Department of Education (HOD) may exempt the learner entirely, partially or conditionally if it is in the interests of the learner. The HOD must maintain a register of all learners exempted from compulsory school attendance.<sup>153</sup> Also, in terms of section 5 of the Act, a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.<sup>154</sup> It is an important function of the school governing body to determine the admission policy of the school but may not impose discriminatory conditions.

Application for admission to a public school must be made to the Provincial Education Department and if the application is refused, the HOD must inform the parent in writing of such refusal and furnish written reasons for the refusal. A learner who is refused admission may

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<sup>149</sup> S 1 of the South African Schools Act refers to learner as any person receiving education or obliged to receive education in terms of the Act.

<sup>150</sup> See s 3(1) of the SASA.

<sup>151</sup> See s 3(5) of the SASA.

<sup>152</sup> See s 3(6) of the SASA.

<sup>153</sup> See s 51 of the Act which provides that parents may apply to the HOD for registration of a learner to receive education at home.

<sup>154</sup> This provision gives effect to s 9 of the Constitution.

appeal against the decision to the MEC.<sup>155</sup> The Act also allows registration of learners for education at home. On application by a parent to the HOD, a learner may be allowed to receive education at his home.<sup>156</sup> The registration of a learner to receive education at home may, , be withdrawn once the parent of such learner is informed of such an intention. The reasons for such a decision and an opportunity to make representations shall be granted to such parent and the representations received must be duly considered, subject to a right of appeal against the withdrawal or refusal of registration by the parent to the MEC.<sup>157</sup>

The Act provides that school fees are to be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting to consider and approve the annual budget.<sup>158</sup> The resolution to charge school fees has to provide for the amount to be charged and equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees.<sup>159</sup> Parents are liable to pay school fees unless exempted by the governing body.<sup>160</sup> Section 5(3)(a) of the Act provides that a learner may not be refused admission on the basis that his or her parent is unable to pay or has not paid such fees.<sup>161</sup> The payment of school fees may be enforced by the process of law against parents who are liable to pay.<sup>162</sup> One of the fundamental provisions of this Act is that all children should have access to learning and to equal opportunities in education without discrimination. Learners may therefore not be denied admission to an ordinary school on the basis of language, disability or learning difficulty. The Act embraces the constitutional rights to equal access, the right to claim learning support, access to curriculum, and the right of parents to choose.<sup>163</sup> The Act contains elaborate and detailed provisions on the right to education, administration and governance of schools in South Africa.

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<sup>155</sup> S 5(7)-(9) of the Act.

<sup>156</sup> The Head of Department is obliged to register a learner to receive education at home if he or she is satisfied that such registration is in the interest of the learner and that the education likely to be received by the learner will meet the minimum requirements of the curricular at the public school, and be of a standard not inferior to the standard of education provided at public schools and the parent will comply with any other reasonable conditions set. See s 51(1) & (2) of the SASA.

<sup>157</sup> See s 51(3)-(5) of the SASA.

<sup>158</sup> See ss 38(2) & 39(1) of the SASA.

<sup>159</sup> See s 39(2)(a)-(b) of the SASA.

<sup>160</sup> See s 40(1) of the SASA.

<sup>161</sup> See s 5(3)(a) of the SASA.

<sup>162</sup> See s 41 of the SASA.

<sup>163</sup> Williams *Inclusive Education: A Model for In-Service Teachers* (2007) 36.

#### **2 5 1 4 The Higher Education Act, 1997**

As garnered from the preamble to the Higher Education Act 101 of 1997, its purposes are: to establish a “single coordinated system”; the transformation of programmes so that they can “respond better to the human resource, economic and development needs of the Republic”; the need to redress discriminatory practices in respect of representation and access; and various freedoms and values regarding scholarship, international standard and academic quality. According to the Act, it is desirable for higher education institutions to enjoy freedom and autonomy in their relationship with the State within the context of public accountability and national need for advanced skills and scientific knowledge.<sup>164</sup> The Act, like many other pieces of legislation on education, refers to a duality of issues, that is, past discriminatory practices and the need to address them, and the question of human resources and economic development.

#### **2 5 1 5 White Paper on Education and Training, 1995**

The values and principles which “drive the national policy” in education and training are set out in the 1995 White Paper on Education.<sup>165</sup> These re-affirm that education and training are basic human rights which the State has an obligation to advance and protect so that the citizens of the country could “have the opportunity to develop their capacities and potentials, and make their contribution to the society.”<sup>166</sup> The state’s obligation includes the duty to provide “advice and counselling” in respect of people “fragmented by such factors as past unjust laws, migratory labour practices, and marital breakdown, and handicapped by illiteracy” together with “appropriate care and educational services for parents, especially mothers, and young children within the community.”<sup>167</sup> The principles also reaffirm the commitment to provide access to lifelong learning, education and training of good quality.

In making these commitments, the White Paper also commits itself to the redress of educational inequalities among those sections of people who have suffered particular disadvantages; the principle of equity; rehabilitation of schools and colleges; the idea of democratic governance in every levels of the system; restoration of the culture of teaching,

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<sup>164</sup> Preamble.

<sup>165</sup> See Department of Education (1995) the white Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System, *Government Gazette*, 357 (16312) ch 4.

<sup>166</sup> White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System, *Government Gazette*, 357 (16312) (1995) 21.

<sup>167</sup> White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System, *Government Gazette* 357 para 5.

learning and management involving the creation of a culture of accountability; sustainable and productivity.<sup>168</sup> These principles are to be read together with other government developmental initiatives concerning matters such as the qualifications framework, changes in the curriculum, teacher supports, the higher education system, further education and training, and recovery programme for students.<sup>169</sup>

### **2 5 1 6 White Paper on Further Education and Training, 1998**

This White Paper provides for the framework for Further Education and Training (FET) and aims at pursuing government's constitutional obligations on education. The document outlines a vision and policy framework for a nationally coordinated system of FET which "provides access to high quality education and training within a differentiated system, which will offer a wide range of learning options to a diverse range of learners, including school-going young people, out-of-school youth, young adults and the larger adult population."<sup>170</sup>

The White Paper adopts a strong development approach to the transformation of FET. It signals the critical role of FET in social and economic development, reinforces the Ministry's vision and strategy that serious and systematic efforts are required to overcome the resource and capacity constraints that hold back the process of change. It reflects on the new economic realities and regards the phenomenon of globalisation as a significant challenge requiring a response to a rapidly changing world economy. The FET White Paper is significant because it constitutes an important investment for the development of the country and provides opportunities for young and old.<sup>171</sup> It also provides a diversity of programmes to enhance the possibility of lifelong learning and "intermediate to higher-level skills" in response to the needs of the citizenry and the country.<sup>172</sup>

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<sup>168</sup> White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System 21-22.

<sup>169</sup> Montola & Pampallis (eds) *Education and Equity: The Impact of State Policies on South African Education* 26.

<sup>170</sup> White Paper on Further Education and Training: Preparing for the Twenty-first Century through Education, Training and Work, Department of Education, Pretoria (1998) 6.

<sup>171</sup> It is stated that FET caters for almost 3 million learners, 8000 providers and an estimated investment of R10 billion annually. See White Paper on Further Education and Training (1998) 6.

<sup>172</sup> See White Paper on Further Education and Training (1998) 6.

### **2 5 1 7 Education White Paper 6 of 2001**

In 2001, the Education White Paper 6 on Special Needs Education, Building an Inclusive and Training System was gazetted. The White Paper provides a framework for a single inclusive system of education and training in South Africa. It outlines what an inclusive education and training system is, and how it should be built.<sup>173</sup> According to the Department of Education, an inclusive education and training system in terms of the White Paper is based on the following principles of human rights and social justice for all learners, namely; participation and social integration; equity and redress in education; equal and equitable access to a single, inclusive education system; access to the curriculum; community responsiveness, and cost-effectiveness.<sup>174</sup>

The White Paper declares the commitment of the government to the provision of educational opportunities, especially for those learners who experience barriers to learning or who have dropped out of learning, because of the inability of the education and training service to accommodate their learning needs. It also outlines how the education and training system must transform itself to assist in building and securing a caring and humane society. The White Paper recognised that priorities have to be determined within an education and training system that is engaged in multiple and simultaneous policy change, but subject to severe resources constraint.<sup>175</sup> In terms of this White Paper, a wider distribution of educational support services will help to ensure that learners' need are accommodated according to the level of support needed by them. The Paper explains the placement of learners as follows: (i) learners who require low-intensive support will be placed in mainstream schools; (ii) learners who require moderate support will receive this in full services schools, and (iii) learners who require high-intensive support will be placed in special schools.<sup>176</sup> It sets a time frame of twenty years for the implementation of the inclusive education system in the country thus: short-term steps (2001-2003); medium-term steps (2004-2008), and long-term steps (2009-2021).<sup>177</sup>

The aim of this manual is to assist the various role-players who are involved in the emerging inclusive education system in South Africa. The manual examines and explores the

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<sup>173</sup> See Williams *Inclusive Education: A Model for In-Service Teachers* 40.

<sup>174</sup> See Department of Education *Draft Guidelines for the Implementation of Inclusive Education* (2002) 37.

<sup>175</sup> See Department of Education, *Education White Paper 6 on Special Needs Education, Building an Inclusive and Training System* (2001) 20.

<sup>176</sup> *Education White Paper 6 on Special Needs Education* 15 & 39.

<sup>177</sup> *Education White Paper 6 on Special Needs Education* 37.

screening, identification and assessment of learners and attempts to provide support to those learners who experience barriers to learning of whatever kind. Screening, identification and assessment at schools are ongoing processes, with the development of learners as the ultimate aim.<sup>178</sup>

## **2 5 2 Nigerian Statutes on Education**

### **2 5 2 1 The Constitution of the Federal Republic of Nigeria, 1999**

The Constitution of the Federal Republic of Nigeria (CFRN), 1999 is the supreme law of the land and it binds everybody including the State, and any law, policy or conduct which is inconsistent with the Constitution is invalid.<sup>179</sup> The Nigerian Constitution is enacted for the purpose of promoting the good governance and welfare of all persons in the country on the principles of freedom, equality and justice and for the purpose of consolidating the unity of the country.<sup>180</sup> The Constitution represents the most important policy pronouncement of the Nigerian government. The Nigerian Constitution is a basic and fundamental charter that outlines governmental structure; it allocates powers and duties of the Government, establishes basic decision-making procedures, and places limitations upon governmental activities.<sup>181</sup>

The Constitution is the fundamental organic law by which a state or a nation is governed. Its object is to establish the essential foundation and the general framework of government and to provide the body of rules and maxims in accordance with which the powers of a State are habitually exercised.<sup>182</sup> The Constitution is the original law by which a system of government is created and set up, and to which the branches of government must look for all their powers and authority.<sup>183</sup>

The 1999 Nigerian Constitution recognises two sets of “rights” namely, the fundamental human rights and fundamental objectives and directive principles of state policy.<sup>184</sup> There is significant difference between the two set of rights as provided for in the Nigerian Constitution.

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<sup>178</sup> See Williams *Inclusive Education: A Model for In-Service Teachers* 45.

<sup>179</sup> S 1(1) of the Constitution provides: “This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.” It states in sub s 3 that “if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void.”

<sup>180</sup> See the Preamble to the 1999 Nigerian Constitution.

<sup>181</sup> Saharay *The Constitution of India: An Analytical Approach* 3 ed (2002) 1.

<sup>182</sup> Weaver *Constitutional Law and its Administration* (1946) 1-2.

<sup>183</sup> Saharay *The Constitution of India* 1; see also, *India Cement Ltd v State of Tamil Nadu* AIR 1990 SC 85; *Nafiu Rabiu v The State* (1981) 2 NCLR 293 at 326; *Bronik Motors Ltd v Wema Bank Ltd* (1983) 6 SC 158.

<sup>184</sup> Ss 13-24 deal with objective policy while ss 33-46 contained fundamental rights.



While fundamental rights are inviolable, fundamental objectives and directive principles are not. The rights provided for in Chapter II of the Constitution in the form of fundamental objectives and directive principles include the rights to suitable and adequate shelter, suitable and adequate food, reasonable minimum living wage, old age care and pension, unemployment and sick benefits and welfare of the disabled,<sup>185</sup> promotion of science and technology, eradication of illiteracy by making provision for free, universal and compulsory primary education; free secondary education, free university education<sup>186</sup> and free adult literacy programme.<sup>187</sup> Those objectives and principles were essentially a set of guidelines designed to secure the national target of social well-being, social justice, political stability and economic growth in accordance with the espoused vision of the Preamble to the Constitution.<sup>188</sup>

The fundamental objectives and directive principles of the state policy were introduced into Nigerian constitutional jurisprudence for the first time in the 1979 Constitution. They were copied from the Indian Constitution<sup>189</sup> which has similar rights incorporated as far back as 1951.<sup>190</sup> As to the legal effect of the directive principles in the Nigerian Constitution, Aguda

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<sup>185</sup> See ss 16 & 17.

<sup>186</sup> See s 18.

<sup>187</sup> See Aguda *Understanding the Nigerian Constitution of 1999* (2000) 87-88.

<sup>188</sup> It is submitted that while those fundamental objectives could have been hailed as one of the most innovative dimensions in the history of constitutional making in Nigeria, they have been rendered worthless platitudes because of their inherently emasculated constitutional status. See Olowu "Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees" (2006) 69(1) *Saskatchewan Law Review* 39 56; see also, Aguda *The Judiciary in the Government of Nigeria* (1983) 77-78, where fundamental objectives are described as "a white elephant...[which] attempt[s] to introduce into the constitution some ideas and concepts in the nature...of a by-gone era."

<sup>189</sup> The Constitution of India provides for two sets of rights, rights which are fundamental and justiciable, and rights that are not fundamental and non-justiciable. The fundamental rights enshrined in Part III of the Constitution create political rights while economic rights are provided for in Part IV in the nature of non-justiciable right which are called the directive principles of the state policy. It is submitted that the Indian Constitution which is the lengthiest and the most detailed of all the Constitutions in the world has influenced many drafters of national constitutions and has specifically informed the inclusion of many fundamental provisions in the Nigerian Constitution. See Kumar *Constitutional Law of India* 2 ed (2000) 14.

<sup>190</sup> The Nigerian Constitution borrowed heavily from the Indian Constitution and the major characteristics of the Indian Constitution also permeate various Nigerian Constitutions since 1979. Ajomo submits as follows: "[t]here are other rights in the Constitution...which deserve recognition and comment; these are Fundamental Objectives and Directive Principles of State policy in Chapter II of the Constitution. They were introduced into the Constitution for the first time in 1979... These rights are those to education, to work and just remuneration, right to protection against unemployment, sickness, disability or old age. They have been copied from chapter IV of the Indian Constitution which has similar rights incorporated as far back as 1951. The Constitution of Ireland also contains similar provisions." See Ajomo "The Development of Individual Rights in Nigeria's Constitutional History" in Ajomo & Owasanoye (eds) *Individual Rights Under the 1989 Constitution* (1993) 10. In the same vein, Agbede notes as follows: "[i]t should be observed that the bill of rights as contained in the 1989 constitution, like its predecessors, provides for protection against restraints. In effect it is concerned with the idea of human rights in the negative sense... To that extent Nigerian Bill of Rights falls short of the standard which

submits as follows: "...on the face of it, the Constitution does not give any legal right to individuals in so far as the fundamental objectives and directive principles of the State policy are concerned."<sup>191</sup> It is observed that coterminous Bill of Rights and directive principles is a common experience of most States that were former colonies of Great Britain, particularly, the newer Commonwealth States located in Africa, the Caribbean, and Asia and the Pacific.<sup>192</sup>

In its section 18, the 1999 Nigerian Constitution provides for the "right" to education in the following words:

"(1) The Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels;  
(2) Government shall promote science and technology;  
(3) Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide- (a) free, compulsory and universal primary education; (b) free secondary education; (c) free university education; and (d) free adult literacy programme."

The "right to education" as provided for under the Nigerian Constitution is categorised as part of fundamental objectives and directive principles of State policies. It should be pointed out that one of the factors that have been attributed as impeding the effective promotion and implementation of the fundamental objectives is that they are regarded as economic, social and cultural rights which are non-justiciable in terms of the Constitution.<sup>193</sup> Section 6(6)(c) of the 1999 Nigerian Constitution provides that the judicial powers vested (by the Constitution) on the courts "shall not extend ... to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the

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obtains in international document on the issue. Although Chapter II of the constitution contains a number of the positive human rights provisions even if in vague form but as they are not justiciable they hold no comfort or promise for the ordinary citizens in need of such rights. However, it seems inappropriate that section 19 should not have been made justiciable even in a modified form. What is particularly intolerable is the failure of the successive governments since 1979 to implement item 58 of the exclusive legislative list which provides for the establishment of authorities to promote and enforce the observance of the fundamental objectives and directive principles of state policy contained in the Constitution." See Agbede "The Rule of Law and the Preservation of Individual Rights" in Ajomo & Owasanoye (eds) *Individual Rights Under the 1989 Constitution* 35.

<sup>191</sup> Aguda "Judicial Attitude to Individual Rights in Nigeria" in Ajomo & Owasanoye *Individual Rights Under the 1989 Constitution* 68.

<sup>192</sup> See Olowu *Saskatchewan Law Review* 52.

<sup>193</sup> The Nigerian constitution sets out objectives and state policy goals the government is obligated to pursue for the better life of its citizens. Under the Nigerian Constitution (the 1999 Constitution which is similar to the 1979 constitution), Directive Principles in Chapter 2 enjoin the state to ensure that its policies and actions aim toward the full realisation of economic and social rights such as health, education, employment, etc. A close examination of these "Directive Principles" shows that they are simply declarations of state policies that set guidelines for law making and good governance. They are mere political statements of national goals and agenda that are given constitutional recognition.

Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution.”

The interpretation given to this provision is that section 6(6)(c) of the Constitution disallows the courts from entertaining complaints on breach of fundamental objectives and directive principles of State policy. In other words, the jurisdiction of the courts over those “rights” (including the right to education) has been removed by section 6(6)(c) of the Constitution. In a number of cases concerning economic, social and cultural rights, the courts had declined to offer any remedy pleading non-justiciability clause in section 6(6)(c) of the Constitution.<sup>194</sup> For instance, in *Uzoukwu v Ezeonu II*,<sup>195</sup> the Nigerian Court of Appeal said concerning economic, social and cultural rights thus: “[t]here are other rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under the Chapter 2 of the Constitution.”

It should be noted that though the non-justiciability of the fundamental objectives and directive of the State policy under the Nigerian Constitution is recognised, it has been opined that it would amount to a failure of duty and responsibility on the part of the State organs to act in clear disregard of those fundamental objectives and directives of the State policy in the Constitution.<sup>196</sup> It is also noted that directive principles can be made justiciable by legislation.<sup>197</sup> This position gives a ray of hope for the enforcement of the provisions of the fundamental objectives and directives principles of the State policy in the Nigerian Constitution.

### **2 5 2 2 The Child Rights Act, 2003**

The Child Rights Act (CRA), 2003 was enacted by the National Assembly to provide and protect the rights of a Nigerian child and other related matters. It provides for comprehensive rights of the child in a binding and fundamental way such as the United Nations’ CRC. The Act

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<sup>194</sup> See *Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337. In *Uzuokwu v Ezeonu II* [1991] 6 NWLR (pt 200) 708 at 761-762, the Nigerian Court of Appeal said concerning economic, social and cultural rights: “There are other rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter 2 of the Constitution.” See also, Odinkalu “The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights” in Gauri & Brinks (eds) *Courting Social Justice (Judicial Enforcement of Social and Economic Rights in the Developing World)* (2008) 183-223 193.

<sup>195</sup> [1991] 6 NWLR (pt 200) 708 at 761-762

<sup>196</sup> See *Attorney-General, Ondo State v Attorney-General, Federation of Nigeria* (2002) 9 SCM 1 at 97-98.

<sup>197</sup> *Attorney-General, Ondo State v Attorney-General Federation* (supra) at 98.

provides that a child shall be given such protection and care as is necessary for the well-being of the child, taking into account the rights and duties of the child's parents, legal guardians, or other individuals, institutions, services, agencies, organisations, or bodies legally responsible for the child. Every person, institution, service, agency, organisation and body responsible for the care or protection of children shall conform to the standards established by the appropriate authorities, particularly in the areas of safety, health, welfare, number and suitability of their staff and competent supervision.<sup>198</sup>

Section 15 of the Act provides for the right to education in the following words:

“(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.

(3) Every parent, guardian or person who has the care and custody of a child who has completed his basic education, shall endeavour to send the child to a senior secondary school, except as provided for in subsection (4) of this section.

(4) Where a child to whom subsection (3) of this section applies is not sent to senior secondary school, the child shall be encouraged to learn an appropriate trade and the employer of the child shall provide the necessaries for learning the trade.

(5) A female child who become pregnant, before completing her education shall be given the opportunity, after delivery, to continue with the education, on the basis of her individual ability.

(6) Where a parent, guardian or person who has care and custody of a child, fails in the duty imposed on him under subsection (2) of this sections, commits an offence and is liable-

- i. on first conviction to be reprimanded and ordered to undertake community service;
- ii. on second conviction to a fine of two thousand naira or imprisonment for a term not exceeding one month or to both such fine and imprisonment; and
- iii. on any subsequent conviction to a fine not exceeding five thousand naira or imprisonment for a term not exceeding two months or to both such fine and imprisonment.

(7) The provisions of this section shall not apply to children with mental disability.”

The Act further provides that every person, authority, body or institution that has 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 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.<sup>199</sup> In terms of section 20 of the Act, every parent, guardian, institution, person and

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<sup>198</sup> S 2(1) & (2) of the Child's Rights Act, 2003.

<sup>199</sup> See s 16(2) of the Act.

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 responsibilities set out in the Act.

The Act, in section 58 further provides for education supervision orders in these words:

- “(1) On the application of an appropriate education authority, the court may make an order to be known as an education supervision order putting the child with respect to whom the application is made under the supervision of a designated appropriate education authority.
- (2) The court shall only make an education supervision order if it is satisfied that the child concerned is of compulsory school age and is not being properly educated.<sup>200</sup>
- (3) For purpose of this section, a child is being properly educated only if he is receiving efficient full-time education suitable to his age, ability and aptitude and any special educational needs he may have.
- (4) Where a child is (a) the subject of a school attendance order which is in force and which has not been complied with; or (b) a registered pupil at a school which he is not attending regularly, it shall be assumed that he is not being properly educated unless the contrary is proved.
- (5) An education supervision order may be made with respect to a child who is in the care of a State Government if the court deems it necessary in the interest of the child.
- (6) The appropriate education authority designated in an education supervision order shall be-
- (a) the authority within whose area the child concerned is living or will live; or
- (b) the authority within whose area a school is situated if (i) the child is a registered pupil at the school; and (ii) the authority mentioned in paragraph (a) of this subsection and the authority within whose area the school is situated agree.
- (7) An appropriate education authority which proposes to make an application for an education supervision order shall, before making the applicant, consult the child service committee or unit of the appropriate authority.”

The Act, in addition to providing for comprehensive provisions on the protection of the rights of the child, also guarantees the right of Nigerian child to education.

### **2 5 2 3 The National Policy on Education, 2004**

The National Policy on Education (NPE) states that education in Nigeria is an instrument “par excellence” for effecting national development. It has witnessed active participation by non-governmental agencies, communities, and individuals as well as government intervention. It is therefore desirable for the country to spell out in clear and unequivocal terms the philosophy and objectives that underlie its investment in education. It states that the NPE seeks to fulfil that

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<sup>200</sup> A child is of compulsory school age if he is not below the age of six years old or above eighteen years old. See s 277 of the Act.

role.<sup>201</sup> The Nigerian government notes that for the benefit of all citizens, the country's educational goals shall be clearly set out in terms of their relevance to the needs of the individual and those of society, in consonance with the realities of our environment and the modern world. Thus, in 1973, a National Curriculum Conference, (a seminar of experts drawn from a wide range of interest groups within Nigeria) was convened. The seminar deliberated on what a national policy on education for an independent and sovereign Nigeria should be. The outcome of the seminar was a draft document, which after due comments were received from the component States and other interest groups, led to the final document known as the National Policy on Education being published in 1977.<sup>202</sup>

A country's policy on education is the government's way of realising that part of the national goals which can be achieved using education as a tool.<sup>203</sup> It is submitted that no policy in education can be formulated without first identifying the overall philosophy and goals of a nation. In terms of the Policy, the national overall philosophy is to: live in unity and harmony as one indivisible, indissoluble, democratic and sovereign nation founded on the principles of freedom, equality and justice, and promote inter-African solidarity and world peace through understanding.<sup>204</sup> Nigeria's philosophy of education therefore believes that: (a) education is an instrument for national development; to this end, the formulation of ideas, their integration for national development, and the interaction of persons and ideas are all aspects of education; (b) education fosters the worth and development of the individual, for each individual's sake, and for the general development of the society; (c) every Nigeria child shall have a right to equal educational opportunities irrespective of any disabilities; and (d) there is need for functional education for the promotion of progressive, united Nigeria, to this end, school programmes need

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<sup>201</sup> See Federal Republic of Nigeria National Policy on Education 4 ed (2004) iii.

<sup>202</sup> Since the publication of the first edition in 1977, the 2 ed and 3 ed were published in 1981 and 1998 respectively in keeping with the dynamics of social change and the demands on education. The 4 ed was necessitated by some policy innovations and changes, and the need to update the 3 ed accordingly. These innovations and changes include: (a) in this regard: (i) in pre-primary schools, there shall not be more than 20 pupils to a teacher and a helper (assistant); (ii) in primary and secondary schools, there shall not be more than 35 and 40 pupils respectively to a class, and (iii) in technical and vocational colleges, there shall not be more than 20 pupils for practical work. (b) Primary, post-primary and tertiary education shall be the responsibility of the local, state and federal governments. (c) Education boards or similar authorities shall be responsible for the management of schools and appointment, posting and discipline of teachers within defined areas of authority. Special and adequate inducement shall be provided for teachers in rural areas to make them stay on their jobs. See Federal Republic of Nigeria National Policy on Education 4 ed iii-iv.

<sup>203</sup> S 1 para 1 of the National Policy on Education 2004.

<sup>204</sup> S 1 para 2(a) & (b) of the National Policy on Education.

to be relevant, practical and comprehensive, while interest and ability should determine the individual's direction in education.<sup>205</sup>

The national educational goals, which derive from the philosophy, are set towards the inculcation of national consciousness and national unity; the inculcation of the type of values and attitudes for the survival of the individual and the Nigeria society; the training of the mind in the understanding of the world around, and the acquisition of appropriate skills and the development of mental, physical and social abilities and competencies as equipment for the individual to live in and contribute to the development of the society.<sup>206</sup> To ensure the full achievement of those goals and values, the Policy obliges all other agencies to work in concert with governments by contributing their full potential to education. This Policy represents the Nigerian government commitments on education and it constitutes an important instrument in so far as education is concerned in the country.

#### **2 5 2 4 The National University Commission Act, 2004**

The Nigerian Government establishes certain bodies and commissions which regulate tertiary education in the country.<sup>207</sup> The Nigerian Universities Commission Act, for instance, established the National Universities Commission (NUC) as a body corporate and charged it with the responsibility of advising the Federal and State governments on all aspects of university education and the general development of universities in Nigeria.<sup>208</sup> The Commission consists of a chairman and other members from relevant ministries and academic disciplines.<sup>209</sup> In addition, this body is vested with the power to disburse money to universities in the country.<sup>210</sup>

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<sup>205</sup> S 1 para 4 of the National Policy on Education.

<sup>206</sup> S 1 para 7 of the National Policy on Education.

<sup>207</sup> These bodies include the National Universities Commission (for University education), the National Board for Technical Education (for Polytechnic education) and National Commission for Colleges of education (for teachers' education).

<sup>208</sup> See the Preamble and s 1 of the National Universities Commission Act (Cap N81), LFN, 2004.

<sup>209</sup> In addition to the Chairman, other members include, one representative each from the following Federal Ministries: Education and Youth Development, Health and Human services, Finance and Economic Development, Establishment and Management services; one representative of the National Commission for Women; six persons with wide knowledge and experience representing both private and public sector interest, one representative each from each of the following academic disciplines, that is, Agriculture and Veterinary sciences, Education, Environmental Sciences, Humanities, Social and Management Sciences, Health Sciences, Engineering Science and Technology, Earth, Mineral and Natural Sciences and Law; the Executive Secretary, who shall be an *ex officio* member of the Board. The Chairman and other members of the Commission shall be appointed by the President. See s 2(1) & (2) of the Act.

<sup>210</sup> See s 4 of the National University Act.

The functions of the NUC are elaborate and are expressly stated in the Act. In terms of section 4 of the Act, the functions of the Commission shall be to: (a) advise the President and the Governors of the States, through the Minister, on the creation of new universities and other degree-granting institutions in Nigeria; (b) prepare, after consultation with all the State governments, the universities, the National Manpower Board and such other bodies as it considers appropriate, periodic master plans<sup>211</sup> for the balanced and coordinated development of all universities in Nigeria; (c) make such other investigations relating to higher education as the Commission may consider necessary in the national interest; (d) make such other recommendations to the Federal and State governments, relating to universities and other degree-awarding institutions as the Commission may consider to be in the national interest; and (e) inquire into and advise the Federal government on the financial needs of the university education in Nigeria and, in particular, to investigate and study the financial needs of university research and ensure that adequate provision is made for this in the universities.<sup>212</sup>

The NUC duties also include advising both the federal and state governments and making inquiry into the financial needs, both recurrent and capital, of university education in Nigeria; receiving block grants from the Federal government and allocate them to Federal universities; taking into account, in advising the Federal and State governments on university finances, such grants as may be made to the universities by the State governments and by persons and institutions in and outside Nigeria; undertaking periodic reviews of the terms and conditions of service of personnel engaged in the universities and to make recommendations thereon to the Federal Government, where appropriate.<sup>213</sup> For the purpose of performing its function, the Executive Secretary or any authorised officer of the Commission shall have a right of access to all the records of any institutions to which the Act applies.<sup>214</sup> The Commission performs its functions under the general directives of the Minister for Education and attempts to ensure standard and quality in the Nigerian university education system.<sup>215</sup>

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<sup>211</sup> Such plans shall include, (i) the general programmes to be pursued by the universities, in order to ensure that they are fully adequate to meet national needs and objectives; (ii) recommendations for the establishment and location of new universities as and when considered necessary, and in accordance with the Commission's approved guidelines; (iii) recommendations for the establishment of new academic units in existing universities or the approval or disapproval of proposals to establish such academic units. See s 4(1)(b) of the NUC Act.

<sup>212</sup> See generally, s 4(1)(a)-(l) of the NUC Act.

<sup>213</sup> See generally, s 4(1)(a)-(l) of the NUC Act.

<sup>214</sup> See s 13 of the Act.

<sup>215</sup> See s 4(2) of the Act.



## **2 5 2 5 Education (National Minimum Standards and Establishment of Institutions) Act, 2004**

The Education (National Minimum Standards and Establishment of Institutions) Act is otherwise known as the Education Act. The Act was enacted to deal, among other things, with the specification of various authorities empowered to prescribe minimum standards of education in Nigeria.<sup>216</sup> The Act provides for minimum standards for each of the levels of education in Nigeria, to wit: pre-primary and primary education,<sup>217</sup> secondary and teacher education,<sup>218</sup> and higher education.<sup>219</sup> It further prescribes for the minimum standard in respect of technical education<sup>220</sup> as well as special and adult education.<sup>221</sup> The Act also vests the appropriate Authority the power to issue guidelines to relevant institutions in respect of the maximum number of the pupils or students that may occupy each class by reference to its physical dimension; the ratio of pupils or students to each teacher; the minimum number of weeks in each school year during which instruction would be given to pupils or students.

Others include issuing guidelines on the accommodation and amenities to be maintained by the institution, laboratories, workshops, technical drawing-rooms, typing rooms, model workshops, art rooms and libraries to be maintained by the institution; staff rooms, administrative blocks, assembly halls, staff quarters, and other special and allied buildings to be maintained as well as such other physical structures as would be required to ensure or would be conducive to maintenance of the minimum standards prescribed in respect of such institution.<sup>222</sup> The Act sets the standard to be maintained in every school in Nigeria from pre-primary school up to the university level and vests the appropriate authority with the powers of inspection.<sup>223</sup> In terms of section 22 of the Act, any institution which does not meet or maintain the standard stipulated in the Act is liable to being closed down. In addition to the closure of the affected

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<sup>216</sup> See the Preamble to the Education (National Minimum Standards and Establishment of Institutions) Act, Cap E3, LFN 2004.

<sup>217</sup> See ss 1-3 of the Act.

<sup>218</sup> See ss 4-7 of the Act.

<sup>219</sup> See ss 10 & 11 of the Act

<sup>220</sup> See ss 8 & 9 of the Act

<sup>221</sup> See ss 12-14 of the Act.

<sup>222</sup> See s 24 of the Act.

<sup>223</sup> See s 15 of the Act.

institutions, the Act also creates offences punishable with a fine or imprisonment for failure to comply with the standards set in the Act.<sup>224</sup>

### **2 5 2 6 The Joint Admission and Matriculation Board Act, 2004**

The Joint Admission and Matriculation Board Act established a body corporate known as the Joint Admission and Matriculation Board (JAMB) which is saddled with the responsibility of administering a centralised admissions system for the universities, polytechnics and colleges of education in Nigeria.<sup>225</sup> The JAMB has the sole responsibility to set the admission standard and to determine who to admit and when to admit candidates into the Nigerian tertiary institutions.<sup>226</sup> The Board consists of a Chairman and other members who all hold office for a period of three years, renewable for a further period of three years.<sup>227</sup> The Board performs vital functions in terms of conducting examinations into higher institutions in Nigeria.

The functions that the Board is to perform include the following: (a) the general control of the conduct of matriculation examinations for admissions into all Universities, Polytechnics and Colleges of Education in Nigeria; (b) the appointment of examiners, moderators, invigilators, members of subject panels and committees and other persons with respect to matriculation examinations and any other matter incidental or connected therewith; (c) the placement of suitably qualified candidates in collaboration with the tertiary institutions after taking into account some other important factors;<sup>228</sup> (d) the collection and dissemination of information on all matters relating to admissions into tertiary institutions or to any other matter relevant to the discharge of the functions of the Board under the Act; and (e) carrying out of

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<sup>224</sup> See s 17 of the Act.

<sup>225</sup> See s 1 and the Preamble to the Joint Admission and Matriculation Board Act (Cap J1), LFN 2004.

<sup>226</sup> See s 5 of the JAMB Act.

<sup>227</sup> The Board chairman and members are appointed by the President on the recommendation of the Minister. It consists of the Chairman who shall have appropriate qualifications; five representatives of all the Universities in Nigeria; three representatives of all the Colleges of education in Nigeria; three representatives of all Polytechnic in Nigeria; one representative of the National Conference of Principals of Secondary Schools; one representative of the Federal Ministry of education; the Registrar of the West African Examination Council or his representative; the Executive Secretary of the National Universities Commission or his representative; the Executive Secretary of the National Board for Technical Education or his representative; the Executive of the National Commission of the Colleges of Education or his representative; the Registrar of the National Business and Technical Examinations Board or his representative; the Registrar of the Board who shall be an ex-officio member; and three other persons to represent interests not otherwise represented on the Board. See s 2(1) of the JAMB Act.

<sup>228</sup> Many factors such as quota system, policy of educational disadvantage state and federal character are, however, introduced into admission process thereby putting merits as secondary in some cases. See s 5(1)(c)(i)-(iv) of the Act.

such other activities as are necessary or expedient for the full discharge of all or any of the functions conferred on it under the Act.<sup>229</sup>

The Board is solely responsible for determining matriculation requirements and conducting examinations leading to undergraduate admissions and also for admissions to National Diploma and Nigerian Certificate in Education courses, but shall not be responsible for examinations or any other selective processes for postgraduate courses.<sup>230</sup> The JAMB works in collaboration with the NUC as far as tertiary education is concerned. While the JAMB determines the number of students each university is to admit, the NUC determines those courses that are to be offered, who will teach them and the qualifications of those to teach those subjects.<sup>231</sup> The JAMB Act recognises any other enactment or law setting up any tertiary institution, it, , provides that in case of conflict or inconsistency, the JAMB Act shall prevail.<sup>232</sup>

#### **2 5 2 7 The West African Examinations Council Act, 2004**

The West Africa Examinations Council (WAEC) is charged with the responsibility of holding such examinations in Nigeria as may be necessary in the public interest in West Africa. The WAEC is established by virtue of the Act as a body corporate with perpetual succession and a common seal.<sup>233</sup> In terms of section 2 of the Act, the function of the WAEC shall be to: (a) review and consider annually, the examinations to be held in West Africa in the public interest; (b) conduct such examinations as it may think appropriate pursuant to the Act and to award certificates and diplomas on the results of examinations so conducted; (c) consider the advisability of inviting and, if thought fit, to invite any other examination body to conduct examinations in West Africa and to: (i) award certificates and diplomas on the result of such examinations; (ii) advise anybody so invited on such adaptations of their examinations as the Council may think necessary for the purposes of the Act; and (iii) assist anybody so invited in the conduct of such examinations in west Africa.

The Act further establishes a National Committee in each of the four West African Countries that acceded to the Act.<sup>234</sup> Each National Committee shall be composed of such

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<sup>229</sup> See generally, s 5((1) of the Act.

<sup>230</sup> See s 5(2) of the Act.

<sup>231</sup> See s 4(1)(b) of the NUC Act.

<sup>232</sup> See s 17(2) of the Act.

<sup>233</sup> See s 1 of the West Africa examination Council Act (Cap W4) LFN 2004.

<sup>234</sup> These countries are the Gambia, Ghana, Nigeria and Sierra Leone.

persons or holders of certain offices as the Council shall think fit. Each member of the National Committee shall hold office for a period of four years and shall be renewable for another term.<sup>235</sup> The National Committee is charged with the duties of (a) advising the Council on any matter that may be referred to it for advice; (b) electing such number of members to the Council as the Council may prescribe; and (c) carrying out such functions as the Council may from time to time delegate to it.<sup>236</sup>

### **2 5 2 8 The National Examinations Council Act, 2004**

The National Examinations Council (NECO) (Establishment) Act established the National Examinations Council. The Council, (together with the WAEC) is responsible for conducting internal and external examinations in secondary schools in Nigeria.<sup>237</sup> The Act establishes a Council and a Governing Board which are saddled with the functions.<sup>238</sup> In terms of section 7 of the Act, the Council shall be responsible for the following functions: (a) revising and considering, annually, in public interest, the examination to be held for admission into Federal Government colleges and other allied institutions;<sup>239</sup> (b) collecting and disseminating information on all matters relating to admission into Federal Government colleges and other allied institutions; and (c) the general control and conduct of the National Common Entrance Examination for admission into Federal Government colleges and other allied institutions.

In addition, the Council also has the power of general control of specific Federal Government Colleges and Academy and without prejudice to the power of the West African Examinations Council, the general control of the conduct of the internal and external Senior Secondary School Certificate Examinations in Nigeria. It also has power to conduct a Standard National Assessment of Educational Performance at junior and senior secondary school levels;

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<sup>235</sup> See s 14 of the Act.

<sup>236</sup> See s 15 of the Act.

<sup>237</sup> See the Preamble and s 1 of the National Examinations Council (NECO) (Establishment) Act, (Cap N37) LFN 2004.

<sup>238</sup> The Council and the Governing Board shall consist of a Chairman; one person representing the Federal Ministry of Education; six persons, one to represent each of the six-geo-political zones of Nigeria; two representatives representing the Nigeria Conference of Principals of Secondary Schools; three persons to represent the Universities in Nigeria; one person representing the National Employers Consultative Association; the Registrar of JAMB or his representative; the Registrar of NECO, one person representing the National Parents Teachers Association (NPTA); and a representative of the National Educational Research and Development Council. See s 2 of the Act.

<sup>239</sup> Allied institutions include the Command Secondary School, Air Force Secondary Schools and such private secondary schools as may be admitted by the Council from time to time, to undertake any examinations conducted by the Council. See s 29 of the Act.

conducting research leading to national improvement of testing and examination procedures at junior and senior secondary school levels in the country.<sup>240</sup>

### **2 5 2 9 Compulsory, Free and Universal Basic Education Act, 2004**

In 2004, the Compulsory, Free and Universal Basic Education (UBE) Act was enacted.<sup>241</sup> The UBE Act requires every government in Nigeria to provide free, compulsory, and universal basic education.<sup>242</sup> It defines “basic education” as “early childhood care and education and nine years of formal schooling”<sup>243</sup> The Act only provides for free and compulsory basic education for every child up to the end of junior secondary education,<sup>244</sup> excluding remedial basic education for adults. It creates a duty on all parents to ensure that their children or wards attends and completes basic education a breach of which attracts punishment of a criminal sanction.<sup>245</sup>

To implement its provisions, the Act creates a Universal Basic Education Commission (UBEC) to be funded by a block grant of not less than 2 percent of the consolidated revenue fund of the federal government, contributions from state and local governments, or from donor funds.<sup>246</sup> The functions of the Commission extend to policy development on basic education, provision of adequate basic education facilities, and governance of the basic national curricula and syllabi and other necessary instructional materials in use in early childhood care and basic education.

## **2 6 Summary and Conclusion**

This chapter has examined the legal framework guaranteeing the right to education in South Africa and Nigeria. It points out that the right to education is given wide recognition at the global, regional and national levels. The chapter reveals that there is a comprehensive list of legislation, laws and policies which guarantee the right to education, as well as the administration and managements of schools in South Africa and Nigeria. A few conclusions

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<sup>240</sup> See generally, s 7(a)-(l) of the Act.

<sup>241</sup> See Federal Republic of Nigeria, *Official Gazette*, 91(66), Govt. Notice No. 142, Lagos, 2004.

<sup>242</sup> S 2(1) of the Act.

<sup>243</sup> S 15(1).

<sup>244</sup> Ss 2(1) & 3(1).

<sup>245</sup> S 2(2) & (4).

<sup>246</sup> In Nigeria, there is a distinction between the Federation Account and the Consolidated Revenue Fund. All revenue accruable to the Federation and its constituent units is paid into a Federation Account. The Federal Government and each of the States are then required to maintain a Consolidated Revenue Fund into which incomes and revenue accruable to them are paid. See ss 162(1) & 80(1) of the 1999 Nigerian Constitution. See also, Odinkalu “The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights” in Gauri & Brinks (eds) *Courting Social Justice (Judicial Enforcement of Social and Economic Rights in the Developing World)* (2008) 183-223 202.

should be drawn from those conventions, declarations, legislation and policy documents reviewed in this chapter. Apart from providing for the right to education, the reconstruction and transformation of education constitutes the most important focus of those instruments. They present education as a key national and international project which marks a path for individual, community and collective development.

Working from the discussions in the chapter, another point that needs to be made is that educational policies are not static; they are constantly subjected to various influences that impact upon them, as well as economic and social changes nationally and internationally. This is essential because, to be relevant and meaningful, policies and laws must reflect and align with social and economic developments in a particular country. The chapter constitutes the fulcrum of the thesis and has provided a solid foundation on which the discussions on other chapters will be based. The next three chapters will examine the right to education in South Africa and Nigeria with emphasis on the specific levels of education namely, the right to primary, secondary and higher education respectively.

# Chapter 3

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## The Right to Primary Education

“At the level of primary education, the States Parties are not only obliged to make primary education free, they also should make it compulsory.”<sup>1</sup>

### 1 Introduction

Traditionally, levels of education are classified into primary, secondary and higher education and this classification is followed in the major international human rights instruments on the right to education.<sup>2</sup> At the national level, both South Africa and Nigeria grouped their education phases into primary school, secondary school and higher/tertiary education.<sup>3</sup> Although the South African Constitution does not use the term “primary education” it, however, guarantees the right to “basic education” and to “further education” in its provisions.<sup>4</sup> Basic education is defined as the phase of education falling within the General Education and Training phase, and it includes one year of pre-school up to grade 9.<sup>5</sup> Similarly, the Nigerian Child’s Rights Act,<sup>6</sup> which translates the educational objective in the Nigerian Constitution into legal right, states that “every child has the right to free, compulsory and universal basic education.”<sup>7</sup> In terms of this Act, basic education includes primary school education and junior secondary education.<sup>8</sup>

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<sup>1</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child: Article 28- The Right to Education* (2006) 23.

<sup>2</sup> See art 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 and art 28 of the Convention on the Rights of the Child (CRC), 1989 which followed this classification. However, the Universal Declaration of Human Rights (UDHR), 1948 in its art 26 used the word “elementary” and “fundamental” stages as well as “higher education.”

<sup>3</sup> See s 18(3) of the Constitution of the Federal Republic of Nigeria (CFRN), 1999.

<sup>4</sup> See art 29(1)(a) & (b) of the Constitution.

<sup>5</sup> See Khoza *Socio-Economic Rights in South Africa* 2 ed (2007) 419.

<sup>6</sup> Cap C 50, Laws of the Federation, 2004.

<sup>7</sup> See s 15(1) of the Act.

<sup>8</sup> See s 15(2) of the Act. Para 15 of the National Policy on Education, 2004 (Nigeria) provides that “[b]asic education shall be of 9-year duration comprising 6 years of primary education and 3 years of junior secondary school education...”

The right to primary education in South Africa and Nigeria shall be the focus of this chapter while the right to secondary school education and higher education will be discussed in chapters four and five respectively. It should be pointed out at the onset that in both South Africa and Nigeria, the term “basic education” refers to the compulsory phase of education and it covers the primary school level and the lower secondary school. For this reason, in this chapter, the discussion on the right to primary school education will not be examined in isolation but will, as much as practicable, encompass “the right to basic education.”

Primary education is the first level of education recognised in all the international human rights instruments that guarantee the right to education.<sup>9</sup> Apart from the home being the first agent of socialisation, primary school is the first place that introduces “formal education” or literacy to children.<sup>10</sup> According to the CESCR, “[t]he main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that all the basic learning needs of all children are satisfied...”<sup>11</sup> This makes primary education the foundation upon which all other levels of education are built.<sup>12</sup> In terms of UNESCO’s International Standard Classification of Education (ISCED) 1997, pre-primary education programmes are designed primarily to introduce very young children to a school-type environment, that is, to provide a bridge between the home and a school-based atmosphere.<sup>13</sup> As

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<sup>9</sup> According to UNESCO’s International Standard Classification of Education (ISCED) 1997, the notion of “levels” of education is taken to be broadly related to gradations of learning experiences and the competences which the contents of an educational programme require of participants if they are to have a reasonable expectation of acquiring the knowledge, skills and capabilities that the programme is designed to impart. It is essentially a construct based on the assumption that educational programmes can be grouped, both nationally and cross-nationally, into an ordered series of categories broadly corresponding to overall knowledge, skills and capabilities required of participants if they are to have a reasonable expectation of successfully completing the programmes in these categories. The classification represents broad steps of educational progression from very elementary to more complex experiences with the more complex the programme, the higher the level of education. See paras 28 & 29 of ISCED, 1997.

<sup>10</sup> See David & Olabanji “A Critical Review of Management or Primary Education in Nigeria” 2008 3(6) *The Social Sciences: Medwell Journals* 411-419 411.

<sup>11</sup> CESCR General Comment No. 13: The Right to Education para 9; see also, art 5 of the World Declaration on Education for All.

<sup>12</sup> It is submitted that primary education is the bedrock of the other tiers of education; the stability and sustainability of all systems of governance, social, and economic development in a country depend on how well the nation’s primary education is planned and managed. As such, primary education is fundamental to accelerated and sustained development. See Nwonwu “The Role of Universal Primary Education in Development- Implementation Strategies and Lessons from Past Mistakes” 2008 37(4) *Africa Insight* 137-147 137.

<sup>13</sup> UNESCO’s International Standard Classification of Education (ISCED) 1997, para 37.



such, pre-primary education is classified as Level 0 with no formal educational programmes taking place at this level.<sup>14</sup>

At the global level, the right to primary education is guaranteed in a number of important human rights instruments. Article 13(2)(a) of the ICESCR for instance provides that “[t]he States parties to the present Covenant recognise that, with a view to achieving the full realisation of this right: (a) Primary education shall be compulsory and available free to all.” This provision is further reiterated in article 28(1)(a) of the CRC. The article also provides that “States parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all.”

Before going further, however, it is apposite at this stage to examine the aims of education as postulated in article 13(1) of the ICESCR and article 29(1) of the CRC. Following this, the essential features of education, namely availability, accessibility, acceptability and adaptability will be examined. Education, in all its forms and at all levels, is required to exhibit these features. Discussions on the aims of education as well as the features of education become necessary because they form the base line for discussions on other levels of education. After this, the right to primary education as guaranteed under the international human rights instruments, South Africa, and Nigeria will be examined respectively. The chapter will compare the positions in the two countries before concluding.

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<sup>14</sup> In South Africa, pre-primary education is outside the definition of compulsory basic education which covers the General Education and Training (GET) over three phases: foundation phase (grades 1-3); intermediate phase (grades 4-6); and senior phase (grades 7-9). A reception year, grade R, will only become compulsory from 2010. See Pendlebury “Meaningful Access to Basic Education” in Pendlebury, Lake & Smith (eds) *South African Child Gauge 2008/2009* (2009) 24 25. Similarly, in Nigeria, in terms of s 15 of the Child’s Rights Act, 2003 basic education covers only primary school education and junior secondary education, excluding pre-primary school education. Also, s 18 of the CFRN, 1999 only obliges the government to provide free-primary education without mentioning pre-primary education. However, in terms of the Federal Ministry of Education Policy Paper, basic education is defined as “the education which every Nigerian receives between the ages of three (3) and fourteen (14) years. It consists of early childhood [pre-primary], primary, junior secondary, as well as adult and non-formal education.” See Federal Ministry of Education *Roadmap for Nigerian Education Sector* (2009) 8 & 18. It is submitted that this document merely defines basic education to include pre-primary education but does not impose any obligation on the government to provide pre-primary education. This position is taken in view of the fact that most pre-primary schools in the country are maintained by private/independent owners.

## 2 The Aims and Content of Education

The right to receive education does not only guarantee access to education but also implies that the aims of education must be met.<sup>15</sup> The starting point here is the provision of article 13(1) of the ICESCR which provides:

“The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”

This provision itemizes the aims of education. These aims apply to all forms of education, whether public or private, formal or non-formal.<sup>16</sup> It is submitted that by providing in article 13(1) of the ICESCR that education should be directed to “the full development of the human personality”, it is envisaged that education should serve to liberate the individual and prevent false educational ideals by the State in its pursuit of narrow state interests.<sup>17</sup> The aims of “respect for human rights and fundamental freedoms” and “understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups” were meant as an expression of criticism and condemnation of all forms of racism.<sup>18</sup> Thus, aims of education were included in article 13 of the ICESCR to strengthen the United Nations’ role in maintaining

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<sup>15</sup> Mehedi *The Realisation of Economic, Social and Cultural Rights: the Realisation of the Right to Education, including Education in Human Rights- The Content of the Right to Education* (UN Doc.E/CN.4/Sub.2/1999/10, 1999) par 40; see also, Verheyde *A Commentary on the United Nations Convention on the Rights of the Child: Article 28- The Right to Education* 1.

<sup>16</sup> See CESCR General Comment No. 13: The Right to Education (art 13 ICESCR) (Twenty-First Session, 1999) [UN Doc. E/2000/22] para 4.

<sup>17</sup> The reason for the inclusion of the aims of education in art 13 of the ICESCR is understood considering the historical context which accompanied the drafting of the International Bill of Human Rights in the late 1940s and the early 1950s. At that time, the world community debated the causes and consequences of World War II. The United Nations Organization had just been founded in 1945 to ensure the future maintenance of international peace and security, in order to prevent any further world war. The Commission on Human Rights, which prepared the UN human rights instruments, was fully aware of this background. When drafting article 13, it was appreciated, therefore, that an education system, premised on false educational ideals, constituted a threat to the commitment of maintaining international peace and security. In particular, the Jewish side pointed to the disastrous consequences of the national socialist education system in Germany, which was well-organized, but, at the same time, corrupted by an ideology which was dictated blind obedience and racial hatred. These false ideals were an important cause of the Second World War. See Beiter *The Protection of the Right to Education by International Law* (2006) 463.

<sup>18</sup> 463-464.

global peace. Educational aims, therefore, reflect the fundamental purposes and principles of the United Nations as enshrined in articles 1 and 2 of the UN Charter.<sup>19</sup>

There is a contention that the aims of education as reflected in the ICESCR are not elaborate enough as there have been new developments which are not reflected in article 13 of the Covenant. In this regard, Beiter argues that the catalogue of aims of education as stated in article 13 of the ICESCR are somewhat outdated.<sup>20</sup> Similarly, the CESCR commented as follows:

“The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States Parties are required to ensure that education conforms to the aims and objectives identified in article 13(1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29(1)), the Vienna Declaration and Programme of Action (Part I, para 33 and Part II, para. 80), and the Plan of Action for the United Nations decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13(1) of the Covenant, they also include elements which are not expressly provided for in article 13(1), such as specific references to gender equality and respect for the environment. These new elements are implicit in, and reflect a contemporary interpretation of article 13(1). The Committee obtains support for this view from the widespread endorsement that the previously mentioned texts have received from all regions of the world.”<sup>21</sup>

Apart from reiterating those aims enumerated in article 13(1) of the ICESCR, the CRC also provides additional ones. Article 29(1) of the CRC provides:

“States Parties agree that the education of the child shall be directed to:

- (a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for natural environment.”

Commenting on the above provision of article 29(1) of the CRC, the Committee on the Rights of the Child (CRC Committee) states that the aims of education as contained in the Convention

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<sup>19</sup> See CESCR General Comment No. 13: The Right to Education (art 13 ICESCR) para 4.

<sup>20</sup> See Beiter *The Protection of the Right to Education* 467.

<sup>21</sup> See CESCR General Comment No. 13 para 5.

are of far-reaching importance.<sup>22</sup> According to the Committee, the aims of education agreed by the States parties promote, support and protect the core value of the Convention, namely, the human dignity innate in every child and his or her equal and inalienable rights. The aims are all linked directly to the realisation of the child's human dignity and rights.<sup>23</sup> The aims of education also insist upon the need for education to be child-centred, child-friendly and empowering. Thus, education must be designed "to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values."<sup>24</sup> Education must empower the child, by developing his or her skills, learning capacities and human dignity.

The Committee notes further that the aims of education agreed to by the States parties make it clear that the right to education is not only a matter of access, but also of content. According to it, "[a]n education with its contents firmly rooted in the values of article 29(1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalisation, new technologies and related phenomena."<sup>25</sup> The aims of education should also reflect the conviction that education should be directed to a wide range of values which overcome the boundaries of religion, nation and culture. Some of these diverse values might be thought to be in conflict with each other in certain cases, however, the importance of the provisions on the aims of education lies precisely "in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference."<sup>26</sup>

The aims of education also underline that the child has a right to a specific quality of education. The content of the curriculum, the pedagogical methods and the environment within which education takes place must promote the values stated in the aims of education.<sup>27</sup> According to the CRC Committee,

"[T]he curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's

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<sup>22</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education (art 29(1) CRC) (Twenty-Sixth Session, 2001) [UN Doc. CRC/C/103] para 1.

<sup>23</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education para 1.

<sup>24</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education para 2.

<sup>25</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education para 3.

<sup>26</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education para 4.

<sup>27</sup> Beiter *The Protection of the Right to Education* 465.

evolving capacities; teaching methods should be tailored to the different needs of different children. Education must also be aimed at ensuring that essential life skills are learnt by every child... Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.”<sup>28</sup>

Apart from the point that education must also be directed to the development of the child’s personality, it must also be free from any form of discriminatory practices. As formulated by the CRC Committee:

“Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values [of the aims of education], including respect for differences, and challenges all aspects of discrimination and prejudice. Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena. Emphasis must also be placed upon the importance of teaching about racism as it has been practiced historically and particularly as it manifests or has manifested itself within particular communities.”<sup>29</sup>

The aims of education stress that a holistic approach to education must be followed. This is an approach which ensures that there is a balance between the physical, mental, spiritual and emotional aspects of education. Only a holistic approach to education guarantees that the child’s ability to participate fully and responsibly in a free society is maximized. It is submitted that “the type of teaching that focused primarily on accumulation of knowledge, prompting competition and leading to an excessive burden of work on children, may seriously hamper the harmonious development of the child to the fullest potential of his or her abilities and talents.”<sup>30</sup> The CESCR obliges States parties to ensure that curricula, for all levels of the educational system, are directed to the objectives of education identified in article 13(1) of the ICESCR. They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13(1).<sup>31</sup> It is identified that the aims of education in article 13 of the ICESCR are limited.

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<sup>28</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education para 9.

<sup>29</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education para 11.

<sup>30</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education para 12.

<sup>31</sup> CESCR General Comment No. 13: The Right to Education (art 13 ICESCR) para 49.

Thus, States parties must ensure that curricula for all levels of education reflect the content of article 29(1) of the CRC in addition to reflecting the provision of article 13 of the ICESCR.<sup>32</sup>

Garnered from the foregoing, before education can be said to be complete, it must exhibit the following four main objectives. Firstly, education should enable individuals to develop to their fullest potential their sense of dignity and their personality, talents, mental and physical abilities.<sup>33</sup> According to the CESCR, of all the education aims or objectives, this is the most fundamental.<sup>34</sup> The implication of this aim is that education must provide all those educational opportunities necessary for the development of all dimensions of human personality, namely, physical, intellectual, spiritual, psychological and social.<sup>35</sup> It implies that education must not be limited to the transmission of academic knowledge alone. The goal is that every person should be able to develop all aspects of his or her personality to the best of his or her abilities and talents, to become a harmonious person.<sup>36</sup> It requires that education should make the individuals aware of their own inherent worth and of the human rights which accrue to them.<sup>37</sup>

Secondly, education should allow individuals to fully participate in society. That is, no matter what their economic or personal circumstance, individuals should receive an adequate education to genuinely prepare them to become meaningful participants in the political system of the society in which they live.<sup>38</sup> This aim of education requires that education should not solely be theoretically oriented, but that it should also teach the individual how to satisfy his or her practical needs in life. This is not so much for his or her sake alone, but for that of society.<sup>39</sup> Thirdly, education should support the overall objectives of human rights which are to develop “respect for human rights and fundamental freedoms” and to prepare the individual “for a responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples.”<sup>40</sup> Lastly, education should allow individuals to

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<sup>32</sup> General Comment No. 1 of the Committee on the Rights of the Child: The Aims of Education paras 17-28.

<sup>33</sup> See art 26(2) of the UDHR, art 13(1) of the ICESCR, art 29(1) CRC.

<sup>34</sup> CESCR General Comment No. 13: The Right to Education para 4.

<sup>35</sup> Beiter *The Protection of the Right to Education* 470-471.

<sup>36</sup> See Arajarvi “Article 26” in Eide, Alfredsson, Melander, Rehof & Rosas (eds) *The Universal Declaration of Human Rights: A Commentary* (1992) 405-428 409.

<sup>37</sup> Arajarvi “Article 26” in Eide, Alfredsson, Melander, Rehof & Rosas (eds) *The Universal Declaration of Human Rights* 409.

<sup>38</sup> Art 29 CRC.

<sup>39</sup> Beiter *The Protection of the Right to Education* 471.

<sup>40</sup> See art 26(2) of the UDHR; art 13(1) of the ICESCR; art 29(1) CRC, and art 1(1)-(3) of the UN Charter.

become economically productive members of the community in which they live.<sup>41</sup> Having identified the general aims of education, the specific aims of primary education are now examined.

## **2 1 The Aims of Primary Education**

One of the principal advantages of the whole of children's education at the primary school stage is the opportunity it offers of relating education continuously to children's needs at that stage.<sup>42</sup> This includes for example, opportunities for physical development and recreation, for learning manual skills and acquiring some facilities in simple creative arts and for the development and satisfaction of children's curiosity about their immediate environment.<sup>43</sup> It also provides training in the basic skills of reading, writing and numbering, and the opportunities for the child to become sufficiently familiar with these processes, to draw on them freely and fluently towards the end of the primary school experience.<sup>44</sup>

Another important aspect of education at this stage is the development of acceptable standards of behaviour and a sense of social responsibility. It is expected that children's ideas of what is good behaviour will obviously change very much during the time they are in primary school.<sup>45</sup> In the same vein, UNESCO has recommended that general education at the first level (primary school) should "be considered to cover broadly six years, be general and not vocational in intention, and include elements which inculcate manual dexterity and respect for it, provide experience in creative activities and stimulate an intelligent approach to the practical problems of the home and the community."<sup>46</sup>

From the foregoing, the aims and objectives of primary school education may be summarized as follows: (a) to develop sound standards of individual conduct and behaviour; (b) to instil some understanding of the community and what is of value for its development and of the contribution which the individual can make to the community in which he or she lives; (c) to develop a lively curiosity leading to a desire for knowledge not confined to the immediate

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<sup>41</sup> See generally, Bassor & Jones "Fostering Inclusive Societal Values through Law" (2002) 10(4) *The International Journal of Children's Rights* 378.

<sup>42</sup> Burns *African Education: An Introductory Survey of Education in Commonwealth Countries* (1965) 25.

<sup>43</sup> 25.

<sup>44</sup> 25.

<sup>45</sup> 25-26.

<sup>46</sup> See UNESCO *Final Report of the Conference of African States on the Development of Education in Africa* (Addis Ababa, 1961) (Chap VI) 49.

environment; (d) to impart permanent literacy, and (e) to impart some skill of hand and a recognition of the value of manual work.<sup>47</sup> Having identified the aims of education and primary education, the next part of this chapter will now examine the element of the core content of the right to education.

## 2.2 Elements of the Core Content of the Right to Education

Some of the elements which make up the core content of the right to education are stipulated in articles 13 and 14 of the ICESCR. The concept of “core content” has been explained in details in chapter one. It suffices to reiterate here that minimum core content is “the nature or essence of a right.”<sup>48</sup> That is, the essential element or elements without which a right loses its substantive significance as a human right and in the absence of which a State party should be considered to be in violation of its international obligations.<sup>49</sup> It is described as a “floor” below which condition should not be permitted to fall.<sup>50</sup>

In its General Comments 13, the CESCR defines article 13(2) as the right to receive an education.<sup>51</sup> It distinguishes four interrelated and essential features of education, namely: availability, accessibility, acceptability and adaptability.<sup>52</sup> These features are often together called the 4-A scheme or typology of education and serve as useful tool to analyse the content of the right to education in any particular country.<sup>53</sup> It is observed that the State’s obligation under article 13(2) of the ICESCR presents an obligation to make education available, accessible, acceptable and adaptable. This 4-A scheme/features apply to all levels of education. According to the CESCR, “education in all its forms and at all levels shall exhibit the following interrelated and essential features: [availability, accessibility, acceptability and adaptability].”<sup>54</sup>

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<sup>47</sup> See Ministry of Education, Western Region (Ibadan) Primary School Syllabus, Part I. This was quoted originally from A Study of Educational Practice in British West Africa (1951). See also, Burns *African Education* 26.

<sup>48</sup> Brand, D & Russell, S (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) 15.

<sup>49</sup> 15.

<sup>50</sup> 15; see also, Roithmayr “Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education” 2003 19(3) *SAJHR* 382 402; Currie & de Waal *The Bill of Rights Handbook* (2005) 584.

<sup>51</sup> See Khoza (ed) *Socio-Economic Rights in South Africa* (2007) 417.

<sup>52</sup> CESCR General Comment No. 13: The Right to Education para 6; see Tomasevski “Preliminary Report of the Special Rapporteur on the Right to Education” Submitted in accordance with Commission on Human Rights Resolution 1998/33 available at <http://www/hri.ca/fortherecord1999/documentation/commission/e-nc4-199-49.htm> (accessed 02 December 2008).

<sup>53</sup> See Khoza (ed) *Socio-Economic Rights in South Africa* (2007) 418.

<sup>54</sup> CESCR General Comment No. 13: The Right to Education para 6.



This observation makes a brief discussion on these four features necessary at this stage, although, a more detailed examination of these features will be undertaken in chapter seven, which deals with implementation of the right to education.

Availability indicates that the State must provide education and make it available to all children. This embodies the obligation to take financial and technical actions in order to ensure that an education system of good quality is established and maintained.<sup>55</sup> It requires that functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party.<sup>56</sup> This imposes an obligation on the State to make functioning education available to those who live in remote areas and those who cannot, for any reason, attend an established institution.<sup>57</sup> The availability obligation can be fulfilled by means of several models. Firstly, the government can establish a network of public schools. Secondly, the government can fund institutions run by non-state actors. And thirdly, the government can have a mixture of both public schools and private schools.<sup>58</sup>

Accessibility on the other hand means that educational institutions and programmes have to be accessible to everyone, without discrimination.<sup>59</sup> It means that educational facilities provided by the State must meet accessibility criteria. These include physical and economic accessibility and access on a non-discriminatory basis.<sup>60</sup> If students do not have sufficient access to appropriate education, the right to education has not been satisfied.<sup>61</sup> Ensuring that education is economically accessible requires that those students who live in relative poverty should be assisted or supported by the State to ensure that they are able to access education.<sup>62</sup> Making education free at all levels or provision of bursaries and scholarships to students will achieve this aim.

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<sup>55</sup> Verheyde *Article 28 The Right to Education* (2006) 15-16.

<sup>56</sup> CESCR General Comment No. 13: The Right to Education para 6(a).

<sup>57</sup> See Coomans "Content and Scope of the Right to Education and Obstacles to Its Realisation" in Donders & Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 183-229 198.

<sup>58</sup> Verheyde *Article 28 The Right to Education* 17.

<sup>59</sup> CESCR General Comment No. 13: The Right to Education para 6(b); Verheyde *Article 28 The Right to Education* 17.

<sup>60</sup> Coomans "Content and Scope of the Right to Education and Obstacles to Its Realisation" in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 198.

<sup>61</sup> See art 28(C) & (d) of the CRC.

<sup>62</sup> Woolman & Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 131-132.

Acceptability requires that the form and substance of education, including curricula and teaching methods, have to be acceptable to students and parents. It also requires that the form and content of education have to be relevant, culturally appropriate and of good quality.<sup>63</sup> To satisfy this requirement, the education provided must be consistent with the range of the rights of the child set out in the human rights instruments such as the ICESCR and the CRC. These include that schools should be child-friendly, based on the right of the child to be curious, to ask questions and receive answers, to argue and disagree, to test and make mistakes, to know and not know, to create and be spontaneous, to be recognised and respected. Acceptability also requires that learners are not to be treated in a manner that violates their dignity.<sup>64</sup> In addition, parents should have freedom to choose an education for their children free from state interference. They should have choice and be able to choose between state owned and private educational institutions.<sup>65</sup>

Adaptability requires that educational policies should be able to take full account of individual differences and should be able to give special attention to the needs of those children excluded from mainstream education, that is, the children with disabilities.<sup>66</sup> There should be the necessity for curriculum flexibility, addition and adaptation to meet special needs. Curricula should be adapted to suit the learning style of children noting also the children with disabilities. Government must provide support services for those children who require assistance, and these should be available in a manner which neither discriminates against children and families, nor imposes a discriminatory financial burden.<sup>67</sup> With the foregoing discussions on the aims and core content of education, is necessary to examine the right to primary education as guaranteed under the international human rights instruments. The next section is devoted to doing this.

### **3 The Right to Primary Education**

Article 13(2)(a) of the ICESCR states: “the States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right to education]: (a) Primary education shall be compulsory and available free to all.” Primary education is fundamental for

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<sup>63</sup> CESCR General Comment No. 13: The Right to Education para 6(c).

<sup>64</sup> Woolman & Fleisch *The Constitution in the Classroom* 134.

<sup>65</sup> Verheyde *Article 28 The Right to Education* 17.

<sup>66</sup> 17.

<sup>67</sup> See generally, Bassler & Jones (2002) 10(4) *The International Journal of Children's Rights* 380-385; see also, Coomans “Content and Scope of the Right to Education as a Human Rights and Obstacles to Its Realisation” in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 189.

the development of a person's abilities. As such, it can be rightfully defined as a minimum claim.<sup>68</sup> What exactly is the meaning of the term "primary education"? Neither the ICESCR nor the CRC defines it; however, guidelines for using this concept have been developed within the framework of the international organisations such as UNESCO. Further guidance is also taken from the General Comment No.13 of the CESCR which, though not expressly defining the term, explains its main component in terms of the 4-A scheme explained above.<sup>69</sup>

In determining the meaning of "primary education", reference shall be made to the ISCED.<sup>70</sup> In terms of this document, the main criterion of primary education is that it is the beginning of systematic apprenticeship of reading, writing and mathematics along with an elementary understanding of other subjects such as history, geography, natural science, social science, art and music.<sup>71</sup> In some cases, religious instruction is featured.<sup>72</sup> The document also states that primary education covers six years of full-time schooling and is the start of compulsory education.<sup>73</sup> At this level of education, the programmes are organised in units or projects rather than by subjects. This is a principal characteristic differentiating programmes at this level in most countries from those at secondary school level.<sup>74</sup>

The CESCR states that "[t]he main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that all the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community."<sup>75</sup> Module at primary school education level includes the teaching of basic learning needs and basic education.<sup>76</sup> As earlier explained, while primary education is not synonymous with basic education, there is, however, a close correspondence between the two. Primary education constitutes the most important component of basic

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<sup>68</sup> For example, the Supreme Court of India has held the right to (primary) education to be implicit in the right to life because of its inherent fundamental importance. See *Unni Krishnan and Others v State of A.P. and Others*, 4 February (1993) 1 SCC 645; see also, Coomans "Content and Scope of the Right to Education and Obstacles to Its Realisation" in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 198.

<sup>69</sup> CESCR General Comment No. 13: The Right to Education para 8.

<sup>70</sup> This document was approved by UNESCO's General Conference in 1997 and its main purpose is to serve as an instrument suitable for presenting statistics of education both within countries and internationally.

<sup>71</sup> See para 45 of the ISCED.

<sup>72</sup> See para 45 of the ISCED.

<sup>73</sup> See para 46 of the ISCED. In some cases, the duration of primary school extends up to seven years.

<sup>74</sup> See para 47 of the ISCED.

<sup>75</sup> CESCR General Comment No. 13: The Right to Education para 9; see also, art 5 of the World Declaration on Education for All.

<sup>76</sup> Coomans "Content and Scope of the Right to Education and Obstacles to Its Realisation" in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 198.

education.<sup>77</sup> In the light of this observation, it is therefore appropriate at this stage to examine the meanings and distinguishing features of the two concepts.

### 3 1 The Concept of “Basic Education” within the Primary School Context

Although, the concepts “primary education” and “basic education” are not synonymous, there is a close link between the two concepts since primary education constitutes an important component of basic education.<sup>78</sup> The term “basic education” is nowadays often used within the framework of international conferences on education such as the World Declarations on Education for All in Jomtien, 1990 and Dakar, 2000.<sup>79</sup> In terms of article 4 of the Jomtien Declaration 1990, “the focus of basic education must be on actual learning acquisition and outcome, rather than exclusively upon enrolment, continued participation in organized programmes and completion of certification requirements.”<sup>80</sup>

Coomans submits that apart from a school and classroom system, basic education may be given in less traditional forms, such as village or community-based, or in the open air.<sup>81</sup> Basic education within the context of the right to primary education as an element of the core content of the right to education would include literacy, arithmetic, skills relating to one’s health, hygiene and personal care, and social skills such as oral expression and problem-solving. He further contends that basic education must incorporate some teaching of concepts and values as laid down in article 26(2) of the UDHR, article 13(1) of the ICESCR and article 29(1) of the CRC, including respect for human rights.<sup>82</sup>

Usually, basic education is aimed at children within the framework of primary schooling. However, such education is also relevant for other persons who lack basic knowledge and skills. This dimension is called fundamental education in terms of article

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<sup>77</sup> CESCR General Comment No. 13: The Right to Education (art 13 ICESCR) para 9; see also, UNICEF *Advocacy Kit: Basic Education* (1999) sec 1, p. 1.

<sup>78</sup> CESCR General Comment No. 13: The Right to Education (art 13 ICESCR) para 9; see also, UNICEF *Advocacy Kit: Basic Education* (1999) sec 1, p. 1.

<sup>79</sup> Coomans, however, contends that the term is not part of international human rights law. He contends further that basic education relates to the content of education, not the form (formal or non-formal schooling) in which it is presented. See Coomans “Content and Scope of the Right to Education and Obstacles to Its Realisation” in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 198.

<sup>80</sup> World Declaration on Education for All in Jomtien, 1990; see also, Coomans “Content and Scope of the Right to Education and Obstacles to Its Realisation” in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 198.

<sup>81</sup> Coomans “Content and Scope of the Right to Education and Obstacles to Its Realisation” in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 198.

<sup>82</sup> 198-199.

13(2)(d) of the ICESCR.<sup>83</sup> This type of education is rather broad and would include, *inter alia*, basic literacy and arithmetic, but also basic professional skills which enable people to function as members of society, take part in social and cultural life, generate income, participate in projects aimed at community development and have access to and utilise information from a variety of sources. The enjoyment of this right is not limited by age or gender; it extends to children, youth and adults, including older persons. It is an integral component of adult education and lifelong learning.<sup>84</sup> Important components of these two concepts are that they must be free and compulsory.

### 3 2 Free and Compulsory Primary Education

In terms of article 13(2)(a) of the ICESCR, primary education has two distinctive features: it is “compulsory” and must be “available free to all.” The element of compulsion here highlights the fact that neither parents or guardians nor the States are entitled to treat as optional, the decision as to whether a child should have access to primary education.<sup>85</sup> Compulsory education entails obligations at two levels: first, State parties must ensure that enough schools are available so that all children of primary school age can go to school. Secondly, parents and guardians must not keep their children away from school but rather secure their attendance at school.<sup>86</sup> The requirement of compulsory education obliges State parties to enact laws which make primary education compulsory.<sup>87</sup> To achieve compulsory education, it is submitted that States should encourage school attendance rather than enforcing sanctions against absenteeism.<sup>88</sup>

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<sup>83</sup> Fundamental education refers to education given to those persons who have not received or completed the whole period of their primary education. See art 13(2)(d) of the ICESCR.

<sup>84</sup> Coomans “Content and Scope of the Right to Education and Obstacles to Its Realisation” in Donders & Volodin (eds) *Human Rights in Education, Science and Culture* 198; see also, General Comment No. 13 paras 23 & 24.

<sup>85</sup> See CESCR General Comment No. 11: Plans of Action for Primary Education (art. 14), E/C.12/1999/4 of 10 May 1999, para 6.

<sup>86</sup> Beiter *The Protection of the Right to Education* 511.

<sup>87</sup> 512.

<sup>88</sup> See Tomasevski *Economic, Social and Cultural Rights: The Right to Education*, (Preliminary Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Education) (1999), UN Doc. E/CN.4/1999/49 para 77; see also, Van Bueren *The International Law on the Rights of the Child* (1995) 238-239. It is submitted that “a periodic census of the children of school age should be taken in each district, as a means of supervising the application of compulsory education. In obvious cases of intentional failure by parents or guardians to comply with compulsory education regulations, the imposition of penalties may have good results; but the general policy should be one of encouragement. It is essential that families and teachers should co-operate; parents’ associations, as well as officials of the local authority and social workers, can render very

One way of doing this is that the State could ensure that schools are child-friendly, and provide education which is relevant to the child's needs. Since financial obstacles are a significant reason for parents keeping their children away from school, measures should be taken to remove financial obstacles impeding access to primary education.<sup>89</sup> The principle of compulsory education is also based on the notion that, in the best interests of the child, a child must attain minimum level of education. It ensures that the child's right to receive education is not impeded by parental neglect, abuse or ignorance, cultural resistance or child labour.<sup>90</sup> The word "compulsory" as used in article 13(2)(a) of the ICESCR indicates neither coercion nor compulsion on the part of the State. It also does not mean that the family should follow a specific type of education,<sup>91</sup> or that the State has a monopoly over education. Rather, it imposes a positive obligation on the State to ensure minimum levels of education.

Primary education must be made available free of charge. It is observed that the right is expressly formulated so as to ensure the availability of primary school education without charge to the child, parents or guardians. It is submitted that making education "compulsory" is contingent on making it free. The principles of free education and compulsory education are therefore interrelated.<sup>92</sup> It is, therefore, argued that parents cannot be obliged to send their children to school, if they cannot afford the costs of schooling. Beiter posits that the requirement of free education at the primary school level applies unconditionally.<sup>93</sup> Determining the ambit of the principle of free education, the CESCR has commented as follows:

"The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realisation. They are also often very regressive in effect... Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis..."<sup>94</sup>

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real assistance in cases of failure to comply with the regulations." See UNESCO and its Programme VIII: *The Right to Education* (1952) 13.

<sup>89</sup> Beiter *The Protection of the Right to Education* 512.

<sup>90</sup> See CESCR General Comment No. 11: Plans of Action for Primary Education para 6.

<sup>91</sup> Halvorsen "Notes on the Realisation of the Human Rights to Education" 1990 (12) *Human Rights Quarterly* 351-352.

<sup>92</sup> See Verheyde *A Commentary on the United Nations Convention on the Rights of the Child- Article 28 The Right to Education* 23.

<sup>93</sup> Beiter *The Protection of the Right to Education* 512.

<sup>94</sup> CESCR General Comment No. 11: Plans of Action for Primary Education para 7.

In terms of this General Comment, schools must refrain from charging study fees, for example, fees which must be paid in order to gain admission to a school. Also, costs relating to textbooks, stationery, teaching materials, educational facilities, meals and school uniforms, compulsory parental contributions, and additional material cost and informal fees are not acceptable. In this regard, the Special Rapporteur on the Right to Education has argued that the following costs with regard to primary education are unacceptable. First, school fees (user charges, registration fees, tuition fees) charge for enrolment, tuition and examination. Secondly, school fees in different guises. In many countries, “[w]here education is tuition free, charges are levied for the use of educational facilities and materials (such as laboratories, computers or sports equipment), or for extra-curricular activities (such as excursions or sports), or generally for supplementing teachers’ salaries or school maintenance.” Schools levy the charge concerned, for example, because there is a lack of adequate government funding of public schools.

Also not acceptable are direct expenditures, including the costs of textbooks, supplies and equipment (notebooks, sketchbooks, pens and pencils), transportation, meals and school uniforms.<sup>95</sup> However, having established the right to primary education as guaranteed under the international human rights instruments, the following part of this chapter will be devoted to examining the right to primary education at the national level. The position in South Africa is considered first.

## **4 The Right to Primary Education in South Africa**

### **4.1 The South African Primary Education**

In line with the South African Constitution and through the National Education Policy Act,<sup>96</sup> national and provincial governments share responsibility for all education except tertiary education, which is the preserve of national government.<sup>97</sup> Education in South Africa can be broken down into the following sectors/bands: Early Childhood Development (ECD);<sup>98</sup> General Education and Training (GET), consisting of grades 1 to 3 (the Foundation Phase), grades 4 to 6

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<sup>95</sup> See Tomasevski *Economic, Social and Cultural Rights: The Right to Education*, (Annual Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Education) (1999), UN Doc. E/CN.4/2004/45 para 26.

<sup>96</sup> Act 27 of 1996.

<sup>97</sup> See OECD *Reviews of National Policies for Education: South Africa* (2008) 19.

<sup>98</sup> While the reception year (grade R) is not yet compulsory, Government aims to make grade R available to all five-years-olds by 2010. See Lake & Pendlebury “Children’s Right to Basic Education” in Pendlebury, Lake & Smith (eds) *South African Child Gauge 2008/2009* (2009) 19.

(the Intermediate Phase), and grades 7 to 9 (the Senior Phase); Further education and Training (FET), including grades 10 to 12;<sup>99</sup> Adult Basic Education and Training (ABET); Special Needs Education (SNE), and Higher Education (HE).<sup>100</sup> Primary education therefore covers both the Foundation Phase and the Intermediate Phase of education.

Since 1994, the South African Government has worked to transform all facets of the education system. The fragmented and racially duplicated institutions of the apartheid era have been replaced by a single national system including nine provincial sub-systems. Consistent and persistent efforts are being made to make education structurally accessible to all who were previously denied, or have limited access to it, and thus, to realise the ideal of nine years of compulsory schooling.<sup>101</sup> This is in tandem with the constitutional provision which guarantees everyone the right to basic education and further education.<sup>102</sup> Marginalized and vulnerable groups have received particular attention in the form of inclusive education programmes and pro-poor funding policies. Government policy on learners with special needs emphasises the mainstreaming of learners with mild learning disabilities into ordinary schools;<sup>103</sup> and school fee exemptions and, most recently, “no fee schools” have assisted indigent learners to access schooling.<sup>104</sup>

The Preamble to the South African Schools Act (the Schools Act), 1996 explains the overall aims of the South African education system. In tune with the Constitution, it emphasises the notions of human dignity, equality, non-racism and human rights and freedom in the educational system. The Preamble says:

“[T]his country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people’s talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold

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<sup>99</sup> Further education and training comprises the senior secondary component of schooling (grade 10-12) as well as further education and training colleges. The final three years of secondary school are not compulsory, but government is constitutionally obliged to make further education and training progressively available. Learners can acquire a FET qualification by completing grade 12 in the schooling system, by attaining equivalent certification from one of the public FET Colleges or through opportunities offered by the private college sector. See OECD *Reviews of National Policies for Education: South Africa* 39-40.

<sup>100</sup> See OECD *Reviews of National Policies for Education: South Africa* 19-20.

<sup>101</sup> 38; see also, Khoza (ed) *Socio-Economic Rights in South Africa* 424.

<sup>102</sup> See s 29(1)(a) & (b) of the Constitution of the Republic of South Africa (CRSA), 1996.

<sup>103</sup> The right to education of learners with special needs (learners with disabilities) is considered in details in chap 6 of this thesis.

<sup>104</sup> See OECD *Reviews of National Policies for Education: South Africa* 38.



the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organization, governance and funding of schools in partnership with the State...”<sup>105</sup>

In terms of section 3 of the Act, primary school education is compulsory in the country. This provision reinforces the provision of section 29(1) of the South African Constitution which guarantees the right to basic education. Section 3(1) of the Act provides that parents must see to it that the learner attends a school from the first day of the year in which he or she reaches the age of seven years until the last day of the year in which he or she reaches the age of fifteen years (or the ninth grade), whichever occurs first. The section further mandates every Member of the Executive Council (MEC) responsible for education in each Province to ensure that there are enough schools places so that every child who lives in the Province can attend a school.<sup>106</sup>

In terms of the Act, a learner<sup>107</sup> who has been admitted to a public school, unless exempted, is obliged to attend such school. Also, every parent must ensure that every learner for whom he or she is responsible, attend school from the first day of the school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of 15 years or the ninth grade, whichever occurs first.<sup>108</sup> The Act provides that if a learner who is subject to compulsory attendance is not enrolled at or fails to attend school, the circumstances of his or her absence may be investigated and appropriate measures taken to remedy the situation by the Head of Department (HOD).<sup>109</sup> If such remedy fails, the official may issue a written notice to the parents of such a learner requiring them to ensure that the learner attends or enrolls in school.<sup>110</sup>

Thus, in terms of the above provisions of the Act, an obligation is placed on parents to ensure that children of school age are enrolled at and attend school. A parent or any person who, without just cause, prevents a learner, who is subject to compulsory school attendance from attending school, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding six months.<sup>111</sup> In certain circumstances, however, a learner may be exempted from compulsory school attendance. For example, the HOD may exempt the learner

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<sup>105</sup> Para 2 of the Preamble to the South Africa Schools Act (SASA), 1996.

<sup>106</sup> See s 3(3) of the SASA.

<sup>107</sup> S 1 SASA refers to learner as “any person receiving education or obliged to receive education in terms of the Act.”

<sup>108</sup> See s 3(1), SASA.

<sup>109</sup> See s 3(5)(a)-(b), SASA.

<sup>110</sup> See s 3(5) (c), SASA.

<sup>111</sup> See s 3(6), SASA.

entirely, partially or conditionally if it is in the interests of the learner.<sup>112</sup> The HOD is required to maintain a register of all learners exempted from compulsory school attendance.<sup>113</sup>

Also, in terms of the provisions of the Act, a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.<sup>114</sup> It is an important function of the school governing body to determine the admission policy of the school but the governing body may not impose discriminatory conditions. There are a number of topical issues in this regard pertaining to indirect discrimination due to the language picked by the governing body. These issues are dealt with in chapter six which examines other rights which bear on the right to education.

#### **4 2 Compulsory Primary Education and School Fees in South Africa**

It is submitted that the requirement of compulsory education in the Schools Act complies with the international requirement which mandates primary education to be compulsory. As examined earlier, primary education embodies two distinctive features of being “compulsory” and “freely available” to all. The requirement of compulsory education obliges States parties to enact laws which make primary education mandatory.<sup>115</sup> This has been complied with in view of the enactment of the Schools Act. In this respect, Khoza submits that South Africa has tried to meet its duties to provide basic education by making this phase of education compulsory and by prioritizing this in government policy, planning and spending.<sup>116</sup>

A major question relating to the interpretation of the right to basic education is whether it permits the charging of school fees. In terms of the Schools Act, schools may charge school fees.<sup>117</sup> The Act provides that school fees are to be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting to consider and approve the annual budget.<sup>118</sup> The resolution to charge school fees has to provide for the amount to be charged and equitable criteria and procedures for the total, partial or

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<sup>112</sup> See s 4(1), SASA.

<sup>113</sup> See s 4(2), SASA; see also s 51 of the Act which provides that parents may apply to the HOD for registration of a learner to receive education at home.

<sup>114</sup> See s 5(1), SASA. This provision gives effect to s 9 of the Constitution.

<sup>115</sup> Beiter *The Protection of the Right to Education* 512.

<sup>116</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 420.

<sup>117</sup> See 39(1) & (2), SASA.

<sup>118</sup> See ss 38(2) & 39(1), SASA.

conditional exemption of parents who are unable to pay school fees.<sup>119</sup> Parents are liable to pay school fee unless exempted by the governing body.<sup>120</sup> A learner may not be refused admission on the basis that his or her parent is unable to pay or has not paid such fees.<sup>121</sup> The payment of school fees is enforceable by the process of law against parents who are liable to pay.<sup>122</sup>

The constitutionality of the imposition of a duty to pay school fees has attracted considerable academic debate in South Africa.<sup>123</sup> It has been canvassed that the system of school fees fundamentally impairs a large number of learners' access to a basic education.<sup>124</sup> It is submitted that the elimination of a user fees system in public schools will facilitate the realisation of the constitutionally-mandated goals and guarantees to access to education for all.<sup>125</sup> It is also submitted that the system, which enables individual schools to augment their allocated state funds, tends to exacerbate the differences between schools in the traditionally white, more affluent, areas and those in the poorer black townships.<sup>126</sup> The system may impede access to education for those learners whose parents cannot afford to pay the prescribed fees, and may thus be an unconstitutional infringement on their right to basic education.<sup>127</sup>

By 2003, the government reviewed education finance and disseminated a number of important findings with reference to school fees.<sup>128</sup> While the review did not suggest the abolishment of the payment of school fees, it did recommend the creation of systems that would more carefully monitor fee setting procedures and provide regular checks on the procedures employed for school fees exemption.<sup>129</sup> Moreover, the Review noted that the poorest schools received less than half of their rather nominal fee payments and that the state subsidy transferred

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<sup>119</sup> See s 39(2)(a)-(b), SASA.

<sup>120</sup> See s 40(1), SASA.

<sup>121</sup> See s 5(3)(a), J SASA.

<sup>122</sup> See s 41, SASA.

<sup>123</sup> See Woolman & Fleisch *The Constitution in the Classroom* 213-234; Vierava & Wilson "A Critique of the Proposed Amendments on School Funding and School Fees" (2005) 6(3) *ESR Review* 9; Porteus "Education Financing: Framing Inclusion or Exclusion" (2002) 9 *Quarterly Review of Education and Training in South Africa* 13; Wilson "Taming the Constitution: Rights and Reform in the South African Education System" (2004) 20 *South African Journal on Human Rights* 418; Roithmayr "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education" (2003) 19(3) *South African Journal on Human Rights* 382-429.

<sup>124</sup> See Roithmayr (2003) 19(3) *South African Journal on Human Rights* 383, 392 & 397.

<sup>125</sup> Woolman & Fleisch *The Constitution in the Classroom* 217-218.

<sup>126</sup> See Malherbe "The Constitutional Dimension of the Best Interests of the Child as Applied in Education" 2008 (2) *TSAR* 267-285 273.

<sup>127</sup> Roithmayr (2003) 19(3) *South African Journal on Human Rights* 397; Malherbe 2008 (2) *TSAR* 273.

<sup>128</sup> See Department of Education Review of the Financing, Resourcing and Costs of Education in Public Schools, 2003.

<sup>129</sup> Woolman & Fleisch *The Constitution in the Classroom* 216.

to these poorest of schools did not meet the minimum criteria for an adequate basic education.<sup>130</sup> A new policy on the regulations on school funding and school fees came into operation during 2007.<sup>131</sup> One of the major consequences of this Policy was the emergence of two distinct types of “public schools.” Some 60 per cent of schools retain the right to levy compulsory school fees. The bottom two quintiles of schools could no longer charge fees.<sup>132</sup> In other words, the poorest 40 per cent of schools were granted “no-fee” status. “No-fee schools” may not charge fees and funding allocations are instead skewed to ensure that these schools receive the largest per-learner allocations.<sup>133</sup> The no-fee policy is reliant on a national poverty ranking system which divides all schools into quintiles.<sup>134</sup>

The categorisation of this poorest 40 per cent of schools is determined nationally. The poverty index that determines a school’s ranking turns on an assessment of the school’s community, and not the poverty of the individual learners in the schools concerned.<sup>135</sup> In this regard, the Department of education has been publishing every year the list of schools that may not charge school fees for a particular school year.<sup>136</sup> (See *table 3.1* and *table 3.2* below for the 2007, 2008 school years). In 2009, no-fee schools were extended to reach approximately 60 per cent of learners.<sup>137</sup> However, funding allocations for no fee schools vary both within and across Provinces, raising concerns about the equitable implementation of the policy. While many no-fee schools are financially better off than before, it is found that state funding for no-fee schools is not sufficient to provide quality education.<sup>138</sup> It is observed that no-fee schools now face the twin difficulties of inadequate state funding and loss of income from school fees, which make such schools acutely vulnerable.<sup>139</sup>

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<sup>130</sup> 216.

<sup>131</sup> See Amendments to the Schools Act regarding the National Norms and Standards for School Funding GN 1282, 14 December 2006; Regulations Regarding the Exemption of Parents from the Payment of School Fees Pursuant to SASA, Ss 39(4) and 61.

<sup>132</sup> Woolman & Fleisch *The Constitution in the Classroom* 216-217.

<sup>133</sup> See Pendlebury, Lake & Smith *South African Child Gauge 2008/2009* (2009) 36.

<sup>134</sup> 36.

<sup>135</sup> Woolman & Fleisch *The Constitution in the Classroom* 222.

<sup>136</sup> See Republic of South Africa, Government Gazette No. 31498 (Pretoria) of 17 October 2008; See also, Republic of South Africa, Government Gazette No. 30524 (Pretoria) of 5 December 2007 for the list of schools that may not charge school fees for the 2008 school year.

<sup>137</sup> Pendlebury, Lake & Smith *South African Child Gauge* 32.

<sup>138</sup> 32.

<sup>139</sup> 32.

**Table 3.1:** *Learners in no fee schools across the Provinces in 2007*

<b>Province</b>	<b>Number of learners in no fee schools</b>	<b>Number of no fee schools in 2007</b>	<b>Per learner allocation quintile 1</b>	<b>Per learner allocation quintile 2</b>
Eastern Cape	1,224,711	3,825	554	554
Free State	296,184	1,304	721	596
Gauteng	377,274	432	738	738
Kwa-Zulu Natal	1,173,503	3,341	629	560
Limpopo	1,015,524	2,557	579	579
Mpumalanga	404,431	983	829	648
Northern Cape	102,244	335	557	555
North West	267,042	728	658	658
Western Cape	132,560	407	738	677
<b>Total</b>	<b>4,995,473</b>	<b>13,912</b>	<b>667</b>	<b>618</b>

**Source:** OECD *Reviews of National Policies for Education: South Africa* (2008) 160.

**Table 3.2:** *Learners in no fee schools across the Provinces in 2008*

<b>Province</b>	<b>Number of learners in no fee schools</b>	<b>Number of no fee schools in 2007</b>	<b>Per learner allocation quintile 1</b>	<b>Per learner allocation quintile 2</b>
Eastern Cape	1,206,316	3,739	581	581
Free State	304,206	1,253	775	711
Gauteng	382,571	426	775	775
Kwa-Zulu Natal	1,149,391	3,382	775	711
Limpopo	1,011,220	2,832	629	629
Mpumalanga	420,395	951	803	649
Northern Cape	110,919	349	775	713
North West	300,469	927	775	711
Western Cape	135,560	405	775	711
<b>Total</b>	<b>5,020,554</b>	<b>14,264</b>	<b>Average 740</b>	<b>Average 688</b>

**Source:** OECD *Reviews of National Policies for Education: South Africa* (2008) 161.

The no-fee schools policy is a laudable innovation on the part of government to address the issue of equity and access to education.<sup>140</sup> Notwithstanding this comment, it is submitted that anything falling short of a total abolition of school fees at this level of education would amount to a violation of the obligation to provide free primary education under the ICESCR and CRC. This partial exception to the payment of school fees in terms of the Schools Act<sup>141</sup> is, therefore, unacceptable. Apart from the fact that payment of school fees breaches the international commitment to make education available free of charge, at least at the fundamental stage, it also constitutes a derogation of the right to basic education as guaranteed in section 29 of the 1996 South African Constitution. In this regard, Horsten, *et al* submit that unlike the right to further education, the right to basic education is formulated as an unqualified right.<sup>142</sup> According to them, “it is not subject to the qualifications of reasonable measures and progressive availability and accessibility. This creates the impression that basic education should be seen as an absolute priority in South Africa.”<sup>143</sup>

It is conceded that although free education is not mentioned in section 29(1)(a) of the South African Constitution which guarantees the right to basic education, the provision should be interpreted in a wide manner so as to include free education. If a child has the right to basic

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<sup>140</sup> The Amended National Norms and Standards for School Funding, 2006 introduced a policy of no-fee schools, which together with school-fee exemptions, as outlined in the Schools Act Regulation of 2006, aim to alleviate poverty and improve access for learners from poor communities.

<sup>141</sup> In terms of section 39 of the Schools Act, parents may be exempted from paying school fees depending on their combined annual gross income. The categories for the purpose of exemption are as follows: if the combined annual gross income of the parents is less than ten times the annual school fees per learner, the parent qualifies for full. If the combined annual gross income of the parents is less than thirty times but more than ten times the annual school fees per learner, the parent qualifies for partial exemption. If the combined annual gross income of the parents is more than thirty times the annual school fees per learner, the parent does not qualify for exemption. The categories are applicable if the annual school fees are determined in terms of section 39 of the Act. See s 5(3)(a) of the Act which provides that learner may not be denied admission on account of failure to pay school fees.

<sup>142</sup> See Horsten, van Rensburg, Olivier & Mpedi “Socio-Economic Rights” in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* (2009) 159 176.

<sup>143</sup> See Horsten, van Rensburg, Olivier & Mpedi “Socio-Economic Rights” 176. In this regard, Berger submits “[u]nder the Constitution, basic education is a ‘strong positive right,’ a right that can be asserted regardless of the state’s other budget imperatives. Unlike further education, which the government need only make ‘progressively available’ ‘through reasonable measures,’ the right to basic education appears absolute. While the government may decide how to structure its schools, section 29(1)(a) [of the Constitution] gives constitutional support to an unhappy parent who might demand that the state immediately provide her child with better education through the ninth grade. By way of contrast, section 29(1)(b) provides not an absolute right to further education, but a right to reasonable government measures that make it progressively available.” See Berger 2003 *Columbia Law Review* 625; see also, Malherbe “The Constitutional Dimension of the Best Interests of the Child as Applied in Education” 2008 (2) *TSAR* 267-285 274; Malherbe “Equal Educational Opportunities in South Africa: the Constitutional Framework” 2004 (3) *TSAR* 427-447 432.

education (which includes primary education), the State, therefore, has the obligation to remove every impediment that can hinder the enjoyment of such right. School fees are an important impediment that can hinder full realisation of such a right and should be eliminated by the introduction of free education across the country. This position is fortified by the provision of section 39 of the Constitution which obliges a court or tribunal when interpreting the Bill of Rights to consider international law.<sup>144</sup> In this regard, article 13 of the ICESCR and article 28 of the CRC guarantee the right to free and compulsory primary education.

Lake and Pendlebury support such an argument by arguing that section 29(1)(a) of the Constitution establishes the right to basic education as an immediate right unqualified by any limitation related to progressive realisation.<sup>145</sup> Fulfilment of the right places positive and negative obligations on the State. The positive obligation requires government to take active steps to ensure that every child has access to educational facilities and enjoys the right to education. The negative obligation means that government and its agencies should not impede children's access to education.<sup>146</sup> Although section 36 of the Constitution allows some limitations on the Bill of Rights in the Constitution, for such a limitation to be valid, it has to be reasonable and justifiable in an open and democratic society.<sup>147</sup> It is submitted that payment of school fees in public schools in South Africa is incompatible with the notion of the right to basic education guaranteed in the Constitution.<sup>148</sup>

In this regard, Roithmayr asserts that the system of school fees fundamentally impairs a large number of learners' access to a basic education.<sup>149</sup> Contrary to Roithmayr's position, Woolman and Fleisch contend that school fees are not the principal, or even a primary, barrier to access to education.<sup>150</sup> They based their position on the argument that the problem of school fees does not reflect in school enrolment rate because South Africa has consistently maintained net enrolment rates of greater than 95 per cent despite the system of payment of school fees.<sup>151</sup>

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<sup>144</sup> See s 39(1)(b) of the Constitution.

<sup>145</sup> See Lake & Pendlebury "Children's Right to Basic Education" in Pendlebury *et al* (eds) *South African Child Gauge* 19.

<sup>146</sup> 19.

<sup>147</sup> See Malherbe "Equal Educational Opportunities in South Africa: The Constitutional Framework" 2004 (3) *TSAR* 427-447 433-434.

<sup>148</sup> See Lake & Pendlebury "Children's Right to Basic Education" 19.

<sup>149</sup> See Roithmayr "The Constitutionality of School Fees in Public Education" in Education Rights Project, Center for Applied Legal Studies Issue Paper, University of the Witwatersrand (2002) 39-46.

<sup>150</sup> Woolman & Fleisch *The Constitution in the Classroom* 219.

<sup>151</sup> 220.

The position taken in this thesis is that while the enrolment rate constitutes an important indicator in this respect; enrolment alone does not determine the access to education, and the drop-out rate as a result of a school fees related barrier is the most important indicator.

It is, in sum, submitted that school fees constitute an impediment to the realisation of the right to education. Not only do many parents struggle to pay school fees, they also struggle to pay other costs involved in sending their children to schools such as transport, uniforms, books and stationery.<sup>152</sup> These costs make schooling inaccessible to poor learners.<sup>153</sup> In this regard, the South African Human Rights Commission Report of the Public Hearing on the Right to Basic Education notes that transport and uniform costs are often more of a burden on parents than school fees.<sup>154</sup> The Report suggested some recommendations on improving accessibility of learners to education which include abolition of school fees at primary level; that government should move rapidly to increase the number of fee-free schools available for poor learners; and that poor learners who live far from their nearest schools should receive State transportation assistance.<sup>155</sup> While State transport assistance is not yet in place, government has consistently increased the number of no fee schools in the country in the recent past. Based on the above findings and recommendations, it is submitted that the problem of access to education can never be adequately resolved simply by removing school fees, while other attendant costs of schooling remained unaddressed. A holistic approach addressing all the barriers to education is, therefore, proposed.

#### **4 3 The Right to Primary Education: Content and Adequacy**

The South African Constitution explicitly guarantees the right to education. Nonetheless, section 29 of the Constitution does not specify the content and quality of education the State must provide.<sup>156</sup> Berger poses a fundamental question which is relevant for this study: “[d]oes section 29 promise merely a place to go to school, or does it provide for an ‘adequate’ education?”<sup>157</sup> He contends that though the Constitution clearly promises some level of

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<sup>152</sup> See Jansen “Reflections on Meaningful Access to Education” in Pendlebury et al *South African Child Gauge* 8.

<sup>153</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 430.

<sup>154</sup> See *South African Human Rights Commission Report of the Public Hearing on the Right to Basic Education* (2006) paras 39-40.

<sup>155</sup> See *South African Human Rights Commission Report on the Right to Basic Education* paras 39-40.

<sup>156</sup> Berger 2003 *Columbia Law Review* 625.

<sup>157</sup> 625.



education, unlike some American States Constitutions, section 29 includes no standard form it must take.<sup>158</sup> Similarly, Roithmayr posits that the question of whether the Constitution guarantees some “core content” of the right to education will no doubt be the subject of significant controversy in South African jurisprudence.<sup>159</sup>

It is submitted that the right to basic education imposes a duty on the State to provide adequate education in order for the right to be enjoyed and fulfilled.<sup>160</sup> It is an unqualified right requiring the priority attention of the State, also in respect of budgetary allocations. This requires the State to provide sufficient schools, educators and support, and other incidental services in order to ensure reasonable access to basic education for everybody.<sup>161</sup> The right refers to 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.<sup>162</sup> Regarding what amounts to “adequate” education, Melherbe submits as follows:

“In the South African context ‘adequate’ education could refer to a standard of education that empowers people to rise above the poverty cycle and compete effectively in the labour market, enables people to understand and enjoy their newly acquired democratic values, rights and freedoms, encourages people to participate in and protect the fledgling democratic system, and enhances their dignity and feeling of self-worth as human beings.”<sup>163</sup>

Section 7(1) of the Constitution provides that the Bill of Rights is the cornerstone of the democratic South Africa while section 7(2) obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This suggests that the government must play an active role in continuing to improve access to positive rights.<sup>164</sup> Additionally, section 39 of the Constitution requires courts when interpreting the Bill of Rights to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”<sup>165</sup> Berger contends that

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<sup>158</sup> 624 & 625; see for example, art VIII, s 4 of the New Jersey Constitution which requires the legislature to “provide for the maintenance and support of a thorough and efficient system of public schools.” Other state constitutions require the establishment of “an adequate public education” or “ample” education. See William E “Thro, The Role of Language of the State Education Clauses in School Finance Litigation” 79 *Educ. L. Rep.* 19 (1993); see also, Berger 2003 *Columbia Law Review* 625 fn 68.

<sup>159</sup> See Roithmayr (2003) 19(3) *South African Journal on Human Rights* 402.

<sup>160</sup> See *Ex parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) paras 8-9; see also s 7(2) of the Constitution. The will be elaborated upon shortly.

<sup>161</sup> See Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) 536; see also, Malherbe 2004 (3) *TSAR* 432; Malherbe 2008 (2) *TSAR* 274.

<sup>162</sup> See Malherbe 2008 (2) *TSAR* 267-285 274.

<sup>163</sup> Malherbe 2008 (2) *TSAR* 274-275.

<sup>164</sup> Berger 2003 *Columbia Law Review* 626.

<sup>165</sup> S 39(1)(a) of the Constitution.

interpreting section 29 to mean that the State “merely” has to provide education, without any implicit quality standard, would pervert section 39’s interpretative instructions.<sup>166</sup> Not only would such an interpretation render section 29 virtually toothless, but also, such an interpretation would run counter to the democratic values the Constitution explicitly seeks to promote.<sup>167</sup> Adequate education is, indeed, essential to the realisation of dignity, equality, and freedom.<sup>168</sup>

Moreover, section 39 states that courts, when interpreting the Bill of Rights, “must consider international law.”<sup>169</sup> The treaties which the courts have to consider include the ICESCR and the CRC.<sup>170</sup> The ICESCR for instance specifically recognises “the right of everyone to education... [that is] directed to the full development of human personality and its sense of dignity; strengthen respect for human rights and fundamental freedoms; enable all persons to participate effectively in a free society; promote understanding, tolerance and friendship among all nations and all racial, ethnic and religious groups; and further the activities of the United Nations for the maintenance of peace.”<sup>171</sup> Given that the Covenant speaks directly to the question of education, the courts would have to turn to it to find that the Constitution promises an adequate education to promote democratic principles.<sup>172</sup> However, given the fact that all the United Nations’ human rights treaties have cross-cutting linkage to the right to education, a court would not be able to limit itself to the provisions of the ICESCR and CRC alone, but would be compelled to consider other relevant instruments as well.<sup>173</sup>

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<sup>166</sup> Berger 2003 *Columbia Law Review* 626.

<sup>167</sup> 626.

<sup>168</sup> See s 7(1) & s 39(1)(a) of the Constitution. See also, s 28 of the Constitution which provides that a child’s best interests are of paramount importance in every matter concerning the child. It is argued that failing schools will also violate s 28 of the Constitution. Berger 2003 *Columbia Law Review* 628.

<sup>169</sup> S 39(1)(b) of the Constitution.

<sup>170</sup> See *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), paras 26-19 & 45 where the Court cited ICESCR’s significance in understanding the positive obligations created by the socio-economic rights in the Constitution.

<sup>171</sup> See art 13(1) of the ICESCR; see also art 29(1) of the CRC.

<sup>172</sup> Berger 2003 *Columbia Law Review* 628.

<sup>173</sup> In this respect, the Committee on Economic, Social and Cultural Rights submits as follows: “[e]ducation is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely

The Dakar Framework for Action<sup>174</sup> requires that every aspect of the quality of education must be improved so that “recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.”<sup>175</sup> Garnered from the relevant international human rights instruments are common elements in terms of process, including non-discriminatory access to public educational institutions and programmes; compulsory and free primary education for all; free choice of education; minimum standards and a transparent, effective monitoring system. The CESCR also provides further guidelines for interpreting the right to education and calls for basic education to be available, accessible, acceptable and adaptable.<sup>176</sup> The Committee states that the four elements apply to primary education.<sup>177</sup>

Pendlebury contends that although the proportion of the population attaining grade 9 has increased, for the majority of children in South Africa, meaningful access remains elusive.<sup>178</sup> He asserts that poor national averages for language and mathematics in grades 3 and 6 indicate that most children do not acquire the skill and understanding that give substance to the right to education.<sup>179</sup> The Department of Education has conducted two grade 3 systemic evaluations of children’s literacy and numeracy learning achievements, in 2001 and 2007. Provincial results of the 2007 evaluation show improved national and provincial averages (with the exception of the Northern Province). Nonetheless, the results reveal that schools still have a long way to go to enable children to learn to read, write, reason, and work with numbers.<sup>180</sup> This is reflected in *table 3.3* below.

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and widely, is one of the joys and rewards of human existence.” See CESCR General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The Right to Education (art 13 ICESCR) para 1.

<sup>174</sup> Adopted by the World Education Forum held at Dakar, Senegal from 26 to 28 April, 2000.

<sup>175</sup> Goal No. 6, Dakar Declaration on Education for All.

<sup>176</sup> See CESCR General Comment No. 13: The Right to Education para 6.

<sup>177</sup> CESCR General Comment No. 13: The Right to Education para 8.

<sup>178</sup> Penlebury, Lake & Smith the *South African Child Gauge* 26.

<sup>179</sup> 26.

<sup>180</sup> 26.

Table 3.3: *Grade 3 Mean Achievement Scores (%) for Literacy and Numeracy, 2001 & 2007*

	<b>Literacy</b>		<b>Numeracy</b>	
	<b>2001</b>	<b>2007</b>	<b>2001</b>	<b>2007</b>
Eastern Cape	24	35	34	36
Free State	27	43	29	42
Gauteng	33	38	32	47
Kwa-Zulu Natal	35	38	31	35
Limpopo	27	29	26	24
Mpumalanga	28	32	29	31
North West	29	35	25	29
Northern Cape	23	34	26	31
Western Cape	33	48	32	49
<b>South Africa</b>	<b>30</b>	<b>36</b>	<b>30</b>	<b>35</b>

**Source:** Department of Education (2008) 2007 Grade 3 Systemic Evaluation. Pretoria: DoE [Leaflet] (Adapted from the *South African Child Gauge 2008/2009* (2009) 26.

However, an intensive four years campaign has been launched by the Department of Education (DoE) in order to improve the basic skills of learners in grades 1 to 6.<sup>181</sup> All primary schools are expected to increase the average learner performance in literacy/language and numeracy/mathematics to no less than 50 per cent by 2011.<sup>182</sup> In order to achieve this initiative, detailed directives regarding time allocations, essential resources for teaching, and minimum expectations have been set out. The minimum expectations are that all teachers in grades 1-3 actually teach reading and numeracy skills every day; that all teachers in grades 1-6 will spend at least 30 minutes daily on additional reading for enjoyment and at least one hour on extended writing every week; and that all teachers in grades 1-6 will also teach numeracy (or

<sup>181</sup> See Department of Education, Government Notice No.306: Foundation for Learning Campaign 2007-2011” Government Gazette, Vol. 513, No. 30880, 14 March 2008.

<sup>182</sup> See OECD *Reviews of National Policies for Education: South Africa* 172.

mathematics) for at least 30 minutes every day, including 20 minutes of written exercise and 10 minutes of mental arithmetic exercise as appropriate to the grade level.<sup>183</sup>

Teachers are expected to assess learners' progress regularly and maintain individual learner performance reports of their monthly tests. Each school will send records of quarterly assessment to the district office. Monitoring of campaign activities and outcomes is a joint responsibility of the DoE and the nine provincial departments of education. At the end of 2011, it has been proposed that a national evaluation will be conducted for grade 3 and grade 6 learners.<sup>184</sup> It is submitted that this initiative will go a long way to guarantee the right to primary education in South Africa.

#### **4 4 The Concept of Basic Education in South Africa**

Section 29(1)(a) of the 1996 South African Constitution establishes “the right to a basic education, including adult basic education.” Primary education constitutes an important component of basic education guaranteed in the Constitution. The concept of “basic” education is yet to be interpreted by the South African courts.<sup>185</sup> However, in *Motala v University of Natal*,<sup>186</sup> it was held that the Interim Constitution’s guarantee of basic education did not include tertiary or other forms of higher education.

Interpreting the concept, the Department of Education in its White Paper on Education and Training<sup>187</sup> noted that “basic education” is a flexible concept which must be defined so as to meet the “learning needs appropriate to the age and experience of the learner, whether child, youth or adult...”, and should also provide access to nationally recognised qualifications. Accordingly, “appropriately designed education programmes to the level of the proposed General Education Certificate (GEC) (one-year reception class plus 9 years of schooling), whether offered in school to children, or through other forms of delivery to young people and adults, would adequately define basic education for the purposes of the constitutional requirement.”<sup>188</sup>

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<sup>183</sup> 172.

<sup>184</sup> 173.

<sup>185</sup> See Horsten *et al* “Socio-Economic Rights” in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* 176.

<sup>186</sup> 1995 (3) BCLR 374 (D).

<sup>187</sup> Published on 15 March 1995 in terms of its obligations under s 32(a) of the Interim Constitution.

<sup>188</sup> See White Paper on Education and Training (1995) ch 7 para 14.

There is consensus among academic writers and scholars that the definition of basic education in the South African context is very narrow. This contention is based on the fact that learners who have completed grade 9 are not yet sufficiently equipped with knowledge and skills that will enable them to develop to their full potential, to live and work with dignity, and to improve the quality of their lives. It is submitted that “basic education” should include a learner’s entire schooling career.<sup>189</sup> It is further contended that basic education should not be defined in terms of age or the completion of a particular level of schooling; it should rather be seen as wider than only primary or compulsory education and should also include secondary education.<sup>190</sup> On this point, Liebenberg submits that the concept of “basic education” should evolve with the increasing educational standards and capacities in the country, and the changing requirements of society.<sup>191</sup> She posits that any basic education should at least provide learners with the foundation for being successful in society, including the minimum essential learning tools of literacy and numeracy.<sup>192</sup>

Roithmayr argues that the Department of Education’s narrow interpretation is inconsistent with the other language used by the constitutional drafters in section 29 of the Constitution, particularly in the reference to “adult basic education.”<sup>193</sup> She submits “‘adult basic education’ is rendered nonsensical if one defines ‘basic’ to include only compulsory primary education. In fact, the phrase ‘basic education’ has been interpreted by most international instruments to refer substantially to minimum skills needed to equip learners with necessary knowledge and skills to function as citizens.”<sup>194</sup> In particular, article 4 of the World Declaration on Education for All specifies that “basic education” should be focused on qualitative criteria rather than years of completion of education: “the focus of basic education must...be on actual learning acquisition and outcome rather than exclusively upon enrolment, continued participation in organized programmes and completion of certification requirements.” Thus, the concept of basic education in international law focuses on substantive criteria of minimum adequacy.<sup>195</sup>

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<sup>189</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 420.

<sup>190</sup> See Horsten et al “Socio-Economic Rights” in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* 176.

<sup>191</sup> Liebenberg “Education” in Davis, et al *Fundamental Rights in the Constitution: Commentary and Cases* 296.  
<sup>192</sup> 296.

<sup>193</sup> See Roithmayr (2003) 19(3) *South African Journal on Human Rights* 393.

<sup>194</sup> 393.

<sup>195</sup> 394.

The right to basic education as guaranteed in the South African Constitution includes the right to adult basic education.<sup>196</sup> This right gives people who have not received an education in the past and who are now beyond the school-going age the right to receive an education. In this context, Government is obliged to ensure that there are sufficient and affordable Adult Basic Education Training (ABET) centres and that all ABET learners are able to access those institutions.<sup>197</sup> In this regard, du Plessis, Conley and Loock also contend that what constitutes basic education in the South African context should not be arbitrarily defined in terms of age or the completion of a particular level of schooling but should be determined in accordance with the educational interest to be achieved by the guarantee of the right.<sup>198</sup> According to them, the meaning should therefore be wider than that of only primary education, or compulsory education in terms of the Schools Act but should include secondary education.<sup>199</sup>

An ABET learner is an adult who has not completed his or her basic education. In terms of section 29(1)(a) of the South African Constitution, the right to adult basic education is guaranteed in an unqualified term. This right gives people, who have not received an education in the past and who are now beyond the school-going age, the opportunity to receive an education.<sup>200</sup> In view of the age limit for compulsory education in terms of the Schools Act, adult basic education is not compulsory, but as earlier mentioned, the government must ensure that there are sufficient and affordable ABET centres for all ABET learners to access.<sup>201</sup> Having regards to the fact that ABET education is for adults, it is submitted that learning in the ABET centres should be on a part-time basis.

It is observed that developing literacy is a central purpose of basic education. Literacy includes the reading, writing and numeracy skills that children acquire through formal schooling, as well as in different community and household contexts.<sup>202</sup> At the heart of basic education is learning to read and write, to reason, to work with numbers, shapes and patterns,

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<sup>196</sup> See s 29(1)(a) of the Constitution.

<sup>197</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 421.

<sup>198</sup> See du Plessis, Conley & Loock “The Right to Education: Are we facing the Challenges?” (2007) 2(8) *Educational Research Review* 198-208 202. See also, art 1 of the United Nations World Declaration on Education for All; also, the United States Supreme Court has suggested that the government may be under an obligation to ensure a minimum standard of education to avoid inequalities in the right to speak or to vote. See *San Antonio Independent School District v Rodriguez* (1973) 411 US 1 36-37

<sup>199</sup> du Plessis, Conley & Loock (2007) 2(8) *Educational Research Review* 202.

<sup>200</sup> Khoza *Socio-Economic Rights in South Africa* 421.

<sup>201</sup> 421.

<sup>202</sup> Pendlebury “Meaningful Access to Basic Education” in Pendlebury *et al South African Child Gauge* 25.

and to use concepts to understand the content of different learning areas. It is submitted that children have access to education when basic education is meaningful and adaptable, and its content and teaching methods work together to foster generative learning that extends children's capacity to think for themselves and with others, and to apply what they have learnt in different contexts.<sup>203</sup> In the process, basic education should also prepare young people for a productive role in society.<sup>204</sup>

It is observed that children's institutional access to education in South Africa is extensive.<sup>205</sup> Analysis of General Household Survey data shows that 96.5 per cent of children 7-17 years attended some form of educational facility in 2007.<sup>206</sup> Attendance rates are high until the age of 14 years, with a 98 per cent attendance rate for 14-year olds in 2007. Thereafter, attendance rates drop to 95 per cent for 15-year-olds, and 88 per cent for 17-year-olds.<sup>207</sup> It is submitted that children's meaningful access to basic education depends largely on who has access to what kind of schooling and on what basis. Poverty, race, gender, geography and disability may all affect school attendance and the quality of schools that children attend.<sup>208</sup> It is submitted that in terms of attainment, access is meaningful if children are able to progress through school to attain at least grade 9. In terms of achievement, access is meaningful only if children achieve the appropriate learning outcomes at a level right for their age.<sup>209</sup>

#### **4 5 Assessment of the Government Efforts on Quality Education**

Since 1994, a range of initiatives has been introduced to improve access, equity and quality in the South African education system.<sup>210</sup> Spending became oriented toward the achievement of equity and ceased to be determined on a racial basis. Despite these efforts, there is a body of

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<sup>203</sup> 25.

<sup>204</sup> 25.

<sup>205</sup> The right to basic education in the Constitution guarantees access to education for all, including those who cannot pay school fees. See Roithmayr (2003) 19 *SAJHR* 394; The Schools Act provides that learner may not be denied admission on the ground that his/her parents did not pay school fees. Also, the policy of "no-fees school" is another means to ensure access to education in the country. The decisions of the Constitutional courts addressing the right to housing and health care, where the Constitutional Court held that these rights guarantee access for those who cannot afford to pay also guarantee access to basic education. See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 47 (CC) paras 36 & 68; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) paras 70-71.

<sup>206</sup> Pendlebury et al *South African Child Gauge* 25.

<sup>207</sup> 25.

<sup>208</sup> These factors are examined in details in ch 7 of this thesis.

<sup>209</sup> Pendlebury et al *South African Child Gauge* 26.

<sup>210</sup> See Chisholm "The Quality of Primary Education in South Africa" *Background Paper Prepared for the Education for All Global Monitoring Report 2005* (UNESCO 2005/ED/EFA/MRT/PI/13) 2.



evidence which illustrates that the quality of education in the majority of primary schools remains poor.<sup>211</sup> According to the Department of Education, “there is considerable evidence that quality of education in South African schools is worryingly low relative to what South Africa spends on schooling.”<sup>212</sup> A number of factors affect the South African educational system and make poor schools hard to improve. Budget reductions and insufficient funding are the major considerations.<sup>213</sup> Most schools still charge user fees to all parents and budget cuts force schools to rely even more on these fees to provide education.<sup>214</sup> Many poor parents have difficulty paying these fees, meaning either that their children do not receive an education or that the schools do not receive adequate funding to instruct their students.<sup>215</sup> Even with the no-fees schools policy of the government, it is found that state funding for these schools is not sufficient to provide quality education.<sup>216</sup>

It is found that the payment of tuition fees perpetuates inequality in the educational system. Good teachers elude poor schools as they tend to prefer staying in better schools. In addition, rich communities (schools) have the means to hire extra teachers and offer higher salaries to retain the most qualified instructors while poor schools are left to rely on government funding.<sup>217</sup> Similarly, poor schools are with inferior facilities and supplies and are finding it difficult to catch up due to the past apartheid inequalities. Because poor children in poor schools tend to have less exposure to the letters of the alphabet at an early age, they are inherently more

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<sup>211</sup> 5.

<sup>212</sup> Department of Education *Review of the Financing, Resourcing and Costs of Education in Public Schools*, Pretoria (2003) 101.

<sup>213</sup> As a percentage of the GDP, South Africa spent 7.3 % on education in 1991/92. Between 2001 and 2004, it spent an average of 5.5 %. See Chisholm “The Quality of Primary Education in South Africa” *Background Paper for the Education for All Global Monitoring Report 2005*, 6; for 2006/07 the GDP is also put at 5.5 %. See *the 2006/07 South African Yearbook* 195: <http://www.gcis.gov.za/docs/publications/yearbook/2007/chapter8.pdf> (accessed on 2008/09/17); See also, OECD *Reviews of National Policies for Education: South Africa* (2008) 24, which puts South Africa education spending at over 5% of Gross Domestic Product (GDP); UNESCO puts the South Africa GDP at 5.4 per cent. See UNESCO *Global Education Digest 2009: Comparing Education Statistics across the World* (2009) 176.

<sup>214</sup> Berger 2003 *Columbia Law Review* 618.

<sup>215</sup> 618.

<sup>216</sup> Pendlebury, Lake & Smith *South African Child Gauge* 32.

<sup>217</sup> It is observed that in order to retain their previous small pupil to teacher ratios, formerly privilege schools with low pupil to teacher ratios used the powers given to them under the Schools Act, 1996 to set fees that would enable the employment of additional teachers known as “governing body teachers.” The School Register of Needs for 2000 showed that the proportion of School Governing Body-paid teachers increased from 2.9% in 1996 to 8.2% in 2000. In 2000, the Provinces of Gauteng (21.7%) and Western Cape (13.4%) had the highest proportion of SGB-paid teachers, while the Northern Province (2.5%) reported the lowest. See Department of Education Report on the Schools Register of Needs 2000 Survey, Pretoria (2001) 18; See also, See Chisholm “The Quality of Primary Education in South Africa” *Background Paper for the Education for All* 7-8; Berger 2003 *Columbia Law Review* 618.

difficult and more expensive to teach.<sup>218</sup> According to Chisholm, there is the need to distinguish between urban and rural areas and within them, between formal and informal. Schools in informal settlements within urban and rural areas -the former homelands- remain marked by poor quality.<sup>219</sup> Remedial literacy training and materials may therefore be needed for schools in poor neighbourhoods to overcome the educational obstacles inherent in poverty.<sup>220</sup>

The pupil-to-teacher ratio in South African Schools shows the gross inequality in the system. Officially, the pupil to teacher ratio is put at 40 to 1 in primary schools and 35 to 1 in secondary schools.<sup>221</sup> However, it is submitted that in reality, there is still overcrowding and a high pupil to teacher ratios particularly in rural schools.<sup>222</sup> For instance, a study shows that pupil-to-teacher ratios in the Eastern Cape, Northern Province, and Mpumalanga, all predominantly black rural provinces were respectively, 51 to 1, 44 to 1, and 41 to 1. By way of contrast, in the Western Cape Province, the pupil-to-teacher ratio was 25 to 1.<sup>223</sup> It is further reported that the Western Cape has approximately eight teachers per administrator, whereas the Northern Province has thirty.<sup>224</sup> This disparity highlights the inequality in the system.<sup>225</sup>

Also, the poorest schools also lack the facilities enjoyed by wealthier communities. Most schools in the predominantly black areas are in poor condition needing repairs. Some are without toilets, telephones and no water within walking distance and mostly over-crowded.<sup>226</sup> While most schools need additional buildings, it is observed that in most cases, the existing ones evince collapsing ceiling and broken windows.<sup>227</sup> In view of this reality, it is submitted that when schools let in the cold and wind, there is, therefore, little incentive for learners to stay in

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<sup>218</sup> See Chisholm "The Quality of Primary Education in South Africa" *Background Paper for the Education for All* 6.

<sup>219</sup> 6.

<sup>220</sup> Berger 2003 *Columbia Law Review* 619.

<sup>221</sup> See Chisholm "The Quality of Primary Education in South Africa" *Background Paper for the Education for All* 7.

<sup>222</sup> 7.

<sup>223</sup> Diamond "Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution" (1999) 26 *Hastings Const. L.Q.* 853 901; see also, Berger 2003 *Columbia Law Review* 619-620.

<sup>224</sup> Diamond *Hastings Const. L.Q.* 901; Berger 2003 *Columbia Law Review* 620.

<sup>225</sup> Diamond *Hastings Const. L.Q.* 901; Berger 2003 *Columbia Law Review* 620.

<sup>226</sup> Diamond *Hastings Const. L.Q.* 901; Berger 2003 *Columbia Law Review* 620.

<sup>227</sup> See Chisholm "The Quality of Primary Education in South Africa" *Background Paper for the Education for All* 10.

school.<sup>228</sup> These gross inequalities in spending, facilities, and faculties have resulted in unequal achievement.<sup>229</sup>

In the same vein, researchers and analysts have argued that the quality of schooling in South Africa leaves much to be desired when assessed against outcomes.<sup>230</sup> It is observed that learners' scores are far below what is expected at all levels of the schooling system, both in relation to other countries (including other developing countries) and in relation to the expectations of the South African curriculum.<sup>231</sup> It is also revealed that at the end of the first three years of schooling, learners have only a rudimentary grasp of the principles of reading and writing. When assessed, it is clear that they are unable to perform satisfactorily at either national or internationally accepted levels. It is observed that when considered at the level expected by the Revised National Curriculum Statement, they are performing 1 to 2 years below Grade 3 and 3 years below Grade 6.<sup>232</sup> Also, in South Africa, schools still charge fees at the elementary level; it is found that the system of charging school fees is capable of jeopardizing the right to basic education, particularly for the poorest families who cannot afford to pay.

## **5 The Right to Primary Education in Nigeria**

### **5.1 History of Nigeria Education**

The history of Nigerian education cannot be divorced from missionary and colonial incursion in the country.<sup>233</sup> As Coleman observed, until 1898, all education was under the direct control of missionaries, and as late as 1942 they controlled 99 per cent of the schools in the country.<sup>234</sup> It was later in the century that colonial government took over the schools from missionaries.<sup>235</sup>

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<sup>228</sup> 10.

<sup>229</sup> It is observed that whereas only two of ten Black children reach the "Matric" year in their education, eight of ten white children do. See Diamond *Hastings Const. L.Q.* 901-902; Berger 2003 *Columbia Law Review* 621.

<sup>230</sup> See Chisholm "The Quality of Primary Education in South Africa" *Background Paper for the Education for All 12*.

<sup>231</sup> Taylor, Muller & Vinjevoold *Getting Schools Working: Research and Systemic School Reform in South Africa* (2003) 41.

<sup>232</sup> 129. See also, Chisholm "The Quality of Primary Education in South Africa" *Background Paper for the Education for All 12*.

<sup>233</sup> Nigeria is a creation of the British who established a political presence on the Island of Lagos in 1861 and declared it a colony. See Aguda *Understanding the Nigerian Constitution of 1999* (2000) 1.

<sup>234</sup> Coleman *Nigeria: Background to Nationalism* (1971) 113.

<sup>235</sup> Initially, the management of primary education system was handled by the church missionaries who introduced Western or formal education to Nigeria in 1842. After much criticism from different quarters about the crude and lack of proper coordination of the system by the missionaries, the British government intervened through enactment of various education ordinances. 1887 marked the first purely Nigerian education ordinance

According to Murray, “[t]o all intents and purposes the school is the church. Right away in the bush or in the forest the two are one and the village teacher is also the village evangelist...”<sup>236</sup> Thus, Nigerians saw no difference between the missions and Western education in the sense that the village teachers were in most cases the village evangelists.

The initial objectives of the colonial and missionary education impacted tremendously on primary education curriculum in Nigeria.<sup>237</sup> According to Ukeje and Aisiku, the objectives were: (i) to supply the European traders and missionaries with native assistants who could read, write and talk a little English and (ii) to prepare pupils for entrance into an English type of grammar school.<sup>238</sup> As a result, the curriculum of the primary school remained largely literary and academic. In this regard, Coleman notes as follows:

“With a few notable exceptions, education in Nigeria was based on learning to read, write, and calculate in English language. Later additions to the curriculum were British Empire history and European geography, plus a few practical subjects such as gardening, sanitation, and personal hygiene. As African history was considered either nonexistent or unimportant, the great men who were studied in the schools were the Kings of England and the early white empire builders who came to Nigeria with a new and superior civilization... In literature, Shakespeare and the Bible held the stage. Even today, it is not uncommon to find a semi-educated Nigerian working as a steward who can name the principal English cities, quote the Bible, and recite Hamlet, but who has little knowledge of the geography, the proverbs and folk tales, or prominent leaders and outstanding events in the history of his own country.”<sup>239</sup>

This system of education has been severely criticized. For instance, a former Nigerian President, Nnamdi Azikiwe observed that “Africans have been mis-educated. They need mental emancipation so as to be re-educated to the real needs of Renascent Africa.”<sup>240</sup> It is observed that the report of the 1968 National Conference on Education held in Lagos was the first national effort to change the colonial orientation of the Nigerian educational system.<sup>241</sup> The

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as a result of the separation of Lagos from Gold Coast in which it became the Colony and Protectorate of Lagos. See David & Olabanji (2008) 3(6) *The Social Sciences* 411-419 412.

<sup>236</sup> Murray *The School in the Bush* (1929) 65.

<sup>237</sup> It is observed that the British Government had no clearly defined policy on education for its African colonies until about 1925. David & Olabanji (2008) 3(6) *The Social Sciences* 412.

<sup>238</sup> See Ukeje & Aisiku “Education in Nigeria” in Fafunwa & Aisiku (eds) *Education in Africa: A Comparative Survey* (1982) 229-130; The aim of Colonial education in Nigeria was summed up by a British educator, Scott as follows: “the conception of the aim of education was that it should make useful citizens, and when we say useful citizens we mean literally citizens who would be of use to us. The conception was one of exploitation and development for the benefit of the people of Great Britain- it was to this purpose that such education as was given was directed.” See Scott, “The Development of the Education of the African in Relation to Western Contact” (undated) 737, as quoted in Coleman *Nigeria: Background to Nationalism* 130.

<sup>239</sup> Coleman *Nigeria: Background to Nationalism* 114-115.

<sup>240</sup> Azikiwe *Renascent Africa* (1937) 135; see also, Orizu, *Without Bitterness* (1944) 140-143.

<sup>241</sup> A similar conference on universalizing primary education in Africa was held by the African Ministers of Education in Addis Ababa in 1969.

report reiterated that the primary schools must fulfil two basic functions namely; to prepare children for life, and to give those with the necessary background the opportunity to proceed to secondary school.<sup>242</sup>

Primary school curriculum was to reflect these two functions, and through the school curriculum, education should serve to help the child to realise himself; help the child to relate to others in an atmosphere of mutual understanding; promote self and national economic efficiency; promote effective citizenship through civic responsibility; facilitate national consciousness in the area of national unity and survival; promote social and political awakening and create scientific and technological awareness.<sup>243</sup> The 1975-1980 Nigeria Development Plan ushered in a most profound boom for primary education in Nigeria. In September 1976, the Federal Government introduced a system of Universal Primary Education (UPE) throughout the country. Under the scheme, primary education was free and compulsory.<sup>244</sup> Prior to 1976, the primary education developed at a different pace in various parts of the country and there was no uniform curriculum or system of administration of primary education in Nigeria.<sup>245</sup> Access to education as well as enrolment in schools was uneven; it varied from one region to another.<sup>246</sup>

## 5.2 Primary Education in Nigeria

Education in Nigeria is on the concurrent legislative list, which makes it a shared responsibility of the Federal, State and Local Governments.<sup>247</sup> As a result, there exists a plethora of

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<sup>242</sup> Ukeje & Aisiku "Education in Nigeria" in Fafunwa & Aisiku (eds) *Education in Africa* 230; see also, Arnold *Modern Nigeria* (1977) 103.

<sup>243</sup> Ukeje & Aisiku "Education in Nigeria" in Fafunwa & Aisiku (eds) *Education in Africa* 230.

<sup>244</sup> 211.

<sup>245</sup> For instance, free primary education was first introduced as first of its kind in the country in January 1955 by Obafemi Awolowo led Government of the Western Region of Nigeria and followed by the Eastern Region Government in 1956. In 1974, the then Gowon government declared its intention to adopt the programme of UPE. In his 1974 budget speech, Gowon declared that "Government has accepted universal and compulsory primary education as a matter of policy in order to ensure that all children of primary school age go to school." However, the Gowon Administration did not survive to see the implementation of the programme which was scheduled to commence in 1976. The Obasanjo led government took up the challenge and on 6 September 1976 launched the UPE programme at the Oke Suna Municipal Primary School in Lagos. See Taiwo *The Nigeria Education System: Past, Present and Future* (1980) 173-174.

<sup>246</sup> School enrolment was high in the Southern part of the country compared to the North. It is observed that as late as 1973, fewer than 10 per cent of children in the far north were enrolled in primary schools while nearly 90 per cent of children enrolled in Lagos State, one of the Southern States. See Epelle & Omoruyi "The National Policy on Education" in Igbinovia, Okonofua & Osunde (eds) *Law and Social Policy Legislation and Administration in Nigeria* (2004) 195-197.

<sup>247</sup> See item 30, Part II of the Second Schedule of the CFRN, 1999; Item 2(a) of the CFRN, 1999. In *Attorney-General of the Federation v Attorney-General of Abia State & 35 Other States* [2002] 6 NWLR (pt 764) 542 at 673-674, the Supreme Court held that the duty of providing primary education in Nigeria lies in the respective

stakeholders including regulators, policy formulators, examination bodies and the like who work together to give direction to the sector. The main stakeholders as far as primary education is concerned are the Local Governments and the State Governments while the Federal Government of Nigeria’s intervention or participation in the provision of primary education is only in the form of assistance to the States and Local Governments for the purposes of uniform and qualitative basic education.<sup>248</sup> In terms of the Education (National Minimum Standards and Establishment of Institutions) Act 2004, primary education means the education provided in an institution for children between the ages of six years to eleven years.<sup>249</sup> The Compulsory, Free, Universal Basic Education Act (UBE), 2004 also defines primary school to mean “a school, which provides a six year basic course of full time instruction suitable for pupils between the age of six years and twelve years.”<sup>250</sup>

The Nigerian Constitution guarantees the “right” to education. It provides that Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.<sup>251</sup> In terms of the provision of section 18(3)(a) of the Constitution, Government is to eradicate illiteracy and provide free, compulsory and universal primary education. To achieve this, Government has formulated policies and enacted laws for the implementation of free and compulsory primary education within the context of universal basic education. In this regard, the Child’s Rights Act, 2003 provides that “[e]very child has the right to free, compulsory and universal basic education and it shall be the duty of [the] Government of Nigeria to provide such education.”<sup>252</sup> This is further reiterated in the UBE Act, which states *inter alia* that “[e]very Government in Nigeria shall provide free, compulsory and universal basic education for every child of primary and secondary school age.”<sup>253</sup>

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States of the Federation. In terms of section 7(5) of the Constitution and item 2(a) of the Fourth Schedule of the 1999 Constitution, a local government council only participates with the state government in the provision and maintenance of primary education. See also Akande *Introduction to the Constitution of the Federal Republic of Nigeria 1999* (2000) 60.

<sup>248</sup> S 1 of the Compulsory, Free, Universal Basic Education (UBE) Act, 2004.

<sup>249</sup> See s 25 of the Education (National Minimum Standards and Establishment of Institutions) Act, Cap E3, LFN, 2004.

<sup>250</sup> S 15 of the Act.

<sup>251</sup> S 18(1) of the Constitution.

<sup>252</sup> See s 15(1) of the Child’s Rights Act, Cap 50, LFN, 2004.

<sup>253</sup> See s 2(1) of the Act.

### 5 3 Aims and Content of Primary Education in Nigeria

The purpose of primary education is set out in the Education Act and includes the following: the inculcation of permanent literacy and numeracy and the ability to communicate effectively; the laying of a sound basis for scientific and reflective thinking; citizenship education as a basis for effective participation in and contribution to the life of the society; character and moral training and development of sound attitudes; to develop in the child the ability to adapt to his or her changing environment; to give the child opportunities for developing manipulative skills that will enable him/her to function effectively in the society within the limits of his or her capacity; to provide basic tools for further educational advancement, including preparation for trade and crafts of the locality.<sup>254</sup>

The curriculum for primary education includes the following subjects: Languages (which include language of the environment, English, French, or Arabic); Mathematics; Science; Physical and Health Education; Religious Knowledge; Agriculture/Home Economics; Social Studies and Citizenship Education; Cultural & Creative Arts (Drawing, Handicraft, Music and Cultural Activities) and Computer Education.<sup>255</sup> In order to achieve a good result, the Policy recommends that teaching shall be by practical, exploratory and experimental methods.<sup>256</sup> It provides that the medium of instruction in primary school shall be the language of the environment for the first three years of primary school, but that during this period, English shall be taught as a subject. However, from the fourth year, English shall progressively be used as a medium of instruction while the language of immediate environment and French shall be taught as subjects.<sup>257</sup>

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<sup>254</sup> See s 3 of the Education Act; see also, para 18 of the National Education Policy. Pre-primary education on the other hand means education given in an educational institution to children aged three to five plus, prior to their entering primary school. Section 2 of the Act provides for the purpose of pre-primary education which shall be to effect a smooth transition from home to school; to prepare the child for the primary level of education; to provide adequate care and supervision for children while their parents are away from home either at work, in offices, on the farm, in the market or otherwise; to inculcate in the child the best of social norms; to inculcate in the child the spirit of inquiry and creativity through the exploration of nature and the local environment, playing with toys and indulging in artistic and musical activities; to instil in the child the need for co-operation with others and team spirit; to teach children the rudiments of numbers, colours, shapes and forms through play, and to teach children good habits, especially good health habits.

<sup>255</sup> See para 19(a) & (b) of the National Policy on Education.

<sup>256</sup> Para 19(d) of the National Policy on Education.

<sup>257</sup> Para 19(e) & (f) of the National Policy on Education.

To ensure a good standard and effective teaching and learning, the teacher-pupil ratio is put at 1 to 35 in a class.<sup>258</sup> Government also undertakes to do everything possible to discourage the incidence of dropping out at the primary level of education.<sup>259</sup> Recognising the fact that government alone cannot provide all schools requires in the country, it welcomes the contributions of voluntary agencies, communities and private individuals in the establishment and management of primary schools alongside those provided by the State and local governments. Those schools must meet the minimum standards laid down by the Federal Government.<sup>260</sup>

As already discussed earlier, the right of the child to education is beyond mere school attendance. How well a child progresses in school is an important component of the right. Although it is true that a learner might not progress in school despite good quality teaching and materials and that a learner might progress despite bad quality, good quality is associated with progress and good outcome. Lack of adequate and regular official data is recognised as a serious impediment to determine the quality of education and learning achievement in Nigeria.<sup>261</sup> A nation-wide study conducted on the Monitoring of Learning Achievement by the Federal Ministry of Education (with the support of UNICEF and UNESCO) on literacy, numeracy and life skills illustrates the inadequacy in the Nigerian educational system.<sup>262</sup> It found that most pupils in Primary Grade 4 are not acquiring essential learning tools and the knowledge, skills, values and attitudes that are critical to their future.<sup>263</sup> Educational inputs, such as school infrastructure, the teaching cadre, educational materials and equipment, the curriculum and pedagogical methods, are among the key factors within the education system which most directly affect school access and the quality of education.<sup>264</sup>

#### **5 4 Compulsory and Free Primary Education in Nigeria**

The National Policy on Education, 2004 states that “primary education [in Nigeria] shall be tuition free, universal and compulsory.”<sup>265</sup> In terms of the UBE Act, every parent is obliged to

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<sup>258</sup> Para 19(g) of the National Policy on Education.

<sup>259</sup> Para 19(k) of the National Policy on Education.

<sup>260</sup> Para 19(l) of the National Policy on Education.

<sup>261</sup> Hodges (ed) *Children’s and Women’s Rights in Nigeria: A Wake-Up Call* (2001) 145 & 156.

<sup>262</sup> 154.

<sup>263</sup> 154.

<sup>264</sup> 156.

<sup>265</sup> Para 19(a) of the National Policy on Education, 2004.



ensure that his or her child or ward attends and completes his or her primary school education, and he must achieve this by endeavouring to send the child to school.<sup>266</sup> Section 4 of the Act state that “[e]very parent shall ensure that his child receives full-time education suitable to his age, ability and aptitude by regular attendance at school.” The Act further provides that the stakeholders in education in a Local Government Area must ensure that every parent or person who has the care of and custody of a child performs the duty of sending his or her child to school.<sup>267</sup> To compel compliance with this provision, failure on the part of the parent or guardian attracts criminal punishment in the form of a reprimand on a first conviction, and on second and subsequent conviction, a fine or a term of imprisonment of one or two months as the case may be or both.<sup>268</sup>

The compulsory nature of primary education in terms of the UBE Act is such that every level of government, (Federal, State or Local) has been bestowed with the duty of providing free and compulsory basic education for every Nigerian child of primary school and junior secondary school age.<sup>269</sup> It imposes on a parent or guardian a duty not only to send his or her child to school but also, a duty to ensure that the child continues to attend such a school until after he or she finishes the compulsory terms of schooling.<sup>270</sup> The Act also provides that “services” provides in public primary school shall be free of charge.<sup>271</sup> Services to be provided free of charge include books, instructional materials, classrooms, furniture and free lunch.<sup>272</sup>

To ensure that these services remain free, the law makes it a criminal offence for any person to receive fees from parents or guardians of children. Any person (such as the principal, headmaster, teacher or Parent Teachers Association (PTA) official) who receives or obtains any fee contrary to the provisions of the Act commits an offence, and upon conviction, he or she is liable to a fine of up to ten thousand naira or imprisonment for a term of three months or both such fine and imprisonment.<sup>273</sup> Thus, schooling is free in terms of these provisions and no one may charge pupils for tuition or any other fees.<sup>274</sup> While the Act provides for free lunch in

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<sup>266</sup> S 2(2) of the UBE Act.

<sup>267</sup> S 2(3) of the Act. See s 15(2) & (3) of the Child’s Rights Act, Cap C50, LFN, 2004.

<sup>268</sup> S 2(4)(a)-(c) of the Act. See also, s. 15(6)(a)-(c) of the Child’s Rights Act, Cap C50, LFN 2004.

<sup>269</sup> See UBEC Publication *The Compulsory, Free, Universal Basic Education Act, 2004 and other Related Matters* (2005) 28.

<sup>270</sup> 22; see also, s 3 of the UBE Act.

<sup>271</sup> S 3(1) of the Act.

<sup>272</sup> S 15 of the Act.

<sup>273</sup> S 3(2) of the Act.

<sup>274</sup> See s 15(1) of the Child’s Rights Act, Cap C50, LFN, 2004.

public primary school, in reality, no functional free lunch programmes are in place throughout the country. Also, while the Act provides for free services in the public primary school, some hidden costs are still being charged and in few case where governments provides books and learning materials, they remain inadequate and schools and parents are always forced to complement this through the payment of levies and PTA contributions.

## 5 5 The Concept of Basic Education in Nigeria

As a pre-emptive measure to check the upsurge in the number of primary school leavers, government extended the scope of the UPE programme by introducing the Universal Basic Education (UBE).<sup>275</sup> The term “universal” suggests a programme that is introduced to affect the entire society regardless of social and economic circumstances and physical conditions.<sup>276</sup> The term “basic” on the other hand implies provision of a minimum level of education that can make the individual functions effectively in society.<sup>277</sup> UBE is a programme of nine-year compulsory education. In addition to the compulsory six-year primary schooling under the UPE programme, this programme also makes the first three years of secondary school education both free and compulsory.<sup>278</sup>

The establishment of the UBE Programme is also an expression of the desire of government to entrench viable participatory democracy and enhance national socio-economic development as a consequence of a free and compulsory regime of basic education.<sup>279</sup> In addition, UBE was intended as evidence of Nigeria’s commitment to the World Declarations on Education for All, at Jomtien (1990), New Delhi (1991), Dakar (2000), and the follow-up Conference in Beijing in 2001, requiring stringent efforts by the E-9 Countries<sup>280</sup> to drastically reduce illiteracy within the shortest possible time.<sup>281</sup> The programme also demonstrates Nigeria’s acceptance of the Durban Statement of Commitment (1998) and the OAU Decade of

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<sup>275</sup> See Okemakinde, Okemakinde & Gbenro “Strategies for Effective Organization and Management of Universal Basic Education (UBE) Towards Revitalizing Education in the 21th Century Nigeria” 2006 (12) *Adult Education in Nigeria* 146 251.

<sup>276</sup> See Okemakinde, Okemakinde & Gbenro 2006 (12) *Adult Education in Nigeria* 251.

<sup>277</sup> 251.

<sup>278</sup> Afonja “The Right of the Child to Education” in Ayua & Okagbue (eds) *The Rights of the Child in Nigeria* (1996) 62 67.

<sup>279</sup> *The Compulsory, Free, Universal Basic Education Act, 2004 and other Related Matters* 16.

<sup>280</sup> E-9 Countries refers to nine countries of the world with the largest concentration of illiterate adults.

<sup>281</sup> *The Compulsory, Free, Universal Basic Education Act, 2004 and other Related Matters* 16.

Education (1997-2006) requiring African States to broaden access to quality basic education as a foundation stone for the sustainable socio-economic development of the continent.<sup>282</sup>

Basic education is defined as the education which every Nigerian receives between the ages of three (3) and fourteen (14) years. It consists of the Early Childhood, Primary, Junior Secondary, as well as Adult and Non-Formal Education.<sup>283</sup> The Nigeria's UBE programme accommodates all children of school-going ages, of all sexes, tribes, socio-economic backgrounds and of all abilities. The programme is designed to accommodate global educational objectives articulated in the various international conventions and human rights instruments to which Nigeria is a party.<sup>284</sup> The programme is geared towards ensuring that skills acquisition, job creation and good citizenry education among others are delivered to Nigerians from a tender age.<sup>285</sup> Basic education is wider in scope than primary education; it covers a period of nine years compulsory education, beyond six years of primary education. However, primary education is an important component of Universal Basic Education.

As noted above, universal and free primary education has been one of the cornerstones of national education policy since 1976. This was extended in 1999 by the adoption of the UBE programme to include junior secondary school.<sup>286</sup> With the enactment of the UBE Act, government policies on education have rather been drawn with an emphasis towards the basic education component rather than recognizing primary education as an independent component of education. Under the National Policy on Education, Nigeria has a 6-3-3-4 education system comprised of six years of primary education, three years of junior secondary education, three years of senior secondary education and four years of higher education.<sup>287</sup> Thus, under the UBE Programme, the first nine years of schooling up to the end of junior secondary school constitutes the basic education segment. This type of education is intended to provide children with access to basic literacy skills of reading, writing and numeracy. Basic education aims to impart a fundamental knowledge of the literacy skill to make people functional in society.<sup>288</sup>

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<sup>282</sup> 16.

<sup>283</sup> See Federal Ministry of Education *Roadmap for the Nigerian Education Sector* (2009) 8; see also, s 15 of the UBE Act, 2004.

<sup>284</sup> See Ojo "Universal Basic Education and Millennium Development Goals in Nigeria: An Overview" 2006 (2) *Adult Education in Nigeria* 134 138.

<sup>285</sup> See Idoko "UBEC, Rebuilding Basic Education Structure" *Nigerian Tribune* (2009-01-29) 26.

<sup>286</sup> See Hodges (ed) *Children's and Women's Rights in Nigeria* 143.

<sup>287</sup> See Egunjobi "Access to Basic Education for Girls: the Nigerian Experience" in Oduaran & Bhola (eds) *Widening Access to Education as Social Justice (Essay in Honour of Michael Omolewa)* 427 430.

<sup>288</sup> 430-431.

The system also includes adult education, non-formal education programmes, as well as special education.<sup>289</sup> The basic objectives of the UBE Programme will now be discussed.

### **5 5 1 Objectives of the UBE Programme**

The major objectives of the UBE programme as conceived by the Federal Government of Nigeria are:

- (a) To develop in the entire citizenry a strong consciousness for education and a strong commitment to its vigorous promotion;
- (b) The provision of free, universal basic education for every Nigerian child of school age;
- (c) To Reduce drastically the incidence of drop-out from the formal school system, through improved relevance, quality and efficiency;
- (d) To cater for the learning needs of young persons, who for one reason or another have had to interrupt their schooling, through appropriate forms of complementary approaches to the promotion of basic education;
- (e) To ensure the acquisition of the appropriate levels of literacy, numeracy, communicative and life skills as well as the ethical, moral and civic values needed for laying a solid foundation for lifelong learning.<sup>290</sup>

The UBE Programme has an expanded scope compared to the hitherto UPE programme, and it covers the following areas: Early Childhood Care, Development and Education (ECCDE); Primary Education; and Junior Secondary Education.<sup>291</sup> In order to achieve the above stated objectives of the programme, the UBE Act established a body known as the Universal Basic Education Commission (UBEC) which is charged, *inter alia*, with the function of formulating the policy guidelines for the successful operation of the programme throughout Nigeria.<sup>292</sup> The Commission is also charged with the duty of prescribing the minimum standards for basic education throughout the country in line with the National Policy on Education.<sup>293</sup> It monitors and advises the stakeholders regarding the appropriate implementation of the UBE

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<sup>289</sup> Hodges (ed) *Children's and Women's Rights in Nigeria* 143; see also, Ojo 2006 (2) *Adult Education in Nigeria* 140.

<sup>290</sup> See *The Compulsory, Free, Universal Basic Education Act, 2004 and other Related Matters* 16-17.

<sup>291</sup> 18.

<sup>292</sup> See s 9(a) of the UBE Act.

<sup>293</sup> S 9(c) of the UBE Act.

Programme.<sup>294</sup> The next part of this chapter discusses the major problems facing basic education in Nigeria, including primary education.

## **5 6 Problems and Challenges Facing Primary and Basic Education in Nigeria**

It is observed that access to primary education in Nigeria is constrained by many factors which are categorized into school related, health related, socio-economic and cultural related issues.<sup>295</sup> School related factors include non-availability of schools, distance or location of schools from homes, high cost, inadequacies of physical facilities and inability of the curriculum to meet basic learning needs of education.<sup>296</sup> Inability to benefit from basic education is also as a result of socio-economic constraints. Due to the family background of the child, he or she may be forced to be engaged in income generating activities for the family. Absence from school during farming seasons to help parents on the farm or during market days is prevalent in several part of the country.<sup>297</sup> The challenges of the Nigerian educational system are enormous and this is acknowledged by government and other role-players in education.<sup>298</sup> Unless the problems are addressed they are capable of impacting negatively on the obligation of Nigerian government to provide adequate and quality education. Some of these problems and challenges will now be examined.

### **5 6 1 Curricula Related Problems**

An important challenge to the Nigerian educational system is the issue of curriculum. The curriculum and instructional materials have a direct impact on the quality of teaching and learning in schools. The major challenges include: ineffective implementation of the new 9-year Basic Education curriculum; lack of regular review and updating of existing curricula to meet changing societal needs; low capacity of curriculum developers and implementers; lack of digitization of curriculum including the use of computer simulation and inadequate funding for curriculum development and review.<sup>299</sup> The curriculum of Nigerian schools has also been

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<sup>294</sup> See generally, s 9(b) & (d)-(p) of the UBE Act.

<sup>295</sup> See Afonja "The Right of the Child to Education" in Ayua & Okagbue (eds) *The Rights of the Child in Nigeria* 66.

<sup>296</sup> See Nwonwu "The Role of Universal Primary Education in Development- Implementation Strategies and Lessons from Past Mistakes" 2008 37(4) *Africa Insight* 137 138-139.

<sup>297</sup> Afonja "The Right of the Child to Education" in Ayua & Okagbue (eds) *The Rights of the Child in Nigeria* 66-67.

<sup>298</sup> See Idoko *Nigerian Tribune* (2009-01-29) 26.

<sup>299</sup> See *Roadmap for the Nigerian Education Sector* 29-30.

criticized for being over ambitious, resulting in “overload” and being insufficiently attuned to the needs of the labour market. It is observed that there is also inadequate attention in the curriculum to the development of multi-cultural values and awareness, or to sexuality education, especially in the light of the HIV/AIDS pandemic.<sup>300</sup>

In a renewed effort, the Nigerian Government has stepped up efforts towards a successful implementation of the new 9-year Basic Education Curriculum. It has taken about 1,554 master trainers from across the Federation and the Federal Capital Territory, Abuja, through a training exercise on the new curriculum. These trainers will in turn train teachers in their respective states.<sup>301</sup> It is observed that the training of teachers on the implementation of the new basic education curriculum is necessary because the curriculum is expected to be skills and information driven and teachers need to be re-equipped and re-tooled. According to the Minister of Education, in order to meet the targets, about 39,239 qualified teachers need to be recruited annually for the next eight years.<sup>302</sup> To remedy the weak continuous assessment progress at the basic education level, the UBEC has also developed sets of unified instruments in the core subjects of English Language, Mathematics, Science, Social Studies and Introductory Technology to enhance teaching/learning outcome and to ensure quality.<sup>303</sup>

## **5 6 2 Enrolment Related Problems**

It is observed that the national enrolment rate in Nigeria is less than 50 per cent while the figure is less than the national average in the Northern part of the country.<sup>304</sup> Statistics from the 2006 National Personnel Audit show that there are 54,434 public primary schools in Nigeria. The 2006 School Census put the number at 87,941 with an enrolment figure of 24,422,918 of which the male accounts for 13,302,269 (54.5%) while the female accounts for 11,120,649 (45.5%).<sup>305</sup> More males are enrolled in the primary schools than females in the Northern part of the country while a near parity is recorded in the South.<sup>306</sup> About 65% of primary school children in the

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<sup>300</sup> Hodges (ed) *Children's and Women's Rights in Nigeria* 159.

<sup>301</sup> See Adenipekun “FG Begins Training of Teachers for New Curriculum Implementation” *Vanguard* (2008-08-28) 43.

<sup>302</sup> See Adenipekun *Vanguard* (2008-08-28) 43.

<sup>303</sup> See Idoko *Nigerian Tribune* (2009-01-29) 26.

<sup>304</sup> See Onwuemenyi “NLC seeks Emergency Action on Education Sector” *The Punch* (08/12/2008) 6.

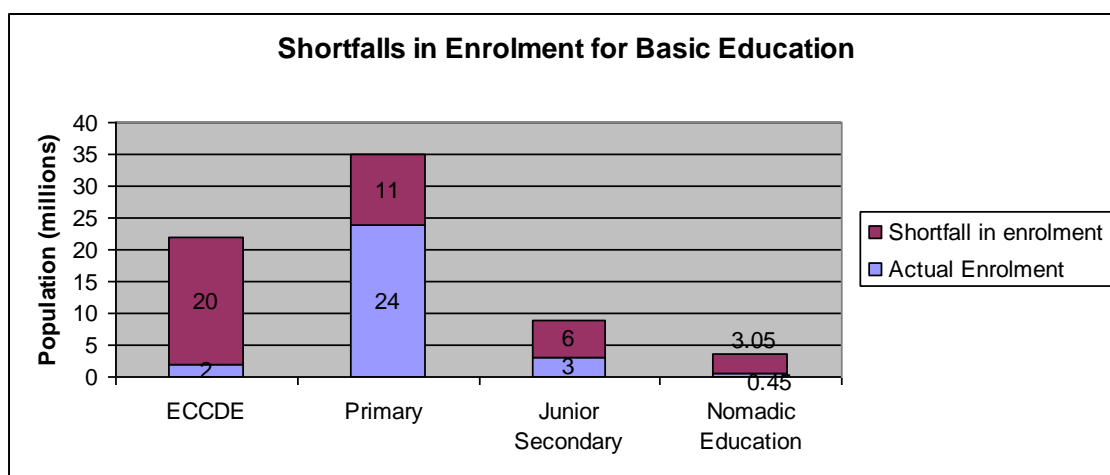
<sup>305</sup> See *Roadmap for the Nigerian Education Sector* 18.

<sup>306</sup> 18.

North are male while 35% are female.<sup>307</sup> There are also 7,129 public Junior Secondary Schools (JSS) in Nigeria with a total enrolment figure of 3,266,780. Gender disparity exists in male and female enrolment figures at the JSS level nationwide. About 55% are male while 45% are female. For nomadic education,<sup>308</sup> the required number of teachers is 23,835 while only 11,506 (48%) are available. This leaves a shortfall of 12,329 (52%) and a teacher-pupil ratio of 1 to 50.<sup>309</sup>

Wide disparity exists between the expected and actual enrolments. For example, the expected enrolment in Primary Education is 34.92 million but the actual is 24.42 million, hence a shortfall of 10.5 million; in junior secondary Education, the expected enrolment is 9.27 million but the actual is 3.27 million, leaving 6.0 million un-enrolled.<sup>310</sup> (See *Figure 3.4* below) The number of available classrooms in formal education as at 2006 is 497,871 and the shortfall is 1,152,412.<sup>311</sup>

**Figure 3.4:** Shortfalls in Enrolment for Basic Education



**Source:** *Roadmap for the Nigerian Education Sector* (Federal Ministry of Education, Abuja: 2009) 19.

<sup>307</sup> 18.

<sup>308</sup> This relate to education for people that move from one place to the other in search of grazing, especially, the Fulani tribe in Northern Nigeria.

<sup>309</sup> See *Roadmap for the Nigerian Education Sector* 18.

<sup>310</sup> See “Education Sector: Roadmap to 2011” *The Guardian* (2009-04-23) 47.

<sup>311</sup> See *Roadmap for the Nigerian Education Sector* 18.

### 5 6 3 Access Related Problems

In terms of access there are deep issues of physical access, quality access and economic access. Provision of uniform access to quality basic education presents a big challenge to the sector in view of economic, cultural, urban-rural dichotomy, public-private schools and other disparities across the country. These disparities have implications for provision of infrastructure, instructional materials, supervision and monitoring of learning achievements, and teacher morale, especially those deployed to rural schools. The children in Nigerian schools need to be guaranteed quality education in learning environment that results in high learning outcomes.<sup>312</sup> Equity issues have always played a significant role in measuring the success or otherwise of basic education delivery in Nigeria. To provide equal opportunity to all children of school age irrespective of gender, location and physical attributes is a major challenge. Apart from gender disparity, other factors of exclusion include: urban–rural dichotomy, access to school from home, aversion to western education by some communities, poverty, vulnerable groups such as nomadic and migrant fisher-folks, out-of-school children, *almajiris*,<sup>313</sup> street children, non-literate adults, children with special needs and in difficult terrains, persons infected and affected by HIV/AIDS and other related factors.<sup>314</sup> Nigeria is still marked down as one of the countries that may not likely achieve the Education for All (EFA) Goals and Millennium Development Goals (MDGs) by 2015, due to wide-spread illiteracy and lack of access to education in the country.<sup>315</sup>

### 5 6 4 Infrastructure

There is a wide gap between the number of schools and classrooms and school-age population at all levels of education in Nigeria. It is estimated that only about two-thirds of the required number of primary schools are currently in place to support the full enrolment of primary school-age children. Some of the worst affected areas are the cities, with their dense population

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<sup>312</sup> 19.

<sup>313</sup> *Almajiris* are pupils under Islamic training in Northern Nigeria. They are more or less street children who always go out begging for alms.

<sup>314</sup> See *Roadmap for the Nigerian Education Sector* 19.

<sup>315</sup> Literacy rate in Nigeria varies from state to state. For instance, it is observed that literacy rate in Taraba State is 30.3 per cent with the rate for children between ages six to nine being 3.9; in Yobe State, it is 15.7 per cent with 10.3 per cent rate for children of six to nine years age range; in Katsina State, the rate is 20.3 per cent while it is 11.6 per cent for children between the six and nine years age brackets. In Ebonyi State, the rate is 49.2 per cent and the rate for children between six and nine years of age is 19.8 per cent. See Olanrewaju “Poverty, Education and the Nigerian Child” *Nigerian Tribune* (23/10/2008) available online at: <http://www.africamasterweb.com/nigeriannewspapers.html> (accessed on 2008/10/23).



of children, resulting in high classroom/teacher ratios.<sup>316</sup> In some rural areas, this is also a serious problem, resulting in children receiving instruction under trees. This inclemency of conditions is a key factor diminishing the motivation of children and their parent for school attendance.<sup>317</sup>

Many schools lack the essential infrastructure to enable them to function as safe, efficient and effective schools. The vast majority, whether urban or rural, have no water, sanitation and electricity and these services are essential. It is reported that the physical state of many classrooms is very poor, with floors full of holes, roofs and ceilings broken, overall, the fabric is in a poor state of repair.<sup>318</sup> Windows have shutters at best but these and doors are often not lockable so schools lack security. Few schools have a perimeter fence or enclosure, again making them open to intruders and vandalism. In some circumstances furniture is stolen and classrooms are used as toilets.<sup>319</sup>

### **5 6 5 Quality of the Teachers**

Another issue that impacts greatly on the basic education in Nigeria is the issue of teacher quality. It is a fact that no education system can rise above the quality of its teachers as the standard of teachers invariably affects the performance of the pupils and students. Government itself recognises that the major challenges include inadequate number of qualified teachers; uneven distribution of teachers between urban and rural schools; poor remuneration and motivation and low teacher support.<sup>320</sup> A large number of teachers with certificates below the National Certificate in Education (NCE) (38.75%) still abound in the system. In the North-East and North-West regions, the figure is about 70%. The existing shortfalls in teachers are 338,147 for primary education; 581 for JSS; 1,580,000 for adult literacy and 12,329 for nomadic education.<sup>321</sup> (See *figure 3.5* below).

### **5 6 6 Inadequate Funding**

Another factor that impacted greatly on the right to basic education in Nigeria is issue of funding. Government commitment to education can be judged by its resource allocation.

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<sup>316</sup> Hodges (ed) *Children's and Women's Rights in Nigeria* 156.

<sup>317</sup> 156-157.

<sup>318</sup> See *Roadmap for the Nigerian Education Sector* 25.

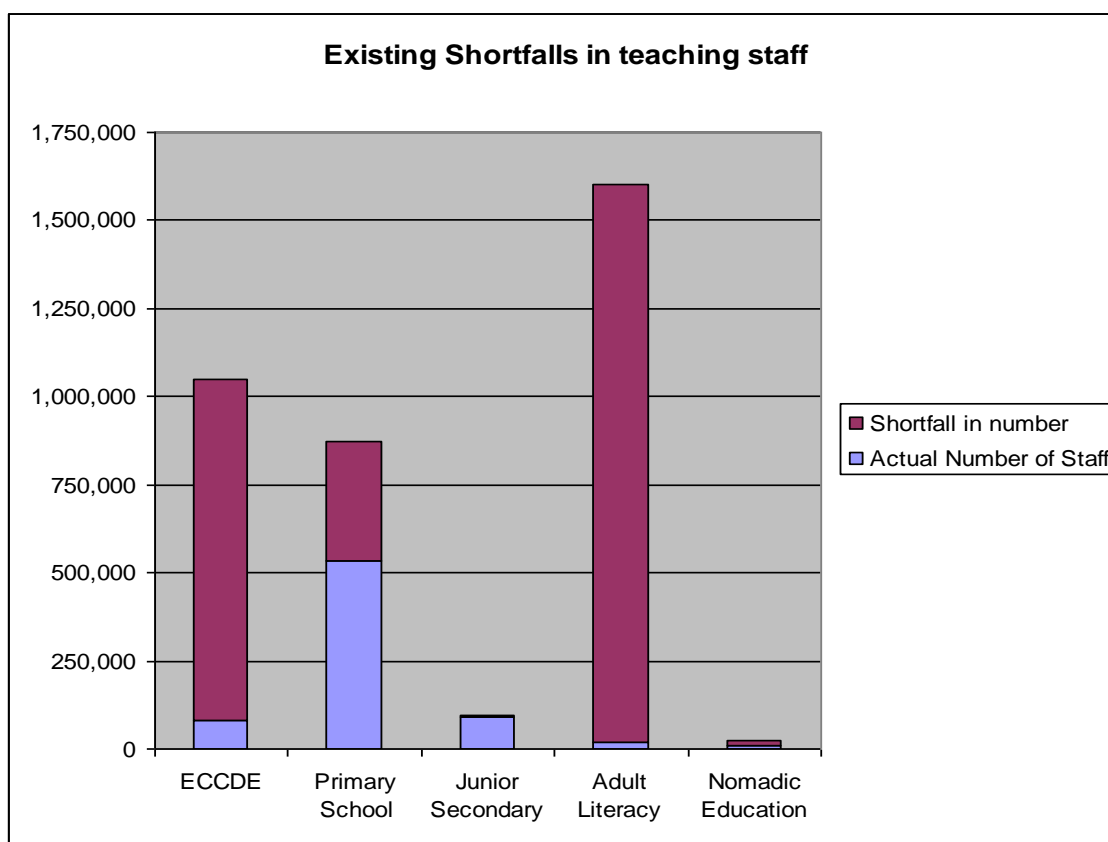
<sup>319</sup> 25.

<sup>320</sup> See Nwonwu (2008) 37(4) *Africa Insight* 139; see also, *Roadmap for the Nigerian Education Sector* 26.

<sup>321</sup> See *Roadmap for the Nigerian Education Sector* 26.

However, there is often significant discrepancy between government pronouncements about the importance of education to human capital development and actual allocation of funds to the sector.<sup>322</sup> Although, there is no accurate data on public expenditure on education in Nigeria, however, some data do exist which show that funding of education is relatively low. According to a former Minister of Education, Dr Igwe Aja-Nwachukwu, the Federal Government has spent about N782.6 billion on education between 1999 and 2007.<sup>323</sup> He pointed out that only 29.2 per cent of this money was spent on basic and secondary education. He further mentioned that a challenge to funding primary education was the low contribution to the UBE fund by the States, due to lack of political will to provide their share of matching grants.<sup>324</sup>

**Figure 3.5:** Existing Shortfalls in Teaching Staff



**Source:** *Roadmap for the Nigerian Education Sector* (Federal Ministry of Education, Abuja: 2009) 27.

<sup>322</sup> 33; David & Olabanji (2008) 3(6) *The Social Sciences* 414.

<sup>323</sup> The breakdown is as follows: N30.6 billion in 1999; N64.2 billion (2000); N74.9 billion (2001); N45.5 billion (2002); N63.5 billion (2003); N90.3 billion (2004); N106.7 billion (2005); N151.7 billion (2006), and N205.2 billion in 2007. See Nigerian Tribune “FG Spends N782.6bn on Education in 9 Yrs- Minister” <http://www.tribune.com.ng/12092008/news/news10.html> (accessed on 2008/09/12).

<sup>324</sup> See Nigerian Tribune “FG Spends N782.6bn on Education in 9 Yrs - Minister” <http://www.tribune.com.ng/12092008/news/news10.html> (accessed on 2008/09/12).

## 5 7 Summary of the Assessment and Findings

The re-launch in 1999 of the UBE Programmes by the Federal Government shows its commitment to giving every citizen a functional and free basic education. Despite all efforts by the government to encourage enrolment of children in schools through the UBE programmes and inclusive education policy of the government, the state of primary/basic education in the country is not very encouraging. The sector faces a lot of challenges that greatly impacted on the quality of education in the country. There are not enough schools to cope with the number of learners that seek to enrol. The consequence of this inadequacy is the over-crowding in classes. In some cases, the teacher to pupils' ratio stands at 1 to 76.<sup>325</sup> This problem is exacerbated by the under-funding and lack of absolute commitment on the part of the government.

The inability on the part of the government to effectively run primary schools has brought about the emergence of many private/independent schools in Nigeria. Experience has shown that public schools tend to perform more poorly than private schools in the country. Few public schools in Nigeria can boast of competency in literacy and numeracy which are the hallmarks of basic education. The general perception is that the quality of education offered at the public schools is low and that standards have dropped. Thus, a large number of parents and guardians prefer private schools for their children or wards. This development is seen as a breach of the government commitment to provide quality basic education.

It is estimated that about 80 per cent of the primary schools are located in the rural areas. Due to insufficient funds on the part of government, schools are subsidized through additional funds contributed by communities to their local schools through Parent-Teacher Associations (PTA), Councils and Community-based Organisations. This arrangement and other hidden costs constitute a violation on the government obligation to provide free basic education. Because the infrastructure and facilities remain inadequate to cope with a system, these funds are used for infrastructure, construction, maintenance and supply of basic equipment. In some cases, the fund are use to pay for teachers hired by PTA. The financial crisis left existing facilities inadequately maintained and has retarded progress in building new facilities. Due to shortages of classrooms, classes are offered in the open air and are subjected to all problems associated with outdoor teaching such as weather fluctuations leading to class cancellations and lack of

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<sup>325</sup> See David & Olabanji (2008) 3(6) *The Social Sciences* 415.

quality instruction.<sup>326</sup> In summary, access to quality primary/basic education remains elusive in Nigeria, and this calls for intervention and commitment on the part of governments at all levels.

## **6 Comparison and Summary of the Positions in South Africa Nigeria**

In South Africa, except for tertiary or higher education, education is a functional area that is shared between the national government and provincial governments over which they both have “concurrent” legislative powers.<sup>327</sup> The 1999 Nigerian Constitution shares similar arrangements with South Africa. In Nigeria, education is classified under the concurrent list in which both the State and the Federal Governments have jurisdiction. However, the Local government complements the efforts of other levels of government on primary education.<sup>328</sup> The advantage which this arrangement has over the South African position is that the government at the grass-root level, that is the local governments, would be able to contribute additional funds for the development and improvement of primary education within their communities.

As pointed out earlier, international and foreign jurisprudence both support the notion that the right to basic education guarantees some minimum level of substantive adequacy, namely the minimally essential components of basic education, as well as some minimum level of implementation, efficacy and adequacy.<sup>329</sup> According to UNESCO, “no child should leave school until the knowledge acquired at school has been sufficiently instilled into him [or her] to be lasting and to enable him [or her] to play his [or her] full part in the life of the community.”<sup>330</sup> Similarly, the CESCR in its General Comment 13 creates concrete minimum requirements with regards to some aspects of education. In this regard, all schools require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries and teaching materials. All these minimum requirements cannot be said to be met considering the state of education in both countries as considered in this chapter.

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<sup>326</sup> 415.

<sup>327</sup> Bray “Law Education and the Learner” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 271; See also, s 104(1) of the South African Constitution read with sch 4.

<sup>328</sup> See *Attorney-General of the Federation v Attorney-General of Abia State & 35 Other States* [2002] 6 NWLR (pt 764) 542 at 673-674.

<sup>329</sup> See Roithmayr (2003) 19 *SAJHR* 402.

<sup>330</sup> UNESCO and its Programme VIII: *The Right to Education* (1952) 12.

Comparatively, as regards what constitutes substantive adequacy in America, the courts have supported the notion of a minimum core for substantive adequacy. Thus, in *Rose v Council for a Better Education*,<sup>331</sup> the Kentucky Supreme Court held that, under the State's right to education, the State had an obligation for all learners, as well as to provide an adequate level of education. The court went on to hold with great specificity what an adequate education sufficient to develop a child should entail. These cover seven basic capacities: "oral and written communication skills; knowledge of social, economic and political systems; knowledge of governmental processes; knowledge of physical and mental wellness; grounding in the arts; adequate training for life work and sufficient academic and vocational training to compete with students in surrounding states."<sup>332</sup> This position is potentially helpful for both South Africa and Nigeria.

For free primary/basic education to be meaningful, it has to conform to the standard set by the international human rights standard. In this regards, UNESCO states:

"Free primary education should not mean merely exemption from the payment of school fees; it should also be extended gradually to include school materials, equipment and text-books. Where communities are scattered over a large area, the resultant difficulty may be overcome ... by the better siting of schools, provision of transport facilities, and establishment of boarding schools. School medical services, meals and (where necessary) clothing services, should be more widespread, as, besides being valuable in themselves, they are an encouragement to school attendance; it would therefore be advantageous for school authorities to organize such services, even where social aids of this kind is provided by other official or private bodies. Family allowances are also an encouragement to school attendance in that they compensate for the inability of children of school age to earn money, which is one of the causes of absenteeism."<sup>333</sup>

Coming to the four essential features/elements of education namely, availability, accessibility, acceptability and adaptability, the two countries have not totally met the requirements of these essential features with regards to primary/basic education. In the South African situation, the position is better in the former Model C Schools while the poorest schools in the predominantly black areas are worst off.<sup>334</sup> Availability requires that functioning

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<sup>331</sup> 790 SW2d 186 (Ky. 1989).

<sup>332</sup> *Rose v Council for a Better Education* (supra) 212; several other US states have followed Kentucky's lead in finding that the right to education guarantees a right to a minimum level of substantive adequacy. These States include Arizona (*Roosevelt Elementary School District No. 66 v. Bishop* 877 P2d 806 (Ariz. 1994)); Massachusetts (*McDuffy v. Secretary of Executive Office of Education* 615 NE2d 516 (Mass. 1993)); New Jersey (*Abbot v Burke* 575 A2d 359 (NJ 1990)); Tennessee (*Tennessee Small School System v. McWherter* 851 SW2d 139 (Tenn. 1993)) and Texas (*Edgewood Independent School District v. Kirby* 777 SW2d 391 (Tex. 1991)).

<sup>333</sup> UNESCO and its Programme VIII: *The Right to Education* 13.

<sup>334</sup> Although this is not generally because the State fulfils its obligations better in the Model C schools, the parents are able to compensate for the lack of compliance by the State.

educational institutions and programmes should be available in sufficient quantity within the jurisdiction of the State party. The assessment of educational systems in the two countries shows deficiency in this aspect. Payment of school fees and other hidden costs in education as experienced in the two countries also violate economic aspects of accessibility. Acceptability requires that substantive education, including curricula and teaching methods, have to be acceptable in the sense that it is relevant, appropriate and of good quality. It is found that the education standard in these two countries is not adequate. The same applies with respect to adaptability.

## **7 Conclusion**

The concept of free education in both South Africa and Nigeria does not completely meet the standard required by UNESCO and other international human rights instruments and this needs to be urgently addressed. Although both countries have, through their education policies and programmes, guaranteed compulsory education at the fundamental stage, this is not enough as quality is lacking and essential elements required for the enjoyment of this right are absent. The next chapter will examine the right to secondary education in South Africa and Nigeria and will also determine the extent to which the secondary school level of education in both countries has been able to conform to international standard and requirements.

# Chapter 4

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## The Right to Secondary Education

“Secondary education in its different forms...shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”<sup>1</sup>

### 1 Introduction

Article 13(2)(b) of the ICESCR guarantees the right to secondary school education. It provides: “[t]he States parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right to education]: (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.” This provision is reiterated in article 28(1)(b) of the CRC which obliges the States parties to the Convention to encourage the development of different forms of secondary education, including general and vocational education. The provision further obliges the States parties to make secondary school education available and accessible to every child, and also to take appropriate measures to ensure access to it such as the introduction of free education and the offering of financial assistance.

Neither the ICESCR nor the CRC defines the term “secondary education.” Guidance is taken from the ISCED. In terms of the provisions of the ISCED, secondary education comprises “lower secondary education” and “upper secondary education.”<sup>2</sup> At the lower secondary level, the contents of education are typically designed to complete the provisions of basic education which had begun at primary school.<sup>3</sup> Since secondary school education is of a higher and more advanced level than primary education, it is expected that pupils seeking to enter secondary schools will have successfully completed a primary school course.<sup>4</sup> Compared to primary

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<sup>1</sup> Art 13(2)(b) of the International Convention on Economic, Social and Cultural Rights, 1966.

<sup>2</sup> See paras 52 & 62, ISCED, 1997.

<sup>3</sup> The concept “basic education” within the context of secondary education will be discussed shortly.

<sup>4</sup> Burns *African Education: An Introductory Survey of Education in Commonwealth Countries* (1965) 51.

school, the programmes at the lower secondary school level are usually on a more subject-oriented pattern and require specialized teachers conducting classes in their fields of specialization. The full implementation of basic skills occurs at the lower secondary school. Also, this phase of education often coincides with the end of compulsory education in the countries where it exists.<sup>5</sup>

The programme orientation at the lower secondary school is divided into three categories: general education, pre-vocational or pre-technical education and vocational or technical education. General education is designed to lead participants to a deeper understanding of a subject or group of subjects.<sup>6</sup> A pre-vocational or pre-technical educational programme, by contrast, is mainly designed to introduce participants to the world of work and to prepare them for entry into vocational or technical education programmes. For a programme to be considered as pre-vocational or pre-technical education, it is required that at least 25 per cent of its content has to be vocational or technical.<sup>7</sup> Vocational or technical education is designed to lead participants to acquire the practical skills, know-how and understanding necessary for employment in a particular occupation or trade.<sup>8</sup>

The second phase of secondary education is the upper secondary school. This level of education begins at the end of full-time compulsory education for those countries that have a system of compulsory education. The programmes at the upper secondary schools are more advanced compared to the lower secondary level. The teachers who are to teach at the upper secondary schools need higher qualifications compared to those at the lower secondary schools.<sup>9</sup> The educational programmes included at the upper secondary level span some three years of full-time education after the lower secondary education.<sup>10</sup> The programme at the upper secondary school level follow the same classifications as for lower secondary schools namely, general education, pre-vocational or pre-technical education and vocational or technical education.<sup>11</sup>

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<sup>5</sup> See para 52, ISCED. The entry into this phase of education is after 6 years of primary school education. See para 53, ISCED. In some case, some primary school end at primary 5 and this is the position for example in most private primary school in Nigeria but all public primary school has the minimum duration of six years.

<sup>6</sup> See paras 56 & 57, ISCED.

<sup>7</sup> See para 58, ISCED.

<sup>8</sup> See para 59, ISCED.

<sup>9</sup> See para 62, ISCED.

<sup>10</sup> See para 63, ISCED.

<sup>11</sup> See para 67, ISCED.



In terms of the ISCED the aim of education at the secondary school level is to lay the foundation for lifelong learning and human development upon which countries may expand and, on a systematic basis, further educational opportunities.<sup>12</sup> Burns submits that the principal aims of secondary education are multifaceted, including the following: (i) to continue the training in those disciplines to which the pupils have been introduced in the primary school, and to develop them in such new ways as appear to correspond to the pupils' growing range of interests; (ii) to provide a life which answers any special needs and brings out the special values of the adolescent years; (iii) to prepare boys and girls for entry into adult life, and (iv) to prepare pupils for a vocation.<sup>13</sup>

Following this brief introduction, this chapter discusses the right to secondary school education as guaranteed in the various international human rights instruments. In terms of these instruments, vocational and technical education is classified as part of secondary education. In this chapter, secondary school/high school is taken as a paradigm representing every other form of secondary school, including vocational and technical education. After this, the right to secondary school education as guaranteed at the national level namely, in South Africa and Nigeria will be examined. The chapter will also analyse the standard and quality of secondary education in the two countries before concluding.

## **2 The Right to Secondary School Education at the Global Level**

The CESCR has attempted to give meaning to the right to secondary school education as guaranteed in article 13(2) of the ICESCR in its General Comment No. 13 on the right to education.<sup>14</sup> In terms of the General Comment, like primary school education, secondary school education also includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.<sup>15</sup> The Committee recognises that while the content of secondary education may vary among States parties and over time, it must include completion of basic education and consolidation of the foundations for life-long learning and human development.<sup>16</sup> It prepares students for vocational and higher educational opportunities. The General Comment further states that article 13(2)(b) of the ICESCR applies

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<sup>12</sup> Para 52, ISCED.

<sup>13</sup> Burns *African Education* 51.

<sup>14</sup> See CESCR General Comment No. 13: The Right to Education (Art 13) E/C.12/1999/10 (21<sup>st</sup> Session, 1999).

<sup>15</sup> See para 11, General Comment 13.

<sup>16</sup> See para 12, General Comment 13.

to secondary education “in its different forms.”<sup>17</sup> This recognises that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings.<sup>18</sup> The Committee also encourages “alternative” educational programmes with parallel regular secondary school systems.<sup>19</sup>

Article 13(2)(b) of the ICESCR makes two demands on secondary education: education at this level must be made “generally available” and “generally accessible.” States parties should by every appropriate means and, in particular, by progressive introduction of free education guarantee this right. It is submitted that although the general availability and accessibility of secondary education need not be realised immediately on becoming party to the ICESCR, this has to be achieved gradually in accordance with the resources a State has at its disposal.<sup>20</sup> The provision of article 13(2)(b) of the ICESCR needs to be read with article 2(1), which provides for the progressive realisation of the rights protected in the ICESCR.<sup>21</sup> The requirement that secondary education be made “generally available” means that there must be enough educational facilities available for all at this level. According to the CESCR, “[t]he phrase ‘generally available’ signifies, firstly, that secondary education is not dependent on a student’s apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all...”<sup>22</sup>

Availability also entails that functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of a State party.<sup>23</sup> What they require to function depends upon numerous factors, including the developmental context within which they operate. For example, similar to the position regarding basic/primary education, all institutions and programmes are likely to require buildings or other protection from the

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<sup>17</sup> See para 12, General Comment 13.

<sup>18</sup> Recognizing this fact, the ISCED, asserts that “[w]hile the classification of educational programmes by level should be based on educational content, it is clearly not possible to directly assess and compare the content of the educational programmes in an internationally consistent way. Curricula are far too diverse, multifaceted and complex to permit unambiguous determinations that one curriculum for students of a given age or grade belongs to a higher level of education than another. International curricula standards that are needed to support such judgments do not yet exist.” See para 31, ISCED.

<sup>19</sup> See Para 12, General Comment 13.

<sup>20</sup> Beiter *The Protection of the Right to Education by International Law* (2006) 517-518.

<sup>21</sup> Art 2(1) of the ICESCR states: “[e]ach 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.”

<sup>22</sup> See para 13, General Comment 13.

<sup>23</sup> Para 6(a), General Comment 13.

elements, sanitations for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on.<sup>24</sup> Facilities such as libraries, computer facilities and information technology are also necessary.<sup>25</sup> It is submitted that the availability of these necessities and educational materials will impact greatly on the quality of secondary education being provided by a particular State.

The requirement that secondary education be made “generally accessible” implies that all obstacles to admission must be eliminated.<sup>26</sup> This means that educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: non-discrimination, physical accessibility, and economic accessibility.<sup>27</sup> Non-discrimination requires that education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds such as race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status.<sup>28</sup> Physical accessibility requires that education has to be within safe physical reach, either by attendance at reasonably convenient geographical location, for example, a neighbourhood school, or via modern technology, for example access to a distance learning programme.<sup>29</sup> Economic accessibility requires that education has to be affordable to all. With regards to secondary school, States parties are required to progressively introduce free education.<sup>30</sup>

In terms of article 13(2)(b) of the ICESCR, secondary education is to be accomplished “by every appropriate means.” It is submitted that each country is obliged to determine “the appropriate means” in terms of this provision. In determining the appropriate means, a State Party may not, however, interpret the phrase in a way capable of defeating the progressive realisation of this right.<sup>31</sup> As noted above, the article obliges States Parties to promote the general accessibility of secondary education “in particular by the progressive introduction of free education.”<sup>32</sup> The best way to make secondary education generally available is by

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<sup>24</sup> Para 6(a), General Comment 13.

<sup>25</sup> Para 6(a), General Comment 13.

<sup>26</sup> Beiter *The Protection of the Right to Education* 518.

<sup>27</sup> Para 6(b), General Comment 13.

<sup>28</sup> Para 6(b), General Comment 13; see also, paras 31-37 General Comment 13.

<sup>29</sup> Para 6(b), General Comment 13.

<sup>30</sup> Para 6(b), General Comment 13.

<sup>31</sup> See art 13(2)(b) of the ICESCR which imposes the obligation to progressively introduce free education.

<sup>32</sup> See art 13(2)(b) of the ICESCR.

introduction of free education.<sup>33</sup> According to the Committee, “‘progressive introduction of free education’ means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary [education]...”<sup>34</sup> Going by the meaning of the term “free education” as examined earlier in chapter three, fees imposed by the government, the local authorities or the school, and other direct costs will constitute disincentives to the enjoyment of this right and may jeopardize its realisation.<sup>35</sup> They are also often highly regressive in effect.<sup>36</sup> The Committee notes further that indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, also fall into the same category.<sup>37</sup> The Committee contends that their elimination is a matter which must be addressed by plan of action.<sup>38</sup> It is agreed with Beiter that other means suitable to promoting the general accessibility of secondary education include: making the first three years of secondary education compulsory; granting study bursaries to students in deserving cases; making it easier for students to move on from primary to secondary education; facilitating changes of “career” within the system of secondary education; provision of accurate information to students on all forms of secondary education available; and respecting the language needs of students at the secondary level.<sup>39</sup>

One important point of note from the provision of article 13(2)(b) of the ICESCR is that it does not mention the requirement of “compulsory education” at the secondary school level.<sup>40</sup> In arguing for compulsory secondary education, recourse will have to be made to the ILO’s Minimum Age Convention of 1973 which obliges the States parties to specify a minimum age for admission to employment which may not be less than the age of completion of compulsory schooling and, in any case, not less than 15 years.<sup>41</sup> The strength of this provision allows implicit support for the argument that education should be compulsory at least until the child reaches the age of 15 years. It is submitted that article 13(2)(b) of the ICESCR should therefore

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<sup>33</sup> Beiter *The Protection of the Right to Education* 518.

<sup>34</sup> Para 14, General Comment 13.

<sup>35</sup> Para 7, General Comment 11.

<sup>36</sup> Para 7, General Comment 11.

<sup>37</sup> Para 7, General Comment 11.

<sup>38</sup> Paras 8 & 9, General Comment 11.

<sup>39</sup> See Beiter *The Protection of the Right to Education* 518.

<sup>40</sup> This is in contrast with art 13(2)(a) of the ICESCR.

<sup>41</sup> See art 2 of the Convention.

be interpreted in the light of article 2 of the ILO's Minimum Age Convention to make "lower secondary education" progressively compulsory. Arguing in favour of the lengthening of compulsory education, Tomasevski submits that the trend is justified for two reasons: first, it prevents children from venturing into adulthood too early, be it through marriage or employment. Secondly, it provides all children with a common core education which is increasingly demanded by the emergence of knowledge-based societies and economies.<sup>42</sup>

The CESCR has argued that education in all its forms and at all levels should exhibit four interrelated and essential features.<sup>43</sup> Thus, in addition to the two demands of "availability" and "accessibility" considered above, secondary education must also be acceptable and adaptable. "Acceptability" requires that the form and substance of education, including curricula and teaching methods, have to be acceptable to students and parents. Education must reflect the educational objectives set out in article 13(1) of the ICESCR, and must also conform to the minimum standards as may be approved by the State.<sup>44</sup> "Adaptability" on the other hand requires that education must be flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.<sup>45</sup>

In summary, the obligations imposed on the State parties in terms of article 13(2)(b) of the ICESCR as far as the right to secondary school education is concerned are that the State party must make secondary education generally available and accessible. A sufficient number of secondary schools should be made available within the State to avoid over-crowding in classes; secondary schools should be evenly distributed throughout the country; there should be adequate sanitation as well as conducive and safe learning environment for students; teachers should be placed on good salaries; teaching materials, libraries, computer facilities and information technology are to be made available. Also, all obstacles to schooling should be eliminated; secondary school education should be made available to all without discrimination on any of the prohibited grounds; schools should be accessible within safe physical reach and

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<sup>42</sup> See Tomasevski *Economic, Social and Cultural Rights: The Right to Education*, UN Doc. E/CN.4/2000/6 (Progress Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Education, 2000) para 46.

<sup>43</sup> Para 6, General Comment 13.

<sup>44</sup> Para 6(c), General Comment 13.

<sup>45</sup> Para 6(d), General Comment 13.

also be affordable to all. While it is not mandatory to provide free secondary school education, States parties are required to progressively introduce free education.

The foregoing constitutes the minimum State obligations imposed on the State parties at the global level. A State may not deviate from these obligations without breaching its obligations under the ICESCR and allied human rights instruments. It is against this standard that the right to secondary education will be assessed in South Africa and Nigeria. Before doing this, since technical and vocational education is considered as secondary education, the next part of this chapter is devoted to examining this form of secondary education.

## **2 1 Technical and Vocational Education**

Technical and vocational education is also classified under the secondary education phase. In terms of article 13(2)(b) of the ICESCR, the States parties to the Covenant are obliged to ensure that secondary education in its different forms, including technical and vocational secondary education, is made generally available and accessible to all. In the same vein, the UDHR provides that “[t]echnical and professional education shall be made generally available.”<sup>46</sup> Technical and Vocational Education (TVE) is defined as “all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, attitudes and understanding relating to occupations in the various sectors of economic and social life.”<sup>47</sup>

TVE forms an integral element of all levels of education.<sup>48</sup> However, article 6(2) of the ICESCR states that TVE forms part of both the right to education and the right to work.<sup>49</sup> Article 6(2) of the ICESCR does not refer to TVE in relation to a specific level of education; it comprehends that TVE has a wider role, and must, with a view to realizing the right to work, be made available “to achieve steady economic, social and cultural development and full and productive employment.”<sup>50</sup> However, the Committee takes the view that an introduction to

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<sup>46</sup> See art 26(1), UDHR, 1948. The UDHR does not, however, refer to TVE in relation to a specific level of education.

<sup>47</sup> See art 1(a) of the UNESCO Convention on Technical and Vocational Education, 1989. This Convention entered into force on 29 August 1991.

<sup>48</sup> See para 15, General Comment 13.

<sup>49</sup> See para 15, General Comment 13.

<sup>50</sup> See para 15, General Comment 13; ISCED also states that vocational or technical education means “education which is mainly designed to lead participants to acquire the practical skills, know-how and understanding necessary for employment in a particular occupation or trade or class of occupations or trade. Successful completion of such

technology and to the world of work should not be confined to specific TVE programmes but should be understood as a component of general education.<sup>51</sup>

According to the Committee, the right to TVE includes the following aspects:

- “(a) It enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party’s economic and social development;
- (b) It takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety and welfare;
- (c) Provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes;
- (d) It consists of programmes which gives students, especially those from developing countries, the opportunity to receive TVE in other States, with a view to the appropriate transfer and adaptation of technology;
- (e) It consists, in the context of the Covenant’s non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantages groups.”<sup>52</sup>

Content has been given to article 13(2)(b) as it relates to TVE by the UNESCO Convention on Technical and Vocational Education (CTVE), 1989 and UNESCO’s Revised Recommendation concerning Technical and Vocational Education (RTVE), 2001. The preamble to the Convention refers to article 23 and 26 of the UDHR on the rights to work and education, respectively. It also mentions ILO instruments in the sphere of vocational guidance and training and notes the co-operation between UNESCO and the ILO in the field concerned. The Convention applies not only to TVE provided in educational institutions but also to that provided through co-operative programmes organized jointly by educational institutions and undertakings related to the world of work.<sup>53</sup> Article 2 of the Convention obliges States parties to frame policies, to define strategies and implement programmes for TVE. It enjoins State parties to provide a legislative or other framework for the development of TVE.<sup>54</sup>

Similarly, the Revised RTVE defines technical and vocational education as: “those aspects of the educational process involving, in addition to general knowledge, the study of

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programmes leads to a labour-market relevant vocational qualification recognised by the competent authorities in the country in which it is obtained...” See para 59, ISCED.

<sup>51</sup> See para 16, General Comment 13.

<sup>52</sup> Para 16, General Comment 13.

<sup>53</sup> See art 1(b) of the Convention.

<sup>54</sup> See art 2(2)(a) & (b) of the Convention.

technologies and related sciences and the acquisition of practical skills, attitudes and understanding relating to occupations in the various sectors of economic and social life...”<sup>55</sup> It is further understood to be an integral part of general education; a means of preparing for occupational fields and for effective participation in the world of work; an aspect of lifelong learning and to a preparation for responsible citizenship; an instrument for promoting environmentally sound sustainable development, and a method of facilitating poverty alleviation.<sup>56</sup> The Recommendation calls upon member States of UNESCO to formulate and implement a policy directed to both the structural and the qualitative improvement of TVE. Such policy should support certain objectives laid down in the Recommendation.<sup>57</sup> With the above as background, the next two parts of this chapter examine the right to secondary education in South Africa and Nigeria respectively.

### **3 The Right to Secondary School Education in South Africa**

The South African Constitution guarantees the right to basic education, including adult basic education; and to further education, which the State, through reasonable measures, must make progressively available and accessible.<sup>58</sup> As considered in chapter 3, education in South Africa can be broken down into early childhood development (ECD); General Education and Training (GET), consisting of grades 1 to 3 (the Foundation Phase), grades 4 to 6 (the Intermediate Phase), and grades 7 to 9 (the Senior Phase); Further Education and Training (FET), including grades 10 to 12;<sup>59</sup> Adult Basic Education and Training (ABET); Special Needs Education (SNE), and Higher Education (HE).<sup>60</sup> Secondary education therefore covers both the senior phase of General Education and Training, that is, grades 7 to 9 and grades 10 to 12 under Further Education and Training. In South Africa, grades 7 to 9 of education fall within the compulsory education phase while grades 10 to 12 are outside the compulsory education scheme.

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<sup>55</sup> See Fig. I, s 2 of the Recommendation.

<sup>56</sup> See Fig. I, s 2 of the Recommendation.

<sup>57</sup> See Fig. II, ss 5 & 6 of the Recommendation.

<sup>58</sup> See s 29(1)(a) & (b) of the Constitution.

<sup>59</sup> Further education and training comprises the senior secondary component of schooling (grade 10-12) as well as further education and training colleges. The final three years of secondary school are not compulsory, but government is constitutionally obliged to make further education and training progressively available. Learners can acquire a FET qualification by completing grade 12 in the schooling system, by attaining equivalent certification from one of the public FET Colleges or through opportunities offered by the private college sector. See OECD *Reviews of National Policies for Education: South Africa* (2008) 39-40.

<sup>60</sup> 19-20.



In terms of section 3(1) of the South Africa Schools Act, parents must see to it that the learner attends a school from the first day of the year in which he or she reaches the age of seven years until the last day of the year in which he or she reaches the age of fifteen years (or the ninth grade), whichever occurs first. The section further mandates every Member of the Executive Council (MEC) of the Province responsible for education in each Province to ensure that there are enough school places so that every child who lives in the Province can attend a school. In terms of the South African Constitution, the State is to make further education progressively available and accessible.<sup>61</sup> It is submitted that the requirement that secondary education should be available and accessible means that all obstacles to admissions must be eliminated. As postulated by the CESCR, it also means that there should be no discrimination on the basis of race, class and gender, and vulnerable groups, such as children with disabilities, must be catered for.<sup>62</sup> School must be physically and economically accessible and affordable.<sup>63</sup>

In terms of 13(2)(b) of the ICESCR, accessibility is to be accomplished “by every appropriate means.” In order to comply with the notion of non-discrimination in access to education, the South Africa Schools Act prohibits discrimination in terms of admission policy. In terms of the provisions of the Act, a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.<sup>64</sup> Admission on the basis of an admission test administered by a governing body or the principal of a school (whether directly or indirectly authorized by such governing body), is prohibited.<sup>65</sup> Previously, children could be refused admission on the basis of failing an admission test which entailed proficiency in the language of instruction. However, in terms of the provision of the Schools Act, this is now outlawed and regarded as discriminatory.<sup>66</sup>

There are judicial decisions regarding the principle that schools may not discriminate in terms of their admission policy on any of the prohibited grounds. In *Mutukane and Others v*

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<sup>61</sup> S 29(1)(b), CRSA 1996.

<sup>62</sup> See paras 6(b) & 31-37 of the General Comment 13; art 2(2) of ICESCR, 1966.

<sup>63</sup> See Pendlebury (ed) *South African Child Gauge* 20.

<sup>64</sup> See section 5(1) of the SASA 1996. This provision gives effect to section 9 of the Constitution on equality and freedom from discrimination. S 9(3) for instance provides: “(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” S 9(4) states: “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)...”

<sup>65</sup> See s 5(2), SASA. See also *Matukane v Laerskool Potgietersrus* 1996 (3) SA 233 (T).

<sup>66</sup> See Robinson (ed) *The Law of Children and Young Persons in South Africa* 258.

*Laerskool Potgietersrus*,<sup>67</sup> the first three applicants were the parents who had unsuccessfully applied to have their children admitted as pupils in the English-medium stream of Laerskool Potgietersrus, the respondent in this case. The fourth applicant was an executive council member of the Northern Province responsible for Education, Arts, Culture and Sport. He joined the other applicants in his official capacity to represent the interest of parents who would like to send their children to the school and also in the public interest.

The applicants contended that black children had been refused admission to the school because of the respondent school's policy which refused admission on racial grounds. The first applicant, Mr. Matukane, a black resident of Potgietersrus, spoke to the principal on 11 January 1996 as to the possibility of getting his children enrolled in the school. The principal informed him to wait until 25 January 1996 for a determination as to whether there would be space available at the school to enrol his three children. Not convinced that any such delay was warranted, the first applicant approached the Provincial Department of Education which informed him that his children could be enrolled at the school. On the strength of this information, Mr. Matukane went to the school on 22 January, completed the necessary application forms and bought the school uniforms for his children.

When he returned the following day to the school with his children for their first day at school, the entrance of the school was blocked by a group of white parents who refused to allow him and his children to enter the school. The following day, the children were again denied access to the school. A standoff ensued between a group of black parents and children and white parents and children. After being rebuffed this second time, Mr. Matukane secured a temporary place for his children at an already overcrowded school. It was established at the hearing that at least 55 black children had been refused admission to the school in the same manner and that no black child had ever been admitted to the school while none appeared on the waiting list. After Mr. Matukane's experience, a group of black parents approached the High Court for an order requiring the *Laerskool Potgietersrus* to admit their children.

At the High Court, the School argued that it was unable to accommodate more children and that it did not reject the children on racial grounds.<sup>68</sup> The school expressed concern that if it admitted those children it would be swamped by English-speaking children which would

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<sup>67</sup> 1996 (3) SA 223 (TPD).

<sup>68</sup> At the time of hearing of the case, the school had 580 Afrikaans-speaking students and 89 English-speaking students.

destroy the Afrikaans ethos of the school. The school contended further that section 32(c) of the Interim Constitution protected the right “to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.” It was also argued that the school was entitled to adopt admission requirements designed to maintain the existing “culture” and “ethos” of the school. Furthermore, it was submitted that a Department of Education directive gave the school governing body the sole power to determine its criteria for admission.

Granting the application, the court, Spoelstra J held *inter alia*:

“I am satisfied that discrimination has been *prima facie* proved. I say this for the following reasons: The fact that no pupils of colour have ever been admitted to the school notwithstanding the number of applications received by the respondent, not only for this year but also for the previous year, is a strong indication in this direction...”<sup>69</sup>

The court held further:

“The respondent failed to establish that there was no unfair discrimination against the black children. Even if their applications had been rejected because they had elected to receive their schooling through the medium of English, it would still constitute unfair discrimination.”<sup>70</sup>

Also in this direction is that schools may not discriminate in its admission policy on account of age or any other ground. The case of *Minister of Education v Harris*<sup>71</sup> was decided on the issue of non-discrimination on account of age. The facts of this case were as follows: on 18 February 2000 the Minister of Education published a notice under section 3(4) of the National Education Policy Act 27 of 1996 stating that a learner should not be enrolled in grade one in an independent school if he or she did not reach the age of seven in the same calendar year. Talya Harris was part of a group of children who had enrolled at the age of three in King David Pre-Primary School, and had spent three years being prepared for the entry to the primary school in year 2001. Her sixth birth day was due to fall on 11 January 2001, a short while before the school year would begin.

Challenging the validity of the notice, her parents sought an order of court permitting her to be enrolled in Grade 1 in the year she turned six. Transvaal High Court, Coetzee J declared the notice to be unconstitutional and invalid, and authorized King David Primary

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<sup>69</sup> At 232A-B.

<sup>70</sup> At 235C.

<sup>71</sup> 2001 (4) SA 1297 (CC).

School to admit Talya to Grade 1. The court held, *inter alia*, that the Minister's action was unjustifiable as it discriminated unfairly on the ground of age against Talya and similarly situated children, and accordingly the directive violated the right to equality guaranteed by section 9 of the Constitution. It held further that by requiring Talya and other children to sit at home waiting for the year to pass, the Minister's action unjustifiably violated section 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning the child. The Minister appealed the whole decision and the order made. Dismissing the appeal, the Constitutional Court confirmed the unconstitutionality of the notice, basing its decision on the principle of legality and declining to pronounce on the constitutional issue as to discrimination.<sup>72</sup>

Before assessing the standard and quality of South African secondary school education, it is necessary to examine two important concepts relating to secondary school education in South Africa namely, "basic education" and "further education." Basic education as it relates to primary education was examine in chapter three, while in the present chapter, the concept will be discussed in so far as it relates to the right to secondary school education.

### **3.1 The Concepts of "Basic Education" and "Further Education" within the South African Secondary School Context**

The South African Constitution provides for the right to basic education and further education and this section is devoted to examining these two concepts. The Constitution guarantees the right of everyone to a basic education which includes adult basic education.<sup>73</sup> As pointed out in chapter 3, the South African courts are yet to interpret the meaning of the term "basic education." In defining the term, Woolman and Fleisch submit that two possible constructions appear plausible: the term "basic education" could refer to a specific period of schooling; it could also refer to standard of education, in other words, its quality or its adequacy.<sup>74</sup> The White

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<sup>72</sup> The court held as follows: "In the present matter, the issue raised in the most crisp form with the best evidential foundation was the one relating to the powers of the Minister. Having resolved the question in a manner which terminates the dispute between the parties, I decline to pronounce on the correctness or otherwise of the determinations on constitutionality made in the High Court regarding unfair discrimination and violation of the best interests of the child. In issuing the notice the Minister exceeded the powers conferred upon him by s 4(4) of the National policy Act and accordingly infringed the constitutional principle of legality. The appeal must fail." Sachs J at 1308G-1309A.

<sup>73</sup> S 29(1)(a), CRSA 1996.

<sup>74</sup> See Woolman & Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 127.

Paper on Education and Training, 1995 states that meeting the certification requirements of the General Education Certificate (GEC) satisfies the constitutional entitlement to a “basic education.”<sup>75</sup>

In *Motala v University of Natal*,<sup>76</sup> the Supreme Court of Appeal held that the interim Constitution’s guarantee of “basic education” did not include tertiary or other forms of higher education. Interpreting the phrase even narrower than the court is the definition by the Department of Education. In terms of the White Paper on Education and Training, “basic education” is “appropriately designed programmes to the level of the proposed General Education Certificate (GEC), whether offered in school to children, or through other forms of delivery to young people and adults.”<sup>77</sup> It notes that “basic education” is a flexible concept which must be defined so as to meet the “learning needs appropriate to the age and experience of the learner, whether child, youth or adult...”, and should also provide access to nationally recognised qualifications. Accordingly, “appropriately designed education programmes to the level of the proposed General Education Certificate (GEC) (one-year reception class plus 9 years of schooling), whether offered in school to children, or through other forms of delivery to young people and adults, would adequately define basic education for the purposes of the constitutional requirement.”<sup>78</sup>

It is submitted that that the narrow interpretation of the term “basic education” by the Department of Education appears to be inconsistent with the other language of section 29 of the Constitution, particularly in the reference to adult basic education.<sup>79</sup> Roithmayr argues: “[t]he phrase ‘adult basic education’ is rendered nonsensical if one defines ‘basic’ to include only compulsory primary education.”<sup>80</sup> It is submitted that the definition of basic education in South Africa is very narrow because learners who have completed grade 9 are not yet sufficiently

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<sup>75</sup> See para 15.

<sup>76</sup> 1995 (3) BCLR 374 (D).

<sup>77</sup> Para 15; The GEC is awarded after completion of the one-year reception class (pre-school) plus Grade One through Grade Nine. In terms of s 3(1) of the South African School Act, it is compulsory for a learner to attend school from the age of seven until the age of fifteen or the ninth grade whichever comes first. This phase of education is also prioritized in terms of actual allocation of resources. See also, the Norms and Standards for School Funding, GN 2362 GG 19347 (October 1998) para 95; Department of Education Report to the Minister on the Review on Cost, Resourcing and Financing of Public Schools (February 2003) 14.

<sup>78</sup> See White Paper on Education and Training (1995) ch 7 para 14.

<sup>79</sup> See Roithmayr “Access, Adequacy and Equality: The Constitutionality of the School Fee Financing in Public Education (2003) 19 *SAJHR* 382-429 393.

<sup>80</sup> 393.

equipped with knowledge and skills that will enable them to develop to their full potential, to live and work with dignity, and to improve the quality of their lives.<sup>81</sup>

The phrase “basic education” has been interpreted by most international instruments to refer substantively to minimum skills needed to equip learners with necessary knowledge and skills to function as citizens.<sup>82</sup> The term has determinable content at international law.<sup>83</sup> For instance, the World Declaration on Education for All does not emphasise the completion of specific formal programmes or certification requirements, but rather stresses the acquisition of a level of learning for an individual to realise his or her full potential. The Declaration states:

“Every person- child, youth and adult- shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to survive, to develop to their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continuing learning.”<sup>84</sup>

Also, the meaning given to the concept “basic education” by the American courts should serve as guide. In *Campaign for Fiscal Equity Inc v The State of New York*,<sup>85</sup> the applicant had argued that the standard of education in New York City schools did not meet the requirement of a “sound basic education” found in the State of New York’s Constitution.<sup>86</sup> The New York State Court of Appeal had, in a preliminary judgment, defined “sound basic education” as the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury. On appeal, the Court of Appeal disagreed and held that an education had to enable people to obtain competitive employment and that the requirement of civic participation “means more than just being qualified to vote or serve as a juror, but to do so capably and knowledgeably.”<sup>87</sup> It concluded that “a sound basic education should not be pegged to the eighth or ninth grade, or indeed to any particular grade level.”<sup>88</sup>

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<sup>81</sup> Khoza (ed) *Socio-economic Rights in South Africa* 420.

<sup>82</sup> Roithmayr (2003) 19 *SAJHR* 382 393 & 394.

<sup>83</sup> See Woolman & Fleisch *The Constitution in the Classroom* 127.

<sup>84</sup> Art 1 of the Declaration; see also, art 4 of the Declaration which states: “the focus of basic education must ... be on actual learning acquisition and outcome rather than exclusively upon enrolment, continued participation in organized programmes and completion of certification requirements.”

<sup>85</sup> 100 NY 2d 893 (“CFE II”).

<sup>86</sup> Art xxii, para 1.

<sup>87</sup> CFE II, 906.

<sup>88</sup> CFE II, 906.

The Campaign for Fiscal Equity court focused on active political participation and competent jury service as the ultimate measures of basic education.<sup>89</sup> By contrast, the West Virginia Supreme Court articulated a detailed list of knowledge that learners would be required to possess in order to meet West Virginia's constitutional requirement of a "thorough and efficient" education system:

"(1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his governance; (4) self-knowledge of his or her total environment to allow the child to intelligently choose life work- to know his or her options; (5) work training and advanced academic training as the child may intelligently choose; (6) recreational pursuit; (7) interests in all creative arts such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioural and abstract, to facilitate compatibility with others in this society."<sup>90</sup>

The point being made here is that the criteria for a basic education in New York or West Virginia namely literacy, numeracy, problem-solving skills and the basic knowledge to function in society is, unequivocally, beyond the current reach of South African educational system.<sup>91</sup> As argued above, the concept of basic education in South Africa, like under the international law, should focus on substantive criteria of minimum adequacy.<sup>92</sup> As mentioned previously, the CESCRC has set forth the specific criteria of "four A's" as an appropriate standard by which to measure a State's compliance with its obligation to provide a basic education namely, availability, accessibility, acceptability and adaptability.<sup>93</sup> These four terms provide useful hooks for pegging the requirements of a basic education.<sup>94</sup>

In terms of the South African Constitution, the right to basic education is formulated, on the one hand, as an unqualified right. In other words, it is not subject to the qualifications of reasonable measures and progressive availability and accessibility.<sup>95</sup> This creates the impression that basic education should be seen as an absolute priority in South Africa.<sup>96</sup> It is submitted that to give effect to the right to basic education, the State should ideally fulfil immediately:

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<sup>89</sup> Woolman & Fleisch *The Constitution in the Classroom* 129.

<sup>90</sup> *Pauley v Kelly* 255 SE2d 859 (1979) 877.

<sup>91</sup> In support of this submission with regards to South Africa, see Woolman & Fleisch *The Constitution in the Classroom* 130.

<sup>92</sup> Roithmayr (2003) 19 *SAJHR* 382 394.

<sup>93</sup> Roithmayr (2003) 19 *SAJHR* 393 & 394; Woolman & Fleisch *The Constitution in the Classroom* 130.

<sup>94</sup> Woolman & Fleisch *The Constitution in the Classroom* 130.

<sup>95</sup> See Horsten, van Rensburg, Olivier & Mpedi "Socio-economic Rights" in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* (2009) 159 176.

<sup>96</sup> 176.

provision of schools in sufficient numbers to accommodate all learners; provision of a basic education of an equally adequate standard for all learners; and it must ensure that all learners are able to access school.<sup>97</sup>

On the other hand, section 29(1)(b) of the South African Constitution guarantees the right to further education, which the State, through reasonable measures, must make progressively available and accessible. The language of section 29(1)(b) of the Constitution is similar to the one used in article 13(2)(b) of the ICESCR. In terms of the ICESCR, secondary education must be progressively “available” and “accessible.” Apart from the phase of secondary education that falls under basic education, the notion of progressive availability and accessibility does not impose immediate obligation, but has to be achieved gradually (progressively) in accordance with the resources a State has at its disposal.

Upper Secondary education is provided for in the FET system and it covers the period of post-compulsory schooling, namely after grade 9, up to pre-higher education learning. It includes both the three years’ academic programme in schools and the provision of vocational education and training.<sup>98</sup> “Further education” has been defined by the Department of Education to mean education from grades 10 to 12 (the highest school grade), including general and career-specific education provided by technical, vocational and other colleges and institutions.<sup>99</sup> Similarly, the Further Education and Training Act, 1998 defines further education as all learning programmes leading to qualifications from level 2 to 4 of the NQF, or their equivalent of grades 10 to 12 in the school system.<sup>100</sup> This definition has also been criticized as too narrow and therefore inadequate.<sup>101</sup> In this regard, Malherbe contends that the narrow South African definition of further education is unfounded in law and out of step with international norms. He

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<sup>97</sup> Khoza (ed) *Socio-economic Rights in South Africa* (2007) 419.

<sup>98</sup> See OECD *Reviews of National Policies for Education: South Africa* (2008) 242.

<sup>99</sup> See White Paper on Education and Training GG 16312 (15/03/1995) 26.

<sup>100</sup> S 1(viii) of the Further Education and Training Act 98 of 1998. See also s 1 (xiii) of the Higher Education Act 101 of 1997 which defines higher education as all those learning programmes leading to qualifications higher than grade 12 or its equivalent in terms of the NQF.

<sup>101</sup> See Malherbe “The Constitutional Dimension of the Best Interests of the Child as Applied in Education” (2008) 2 *TSAR* 267 275-276; see also, Malherbe “Equal Educational Opportunities in South Africa: the Constitutional Framework” (2004) 3 *TSAR* 427 435-437; Malherbe “A Fresh Start I: Education Rights in South Africa” (2000) 4 *European Journal for Education Law and Policy* 49 50-51.



suggests that the term “further education” should be regarded as an open-ended concept that includes all forms of education above basic education.<sup>102</sup>

The South African Constitution also requires that further education must be made progressively available and accessible.<sup>103</sup> With the requirement that secondary (further) education be made generally (progressively) available, it means that there must ultimately be enough educational facilities available for all at that level of education. It also implies that secondary education should be distributed throughout the country in such a way that is available on the same basis to all.<sup>104</sup> Similarly, educational institutions and programmes must be available in sufficient quantity to meet local needs. This includes the availability of a range of resources such as building, water and sanitation, trained teachers receiving domestically competitive salaries, teaching materials, libraries, computer facilities and information technology.<sup>105</sup>

Accessibility implies physical and economic accessibility. In respect of physical accessibility, government has implemented policy which caters for vulnerable groups, such as children with disabilities. In 2001, South African government gazetted the Education White Paper 6 on Special Needs Education, Building an Inclusive and Training System. The White Paper provides a framework for a single inclusive system of education and training in South Africa. It outlines what an inclusive education and training system is, and how it should be built.<sup>106</sup> According to the Department of Education, an inclusive education and training system in terms of the White Paper is based on the following principles of human rights and social justice for all learners, namely; participation and social integration; equity and redress in education; equal and equitable access to a single, inclusive education system; access to the curriculum; community responsiveness, and cost-effectiveness.<sup>107</sup> The White Paper declares the commitments of the government to the provision of educational opportunities, especially for those learners who experience barriers to learning or who have dropped out of learning, because of the inability of the education and training service to accommodate their learning needs.

Economic accessibility on the other hand entails affordability. One of the means to ensure general accessibility of secondary education is by progressive introduction of free

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<sup>102</sup> See Malherbe “The Constitutional Dimension of the Best Interests of the Child as Applied in Education” (2008) 2 *TSAR* 267 275-276.

<sup>103</sup> S 29(1)(b) of the Constitution.

<sup>104</sup> See para 13, General Comment 13.

<sup>105</sup> See Pendlebury (ed) *South African Child Gauge* 20.

<sup>106</sup> See Williams *Inclusive Education: A Model for In-Service Teachers* (2007) 40.

<sup>107</sup> See Department of Education *Draft Guidelines for the Implementation of Inclusive Education* (2002) 37.

education.<sup>108</sup> In terms of the South African schools Act, public schools may charge school fees, and in this case, secondary schools. The Act provides that school fees are to be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting to consider and approve the annual budget.<sup>109</sup> The resolution to charge school fees has to provide for the amount to be charged and equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees.<sup>110</sup> Parents are liable to pay school fee unless exempted by the governing body.<sup>111</sup> Going by the provision of section 5(3)(a) of the Act, a learner may not be refused admission on the basis that his or her parent is unable to pay or has not paid such fees.<sup>112</sup> However, the South African government has introduced a policy of school-fee exceptions. This policy enables learners from poor households who attend fee-paying schools to apply for school-fee exemptions. Orphans and children receiving social grants are automatically exempted from paying school fees.<sup>113</sup>

Another policy put in place to ensure access to education is the no-fee school policy adopted by the Department of Education. In 2007, a new funding policy was implemented nationally, in which the poorest 40 per cent of schools were granted no-fee status. No-fee schools may not charge fees; instead, funding allocations are skewed to ensure that the poorest schools receive the largest per-learner allocation. This forms the basis of a spatially targeted, pro-poor funding approach. The no-fee policy applies to both primary and secondary schools, including the FET Phase of grades 10-12.<sup>114</sup> By 2009, the no-fee schools policy had been extended to cover approximately 60 per cent of learners.<sup>115</sup> All these efforts were put in place to ensure access to education in the country.

It is submitted that the system of charging school fees in South Africa does not guarantee adequate access to secondary school education in the country. Section 29(1)(a) of the Constitution creates basic education as a strong positive right containing none of the limitations that apply to further education. This strongly suggests that the government has an absolute duty

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<sup>108</sup> See para 14, General Comment 13.

<sup>109</sup> See ss 38(2) & 39(1), SASA.

<sup>110</sup> See s 39(2)(a)-(b), SASA.

<sup>111</sup> See s 40(1), SASA.

<sup>112</sup> See s 5(3)(a), SASA.

<sup>113</sup> See Pendlebury (ed) *South African Child Gauge* 32.

<sup>114</sup> 36.

<sup>115</sup> 32.

to provide basic education which should be free. This position is taken having regard to the fact that the South African Schools Act makes secondary school compulsory up till basic education level. What is compulsory should ordinarily be free since financial obstacles are acknowledged as fundamental militating factors on access to education.<sup>116</sup>

With regards to further education, the Constitution imposes no immediate obligation on the State to make further education free. The State does, however, have the duty to make it “progressively available and accessible” through reasonable measures. It is submitted that South Africa has an obligation to take appropriate legislative, administrative and budgetary measures towards the full realisation of free secondary school.<sup>117</sup> The States have burden to demonstrate that it is making measurable progress toward the full realisation of the right to education and cannot use the “progressive realisation” provisions as a pretext for non-compliance.<sup>118</sup> The obligation in terms of article 13(2)(a) of the ICESCR to provide free primary education should be considered as a minimum state obligation on which the State must progressively build on by providing, in addition, free secondary education. It is submitted that both basic education and further education should be among the very highest State priorities to be realised even when resources are at their scarcest.<sup>119</sup>

### **3 2 Standard and Quality of Secondary Education in South Africa**

It is observed that the quality of education in South Africa, particularly in many predominantly black areas, is poor.<sup>120</sup> The National Senior Certificate is an important indicator of the quality of South African education system. The results of the National Senior Certificate Grade 12 examinations for 2009 released in January 2010 reflect a drop in the students’ performance. The national pass rate of the National Senior Certificate examinations for 2009 was 60.7%. This shows a decline of 2% compared to the 2008 pass rate across the country which was 62.5%. The 2007 pass rate was 65 per cent.<sup>121</sup> The breakdown of the 2009 results across Provinces shows a

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<sup>116</sup> This will be discussed in detail in Ch 7.

<sup>117</sup> In support of this argument, see par 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997.

<sup>118</sup> Para 8 of the Maastricht Guidelines.

<sup>119</sup> See Berger “The Right to Education under the South African Constitution” (2003) 103 *Columbia Law Review* 614-661 640.

<sup>120</sup> 623.

<sup>121</sup> See Statement by the Minister of Basic Education, Mrs Angie Motshekga, MP, on the announcement of the National Senior Certificate Grade 12 Examination results for 2009 at the Media Centre, Union Buildings, Pretoria on 07 January, available online at:

consistent drop in the national pass rate since 2007, and this is worrisome given that the National Senior Certificate is an important indicator of the quality of a country's education system.<sup>122</sup> In announcing the National Senior Certificate Grade 12 Examination results for 2009, the Minister of Basic Education noted as follow:

“However, the results I place before you today continue to suggest that we have not yet turned the corner in education. We have not yet reached the quality learning outcomes that we are striving for as a nation. The education system continues to be plagued by obvious weaknesses that act as barriers to the performance of our learners. We must continue to intensify our efforts to address these weaknesses.”<sup>123</sup>

In addressing this issue of poor performance, the minister stated that the ministry is determined to ensure that steps are taken to improve the system so that goals of quality learning and teaching are realised. Particular attention is to be paid on the “gateway” subjects such as Mathematics, Physical Science and Accounting. The Minister has also indicated that the Ministry will encourage schools to do far more in these subjects particularly - and indeed in all subjects - to ensure improvement on the quality of teaching through the strengthening of the teachers' curriculum skills, particularly in their methodology and content knowledge.<sup>124</sup> According to the Minister, “the NSC results also show that we need to improve the support to schools. We must acknowledge that there is poor teaching in many of our schools. Management in our schools is often weak and lacks leadership and commitment. Our systems are also often inefficient. We still face major challenges in the sciences and need to strengthen our interventions in this area.”<sup>125</sup>

To achieve good educational standard and performance, it is suggested that good teaching and learning need to take place from Grade R. Government should pay attention to learners not only when they enter the Further Education and Training Band in grade 10 or begin

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[http://www.news24.com/Content/SouthAfrica/News/1059/dfaaa691ee6e44529f716638cd4ba931/07-01-2010-08-27/Matric\\_results\\_Ministers\\_full\\_speech](http://www.news24.com/Content/SouthAfrica/News/1059/dfaaa691ee6e44529f716638cd4ba931/07-01-2010-08-27/Matric_results_Ministers_full_speech) (accessed on 7/01/2010).

<sup>122</sup> The Minister expressed her unhappiness over this development thus: “I wish to state directly that even though this shift is marginal, I am most unhappy with the decline in the national pass rate and indeed in the overall pass rate of just over 60%. The National Senior Certificate is an important indicator of the quality of our education system, and as a country we cannot afford to allow our young people to achieve results that are in the main average or below average.” See Statement by the Minister of Basic Education, Mrs Motshekga, MP, on the announcement of the Senior Certificate Grade 12 Examination results for 2009.

<sup>123</sup> See Statement by the Minister of Basic Education, Mrs Angie Motshekga, MP, on the announcement of the National Senior Certificate Grade 12 Examination results for 2009.

<sup>124</sup> See Statement by the Minister of Basic Education on the announcement of the National Senior Certificate Grade 12 Examination results for 2009.

<sup>125</sup> See Statement by the Minister of Basic Education on the announcement of the National Senior Certificate Grade 12 Examination results for 2009.

to show concern when they reach Grade 12. There is the necessity for the development of strong foundational skills. As such, from 2010 school years, the Department of Basic Education has committed itself to extending the Foundations for Learning Programme to all primary schools to ensure the improvement of the foundational skills of literacy and numeracy.<sup>126</sup> The role of the school principals is also fundamental. In this regard, the Department should focus on training principals in order to strengthen their management skills and to ensure that they are fully supported in their role as a whole. It is also submitted that school governing bodies should play a significant role in guiding the school and government should encourage the involvement of the parent community in their children's education.

Also, the government should secure the commitment of various education stakeholders, including teacher unions representing teachers, school governing body associations representing parents, and learners' organisations to working together to achieve quality education in South Africa. Every learner in every school in South Africa has the right to quality learning and teaching and it should be the responsibility of everyone to ensure that this right is met. If all the identified problems as revealed in the 2009 Grade 12 results are adequately addressed and the suggestions are carried out, the standard and quality of secondary school education in South Africa should improve considerably.

#### **4 The Right to Secondary Education in Nigeria**

The Nigerian Constitution does not provide for the right to secondary education in a very clear term. Instead, it states that government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.<sup>127</sup> It states further that "Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide free secondary education."<sup>128</sup> Nigerians have not yet enjoyed free secondary school at all levels as promised by the Constitution. In terms of the Compulsory, Free, Universal Basic Education Act 2004, only the Junior Secondary School (JSS) is free.<sup>129</sup> In terms of this Act, "[e]very Government in Nigeria shall provide free, compulsory and universal basic education

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<sup>126</sup> See Statement by the Minister of Basic Education on the announcement of the National Senior Certificate Grade 12 Examination results for 2009.

<sup>127</sup> S 18(1), CFRN 1999.

<sup>128</sup> S 18(3)(b), CFRN.

<sup>129</sup> This Act is shortened as the UBE Act, 2004.

for every child of primary and junior secondary school age.”<sup>130</sup> Education up to the junior secondary school is free and compulsory while schooling beyond this level in Nigeria is not compulsory and also not free.

Secondary education in Nigeria comprises education at the secondary schools, certain categories of teachers’ education as well as other levels of education above the primary school level but below the National Certificate of Education (NCE).<sup>131</sup> The Education (National Minimum Standards and Establishment of Institutions) Act defines secondary education as education given to children after primary education and before higher education in institutions such as secondary schools, technical schools, commercial schools, and grade II teacher training colleges.<sup>132</sup> However, “secondary schools” or “high schools” shall be taken as a paradigm representing other categories of secondary school education in Nigeria.

The Education Act provides that secondary education in Nigeria shall be of six years’ duration to be given at two stages of three years’ duration each namely, the junior secondary stage and the senior secondary stage.<sup>133</sup> The Act provides further that the curricula activities of the junior secondary school should be both pre-vocational and academic and shall include all basic subjects which will enable pupils to acquire further knowledge and develop skills.<sup>134</sup> The senior secondary school shall be comprehensive and shall have a core curriculum designed to broaden pupils’ knowledge and outlook.<sup>135</sup>

The broad goals of secondary education are to prepare the individual for useful living within society and for higher education.<sup>136</sup> In specific terms, the Act provides that the purpose of secondary education in Nigeria shall be to provide pupils with opportunity for education of a high quality, irrespective of sex, social, religious, or ethnic background; to equip students to live in the modern age of science and technology; to develop and project Nigerian culture, art and language as well as the universal and cultural heritage; to raise a generation of people who can think for themselves, respect the views and feelings of others, respect the dignity of labour and appreciate those values specified under broad national aims so as to enable people to live and

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<sup>130</sup> See s 2(1) of the UBE Act, 2004.

<sup>131</sup> S 4 of the Education (National Minimum Standards and Establishment of Institutions) Act, Cap E3, LFN 2004 grouped these categories of education together.

<sup>132</sup> See s 25, Education Act; see also, s 5 para 20 of the National Policy on Education, 2004.

<sup>133</sup> See s 6(1), Education Act; see also, s 5 para 23 of the National Policy on Education.

<sup>134</sup> See s 6(2) of the Act.

<sup>135</sup> See s 6(3) of the Act.

<sup>136</sup> See s 5 para 21 of the National Policy on Education.

function as good citizens; to foster Nigerian unity with emphasis on the common ties that unite the diversity of the country, and to inspire students with a desire for achievement and self-improvement both at school and later on in life.<sup>137</sup>

To achieve the above stated goals, secondary education is divided into stages, namely a junior secondary school stage and a senior secondary school stage. The junior secondary school is both pre-vocational and academic. It is tuition free, universal and compulsory.<sup>138</sup> It teaches basic subjects which will enable pupils to acquire further knowledge and skills. Subjects are grouped into three. Group A comprises core subjects; Group B comprises pre-vocational electives and Group C consists of non-prevocational electives. It is required that every student must register for a minimum of 10 and a maximum of 13 subjects. Students must offer all the subjects in Group A plus, at least, one subject each from both Groups B and C.<sup>139</sup> Students who complete junior secondary school are to be streamed into the senior secondary school, the technical college, an out-of school vocational training centre, or an apprenticeship scheme based on the result of tests to determine academic ability and vocational interest.<sup>140</sup>

The senior secondary school shall be comprehensive with a core-curriculum designed to broaden pupil's knowledge and out-look. Subjects at the senior secondary school phase are grouped into three, namely, Group A which comprises core subjects; Group B which comprises vocational electives and Group C consisting of non-vocational electives. Every student is required to take all the six (6) core subjects in group A and a minimum of one and a maximum of two (2) subjects from the list of elective subjects in groups B and C to give a minimum of seven (7) and maximum of eight (8) subjects. One of the three elective subjects may be dropped in the last year of senior secondary school course.<sup>141</sup> Voluntary agencies, communities and private individuals also participate in the establishment and management of secondary schools in the country. State governments are required to prescribe conditions to be met by the communities and others wishing to establish secondary schools in their respective states.<sup>142</sup>

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<sup>137</sup> See s 5(a)-(f) of the Act; see also, s 5 para 22 of the National Policy on Education 2004. The purpose of teacher education is set out in section 7 as follows: to produce highly motivated, conscientious and efficient classroom teachers; to encourage the spirit of inquiry and creativity in teachers; to help teachers fit into the social life of the community and society at large and to enhance their commitment to national objectives; and to enhance teachers' commitment to teaching profession.

<sup>138</sup> See s 15(1)&(2)(b) of the Child's Rights Act.

<sup>139</sup> See s 5 para 24 of the National Education Policy.

<sup>140</sup> See s 5 para 24 of the National Education Policy.

<sup>141</sup> See s 5 para 25 of the National Education Policy.

<sup>142</sup> See s 5 para 26 of the National Education Policy.

Government, through its agencies, is obliged to regulate the establishment of secondary schools, supervise and inspect those schools regularly and ensure that they all schools follow approved curricula and conform to the National Policy of Education.<sup>143</sup>

As observed earlier, the basic education scheme covers junior secondary school phase, and as such, the discussion on it in chapter 3 applies here.<sup>144</sup> Statistics from the 2006 National Personnel Audit show that there are about 7,129 public junior secondary schools (JSS) in Nigeria with a total enrolment figure of 3,266,780. On the other hand, post basic education refers to the education received after successful completion of 9 years basic education. It includes 3 years of senior secondary school (SSS) education; 3 years of technical college education, or continuing education provided in Vocational Enterprise Institutions (VEIs).<sup>145</sup> Post-basic education is aimed at producing a community of Nigerians well-prepared for higher education, sustainable national development and global competitiveness.<sup>146</sup> However, some factors have been identified as militating against access to and quality secondary education in Nigeria. Those factors will now be examined.

#### **4 1 Access to Secondary Education in Nigeria: Some Besetting Problems**

It is observed that the secondary school phase of education in Nigeria is faced by a number of challenges.<sup>147</sup> In specific terms, problems facing the post-basic education sub-sector include: inadequate enrolment in senior secondary schools: (see *figure 4.1 below*); inadequacy of legal backing and absence of quality control organs; low learning outcomes in literacy, numeracy and life skills; non conducive teaching and learning environment due to dilapidated infrastructure; dearth of relevant textbooks and other instructional materials; and extremely low enrolment in technical and vocational educational institutions.<sup>148</sup> All these problems have impacted greatly on the citizens' access to and quality of education in Nigeria.

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<sup>143</sup> See s 5 para 27 of the National Education Policy.

<sup>144</sup> Basic education is the education which every Nigerian receives between the ages of three (3) and fourteen (14) years. It consists of the Early Childhood, Primary, Junior Secondary, as well as Adult and Non-Formal Education. See *Roadmap for the Nigerian Education Sector* 8.

<sup>145</sup> 9.

<sup>146</sup> 36.

<sup>147</sup> It is worth mentioning that the entire education sector in Nigeria has historically suffered from years of neglect and mismanagement and inadequacy of resources commensurate with national needs, population growth and demand. As a result, education as a strategic priority of the government has not been well positioned as a transformational tool and a formidable instrument for socio-economic empowerment. See *Roadmap for the Nigerian Education Sector* 7.

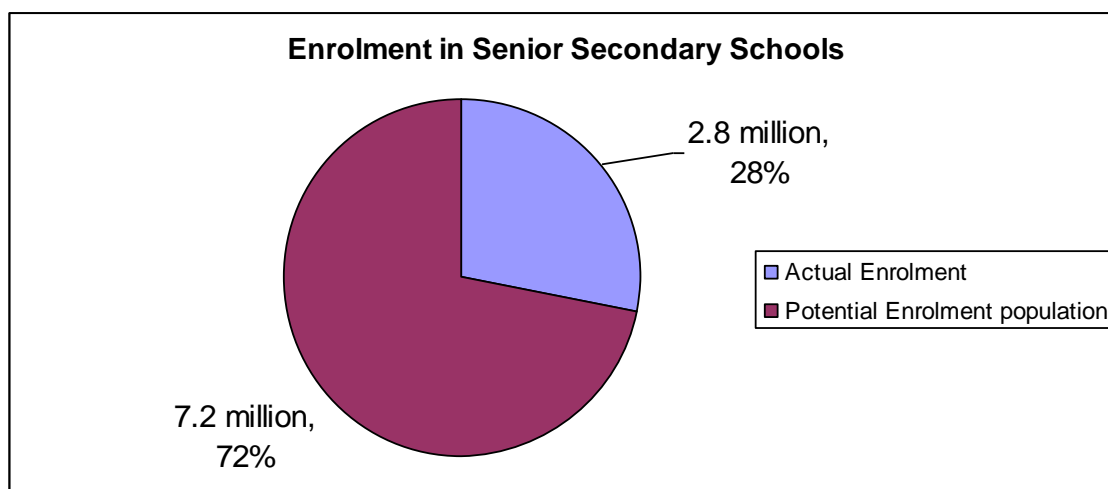
<sup>148</sup> 9.



Education at the lower secondary school level also faces similar challenges, such as gender disparity in access to education, inadequate number of educators and inadequate infrastructure, among others. The relevant data shows that disparity exists in male and female enrolment figures at the JSS level nation-wide. About 55% are male while 45% are female. For nomadic education, the required number of teachers is 23,835 while only 11,506 (48%) are available. This leaves a shortfall of 12,329 (52%) and a teacher-pupil ratio of 1:50.<sup>149</sup> Another problem identified is the problem of low transition rates from the junior secondary to the senior secondary schools (SSS). It is observed that the transition rate is 16% from junior secondary to senior secondary schools.<sup>150</sup> This problem also applies to technical and vocational education and training (TVET), where the expected enrolment rate is also less by 84 per cent.<sup>151</sup>

Other barriers impacting on access to education include inadequate infrastructure and facilities; direct and indirect costs that make education unaffordable for the poor; low intrinsic value for education by some communities; inadequate number of schools and classrooms, (2006 schools census data put the shortfall in the number of available classrooms at 32,677 at the senior secondary level); lack of conducive school environment; weak regulation and coordination of Senior Secondary Education; and lack of standardization and development of non-formal TVET.<sup>152</sup>

**Figure 4.1:** Actual enrolment and potential enrolment population in Nigeria



**Source:** *Roadmap for the Nigerian Education Sector* (2009) 10.

<sup>149</sup> 18.

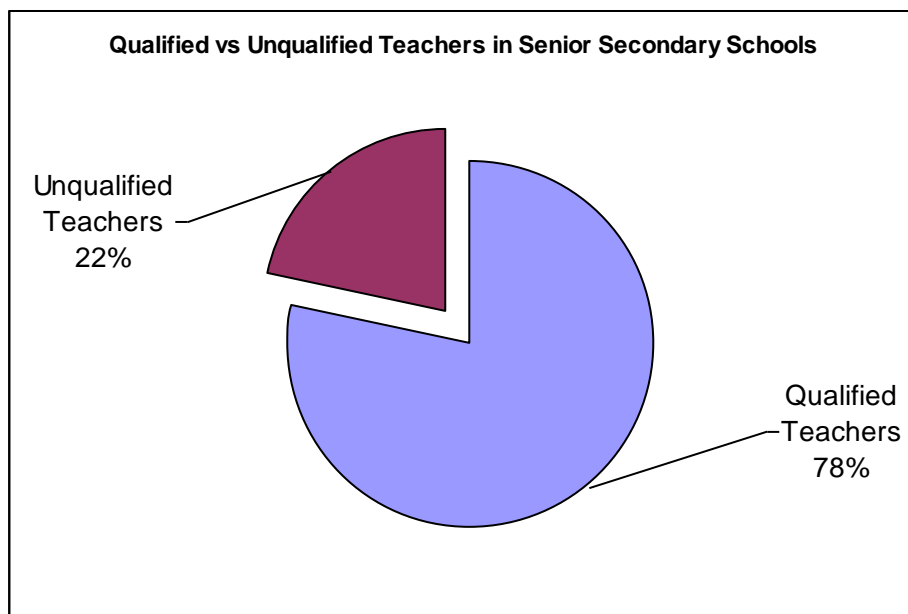
<sup>150</sup> 36.

<sup>151</sup> 36.

<sup>152</sup> 36.

There is also the problem of lack of adequate staffing in terms of quality and quantity. Poor remunerations for teachers and vocational skilled workers accounts for this problem. As a result of poor salaries and remuneration, there has been incessant strike action lately in the Nigerian educational sector generally. Specifically, there exists a great dearth of qualified and competent teachers in the secondary school level. The Federal Ministry of Education has noted that out of a total of 180,540 teachers in the secondary schools, only 141,517 are qualified teachers, while 39,023 are unqualified.<sup>153</sup> The percentage of 22% unqualified teachers, as illustrated in *figure 4.2* below, is worrisome as it has the consequential effect of lowering the standard of education in the country. It is observed that Nigeria requires over 200, 000 teachers to bring to school over eight million children currently out of school. While more teachers are needed to provide quality education to Nigerian children based on international standard, these numbers of teachers could not be attracted because teachers are poorly treated by the government at all levels.<sup>154</sup>

**Figure 4.2:** *Percentage of Qualified and Unqualified Teachers in Senior Secondary Schools*



**Source:** *Roadmap for the Nigerian Education Sector* (Federal Ministry of Education, Abuja: 2009), 40.

<sup>153</sup> 40.

<sup>154</sup> See Education Rights Campaign, Nigeria available online at <http://socialistworld.net/eng/2008/06/30nigera.html> (accessed on 2009/13/10).

The steady decline in the funding of education also impacts on the access to secondary school education in Nigeria. This has resulted in limited access and the inability to attain set standards, disproportionate student–teacher ratio, among others.<sup>155</sup> It is observed that this, in turn, has led to steady decline in the quality of curriculum delivery and over-stretching of available facilities and infrastructure.<sup>156</sup> Given that society is dynamic, there is the need to keep pace with societal changes and this puts pressure on the curriculum. There is, therefore, the need to constantly review curriculum at this sphere of education in order to make it relevant.<sup>157</sup>

#### **4 2 Standard and Quality of Secondary Education in Nigeria**

The poor results in the Senior School Certificate Examinations (SSCE) conducted by the West African Examinations Council (WAEC) and the National Examinations Council (NECO) in May/June 2009 are clear indications of a progressive slide in the Nigerian educational system. From the analyses of the examination bodies, most schools and students posted horrible results. In its assessment of the performance of 1,184,907 candidates who wrote the exams out of the 1,200,765 registered, the National Examination Council (NECO) recorded just 126,500 candidates (about 10.53 per cent) with five credits or higher scores in subjects including English Language and Mathematics, the acceptable basic standard for admission into tertiary institutions. English and Mathematics notwithstanding, however, only 289,966 (about 24.15 per cent) of the candidates achieved five credits in the examination.<sup>158</sup>

Similarly, the West African Examinations Council (WAEC) stated that only 356,981 candidates, representing 25.99 per cent of the 1,373,009 entries, achieved the requisite basic qualification grades of five credits and above, including English and Mathematics. About 75 per cent failed to make five credits, including the two key subjects. In 2008, only 13.76 per cent of the 1,369,142 candidates on the council’s schedule achieved credit pass in five subjects. Two years earlier in the November 2006 GCE examinations, only 11.6 per cent of the 423,518 candidates achieved the required credit grades. These results are certainly discouraging. The

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<sup>155</sup> See *Roadmap for the Nigerian Education Sector* 50.

<sup>156</sup> 50.

<sup>157</sup> 42.

<sup>158</sup> “Mass Failure in WAEC and NECO Exams” *The Guardian* of 19-10-2009 available online at: <http://www.nigeriamasterweb.com/paperfrmes.html> (accessed on 19/10/2009).

phenomenon of mass failure in secondary school examinations has been a recurring feature of the Nigerian education system.<sup>159</sup>

Many reasons account for the poor performance in Nigeria. The public school system has suffered serious neglect by government and is in near-total collapse, while most private schools only exist for the purpose of financial gains. Most students, especially in public schools exhibit a high level of ignorance and illiteracy resulting from the weak or inadequate educational instruction. The downturn in the economy has also affected many homes and families; parents are so distracted they can hardly spare the time to monitor their children's education. Also contributing is the poor remuneration for educators in Nigerian secondary schools.<sup>160</sup>

Teachers in public schools are almost always called out on strike to protest poor conditions of service. Funding, at every level, is grossly inadequate. When secondary school students fail so terribly, the clear indication is that the country is reaping the harvest of its poor investment in education. The collapse of societal values also affects children. Most parents are no longer role models for excellence. Some teachers are corrupt and undisciplined, thus, in many schools both parents and teachers collude to encourage examination malpractice. Standards are, on occasion, compromised even by the examination authorities.<sup>161</sup>

There is, therefore, a compelling reason to overhaul the Nigerian educational system: the education sector must be better funded, policies need proper coordination, teachers' welfare should be addressed and standards must be upgraded. Promotion exams should be better organised to discontinue the current practice in public schools of automatic mass movement from one class to the other. Discipline should be enforced to encourage learning. The government should show greater concern about teachers' education if the nation is to reverse the systemic failure. Teachers' salaries should be relatively competitive with other sectors in the country. All the stake holders should be actively involved while adequate training for secondary teachers and schools principals is recommended.

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<sup>159</sup> "Mass Failure in WAEC and NECO Exams" The Guardian of 19-10-2009.

<sup>160</sup> "Mass Failure in WAEC and NECO Exams" The Guardian of 19-10-2009.

<sup>161</sup> "Mass Failure in WAEC and NECO Exams" The Guardian of 19-10-2009.

## 5 Conclusion

Article 13(2)(b) of the ICESCR makes two demands on secondary education. Education at this level must be made generally available and accessible to all. States parties are obliged to take every appropriate means, and in particular, by progressive introduction of free education to guarantee this right. The general availability and accessibility of secondary education need not be realised immediately on becoming party to the ICESCR: this has to be achieved gradually in accordance with the resources a State Party has at its disposal.<sup>162</sup> The provision of article 13(2)(b) of the ICESCR needs to be read with article 2(1) which provides for the progressive realisation of the rights protected in the ICESCR. The requirement that secondary education be made “generally available” means that there must be sufficient educational facilities available for all at this level. The requirement that secondary education be made “generally accessible” implies that all obstacles to admission must be eliminated, including both physical and economic barriers. It also implies that there should be no discrimination in any form and that free education must be introduced. This is the standard set under the human rights instruments to which South Africa and Nigeria are parties.

As explained earlier in this chapter, secondary education in South Africa covers both the Senior Phases of GET, that is, grades 7 to 9 and grades 10 to 12 under FET. Education is compulsory until grade 9 or the age of 15 years, whichever occurs first. In terms of the Constitution, secondary education must be progressively “available” and “accessible.” Apart from the phase of secondary education that falls under basic education, the notion of progressive availability and accessibility does not impose immediate obligations, but has to be achieved gradually in accordance with the resources the country has at its disposal. It requires, however, that educational institutions and programmes must be available in sufficient quantity to meet local needs. This includes the availability of a range of resources such as building, water and sanitation, trained teachers receiving domestically competitive salaries, teaching materials, libraries, computer facilities and information technology.<sup>163</sup> School must be physically and economically accessible and affordable.<sup>164</sup>

In South Africa, it is unconstitutional for schools to discriminate in terms of admission policy on any of the prohibited grounds. To ensure equal access, the South African government

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<sup>162</sup> Beiter *The Protection of the Right to Education* 517-518.

<sup>163</sup> See Pendlebury (ed) *South African Child Gauge* 20.

<sup>164</sup> 20.

has introduced an inclusive education and training system to cater for all categories of persons. In terms of the South African schools Act, schools may charge school fees. The Act provides that school fees are to be determined and charged at a public school only if a resolution has been adopted by a majority of parents attending the meeting to consider and approve the annual budget.<sup>165</sup> School-fees exemptions and no-fees school policy have been adopted in some selected schools. The conclusion reached is that the system of charging school fees in South Africa does not guarantee adequate access to secondary education in the country.

In Nigeria, secondary education is divided into stages namely, a junior secondary school stage and a senior secondary school stage. The basic education scheme covers the junior secondary school phase. Education at this phase is tuition free, universal and compulsory. Post-Basic Education refers to the education received after successful completion of nine years of basic education. It includes 3 years of Senior Secondary School education; 3 years of Technical College education, and Continuing Education provided in the VEIs. Education at this level is not free and also not compulsory. Some problems have been identified as impacting on the right to secondary education in Nigeria and these include gender disparity in access to education, inadequate number of educators and inadequate infrastructure among others. The position taken in this chapter is that these problems should be adequately addressed to ensure the adequate realisation of the right to education in the country.

In both South Africa and Nigeria, the upper level of secondary school education is not free and is also not compulsory. Since education is recognised as an instrument for national development, making only the lower level of secondary school education compulsory and free is insufficient. It is submitted that learners who have completed compulsory basic education schemes are not yet sufficiently equipped with knowledge and skills that will enable them to develop to their full potential, to live and work with dignity, and to improve the quality of their lives. It would be more beneficial if free and compulsory education covered more than junior secondary education as is now the position in the two countries. It is expected that any basic education should, at least, provide learners with the foundation for being successful in society. Free and compulsory education should, therefore, include the entire duration of secondary school education.

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<sup>165</sup> See ss 38(2) & 39(1), SASA.

It is recognised that making education free and compulsory up to senior secondary school will, no doubt, put additional budgetary burden and demands on the government. However, this is achievable with commitments towards the prioritisation of education. UNESCO has recommended allocation of 26 per cent of the national budget as a measure for financing education. Neither South Africa nor Nigeria has come closer to achieving this recommended budgetary commitment.<sup>166</sup> Improved budgetary allocation to the education sector is, therefore, imperative in both countries if the right to education is to be adequately guaranteed and if education is to achieve its avowed aim of human development. Having examined the right to secondary education in this chapter, the next chapter will examine the right to education at the tertiary level.

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<sup>166</sup> In Nigeria for instance, the allocation to education sector fell from 12% in 1998/99 to 2% in the 2009 Budget which is unacceptably too low. The position is a bit better in South Africa, but definitely low compared to UNESCO standard. See also, OECD *Reviews of National Policies for Education: South Africa* 24, which puts South Africa education spending at over 5% of Gross Domestic Product (GDP); UNESCO puts the South Africa GDP at 5.4 per cent. See UNESCO *Global Education Digest 2009: Comparing Education Statistics Across the World* (2009) 176; see Eso “Beyond ASUU’s Suscitation” [http://www.kwenu.com/publications/hankeso/2009/beyond\\_asuu\\_suscitation.htm](http://www.kwenu.com/publications/hankeso/2009/beyond_asuu_suscitation.htm) (accessed on 2009/13/10).

# Chapter 5

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## The Right to Higher Education

“Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”<sup>1</sup>

### 1 Introduction

This chapter examines the right to higher education in South Africa and Nigeria. What distinguishes higher education from other levels of education is that while primary and secondary schools are concerned with the transmission of knowledge, higher education, on the other hand, is concerned with the generation and transmission of knowledge.<sup>2</sup> Three universal missions of university have been identified, namely the acquisition, the transmission and the application of knowledge.<sup>3</sup> These missions are crucial in the development and progress of a country.<sup>4</sup> Tertiary education can improve the socio-economic wellbeing of the broader community by producing commercially useful inventions and by being an important source of economic and social innovation generally.<sup>5</sup> For this reason, higher education is recognised as a key force for modernization and development in any country.<sup>6</sup> It is also expected to provide people with enabling knowledge to make informed decisions, to foster peace, to entrench democratic lifestyle, to provide opportunities in choices and freedoms, and to provide broad, open-ended views of knowledge construction in a pluralistic world.<sup>7</sup>

Academic writers and scholars have defined higher education differently. According to Harman, higher education is the field of study offered at post-secondary and tertiary institutions.<sup>8</sup> This view is shared by Schwarz and Teichler.<sup>9</sup> Silverman argues that higher

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<sup>1</sup> Art 13(2)(c) of the International Convention on Economic, Social and Cultural Rights (ICESCR), 1966.

<sup>2</sup> See Smith “Constitutional Academic Freedom” 1995 112(4) *South African Law Journal* 678-690 678.

<sup>3</sup> See Ajayi, Goma & Johnson *The African Experience with Higher Education* (1996) 191.

<sup>4</sup> 191.

<sup>5</sup> Good universities increase the stock of reliable information and analytical tools which the citizenry may use to enable its meaningful participation in the ordering of society. See Smith 1995 112(4) *SALJ* 681.

<sup>6</sup> Teferra & Altbach *African Higher Education* (2003) 3.

<sup>7</sup> Maila “Quality Provisioning and Accountability in African Higher Education” 2007 (4) *SAJHE* 694-705 694-695.

<sup>8</sup> Harman “Research on Tertiary Education in Australia” in Schwartz & Treichler (eds) *Institutional Basis of Higher Education Research* (2000) 99-115 99.



education is more than just post-secondary education, to him, higher education is also a field of scholarship and practice, transcending institutional settings, and only confined by the rigour of one's scholarly practice.<sup>10</sup> Maila shared this view when submitting that the core business of higher education, which is scholarly endeavour, can be practised outside the normal or conventional institutions.<sup>11</sup> He asserts further that higher education is not necessarily confined to the field of study offered at post-secondary and tertiary institutions but transcends fields of study within the boundaries of formal or conventional higher education settings.<sup>12</sup>

According to Green, the main purposes of higher-education institutions are twofold, namely the production of graduates to meet the human resource needs of organisations in the business, industrial and service sectors (including public services) and, secondly, the advancement of the frontiers of knowledge via research.<sup>13</sup> Higher education also enhances democracy by producing intellectuals who can engage with the most intractable problems of society and develop more generally, the ability of citizens to participate politically, economically and socially.<sup>14</sup> It produces high-level skilled graduates and a new base of knowledge to drive economic and social development, thereby enhancing the overall levels of intellectual and cultural development.<sup>15</sup> Higher education is of great importance in modern society.

The term higher education as used in this chapter entails education which is given at the tertiary stage which covers the post-secondary school section of any national education system. It refers to education offered at institutions such as universities, polytechnics, colleges of technology, colleges of education, advanced teachers colleges, professional institutions and such similar institutions.<sup>16</sup> According to Barnett, higher institutions are a key part of the total

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<sup>9</sup> Schwartz & Treichler (eds) *Institutional Basis of Higher Education Research* 1.

<sup>10</sup> Silverman "Knowledge Types in Higher Education" in Bergendal (ed) *Knowledge Policies and the Traditions of Higher Education* (1984) 55-70 55.

<sup>11</sup> Maila 2007 (4) *SAJHE* 697; see also, Helmfrid "Who is Going to Study?" in Burgen (ed) *Goals and Purposes of Higher Education in the 21<sup>st</sup> Century* (1996) 55.

<sup>12</sup> Maila 2007 (4) *SAJHE* 697.

<sup>13</sup> Green *What is Quality in Higher Education?* (1994) 8.

<sup>14</sup> CHE *South African Higher Education in the First Decade of Democracy* (2004) 14.

<sup>15</sup> 14.

<sup>16</sup> See s 25 of the Education (National Minimum Standards and Establishment of Institutions) Act, Cap E3, LFN 2004; see also, Kolawole "Introducing Indigenous Education to University Undergraduate Students: Feelers from Obafemi Awolowo University, Nigeria" (2005) 19 *SAJHE* 1189-1196 1190.

apparatus of the State.<sup>17</sup> It is submitted that this can only be true of public higher institutions as private universities/higher institutions cannot be said to be part of the State apparatus. Given that a university is an educational institution at the pinnacle of every educational system operating at the highest level of teaching and research and the most important institution in the educational system of any country,<sup>18</sup> in this chapter, university is taken as a paradigm representing other higher educational institutions. Also, in this chapter, the terms “higher education” and “tertiary education” are used interchangeably.

With the foregoing as background, the chapter will now proceed to examine the concept “university” which, as explained, is taken as a paradigm representing other higher institutions. Following this, the chapter will examine the concept of academic freedom and institutional autonomy as applicable in higher educational institutions. Thereafter, the chapter will examine the right to higher education as guaranteed in the various international, regional and national human rights instruments. In considering the topic at the national level, the position in South Africa is considered first, followed by a discussion of the Nigerian position. Further in this section, the issues of student access and equity, quality assurance and governance of higher education institutions will be analysed. The chapter will also make a brief summary of the discussions in the chapter before concluding.

## **1 1 The Concept of “University”**

The idea of the university is an elusive one.<sup>19</sup> University is defined, however, as an institution of higher education directed at the generation and transmission of knowledge through teaching and research and training of students for certain professions that require advanced knowledge.<sup>20</sup> It is submitted that conservation of knowledge and ideas is recognised as the main business of the

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<sup>17</sup> Barnett “Limits to Academic Freedom: Imposed-Upon or Self-Imposed?” in Tight (ed) *Academic Freedom and Responsibility* (1988) 88.

<sup>18</sup> Dlamini “Academic Freedom and Institutional Autonomy in South Africa” 1999 (62) *THRHR* 3-19 3.

<sup>19</sup> Malherbe “A Fresh Start II: Issues and Challenges of Education Law in South Africa” 2000 (4) *European Journal for Education Law and Policy* 57-68 59.

<sup>20</sup> Malherbe 2000 (4) *European Journal for Education Law and Policy* 59; the word “statutory” is removed from this definition as propounded by Malherbe so that the definition could be more general to cover private universities; see also, Dlamini *University Autonomy and Academic Freedom in South Africa* (1996) 1; On his part, Bray defines South African University thus, “The contemporary South African University may thus be regarded as an institution of tertiary education where a group of people work together to practice science by means of teaching, research and other activities aimed at training future scientists.” See Bray “The Legal Status of the South African University (1993) 33.

universities.<sup>21</sup> The traditional role of a university focuses on issues such as scholarship, high level skill training, research, academic excellence and autonomy of the university.<sup>22</sup> These are the issues that form the core and foundation of every university in the world.<sup>23</sup> It is observed that a university's special function is to combine advanced education with research, satisfying society's needs for new knowledge through the conduct of scholarly enquiry, scientific investigation and graduate training.<sup>24</sup> The provision of advanced education is crucial with the world economy increasingly dependent on highly specialized knowledge.<sup>25</sup>

Universities also play a critical role in identifying and addressing significant social problems; their role in generating new knowledge towards solving societal and economic problems cannot, therefore, be over-emphasized.<sup>26</sup> In this regards, Manuh, Gariba and Budu submit that universities are basically sites and systems for knowledge production.<sup>27</sup> An important way in which they affect society is through the quality of their teaching and research and the effectiveness of their contributions to policy, production and management, as well as to solving social problems.<sup>28</sup> Universities are social and political communities linking men and women of different generations, backgrounds, opinions and capacities for social action.<sup>29</sup> Their intellectual capabilities and diverse associations could be catalytic in mobilizing society for educational transformation.<sup>30</sup>

Writing on the South African tertiary institutions, Malherbe identifies three main characteristics of a university which applies also to Nigerian universities. He states: the university is an entity; it is a statutory institution; and it is an institution of higher learning aimed at teaching and research.<sup>31</sup> First, as an institution the university is a gathering of people

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<sup>21</sup> Kolawole (2005) 19 *SAJHE* 1190.

<sup>22</sup> Reddy "The Perspective of a Historically Black University" in Taylor (ed) *Tertiary Education in A Changing South Africa* (1992) 18.

<sup>23</sup> 18.

<sup>24</sup> Samuels "The Changing Context of Tertiary Education" in Taylor (ed) *Tertiary Education in A Changing South Africa* 6. Universities have as their core functions research, teaching, professional education and diverse forms of public engagement. See Walker & Thomson (eds) *The Routledge Doctoral Supervisor's Companion* (2010) 29.

<sup>25</sup> Samuels "The Changing Context of Tertiary Education" in Taylor (ed) *Tertiary Education in A Changing South Africa* 6.

<sup>26</sup> 7.

<sup>27</sup> Manuh, Gariba & Badu *Changes & Transformation in Ghana's Public Funded Universities* (2007) 15.

<sup>28</sup> 15.

<sup>29</sup> 15.

<sup>30</sup> 15.

<sup>31</sup> Malherbe 2000 (4) *European Journal for Education Law and Policy* 59-60.

with a common purpose but with a distinct entity, regarded in law as a juristic person.<sup>32</sup> It is comprised of staff and students. It has formal distinguishing characteristics such as name, statutes and symbols. It acts through its governing bodies such as its council (composed of members from within and outside the university), the senate, the faculty boards, and the students' representative council.<sup>33</sup> It has an existence and interest of its own, distinct from those of its members, and is subject to the law.<sup>34</sup>

Secondly, as a "statutory institution", it is meant that the university is a creature of statute; every university is established by its own Act of Parliament. The university owes its existence to the State and the State, subject to the autonomy granted the university, exercises control over it.<sup>35</sup> As a creature of statute, the university is dependent on the State for its existence, its status, its powers and its measure of autonomy.<sup>36</sup> It is submitted, that a university's relationship with the State is one of decentralization involving a division of powers between independent entities.<sup>37</sup> It should be pointed out that Malherbe's second postulation here applies to only public universities. Until recently, there were no private universities in South Africa and Nigeria and universities were solely own by governments. Thirdly, as an institution of higher learning, the university provides education and engages in basic and advanced research. With teaching and research functions, the university occupies a unique position in terms of which it is accorded some measure of autonomy vis-à-vis the State.<sup>38</sup>

Malherbe also submits that universities as statutory institutions of higher education are organs of State.<sup>39</sup> By definition, bodies that exercise powers and perform functions in terms of legislation in respect of matters which can be regarded by or in terms of the Constitutions as public matters, either expressly or by the application of the values and norms of the Constitution, are organs of State.<sup>40</sup> This submission again is borne out of the second postulation

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<sup>32</sup> See s 20(4) of the Higher Education Act 101 of 1997, every public higher education institution is a juristic person.

<sup>33</sup> See s 26(2) of the Higher Education Act, 1997; see generally, Malherbe 2000 (4) *European Journal for Education Law and Policy* 59.

<sup>34</sup> Malherbe 2000 (4) *European Journal for Education Law and Policy* 59.

<sup>35</sup> 59.

<sup>36</sup> 59.

<sup>37</sup> Bray *The Legal Status of the South African University* 35. Burns asserts that the true relationship is one of independent control. See Burns *Administrative Law under the 1996 Constitution* (1998) 88.

<sup>38</sup> Malherbe 2000 (4) *European Journal for Education Law and Policy* 60.

<sup>39</sup> See Malherbe "A Constitutional Perspective on Higher Education" 1999 (3) *Stell LR* 328-353 340.

<sup>40</sup> 340.

examined above and is applicable to public universities. In *Toerien v De Villiers NO*,<sup>41</sup> it was held that a university is a public authority which undertakes a function of the State in providing tertiary education and training.<sup>42</sup> As organs of the State, universities are bound by the Bill of Rights in terms of the South African Constitution in the same way as natural persons.<sup>43</sup> In the same vein, a university is also entitled to the rights in the Bill of Rights to the extent that it applies to it as a juristic person.<sup>44</sup> Similarly, in *Baloro v University of Bophuthatswana*,<sup>45</sup> it was stated unequivocally that a university was an organ of state for the purposes of the application of the Bill of Rights and therefore bound by the rights guaranteed in the Constitution. As explained above, while both private and public universities as juristic persons are bound by the Bill of Rights, private universities cannot be said to be organs of the State.

It is submitted that the implications of the university being bound by the Bill of Rights are significant because of some rights which are often involved in the relations between a university and its staff and students.<sup>46</sup> The following constitutional rights, for example, impact on universities: the equality provision and prohibition of unfair discrimination; the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way; the right not to have one's property searched or seized, and not to have one's communications infringed; the right to freedom of conscience, religion, thought, belief and opinion; the right to freedom of expression; the right to assemble and demonstrate; freedom of association; the rights relating to labour relations; the education rights; the language rights; the right of access to information; and the right to fair administrative action.<sup>47</sup> These rights will be discussed in more detail in the next chapter which deals with the rights in education.

Suffice to say at this stage that infringement of any of these rights by a university can only be justified in terms of the applicable limitation provisions in the Constitution. Such a limitation must be reasonable and justifiable in an open and democratic society based on human

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<sup>41</sup> 1995 (2) SA 879 (C) 885H.

<sup>42</sup> See also, *Lunt v University of Cape Town* 1989 (2) SA 438 (C) and *Durr v Universiteit van Stellenbosch* 1990 (1) SA 962 (C), in which the status of universities as public authorities was implicitly accepted. However, private educational institutions, although registered with the state and performing a public function, cannot be classified as organ of the state. See Malherbe "A Constitutional Perspective on Higher Education" 1999 (3) *Stell LR* 341.

<sup>43</sup> See s 8(1) of the CRSA, 1996; s 1(1) of the CFRN, 1999; see also, Malherbe 1999 (3) *Stell LR* 341.

<sup>44</sup> See s 8(4) of the CRSA, 1996.

<sup>45</sup> 1995 8 BCLR 1018 (B).

<sup>46</sup> Malherbe 1999 (3) *Stell LR* 342.

<sup>47</sup> 342.

dignity, equality and freedom.<sup>48</sup> Reasonable limitation of a right in order to prevent or repair the disruption of educational process has been accepted as a legitimate justification.<sup>49</sup> On this basis, the courts will hold lawful many infringements that probably would be struck down in another context.<sup>50</sup> Thus, in *Acting Superintendent-General of Education v Ngubo*,<sup>51</sup> the demonstrators on the campus of the Natal College of Education received little sympathy from the court, *inter alia* on the basis that the proper and orderly conduct of campus activities had been disrupted.<sup>52</sup>

Universities are not only bound by the Bill of Rights, they are also bearers of rights.<sup>53</sup> The rights to which a university can lay claim depend on the nature of the rights and the nature of the university as a juristic person.<sup>54</sup> Universities will be able to enforce many rights against the State. For example, property rights could be enforced should the State expropriate university property in breach of the Constitution or other laws;<sup>55</sup> so also is the right to fair administrative action should the Minister take actions affecting universities without consulting them;<sup>56</sup> furthermore, a university would be able to enforce the right to equal protection of the law should the State discriminate unfairly against a particular university.<sup>57</sup> The following rights have been held as being applicable to juristic personalities such as universities: the right to equal protection of the law and the right to privacy;<sup>58</sup> the right to freedom of expression,<sup>59</sup> and the right to freedom of economic activities.<sup>60</sup>

Before going into the discussion on the substantive right to higher education under the relevant laws, it is necessary at this stage to examine the concepts “academic freedom” and “institutional autonomy” because of the impact they have on the enjoyment of the right to higher education. The next part of this thesis is, therefore, devoted to examining these concepts.

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<sup>48</sup> See s 36 of the CRSA, 1996; s 45 of the CFRN, 1999.

<sup>49</sup> Malherbe 1999 (3) *Stell LR* 343.

<sup>50</sup> 343.

<sup>51</sup> 1996 (3) BCLR 369 (N) 374C.

<sup>52</sup> See also, *Zwelibanzi v University of Transkei* 1995 (1) SA 407 (Tk GD) and *Yates v University of Bophuthatswana* 1994 (3) SA 815 (BGD), where the rules of natural justice were applied to the relationship between a university and its students and staff members, but not expressly on the basis that the university was a public authority.

<sup>53</sup> See s 4(4) of the CRSA, 1996; ss 1 & 13 of the CFRN, 1999.

<sup>54</sup> Malherbe 1999 (3) *Stell LR* 344.

<sup>55</sup> S 25 of the CRSA, 1996; see Malherbe 1999 (3) *Stell LR* 344.

<sup>56</sup> S 33 of the CRSA, 1996; see Malherbe 1999 (3) *Stell LR* 344.

<sup>57</sup> S 9(3) of the CRSA, 1996; See generally, Malherbe 1999 (3) *Stell LR* 344.

<sup>58</sup> *AK Entertainment CC v Minister of Safety and Security* 1994 (4) BCLR 31(E); *Bernstein v Bester* 1996 (4) BCLR 449 (CC), paras 69 & 85.

<sup>59</sup> *Government of the Republic of South Africa v Sunday Times Newspapers* 1995 (2) BCLR 182 (T).

<sup>60</sup> *Ynuico Ltd v Minister of Trade & Industry* 1995 (11) BCLR 1453 (T).

## 2 Academic Freedom and Institutional Autonomy

According to the CESCR, the right to education can only be enjoyed if accompanied by the academic freedom of staff and students.<sup>61</sup> Although the issue of academic freedom is not explicitly mentioned in article 13 of the ICESCR, the Committee considered it appropriate and necessary to make some observations about the issue because in its experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom.<sup>62</sup> The enjoyment of academic freedom requires the autonomy of institutions of higher education.<sup>63</sup> The twin concepts of academic freedom and institutional autonomy are among the most important issues concerning the existence, mission and role of the university throughout the world.<sup>64</sup> Universities have always considered the two concepts to be indispensable values and have defended them as such.<sup>65</sup>

Ajayi, Goma and Johnson submit that the two concepts relate to the protection of the university from day-to-day direction by government officials, specifically on the selection of students; the appointment and removal of academic staff; the determination of the content of university education and the control of degree standards; the determination of size and rate of the growth; the establishment of the balance between teaching, research and advanced study, the selection of research projects, and freedom of publication; and the allocation of recurrent income among the various categories of expenditure.<sup>66</sup> It is submitted in this regard that no one familiar with the operations of the university in the discharge of its mission and role in society can doubt the value of academic freedom and university autonomy.<sup>67</sup> Although, the two concepts are akin to the two sides of a coin, for the purpose of clarity, each of these concepts is examined separately.

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<sup>61</sup> General Comment No.13, para 38.

<sup>62</sup> General Comment No.13, para 38.

<sup>63</sup> General Comment No.13, para 40.

<sup>64</sup> See Ajayi, et al *African Experience with Higher Education* 167.

<sup>65</sup> 167.

<sup>66</sup> 167-168.

<sup>67</sup> 168.

## 2 1 Academic Freedom

“Academic freedom” as a concept defies absolute definition.<sup>68</sup> Russell submits that the word “academic freedom” has often caused confusion because it comes from a medieval intellectual tradition which pre-dates most of the current meanings of the word “freedom”.<sup>69</sup> In this regard, Kaplan and Schrecker note that “there is little consensus regarding the meaning of academic freedom although there is agreement that it is something worth protecting. The concept has been invoked in support of many contrary causes and positions. It, for example, was used to justify student activism and to repress it, to defend radical faculty and to defend their suppression, to support inquiry into admissions or promotion or tenure decisions and to deny such inquiry. It is, at best, a slippery notion, but clearly a notion worth analysis.”<sup>70</sup>

Various writers and scholars have attempted identifying various manifestations of academic freedom. Smith submits that “academic freedom has been described as a fourfold right of a university: ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’”<sup>71</sup> Academic freedom may also entail the freedom of a university to select its own staff and to determine its own standards, and the freedom of both staff and students to free expression in their teaching, studying, publishing and research.<sup>72</sup> According to Nicol, academic freedom means the freedom of the University to select its teachers and students, to set the contents and standards of its curriculum and research and to provide a favourable atmosphere where professors and students are free to be involved in creative processes leading to discovery of new truths and the confirmation of old ones.<sup>73</sup> On his part, Tight posits that “academic freedom refers to the freedom of individual academics to study, teach, research and publish without being subject to or causing undue interference...”<sup>74</sup>

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<sup>68</sup> See *The Open Universities in South Africa and Academic Freedom 1957-1974* (1974) 4.

<sup>69</sup> See Russell *Academic Freedom* (1993) 1.

<sup>70</sup> Kaplan & Schrecker (eds) *Regulating the Intellectuals: Perspectives on Academic Freedom in the 1980s* (1983) 6.

<sup>71</sup> Smith 1995 *SALJ* 680; see also, Albert van de Sandt Centlivres et al (ed. Committee) *The Open Universities in South Africa* (1957) 11-12.

<sup>72</sup> See Birley *Richard Freethan Memorial Lecture* (1970) 4, citing with approval the features of academic freedom that are contained in a resolution of the Council of the University of Rhodesia of 10 December 1965; see also, *The Open Universities in South Africa and Academic Freedom 1957-1974* 3; Ashby *University under Siege* (1962) 6; Butler *Academic Liberty* (1969) 5 & 20.

<sup>73</sup> Nicol “Academic Freedom and Social Responsibility” in Kertesz (ed) *The Task of Universities in a Changing World* (1972) 406.

<sup>74</sup> Tight “So What is Academic Freedom?” in Tight (ed) *Academic Freedom and Responsibility* (1988) 132.



Russell submits that academic freedom is “the freedom for academics within the law, to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy...”<sup>75</sup> Ajayi *et al* also define it as “the freedom of members of the academic community, individually and/or collectively, in the pursuit, development, and transmission of knowledge.”<sup>76</sup> Similarly, O’Hear submits that “academic freedom amounts to no more than a right supposedly given to academics to say and teach what they believe to be true.”<sup>77</sup> A close examination of the definitions of academic freedom as propounded by Smith and Nicol would reveal that these definitions border on institutional autonomy and not academic freedom. The definitions touch on the rights of the university as an entity and not individual academics or students, for this reason, the definitions of the concept as given by Tight, Russell, Ajayi *et al*, and O’Hear are preferred.

It is submitted that in the pursuit of knowledge, academics may not be hindered from following the approach which they think is most fruitful with regard to scientific or scholarly discovery. Academic freedom therefore guarantees the right of academics to freely teach according to their conscience and convictions.<sup>78</sup> Academics have to teach and do research, in the course of this, they have to express certain views which may not be popular but which may nevertheless be valid. This freedom requires that they should pursue the truth without any fear of reprisals.<sup>79</sup> It is a freedom to follow a line of research where it leads, regardless of the consequences.<sup>80</sup> Similarly, students have to learn and in the process they may ask questions or express certain views. Academic freedom, therefore, entails that they should not be punished for asking those questions or expressing those views.<sup>81</sup> The purpose of academic freedom is to enable both academics and students to do their job effectively.<sup>82</sup>

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<sup>75</sup> See Russell *Academic Freedom* 18. See also, Horn, “*Academic Freedom within the University*” The Eleventh EG Malherbe Academic Freedom Lecture delivered at the University of Natal (2 August 1978) 4; Turner “The Price of Freedom” in Tight (ed) *Academic Freedom and Responsibility* 106.

<sup>76</sup> See Ajayi, et al *The African Experience with Higher Education* 242.

<sup>77</sup> O’Hear “Academic Freedom and the University” in Tight (ed) *Academic Freedom and Responsibility* 6.

<sup>78</sup> See Ajayi, et al *The African Experience with Higher Education* 242.

<sup>79</sup> Proposing the Amendment to the Education Bill of 1988 (England), Lord Jenkins of Hillhead (as Chancellor of Oxford University) claimed for academics: “the freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.” See Russell *Academic Freedom* 1-2.

<sup>80</sup> Russell *Academic Freedom* 18.

<sup>81</sup> Dlamini “University Autonomy and Academic Freedom in Transition: The British Experience” (2001) 16 *SAPR/PL* 343-361 356.

<sup>82</sup> See the CESCR which asserts as follows: “Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion,

Goodlad aptly captures the meaning of academic freedom when he submits that academic freedom as a concept has four aspects namely; (i) the freedom of students to study: an issue concerning access; (ii) the freedom of students in what they learn and how they learn it: an issue concerning curriculum and pedagogy; (iii) the freedom of faculty (members of the lecturing staff) to decide what to teach and how: issues concerning course approval, validation, and accreditation, and (iv) the freedom of faculty to carry out research: an issue concerning choices to be made both by faculty themselves and by those who fund their researches on the relative intellectual, practical, financial and other merits of the claims of different programmes and projects for time and attention.<sup>83</sup> Limitation on any aspect of academic freedom as examined above is capable of impacting negatively on the enjoyment of the right to education. This underpins the claim of the CDESCR that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students.<sup>84</sup>

## 2.2 Institutional Autonomy

Like the term “academic freedom”, the term “institutional autonomy” is also susceptible to the problem of precise definition. According to Ojo, “university autonomy may be defined as that freedom granted each university to manage its internal affairs without undue interference from outside bodies, persons, or, most especially, from the government that in most parts of Africa, sustains it financially.”<sup>85</sup> Institutional autonomy implies: (a) the freedom of universities to select

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documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognised human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds. See CDESCR General Comment 13 para 39. See also, Alston & Malherbe “The Constitutional Right to Academic Freedom: An Exploration into Definition, Scope and Threats” (2009) (1) *TSAR* 102-123 102; Dlamini, “University Autonomy and Academic Freedom in Transition: The British Experience” (2001) 16 *SAPR/PL* 343-361 356; Teferra & Altbach (eds) *African Higher Education* (2003) 10-11.

<sup>83</sup> Goodlad “Four Forms of Heresy in Higher Education: Aspects of Academic Freedom in Education for the Professions” in Tight (ed) *Academic Freedom and Responsibility* 49.

<sup>84</sup> General Comment No.13, para 38.

<sup>85</sup> See Ojo *Law and University Administration in Nigeria* (1990) 67; see also, *Esiaga v University of Calabar* [2004] All FWLR (pt 206) 381 at 404, where the Nigerian Supreme Court held that “in so far as examinations are conducted according to the university rules and regulation and duly approved and ratified by the University Senate, the court have no jurisdiction in the matter.” See also *Patrick Magit v University of Agriculture Markurdi & Others* [2005] 19 NWLR 211 at 250 where the Nigerian Supreme Court held that it will generally respect the autonomy of the university to govern itself and will not interfere with the exercise of the powers of certification of graduates by

their students and staff by criteria chosen by the universities themselves; (b) autonomy to shape their curriculum and syllabus, and (c) the freedom to decide how to allocate among their various activities, such funds as are made available to them.<sup>86</sup> The CESCRC states that “[a]utonomy is that degree of self-governance necessary for effective decision-making by institution of higher education in relation to their academic work, standards, management and related activities.”<sup>87</sup>

It is submitted that university autonomy relates to the corporate freedom of an institution in society, while academic freedom is concerned with both the autonomy of the university and the freedom of teacher and student in learning and in research.<sup>88</sup> In this context, Ajayi argues that university autonomy does not mean the right of the individual professional but the rights of the institution to govern itself.<sup>89</sup> University autonomy is further defined “as the freedom and independence of a university, as an institution, to make its own internal decisions, whatever its decision-making processes are, with regard to academic affairs, faculty and student affairs, business affairs, and external relations.”<sup>90</sup> It is taken to mean self-government by a university.<sup>91</sup> For a university to play a meaningful role and discharge its responsibilities effectively, it must enjoy a high degree of institutional autonomy, in addition to academic freedom of its academic staff.<sup>92</sup> As part of its autonomy, it must have freedom to run its own affairs, without external interference; it must have the right to organize its internal affairs, to make decisions, and to establish its own academic programmes.<sup>93</sup>

The content of institutional autonomy may be summed up thus: “the principle of institutional autonomy refers to a high degree of self-regulation and administrative

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a university because “a university is a place of great learning and research” and that it views “with trepidation, the day the court would immerse itself into the cauldron of (an) academic issue which is an area it is not equipped to handle. It will indeed be alarming for any court worth its salt to enter into the arena of questioning why a university has refused to award a degree to any student.” See further, *Fetuga v University of Ibadan* [2000] NWLR (pt 683) 118; *University of Ilorin v Oluwadare* [2003] All FWLR (pt 338) 747.

<sup>86</sup> See University of Sokoto (now Uthman Dan Fodio University, Sokoto) *Memorandum submitted by Senate to the Presidential Commission on Salary and Conditions of Service of University Staff* (February, 1981) 20.

<sup>87</sup> General Comment No. 13 para 40.

<sup>88</sup> See *The Open Universities in South Africa and Academic Freedom 2*.

<sup>89</sup> See Ajayi “Academic Freedom and University Autonomy in Nigeria Today: A Historical Survey and A Search for New Strategies” A Lecture delivered at the Academic Staff Union of Universities Conference in Kano, Nigeria (1980).

<sup>90</sup> See Ajayi, et al *African Experience with Higher Education* 243.

<sup>91</sup> 243.

<sup>92</sup> 169.

<sup>93</sup> 169; see generally, Taiwo “The Regulatory Bodies, Academic Freedom and Institutional Autonomy in Africa: Issues and Challenges- Nigerian Example” A Paper delivered at the CODESRIA Conference, Oran Algeria (09-11/03/2010).

independence with respect to student admissions, curriculum, methods of teaching and assessment, research, establishment of academic regulations and the internal management of resources generated from private and public sources. Such autonomy is a condition of effective self-government.”<sup>94</sup> In this respect Rendel submits:

“Academic freedom for an institution usually includes autonomy or self-government according to the terms of its constitution, with power to determine academic policies, the balance between teaching and research, staffing ratios, the appointment, promotion and discipline of staff at all levels, the admission and discipline of students, curricula, standards, examinations and the conferring of degrees and diplomas; and with control over the material resources needed to undertake these activities.”<sup>95</sup>

### **2 2 1 Institutional Accountability**

An important component of institutional autonomy is institutional accountability. The CESCR submits that the issue of institutional autonomy must be consistent with systems of public accountability. According to the Committee, “[s]elf-governance or institutional autonomy must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. Where there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.”<sup>96</sup> It is submitted that the proportion of public income that goes into the public university budgets requires universities accountability. It is essential for governments to know how their money is spent, what the results of teaching are, whether or not the students are really well-educated when they graduate, and the result of research, whether or not it can be put to good use by society and whether or not the quality of the research conducted stands up to international comparison.<sup>97</sup>

The major concern, however, is reconciling the autonomy of the university with government control of finance. The State is answerable for public funds and, therefore, has a specific duty and responsibility to allot public funds in a manner which assures the efficiency of the educational system and an economical use of available resources.<sup>98</sup> It is logical that since government provides funds to public universities, it should be kept abreast of how those funds

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<sup>94</sup> See the Department of Education, *Education White Paper 3 (1997)* 7.

<sup>95</sup> Rendel “Human Rights and Academic Freedom” in Tight (ed) *Academic Freedom and Responsibility* 74-75.

<sup>96</sup> General Comment 13 para 40.

<sup>97</sup> See Ajayi, et al *African Experience with Higher Education* 170.

<sup>98</sup> 170.

are spent.<sup>99</sup> Ajayi, *et al* submit that both teaching and research seem to suffer when universities are entirely autonomous and when they are rigidly supervised.<sup>100</sup> This suggests that total autonomy may adversely impact on the right of academics and students in the sense that the university administrators may become tyrannical. At the same time, rigid supervision of a university may equally limit its autonomy and make it less functional.

Experience, however, shows that issues of institutional accountability pose dangers to institutional autonomy in the sense that government finance officers, who are often ill-equipped to make educational decisions at times, take crucial decisions which may have lasting adverse effect on educational institutions.<sup>101</sup> In reality, most African governments use financial control to influence (and sometimes to direct) their universities on the rate of growth both in terms of capital development and student intake, the staffing of universities and the remuneration payable to academic staff.<sup>102</sup> For effective operation of the universities, a degree of financial autonomy is therefore recommended.

### **2 3 The Nexus between Academic Freedom and Institutional Autonomy**

Academic freedom in its broadest sense includes university autonomy, but the two terms are not necessarily synonymous.<sup>103</sup> While university autonomy relates to the corporate freedom of an institution in society, academic freedom is concerned with both the autonomy of the university and the freedom of teacher and student in learning and in research.<sup>104</sup> In principle, it could be argued that academic freedom and university autonomy cannot be separated. The close relationship between the two concepts cannot be denied since the two go hand in hand.<sup>105</sup> Tight explains that the view that the two concepts are mutually supporting and that it is desirable to encourage both if each is to flourish, remains the best summary of the symbiotic relationship between the two.<sup>106</sup>

Malherbe reasons that the two concepts, though closely related are, however, not the same for the following reasons: first, the actual content of academic freedom and university

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<sup>99</sup> 171.

<sup>100</sup> 172.

<sup>101</sup> 171.

<sup>102</sup> 171.

<sup>103</sup> See *The Open Universities in South Africa and Academic Freedom 2*.

<sup>104</sup> 2.

<sup>105</sup> Malherbe *A Paper Prepared for Higher Education South Africa* (18 June 2003) 12.

<sup>106</sup> Tight "So what is academic freedom?" in Tight (ed) *Academic Freedom and Responsibility* 123.

autonomy differ in the sense that the former refers to the rights of the individual academic, whereas the latter refers to those aspects of the right to be pursued by the institution.<sup>107</sup> Secondly, although autonomy over academic-related matters includes matters of primary importance to the individual lecturer, academic freedom applies to everybody involved in the practice of science and not only to lecturers.<sup>108</sup> Thirdly, the fact that an autonomous university may restrict the academic freedom of its lecturers' autonomy is no guarantee of academic freedom.<sup>109</sup> It, however, remains a question whether academic freedom can flourish in the absence of autonomy.<sup>110</sup>

Institutional and individual academic freedom are both essential for a conception of academic freedom. This implies that all decisions concerning the production of knowledge within institutions of learning must, ultimately, be taken by academics. Smith declares that decisions about the hiring of academic staff and the admission of students are as integral to this process as the decisions that individual lecturers take about the truth of various theories they wish to propound.<sup>111</sup> Therefore, the university's right to decide who will teach involves not only the hiring and firing of lecturers but also the right to make decisions about their conditions of service, their status in the institution and their access to its resources.<sup>112</sup> It is submitted that interference with the university's right to determine its own academic standard by, for example, choosing how many students to accept and deciding the standard of its degree leaves it without real academic freedom.<sup>113</sup> Such interferences are often by bureaucrats who may not be adequately equipped to perform the functions performed by academics.

Also, arbitrary limitation on the number of students to be admitted may limit citizens' right and access to higher education. Without the institutional right to decide who may be admitted to study and who may teach, the research priorities and capacities of individual

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<sup>107</sup> Malherbe *Higher Education South Africa* (18 June 2003) 12; Malherbe "A Fresh Start II: Issues and Challenges of Education Law in South Africa" 2000 (4) *European Journal for Education Law and Policy* 57-68 61.

<sup>108</sup> See Malherbe *Higher Education South Africa* 12; Malherbe 2000 (4) *European Journal for Education Law and Policy* 61.

<sup>109</sup> 61.

<sup>110</sup> Malherbe *Higher Education South Africa* 12; Malherbe 2000 (4) *European Journal for Education Law and Policy* 61; Rendel "Human Rights and Academic Freedom" in Tight (ed) *Academic Freedom and Responsibility* 80.

<sup>111</sup> See Smith 1995 112(4) *South African Law Journal* 680.

<sup>112</sup> 685.

<sup>113</sup> See Russell *Academic Freedom* 107.

academics will inevitably be significantly restricted.<sup>114</sup> Working from the above, the summary of the argument presented in this part of the thesis is that academic freedom in its broadest sense encompasses university autonomy. The two concepts go hand in hand and each is essential for effective enjoyment of the other.

#### **2 4 Academic Freedom in South African Higher Institutions**

Section 16 of the South African Constitution which guarantees “freedom of expression”, recognises academic freedom and freedom of scientific research.<sup>115</sup> This provision is wider in scope compared to what was obtainable under the Interim Constitution in the sense that under the current Constitution, the provision on academic freedom now extends to any academic institution.<sup>116</sup> The right to academic freedom implies a positive duty of the State to promote research and teaching by providing functional academic and scientific institutions, or at least, the financial and organizational back-up needed to exercise the right to academic freedom and scientific research.<sup>117</sup>

At the core of the right to academic freedom is also the right of the individual to do research, to publish and to disseminate learning through teaching, without government interference.<sup>118</sup> In practical terms, academic freedom would be a hollow ideal without institutions such as universities. It is submitted that one of the reasons for establishing

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<sup>114</sup> See Smith 1995 112(4) *South African Law Journal* 680.

<sup>115</sup> See S 16(d) of the Constitution. It is observed that the first part of section 16 is intended to grant everyone a generous measure of expression protection, including freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. As a result the concept of “expression” should encompass, amongst other things, the display of paraphernalia, the publication of photographs, dancing, dress, the propagation of controversial academic and other opinions. See Govindjee “Freedom of Expression” in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* (2009) 119 120.

<sup>116</sup> S 14 of the Interim Constitution provides: “[e]very person shall have the right to freedom of conscience, religion, though, belief and opinion, which shall include academic freedom in institutions of higher learning.” On the other hand, s 16(d) of the 1996 Constitution says: “[e]veryone has the right to freedom of expression, which includes- ... academic freedom and freedom of scientific research.” In terms of the 1996 Constitution, the right is no longer limited to “institutions of higher learning” as provided in the Interim Constitution, but to every academic institution. See also, Currie & de Waal *The Bill of Rights Handbook* 5 ed (2005) 370.

<sup>117</sup> See de Groof “The Freedom of Teachers. Some Notes” in de Groof & Malherbe (eds) *Human Rights in South African Education* (1997) 295; Currie *The Constitution of the Federal Republic of Germany* (1994) 235; Currie & de Waal *The Bill of Rights Handbook* 371.

<sup>118</sup> Currie and de Waal submit that currently in South Africa, the area in which freedom of scientific research clashes most frequently with government regulation is in the field of human genetics. They argued that regulation such as bans on stem-cell research, human cloning or germ-line engineering is motivated less by political than by ethical concerns, concerns that are frequently at odds with the impetus of scientific discovery. See Currie & de Waal *The Bill of Rights Handbook* 370 & 371 fn 59.

universities is, after all, to realise academic freedom.<sup>119</sup> If the State could prescribe to universities that no research critical of the government may be funded by the university or that no researcher critical of the government may be appointed, academic freedom would be left stranded.<sup>120</sup> To achieve academic freedom, a right to a degree of institutional autonomy is essential and this may be derived from the provision of section 16 of the South African Constitution.<sup>121</sup>

Malherbe summarises the contents of academic freedom in the South African context as follows: freedom to teach without outside interference. It includes the freedom to determine the content, process and methods of teaching, as well as the evaluation (assessment) of those taught. Admission requirements, standards and criteria for awarding qualifications are logical corollaries of this right, and freedom to do research without outside interference.<sup>122</sup> It also includes freedom to decide who shall teach and conduct research. This implies peer evaluation according to academic criteria and compliance with professional and ethical norms;<sup>123</sup> and the right to tenure, which means that when an academic complies with reasonable criteria, he or she should be entitled to a permanent position.<sup>124</sup>

Academic freedom finds its principal justification in its functional significance with regard to the advancement of knowledge which demands that the process of seeking objective truth should not be corrupted by ideologies and interests.<sup>125</sup> Academic freedom cannot exist in a society which is not free because violations of general liberty will almost always affect the freedom of the university.<sup>126</sup> Thus, freedom of person, freedom of movement, freedom of speech and freedom of assembly are all fundamental to the university in the pursuit of the truth.<sup>127</sup> Asserting the importance of constitutional recognition of academic freedom in South Africa, Malherbe posits further:

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<sup>119</sup> 370.

<sup>120</sup> 371.

<sup>121</sup> 371.

<sup>122</sup> Malherbe 2000 (4) *European Journal for Education Law and Policy* 60.

<sup>123</sup> 60.

<sup>124</sup> See generally, Malherbe "A Constitutional Perspective on Higher Education" 1999 (10) *Stell LR* 328 346; Malherbe *Higher Education South Africa* 9-10.

<sup>125</sup> See Ajayi, et al *African Experience with Higher Education* 168.

<sup>126</sup> See *The Open Universities in South Africa and Academic Freedom* 4.

<sup>127</sup> Freedom of academic expression, in the sense of freedom for university teachers to teach and to pursue research freely, and freedom for students to debate old and new ideas freely, is simply a special manifestation of the freedoms of speech, assembly and association. See *The Open Universities in South Africa and Academic Freedom* 5 & 25.



“[I]t means that academic freedom forms part of the key freedom rights such as privacy, belief, opinion and conscience, expression, freedom and security of person, and freedom of assembly, association and movement, all of which protect individual freedom, the cornerstone and founding value of any civilized and democratic state. As sure as freedom of movement allows the individual physically to move about freely, academic or intellectual freedom, together with the freedom of thought, conscience, opinion and expression, ensures that we may follow wherever the explorations of the mind may lead us.”<sup>128</sup>

Although, it is not the business of the university to engage in partisan politics, it is submitted, however, that the correct philosophy is that the university autonomy and academic freedom does not mean a university’s seclusion from the rest of the world.<sup>129</sup> A university should be permitted to experiment with unorthodox views and ideas so also, its academics should have the right to assemble peacefully to protest where necessary.<sup>130</sup> Academic freedom includes the right of both staff and students to express their views either publicly or within the confines of the university not solely on matters affecting the university but also on matters of general public interest.<sup>131</sup>

While it lasted, apartheid educational policy impacted adversely on the academic freedom and institutional autonomy in South Africa. In 1957, when the National Party Government made clear its intention of applying the principle of racial separation in university education, the University of Cape Town and the University of Witwatersrand unequivocally declared their opposition in a booklet titled: *The Open Universities in South Africa*.<sup>132</sup> This publication emphasized the four essential components of academic freedoms namely, the right of the university “to determine for itself, on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>133</sup> However, as a result of the moves by Government to close the doors of these universities to African, Asian and

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<sup>128</sup> Malherbe *Higher Education South Africa* 8.

<sup>129</sup> Birley eloquently expressed this contention as follows: “It is certainly not the business of a university to become a kind of unofficial political opposition. But this does not mean that it should ignore what happens in the world outside it. The fate of the German universities in the 1930s should be a warning to us. They believed that, as long as they preserved the right of free research and free teaching within their own walls, they did not need to concern themselves about what else was happening in their country. As a result, they did nothing to oppose the rise to power of a political party which made it quite clear that it intended to destroy the academic freedom which the universities enjoyed. I should say that a university today should be deeply concerned about the denial of justice beyond its own walls.” See Birley *The Universities and Utopia* (1965) 16.

<sup>130</sup> See *The Open Universities in South Africa and Academic Freedom* 5.

<sup>131</sup> 5.

<sup>132</sup> During this period, the two universities were “open universities” in the sense that they admitted students on academic grounds, without regard to race, colour or creed. See *The Open Universities in South Africa and Academic Freedom* vii.

<sup>133</sup> 1.

Coloured students, during the 1957, the fourth aspect of the four freedoms, to wit, “freedom to determine who may be admitted to study” was given much emphasis.<sup>134</sup>

The apartheid education system has been criticized as criminal, oppressive and a violation of academic freedom.<sup>135</sup> In this regard, Polanyi contends “[t]o exclude black students from a university is an insult to their human dignity, it is inhuman. To force them into native reserves under the supervision of white authorities is oppressive. To pretend that this is done in order to preserve their native culture is intellectually dishonest. To demand the participation of universities in a programme of inhumanity, oppression and intellectual dishonesty is a violation of academic freedom.”<sup>136</sup> In the same vein, trial and criminal prosecutions of academics for expressing views on academic/public issues is capable of limiting academic freedom. The case of *S v Van Niekerk*,<sup>137</sup> in which Dr van Niekerk of the Law School of the University of Witwatersrand was tried for contempt of court, is a classical example. In that case, the contempt proceedings arose from the article which Dr van Niekerk published in the *South African Law Journal*<sup>138</sup> in which he discussed the racial factor in the imposition of death penalty in South Africa. Although he was acquitted on the ground that that he had not intended to be contemptuous of the court, the judgment was a warning or restraint against pursuing research of this kind by any scholar.<sup>139</sup>

The inhibitions on freedom of speech (academic freedom) resulting from the possibility of contempt of court charges were further emphasized in a sister case of *S v Van Niekerk*.<sup>140</sup> In that case, the appellant, a professor of law at the University of Natal, was charged before Fannin J in the Durban and Coast Local Division with the two crimes of contempt of court and attempting to defeat or obstruct the course of justice. The proceedings arose out of a speech he delivered at a public meeting held in Durban City Hall on 9 November 1971. This meeting was directed against certain aspects of the Terrorist Act, 83 of 1967 (more especially, detention for

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<sup>134</sup> The right of the university to select its own teachers, freedom of expression, and many more were advocated. See *The Open Universities in South Africa and Academic Freedom* 1.

<sup>135</sup> See Ajayi, et al *African Experience with Higher Education* 73.

<sup>136</sup> See Polayi, et al *Apartheid and the World's Universities: Report on a Meeting held in London, November 1957* (1958) 11.

<sup>137</sup> 1970 (3) SA 655 (T).

<sup>138</sup> “Hanged by the Neck until you are dead” (1969) 86 *South African Law Journal* 457 and (1970) 87 *South African Law Journal* 60.

<sup>139</sup> The judgment has been criticized by the council of the Society of University Teachers of Law of South Africa as an attempt on the part of the authorities to discourage academic examination of judicial process. For the text of the statement of 9 September 1970; see also, (1970) 87 *South African Law Journal* 467-468.

<sup>140</sup> 1972 (3) SA 711 (AD).

interrogation without trial and solitary confinement) and to the circumstances that various people had died while detained under that Act. The meeting had in attendance between three and five thousand people.

He spoke from a typewritten speech, a copy of which he handed to the press. In it, he supported a “demand for an open judicial enquiry into possible abuses under the Terrorist Act”, strongly condemning certain provisions of the Act, equating the obtaining of information from detainees with the procuring of evidence by torture. Secondly, he criticized what he considered to be a reprehensible inaction on the part of lawyers regarding those provisions, specifically, including the judiciary. Thirdly, he advanced a “solution” which he had exhorted the judiciary to adopt, including an exhortation to all judges that they should, in effect, ignore the testimony of all witnesses who had previously been detained under the Act. The whole tenor of his speech was criticism of the inaction of lawyers (including judges), and a call for protest and action against those provisions which he regarded as otiose. He criticised the judges for not raising their voices in protest.

The 10 November 1971 issue of the Daily News (a newspaper circulating in Durban and elsewhere) carried a fairly comprehensive report of the City Hall Meeting and of the resolutions passed thereat. Reference to a petition supporting this request, and which, *inter alia*, made mention of “the Pietermaritzburg Terrorist Trial”, was also included in the newspaper report. This article, under the banner heading “Appeal to the Judiciary”, incorporated a brief summary of appellant’s speech.<sup>141</sup> He was convicted on contempt and the charge of attempting to defeat or obstruct the course of justice for inviting judges to reject the evidence of witnesses held for lengthy periods under the Terrorism Act 83 of 1967. He was sentenced to pay a fine of 100 Rand with an alternative of one month’s imprisonment.<sup>142</sup> Confirming the judgment on appeal, the court, Botha, JA (with Holmes, JA concurring) held: “For all the foregoing reasons, I accordingly come to the conclusion that appellant was rightly convicted of contempt of court.”<sup>143</sup>

Academic staff had their academic freedom severely violated during the apartheid era. For instance, in 1964 two distinguished academics were excluded from the universities.

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<sup>141</sup> At 714-717.

<sup>142</sup> See *S v Van Niekerk* 1972 (3) SA 711 (AD). The judgment has however been criticized as limiting academic freedom and freedom of expression. See Dugard “Judges, Academics and Unjust Laws” (1972) 89 *South African Law Journal* 271.

<sup>143</sup> At 725.

Professor Simons, an Associate Professor of Comparative and African Government and Law in the University of Cape Town, and professor Edward Roux, Professor of Botany in the University of the Witwatersrand, were prohibited by banning orders from teaching and pursuing research.<sup>144</sup> In 1967, a similar order was served on Dr Raymond Hoffenberg, a senior lecturer and research worker at the Cape Town Medical School. Professor GA Doyle, Professor of Psychology in the University of the Witwatersrand, was placed under a banning order from 1965 to 1967, which permitted him to continue teaching but prohibited him from publishing without ministerial consent.<sup>145</sup>

Security law also impacted greatly on academic freedom in South Africa during apartheid days. The Publications and Entertainments Act 26 of 1963 and the Suppression of Communism Act 44 of 1950 were the two foremost statutes proscribing literature in South Africa during this period. In terms of the Publications and Entertainments Act, the Publications Control Board was empowered to declare any literary work “undesirable”. During this period, it was reported that over 26 000 works, many of which were books of accepted literary quality were banned in South Africa.<sup>146</sup> Similarly, under the Suppression of Communism Act, the writings of any person listed or prohibited from attending any gathering, or who was formerly resident in South Africa and who the Minister of Justice was satisfied was directly or indirectly furthering any object of communism, could not lawfully be used either as references for teaching purposes or as sources for scholarly writings.<sup>147</sup>

The consequence of this Act was that unless with the permission of the Minister of Justice, many works of well-known South African scholars could not be distributed, discussed in the lecture rooms or used as source of academic research work.<sup>148</sup> Restrictions as mentioned above limit the scope of open debate in a number of disciplines in the universities, and inhibit the free flow of ideas and scholarly inquiry.<sup>149</sup> The limitations on freedom of research under the above circumstances are obvious. In some case, several academics restricted under the

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<sup>144</sup> See *The Open Universities in South Africa and Academic Freedom 1957-1974* (1974) 36.

<sup>145</sup> 36.

<sup>146</sup> Blanket exceptions from these prohibitions were granted by the Publications Control Board to university libraries, provided the works are not of a “communistic” nature and provided the books are kept under lock and key in the reference section and are used only for bona fide study and research purposes. See *The Open Universities in South Africa and Academic Freedom* 28.

<sup>147</sup> 28.

<sup>148</sup> In this category were the works of Professors Edward Roux, HJ Simons, MA Millner, R Hoffenberg and Mr. BA Hepple.

<sup>149</sup> See *The Open Universities in South Africa and Academic Freedom* 29.

Suppression of Communism Act were excluded from both teaching and research in terms of their restriction orders. Others who were given exception to teach were prohibited from publishing without ministerial consent.<sup>150</sup> These limitations deterred some scholars from entering such prohibited fields of study (especially contemporary South African literature and social sciences) or prompted them to pursue less significant inquiries.<sup>151</sup>

With the South African return to democratic rule in 1994, the Interim Constitution unequivocally guaranteed the right to academic freedom in the higher institutions. The South African Constitution expands on this provision by providing that academic freedom is for every academic institution. Thus, in terms of these two Constitutions, academic freedom and freedom of scientific research has become a constitutionally guaranteed right which is binding on the State. It is a right which the State must respect, protect, promote and fulfil.<sup>152</sup> Both staff and students are entitled to this right and subject to the limitation allowed by the Constitution, the State or its agents may not derogate from the right.<sup>153</sup> For any limitation to this right to be acceptable, it has to be reasonable and justifiable in an open and democratic society.<sup>154</sup>

Notwithstanding the constitutional guarantee of the right to academic freedom, experiences show that it is not an absolute right in South Africa. Like in any part of the world, there is tendency towards extended state control of higher education due to financial considerations, accountability issues, changing needs and values of society, market forces, commercialization, and globalisation, all of which tend to put academic freedom and institutional autonomy under pressure.<sup>155</sup> It is submitted that academic freedom and institutional autonomy are increasingly subjected to incursions in South Africa, especially because of legislation which aimed at enabling the government to gain more and more control over higher

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<sup>150</sup> 29-30.

<sup>151</sup> A classic example of the effects of those restrictive statutes was given in respect of the publication of the second volume of a book titled *The Oxford History of South Africa*, published in 1971 by the Clarendon Press of the University of Oxford. After receiving legal opinion, the publishers and editors felt obliged to omit from the South African edition a chapter by Leo Kuper entitled 'African Nationalism in South Africa, 1910-1964'. The chapter contained many quotations from banned persons and organizations, and their publication in South Africa could have laid the local editor and the branch of the publishing house open to prosecution. In view of the legal problem, the editors and publishers decided to produce a separate South African edition in which pages 424-427, on which Professor Kuper's chapter appeared, were completely blank. A postscript to be added is that subsequent to this publication, the authorities later permitted the international edition, containing Prof Kuper's chapter, to be distributed in South Africa. See *The Open Universities in South Africa and Academic Freedom* 30-31.

<sup>152</sup> See ss 7(2) & 8 of the Constitution.

<sup>153</sup> S 7(3) of the Constitution.

<sup>154</sup> See s 36 of the Constitution; see also, Malherbe 1999 (10) *Stell LR* 346- 347; Malherbe *A Paper Prepared for Higher Education South Africa* (2003) 10.

<sup>155</sup> Malherbe *A Paper Prepared for Higher Education South Africa* (18 June 2003) 10.

education.<sup>156</sup> This is worrisome since academic freedom is a constitutionally guaranteed right which is critical to the success of higher education.<sup>157</sup> Broadly speaking, since 1995, a comprehensive, systematic and far-reaching plan to restructure and transform education has been undertaken. The plan seeks to eliminate historical disparities and disadvantages, and create an educational system that will ensure quality education for all. The plan is, however, ideologically predisposed towards the creation of a centrally controlled education system. It confers on the State complete dominance in all educational matters and leaves little room for academic freedom.<sup>158</sup>

An overview of some of the relevant policy instruments towards restructuring the South African higher education section shows that they impact negatively on academic freedom and institutional autonomy. For instance, the White Paper on Higher Education of 1997 openly envisaged a single, integrated, state-controlled higher education system. This White Paper has been criticised as paying lip service to academic freedom and as strengthening authoritarian tendencies of previous policies regarding higher education.<sup>159</sup> In this regard, Dlamini comments as follows: “[t]here is no doubt that while the White Paper pays lip service to academic freedom and co-operative governance, certain policies will have effect of whittling away academic freedom, especially in the form of institutional autonomy, and will result in increased control of government.”<sup>160</sup>

Also, the Higher Education Act of 1997 repealed the private acts of universities, and placed all universities under the direct executive control of the Minister of Education. The Act, and its subsequent amendments,<sup>161</sup> confers quite sweeping powers on the Minister to establish, abolish, merge and control higher education institutions.<sup>162</sup> In the same vein, the National Plan for Higher Education of 2001<sup>163</sup> set so-called “sizes and shapes” targets of the higher education system, including the composition of institutions, the programmes they offered and the growth and participation to be realised by each. The Plan, *inter alia* requires that admission

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<sup>156</sup> Dlamini “University Autonomy and Academic Freedom in Transition: the British Experience” 2001 (16) SA *Public Law* 343-361 343.

<sup>157</sup> Dlamini 2001 (16) SA *Public Law* 343.

<sup>158</sup> Malherbe *A Paper Prepared for Higher Education* 3; Alston & Malherbe (2009) (1) *TSAR* 102 120.

<sup>159</sup> Alston & Malherbe (2009) (1) *TSAR* 102 120.

<sup>160</sup> See Dlamini “Limitations on and Threats to University Autonomy and Academic Freedom” 2000 *THRHR* 171-179 175.

<sup>161</sup> Such amendment includes Act 55 of 1999, Act 54 of 2000, Act 23 of 2001, and Act 63 of 2003.

<sup>162</sup> Alston & Malherbe (2009) (1) *TSAR* 120; Malherbe *A Paper Prepared for Higher Education* 4.

<sup>163</sup> National Plan for Higher Education, February 2001 (GG 22138, 2001/03/09).

requirements be lowered, registrations be transferred from the humanities to the natural and applied sciences, prescribed graduation targets to be realised and funding to be linked to outputs.<sup>164</sup>

The South African Qualifications Authority (SAQA)<sup>165</sup> established a single, integrated qualification framework, namely the National Qualification Framework (NQF). Through this medium all qualifications must be approved by the SAQA. Likewise, every qualification has must be accredited with the Council on Higher Education (CHE), which also entails similar details being provided as those required by SAQA. The NQF constitutes a serious infringement on the institutional autonomy and freedom to decide for themselves who shall teach, what shall be taught, how it shall be taught and to whom it shall be taught.<sup>166</sup>

Finally, the merger of higher education institutions announced in 2005 also impugned academic freedom and institutional autonomy. This has been described as the final nail in the coffin of academic freedom and university autonomy in South Africa.<sup>167</sup> Malherbe asserts that there is simply nothing left of academic freedom and autonomy when institutions are forcefully merged with other institutions.<sup>168</sup> Wrapping this up, he submits:

“Obviously, this policy framework for higher education not only aims at eradicating inequalities and eliminating mismanagement. If so, it could have been implemented in a much more differentiated way. The framework rather seeks the creation of a completely new system of higher education which affects all institutions and leaves little scope for academic freedom and university autonomy... The system not only profoundly affects various elements of academic freedom and university autonomy; in many respects it completely erodes their exercise. Universities may not themselves decide which courses to offer, who will teach them, what research will be conducted, and to whom they will award their qualifications. The state approves or disapproves a university’s applications for all these matters and by approving or rejecting programs, decides in effect in which direction a university will be specializing. A bureaucrat decides whether a particular lecturer is fit to teach. The state prescribes admission requirements (and may eventually even select and allocate students), assessment methods and criteria and, eventually, to whom qualifications should be awarded. Finally, the state has a blank cheque to establish, abolish and merge higher education institutions in order to create the exact system it wants. With this arsenal of powers the state has transformed higher education institutions into

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<sup>164</sup> National Plan, para 2.3.1.

<sup>165</sup> SAQA was established by the South African Qualifications Authority Act 58 of 1995.

<sup>166</sup> See Malherbe & Berkhout “The National Qualifications Framework and the Unconstitutional Limitation of Academic Freedom” (2001) *South Africa Journal of Higher Education* 62-73 68-71; Alston & Malherbe (2009) (1) *TSAR* 102 121; see also, Jansen “Accounting for Autonomy” in Pithouse (ed) *Asinamali: University Struggles in Post-Apartheid South Africa* (2006) 11-21 12-14.

<sup>167</sup> Malherbe *A Paper Prepared for Higher Education* 5.

<sup>168</sup> 5-6.

state-controlled qualification factories, with complete disregard for their academic freedom and autonomy.”<sup>169</sup>

## 2.5 Academic Freedom in Nigerian Tertiary Institutions

There is no specific constitutional provision on academic freedom in Nigeria. However, the concept of academic freedom can be inferred from the provision of section 39(1) of the Nigerian Constitution which provides for the freedom of expression and the press. The section states: “[e]very person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.”<sup>170</sup> Nigeria is also a signatory to the ICCPR and the ICESCR which are relevant to the right to academic freedom.<sup>171</sup> Article 19 of the ICCPR, for instance, provides for freedom of expression and the right to hold opinion, from which the concept of academic freedom can also be inferred. It states:

“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 form of art, or through any other media of his choice.”<sup>172</sup>

Article 15(3) of the ICESCR obliges the States parties to respect the freedom indispensable for scientific research and creative activity. It is submitted that the combined provisions of section 39 of the Nigerian Constitution, articles 19 and 26 of the UDHR, article 15 of the ICESCR and article 19 of the ICCPR guarantee academic freedom in Nigeria. However, unwarranted government interference and abuses of academic freedom have eroded the autonomy of higher learning institutions. For example, summary dismissal of university professors and lecturers on issues bothering academic and government educational policies as well as national issues epitomizes a gross violation of academic freedom. In such a hostile environment, the academic community is often careful not to overtly offend those in power. This contributes to the perpetuation of a culture of self-censorship.<sup>173</sup>

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<sup>169</sup> 6.

<sup>170</sup> This is in contrast with the position in South Africa where section 16(d) of the South African Constitution expressly provides for the right to freedom of expression which includes *inter alia*, academic freedom and freedom of scientific research.

<sup>171</sup> Both Covenants ratified on 29 October 1993.

<sup>172</sup> See also, art 19 of the UDHR which also provides that “[e]veryone has the rights to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

<sup>173</sup> Teferra & Altbach (eds) *African Higher Education* 11.



The establishment of many regulatory bodies in the Nigerian tertiary education sector has also compromised the ideal concept of academic freedom and institutional autonomy in the country. The National University Commission (NUC), for instance, is charged with the responsibility of advising the governments on all aspects of university education and general development of universities in Nigeria.<sup>174</sup> This body is also vested with the power to disburse money to universities in the country.<sup>175</sup> The functions of the NUC are elaborate and are expressly stated in the NUC Act. The duties include advising the government and making inquiry into the financial needs, both recurrent and capital, of university education in Nigeria; receiving block grants from the federal government and allocating them to the federal universities; taking into account, in advising the federal and state governments on university finances, such grants as may be made to the universities by state governments and by persons and institutions in and outside Nigeria.

The NUC also undertakes periodic reviews of the terms and conditions of service of personnel engaged in the universities and to make recommendations thereon to the Federal Government, where appropriate.<sup>176</sup> The institutional autonomy of the Nigerian universities has been compromised in the process of performing those functions. Similarly, undue rigidity which hampers smooth operation of the universities has been introduced. This arrangement puts an unnecessary barrier between the ministry in charge of education and the universities. Consequently, some institutions are starved financially, thereby negating the ideal concept of academic freedom and institutional autonomy.

Also, the Joint Admission and Matriculation Board (JAMB) is established to conduct examinations into the Nigerian universities and other tertiary institutions in the country. The institutional autonomy to decide who to admit and the criteria for admission has invariably been transferred from the educational institutions to this regulatory body. In terms of the JAMB Act, the body has the sole responsibility to set the admission standard and to determine whom and when to admit.<sup>177</sup> Many factors, such as a quota system, educational disadvantaged states policy and federal character policy, have been introduced into the admission process, thereby reducing merit into an inferior position in some cases. While the JAMB determines the number of

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<sup>174</sup> See Preamble to the NUC Act, Cap N81, Laws of the Federation of Nigeria (LFN) 2004.

<sup>175</sup> See s 4 of the National University Act, Cap N81, LFN 2004.

<sup>176</sup> See section 4(1)(a)-(l) of the NUC Act.

<sup>177</sup> See section 5 of the JAMB Act Cap J1, LFN 2004.

students each university is to admit, the NUC determines those courses that are to be offered, who will teach them, and the qualifications of those to teach those subjects.<sup>178</sup>

It is submitted that this arrangement not only profoundly affects various elements of academic freedom and university autonomy; in many respects, it completely erodes their exercise. As a consequence, universities may not themselves decide which courses to offer, who will teach them, what research will be conducted, and to whom they will award their qualifications. The State (through the NUC) approves or disapproves a university's applications regarding all these matters and, by approving or rejecting programmes, in effect decides the direction in which a university will be specialising.<sup>179</sup> A bureaucrat decides whether a particular lecturer is fit to teach.<sup>180</sup> Also, the State (through the JAMB) prescribes admission requirements (and eventually selects and allocates students), assessment methods and criteria and, in effect, decides who should be awarded qualifications.<sup>181</sup> It is submitted that this arrangement constitutes a gross violation of the ideal concept of academic freedom and institutional autonomy and calls for redress.

It is accepted that the grant of tenure to teachers and researchers who have successfully completed a period of probation is a vital aspect of academic freedom.<sup>182</sup> Tenure is a status

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<sup>178</sup> See section 4(1)(b) of the NUC Act.

<sup>179</sup> For example, in 1985 the government enacted Decree 16 of 1985, establishing the National Minimum standards and conditions for the accreditation of the universities courses and programmes. The Decree sought to, in the first instance, harmonize all programmes and courses across the universities and in the second instance, empowered accreditation panels to inspect courses, facilities and staffing to determine compliance with minimum standards. The report of the panels were then to serve as the basis for the selection of departments, programmes and facilities to be closed down in order to ensure standards and remove "duplication". The staff of closed departments, faculties and programmes were then to be retrenched as part of the rationalization exercise. See Ya'u *Academic Staff Union of Universities under Attahiru Jega: A Leadership Profile* (2004) 19.

<sup>180</sup> For instance the NUC recently ordered that all lecturers in Nigerian universities must as from the year 2010 possess PhD qualification, otherwise, they would no longer be allowed to teach in the universities. This has put undue pressure on professional faculties such as Law, Medicine, Engineering and many more which traditionally based their promotion on professional competence and publications. For example, in most faculties of law, several competent academics have on account of this policy been denied promotion beyond the rank of lecturer I while those caught up in the rank higher than lecturer I were denied promotion to the next rank. The disastrous effect apart from violating academic freedom is that many of the affected academics may resign or transfer their services to other sectors of economy thereby leading to brain-drain in those faculties.

<sup>181</sup> The JAMB Act provides for the functions of the Board and provides that it shall be responsible for the general control of the conduct of matriculation examinations for the admissions into all Universities, Polytechnics and Colleges of Education in Nigeria; appointment of examiners, moderators and invigilators, members of subject panels and committee and other persons with respect to matriculation examinations and any other matter incidental thereto; placement of suitably qualified candidates in collaboration with the tertiary institutions, collection and dissemination of information on all matters relating to admissions into tertiary institutions. See s 5(1) & (2) of the Act.

<sup>182</sup> See Tight (ed) *Academic Freedom and Responsibility* 75. See also, Malherbe 2000 (4) *European Journal for Education Law and Policy* 60.

which the teacher could take to a new post and retain on promotion until retirement. However, the experiences of Nigerian academics are not palatable in this regard. The dismissal of 49 lecturers and professors of the University of Ilorin (one of the federal universities in Nigeria) in 2001 for participating in strike action called by the national body of the Academic Staff Union of Universities (ASUU) is a good illustration of the challenge experienced in this regard.<sup>183</sup> In 2009, following eight years of legal battle, the Nigerian Supreme Court declared their dismissal a nullity and ordered their reinstatement into their respective positions in the university.<sup>184</sup> This was not the first time that the Nigerian government would dismiss academic staff on issues relating to academic freedom. In 1973, members of the National Association of University Teachers (NAUT) which was the forerunner of the present ASUU embarked on a nation-wide indefinite strike to press home their demand for a review of their conditions of service. The General Gowon led military government, instead of addressing the issue, responded by dismissing the lecturers and gave them 24 hours within which to vacate their official residence.<sup>185</sup>

Between 1988 and 1990, ASUU was officially banned by the Federal Military Government of Nigeria. Undaunted, academics continued to organize and networked at both local and national levels under a new name: the Association of University Teachers (AUT). They were able to coordinate their struggle against the World Bank University Sector Loan Facilities and the federal government commitment to rationalize and retrench staff in the universities. The Obafemi Awolowo University Chapter of the Association hosted a national conference on the World Bank loan issue on 20 April 1990. At the conference, academics from various universities agreed to collectively resist the World Bank loan and decided to openly assert their rights to freedom of association.<sup>186</sup>

The morning after the conference, the military coup attempt of Major Gideon Orka occurred. Two key members of the organizing committee of the conference, Professor Omotoye Olorode and Dr Idowu Awopetu were framed by government and were immediately arrested

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<sup>183</sup> This is however, not peculiar to Nigeria, for example, summary expulsion of over forty university professors and lecturers from Addis Ababa University, Ethiopia, in the Mid-1990s epitomizes a gross violation of academic freedom and illustrates the intolerance of academic freedom that governments in many African countries have. See Teferra & Altbach (eds) *African Higher Education* 11.

<sup>184</sup> See *Oloruntoba-Oju & Others v Abdul-Raheem & Others* [2009] 13 NWLR (pt 1157) 83.

<sup>185</sup> See *Ya'u Academic Staff Union of Universities under Attairu Jega* 5.

<sup>186</sup> 23.

and detained as alleged coup suspects.<sup>187</sup> This was seen by everyone as an open attempt to discourage the union in its campaign against unpopular government policies and decisions. Earlier in March 1988, a radical sociology lecturer and anti-apartheid activist from the Ahmadu Bello University Zaria, Dr Patrick F Wilmot, along with Ms Firinne NC Adelugba of Bayero University Kano, were abducted and deported from Nigeria on 8 March 1988 for being critical of government policies.<sup>188</sup>

Academics and universities staff have suffered greatly under both the military and civilian regimes in Nigeria. The education sector was neglected and universities unions took it upon themselves to canvass government attention, which resulted in many strikes when government was unwilling to improve the sector. In 1992, ASUU embarked on a strike to press home their demands for better conditions of service, a separate salary structure (Universities Academic Staff Salary Structure) and general improvement on the state of the universities in the country. Reacting to this, the government announced the dismissal of all striking lecturers through a newly enacted decree which categorized university education as essential services and retrospectively prohibited universities teachers from embarking on strikes.<sup>189</sup> The salaries of universities teachers were stopped and dismissal letters were issued to all the lecturers who refused to return to work.<sup>190</sup> This impasse was not resolved until the end of Babangida's regime when Professor Abrahams Imogie was appointed the Secretary for Education to replace Professor Nwabueze, who was the then Minister for Education. Imogie directed Vice-Chancellors to formally write to each academic staff withdrawing the earlier sacked letters served on them.<sup>191</sup>

There is hardly any country in the world whose government does not retain some kind of control over its universities. This is understandable given the fact that universities are not parallel governments but exist for the service and good of the country.<sup>192</sup> Pragmatism dictates certain limitations which academics and their universities must accept and put up with in

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<sup>187</sup> 23-24.

<sup>188</sup> Government alleged that Dr Wilmot was a South African spy, a charge nobody even within the government circles was ready to believe given the antecedents of Wilmot as anti-apartheid activist. See Ya'u *Academic Staff Union of Universities under Attairu Jega* 18-19.

<sup>189</sup> See Essential Services (Teaching) etc Decree 1992.

<sup>190</sup> All these were done in defiance of court injunction restraining the government from arbitrarily terminating the appointments of the universities lecturers. See Ya'u *Academic Staff Union of Universities under Attairu Jega* 30.

<sup>191</sup> 30-31.

<sup>192</sup> Eso *Thoughts on Human Rights and Education* (2008) 59-60.

practice.<sup>193</sup> It is also accepted that academic freedom and institutional autonomy should have their own limitations as there is no meaningful freedom without a limitation. However, in Nigeria, the need for efficient management, accountability and periodic evaluation are forcing their way to centre stage, especially in the face of strangulating stringency and declining resources, thereby posing threats to the ideal concept of academic freedom and university autonomy.<sup>194</sup> It is therefore submitted that there should be limited control of universities by government agencies so as not to erode autonomy which makes a university functional. Having examined the preliminary concepts relating to the right to higher education, the subsequent parts of this chapter will now examine the right to higher education as guaranteed under the international and national human rights instruments.

### **3 The Right to Higher Education at the Global Level**

Article 13(2)(c) of the ICESCR provides for the right to higher education in these terms:

“The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right to education]:

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”<sup>195</sup>

There is no guidance as to what is meant by “higher education” in international human rights treaties.<sup>196</sup> However, higher education includes education provided by post-secondary institutions such as universities, polytechnics, colleges of education, and other providers of higher education.<sup>197</sup> In clarifying the meaning of the term “higher education”, guidance is taken from the ISCED. In terms of this document, higher or tertiary education involves two stages. The first stage consists of programmes with an educational content more advanced than those at the upper secondary school. The entry into this level of education normally requires a successful completion of upper secondary school education.<sup>198</sup> The programmes at this stage of education are divided into theoretically based (or research preparatory) on the one hand, and practical (or occupationally specific) programmes on the other.<sup>199</sup> With regards to this first stage of tertiary

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<sup>193</sup> See Ade Ajayi, et al *African Experience with Higher Education* 245.

<sup>194</sup> 167.

<sup>195</sup> See also, art 28(1)(c) of the Convention on the Rights of the Child, 1989.

<sup>196</sup> See Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 384.

<sup>197</sup> Taylor & Miroiu *Policy-Making, Strategic Planning, and Management of Higher Education* (2002) 19.

<sup>198</sup> See paras 80-83 of the ISCED.

<sup>199</sup> Para 83 of the ISCED.

education, a distinction may be drawn between the long stream programmes and the short stream programmes.<sup>200</sup>

It should be noted that because the organizational structure of tertiary education programmes varies greatly across countries, no single criterion can be used to define boundaries between the two.<sup>201</sup> The long stream tertiary programmes are intended to provide sufficient qualifications for gaining entry into advanced research programmes and professions with high skills requirements.<sup>202</sup> The programmes must satisfy a sufficient number of the following criteria: they must have a minimum cumulative theoretical duration of three years' full-time study; they typically require that the faculty have advanced research credentials; and they may involve completion of a research project or thesis.<sup>203</sup> Bachelor's degrees, for example, will fall under this grouping.

The short stream educational programmes are typically shorter in duration. The programmes focus on occupationally specific skills geared towards entry into the labour market.<sup>204</sup> The content of the programmes in this stream is practically oriented and occupationally specific, designed for participants to acquire the practical skills and know-how needed for employment in a particular occupation or trade.<sup>205</sup> It has a minimum of two years' full-time duration. It provides access to an occupation rather than direct access to advanced research programmes.<sup>206</sup> Diploma certificates, for example, will fall under this classification.

The second stage of tertiary education programmes leads to the award of an advanced research qualification. The programmes at this second stage are devoted to advanced study and original research which are not based on course-work only.<sup>207</sup> This stage of tertiary education requires the submission of a thesis or dissertation of publishable quality which is the product of original research which represents a significant contribution to knowledge.<sup>208</sup> Master's degrees, other postgraduate qualifications and doctoral degrees will come under this classification.<sup>209</sup> This second stage of tertiary education prepares graduates for faculty posts in tertiary

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<sup>200</sup> Para 85, ISCED.

<sup>201</sup> Para 86, ISCED.

<sup>202</sup> Paras 85 & 87, ISCED.

<sup>203</sup> Para 87, ISCED.

<sup>204</sup> Para 88, ISCED.

<sup>205</sup> Para 89, ISCED.

<sup>206</sup> Para 90, ISCED.

<sup>207</sup> Para 103, ISCED.

<sup>208</sup> See para 104, ISCED; Beiter *The Protection of the Right to Education by International Law* (2006) 521.

<sup>209</sup> See para 98, ISCED.

institutions as well as research posts in government and industry.<sup>210</sup> This chapter is concerned, however, with the right to education at the first stage of tertiary education encompassing both the long stream programmes and the short stream programmes, with only brief mention being made of the second stage of tertiary education.

The CESCR has articulated on the content of article 13(c) of the ICESCR which guarantees the right to higher education. Just as the case with both the primary and secondary levels of education, tertiary education should also exhibit the elements of availability, accessibility, acceptability and adaptability.<sup>211</sup> It should be noted that, unlike article 13(2)(b), article 13(2)(c) of the ICESCR does not include a reference to either education “in its different forms” or specifically to technical and vocational education with regards to higher education. The Committee considered these two omissions as only reflecting a level of emphasis between article 13(2)(b) and (c).<sup>212</sup> According to the Committee:

“If higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning; in practice, therefore, both secondary and higher education have to be available ‘in different forms’. As for the lack of reference in article 13(2)(c) to technical and vocational education, given article 6(2) of the Covenant and article 26(1) of the Universal Declaration, TVE forms an integral component of all levels of education, including higher education.”

The Committee has pointed out that higher education also includes the elements of availability, accessibility, acceptability and adaptability.<sup>213</sup> It qualified this position by stating that while secondary education should be made “generally available and accessible to all”, in terms of article 13(2)(c) of the ICESCR, higher education should be made equally accessible to all, “on the basis of capacity.”<sup>214</sup> The “capacity” of individuals should, however, be assessed by reference to all their relevant expertise and experience.<sup>215</sup> The notion of equal access to higher education on the basis of capacity requires a detailed examination, which the next part of this chapter is devoted to.

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<sup>210</sup> Para 104, ISCED.

<sup>211</sup> Para 17 of the General Comment 13.

<sup>212</sup> Para 18 of the General Comment 13.

<sup>213</sup> Para 17 of the General Comment 13.

<sup>214</sup> Para 19 of the General Comment 13.

<sup>215</sup> Para 19 of the General Comment 13.

### 3 1 Equal Accessibility of Higher Education to All on the Basis of Capacity

In terms of article 13(2)(c) of the ICESCR state parties are obliged to make higher education “equally accessible to all, on the basis of capacity.” Although article 13(2)(c) does not refer to the “availability” of education, it is submitted that this provision should not be interpreted as exempting States parties from making higher education available.<sup>216</sup> It only means that such education need not be made “generally” available.<sup>217</sup> In this regard, States parties must ensure that access to higher education is equitable and must be in compliance with the provisions of article 13(2)(c) which stipulates the criterion of “capacity.”<sup>218</sup> Similarly, article 13(2)(c) has to be read in conjunction with article 2(1) of the ICESCR, which provides for the progressive realisation of the rights protected in the Covenant. This implies that availability and accessibility of higher education need not be realised immediately on becoming party to the ICESCR, but may be achieved gradually in accordance with the resources a State party has at its disposal.<sup>219</sup>

Article 13(2)(c) further directs States parties to promote the accessibility of education “by every appropriate means.” This provision gives the States parties the discretion to determine which means they regard as appropriate. It must be mentioned that this is subject to the qualification that accessibility must be promoted “in particular by the progressive introduction of free education.”<sup>220</sup> It is recognised that although the States parties may prioritise the provision of free primary education, they also have an obligation to take concrete steps towards providing free higher education.<sup>221</sup> Other means suitable to promoting the accessibility of higher education include granting study bursaries to students; facilitating access to university via different paths, (for example, not only by means of passing the school-leaving examinations); providing accurate information to students on all forms of higher education available, and increasing the opportunities for distance education.<sup>222</sup>

The notion of “equal access” means that higher education should be made available in non-discriminatory ways. It requires that States parties must remove legal and administrative

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<sup>216</sup> See Beiter *The Protection of the Right to Education by International Law* 522.

<sup>217</sup> See also, para 17 of the General Comment 13.

<sup>218</sup> See Beiter *The Protection of the Right to Education by International Law* 522.

<sup>219</sup> 522.

<sup>220</sup> According to the Committee, the concept of “progressive introduction of free education” also applies to higher education. See para 20 of the General Comment 13 & para 7 of the General Comment 11.

<sup>221</sup> See para 20 read with para 14 of the General Comment 13.

<sup>222</sup> Beiter *The Protection of the Right to Education by International Law* 523.



provisions which discriminate on grounds such as religion, race or gender as regards access to higher education.<sup>223</sup> They must also take steps to promote equality of opportunity and treatment as regards access to higher education. Steps should, in particular, be taken to advance the position of disadvantaged groups, such as women or minority groups in this regard. States parties should initiate special positive programmes aimed at developing the “capacity” of members of such groups, so as to increase their chances of being admitted to institutions of higher learning.<sup>224</sup>

The notion of “capacity” within the context of article 13(2)(c) is relevant in two contexts. On the one hand, it is the criterion to be applied to “restrict” access to higher education to those students who possess the required potential to complete studies at the higher level.<sup>225</sup> On the other hand, it is the criterion to be applied where the States parties wish to “restrict” the number of students gaining admission to particular fields of study at the tertiary level.<sup>226</sup> In the former instance, “capacity” constitutes a “qualitative” criterion of restriction on admission, while in the latter; it constitutes a “quantitative” criterion of restriction on admission.<sup>227</sup> As a qualitative criterion, “capacity” refers to the intellectual ability of applicants.<sup>228</sup> Beiter rightly pointed out that as a quantitative criterion, the “capacity” of a student is the criterion to be applied where States parties wish to restrict the number of students gaining admission to particular fields of study at the higher level.<sup>229</sup>

However, a State party may justifiably restrict the number of students to be admitted with regard to fields of study for which the number of admission seats available in particular institutions of higher learning is limited.<sup>230</sup> The justification may also be sustained in the sense that state resources are often not sufficient to make higher education accessible to all.<sup>231</sup> Conversely, it is submitted that a restriction on access interferes with the individual’s freedom

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<sup>223</sup> 523.

<sup>224</sup> 523.

<sup>225</sup> 524.

<sup>226</sup> 524.

<sup>227</sup> 524.

<sup>228</sup> In terms of article 13(2)(c) of the ICESCR, the following methods of ascertaining a student’s capacity seem acceptable: proof of the successful completion of prior education (for admission to university for instance, a school-leaving exam, etc); oral and/or written entrance examination; occupational experience; and interview; a period of probation, or a combination of these methods. See Beiter *The Protection of the Right to Education by International Law* 524.

<sup>229</sup> 524.

<sup>230</sup> 524-525.

<sup>231</sup> 525.

to plan his or her life, given that higher education prepares a person for a particular profession.<sup>232</sup> A refusal of admission to commence a desired course of study may, therefore, amount to denying the person the opportunity of choosing a desired profession.<sup>233</sup> This again shows the interdependence and nexus between the right to education and other rights, particularly in this context, labour rights such as the right to freedom of trade, occupation and profession.

For a restriction on access to education to be justified, it must comply with two requirements. Firstly, it must be formulated in such a way that the existing intake capacity of institutions of higher learning is fully exhausted.<sup>234</sup> Secondly, it must ensure that the selection of students is “on the basis of capacity.”<sup>235</sup> In this regard, the CESCR submits that “[t]he ‘capacity’ of individuals should be accessed by reference to all their relevant expertise and experience.”<sup>236</sup> While selection which is based on an aptitude test or the successful completion of a practical period would meet this requirement, selection criteria on purely administrative criteria, drawing of lot or age or quota system may not comply with the requirement of “on the basis of capacity.”<sup>237</sup> However, in cases where there are more capable candidates than places available, fair selection procedure should be adopted on the basis of merit and not on arbitrary discretion of the administrative or admission officers. The foregoing constitutes the foundation on which the discussion on the right to higher education in South Africa and Nigeria will now be based.

#### **4 The Right to Higher Education in South Africa**

Section 29(1)(b) of the South African Constitution provides for the right to further education, which the State, through reasonable measures, must make progressively available and accessible. It is submitted that the term “progressively” as used in the section suggests that it is a right that may be realised over time.<sup>238</sup> It should be noted that the term “further education” as used in the South African Constitution is not used in any international human rights

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<sup>232</sup> 525.

<sup>233</sup> 525.

<sup>234</sup> 525.

<sup>235</sup> 525.

<sup>236</sup> Para 19 of the General Comment 13.

<sup>237</sup> See Beiter *The Protection of the Right to Education by International Law* 525.

<sup>238</sup> du Plessis, Conley & Loock “The Right to Education: Are we facing the Challenges?” (2007) 2(8) *Educational Research Review* 198-208 203.

instruments. The Higher Education Act, 1997 defines higher education as “all learning programmes leading to qualifications higher than grade 12 or its equivalent in terms of the National Qualification Framework.”<sup>239</sup> This includes universities, technikons and colleges.<sup>240</sup> This can be contrasted with the Further Education and Training Act, 1998 which defines further education to mean education from grade 10 to 12 including general and career-specific education provided by technical, vocational and other colleges and institutions.<sup>241</sup>

The definition of “further education” in terms of the Further Education and Training Act is too narrow and unfounded in law and out of step with international norms.<sup>242</sup> It is submitted that the definition of further education in the in the Further Education and Training Act is not explicit in the provision of section 29(1)(b) of the South African Constitution. The concept “further education” in terms of the Constitution should, therefore, be seen as referring to all education of a higher level than basic education and that this should include higher education.<sup>243</sup> Only this approach would be consistent with the international interpretation given to the meaning of the right, and it would be the only way to make sense of the different meanings the Constitution gives to “basic” and “further” education respectively.<sup>244</sup>

It is important to point out that in South Africa, tertiary education falls within the exclusive preserve of the national government, while all other levels of the education system are concurrently a functional area of national and a provincial competency.<sup>245</sup> With this arrangement, higher education comes within the administrative responsibility of the National Department of Higher Education and Training with the Higher Education Act creating the legal basis of a single, national higher education system in the country.<sup>246</sup> While the higher education sector in South Africa is predominantly public, the Constitution guarantees the right of an

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<sup>239</sup> See s 1(xiii) of the Higher Education Act 101 of 1997.

<sup>240</sup> See Khoza (ed) *Socio-Economic Rights in South Africa* 2 ed (2007) 422; du Plessis, et al (2007) 2(8) *Educational Research Review* 203.

<sup>241</sup> See s 1(viii) of Further Education and Training Act 98 of 1998.

<sup>242</sup> Melherbe “The Constitutional Dimension of the Best Interests of the Child as Applied in Education” 2008 (2) *TSAR* 267-285 275; Malherbe “Equal Educational Opportunities in South Africa: The Constitutional Framework” 2004 (3) *TSAR* 427-447 435-436.

<sup>243</sup> See Khoza (ed) *Socio-Economic Rights in South Africa* 422.

<sup>244</sup> 422; du Plessis, et al (2007) 2(8) *Educational Research Review* 203.

<sup>245</sup> See OECD *Reviews of National Policies for Education: South Africa* (2008) 19 & 328.

<sup>246</sup> See Khoza (ed) *Socio-Economic Rights in South Africa* 432; OECD *Reviews of National Policies for Education: South Africa* 328.

individual to establish and maintain private/independent higher educational institutions.<sup>247</sup> It is observed that the size of the private higher education sector is very small in South Africa representing less than 10 per cent of the total students' population. Most of the private higher educational institutions offer certificates and diplomas, while a few offer degree programmes.<sup>248</sup>

Equity has been a cornerstone of South Africa's new education policies since 1994.<sup>249</sup> This has become more pronounced with the coming into effect of the South African Constitution.<sup>250</sup> Given the past apartheid experience, transformation as a means of redress requires that the ethos that prevailed at higher education institutions in the past be replaced with a new democratic culture directed at actively undoing race-based separation.<sup>251</sup> It is observed that transformation in higher education is more than just a process of producing "skilled acolytes", but it is also about producing people who can lead, who can produce new knowledge, who can see new problems and imagine new ways of approaching old problems.<sup>252</sup> One scarcely needs to be reminded that historical-educational disparities skewed patterns of access, participation and success in the South African educational sector. An examination of the development of higher education in South Africa becomes necessary at this stage for a proper understanding of the experiences leading to merger of tertiary institutions in the country. The next part of this chapter is devoted to examining this.

#### **4 1 Development of Higher Education in South Africa**

The development of higher education in South Africa began with missionary initiatives.<sup>253</sup> Missionary societies such as the Paris Evangelical Mission, the London Missionary Society, and the Scottish Presbyterian Mission all felt the need to establish higher education institutions in the areas of pastoral, teaching, and agriculture training as a logical extension of their evangelical work.<sup>254</sup> Thus, in 1829, the South African College was established in Cape Town for the

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<sup>247</sup> See s 29(3) of the Constitution. The Higher Education Act, 1997 stipulates the legal conditions for registration of private higher educational institutions as well as their obligations.

<sup>248</sup> See OECD *Reviews of National Policies for Education: South Africa* 335.

<sup>249</sup> Beckmann "Aspects of Students Equity and Higher Education in South Africa" (2008) 22(4) *SAJHE* 773-788 773.

<sup>250</sup> See ss 1 & 9 of the 1996 Constitution.

<sup>251</sup> Akoojee & Nkomo "Access and Quality in South African Higher Education: the Twin Challenges of Transformation" 2007 21 (3) *SAJHE* 390.

<sup>252</sup> Waghid "Knowledge Production and Higher Education Transformation in South Africa: Towards Reflexivity in University Teaching, Research and Community Service" (2002) 43 *Higher Education* 457-488 459.

<sup>253</sup> Teferra & Altbach *African Higher Education* 23.

<sup>254</sup> 23.

English-speaking Anglo South Africans and Victoria College for the Afrikaans-speaking Dutch South Africans in Stellenbosch as private higher education initiatives supported by government subventions.<sup>255</sup> Among the early missionary-founded higher education institutions was the Lovedale institution, established by the Presbyterians in 1841.

The earliest government foray into higher education, however, was initially limited to the creation of an examining body. In 1858, the Board of Public Examinations in literature and science, which was responsible for administering examinations to graduates of various colleges with the aim of standardizing higher education credentials, was established.<sup>256</sup> The functions of the board were taken over in 1873 by a non-teaching institution, the University of Cape of Good Hope.<sup>257</sup> Following the Union of South Africa in 1910, discussion and debate on the “university question” was intense and two universities were proposed, the University of the South and the University of the North to incorporate the existing colleges. The outbreak of World War I thwarted these recommendations.<sup>258</sup>

However, the University Act of 1916 established three independent universities, namely the University of Cape Town, the University of Stellenbosch, and the University of South Africa (UNISA). This triggered a series of similar developments. The South African School of Mines and Technology in Johannesburg was granted university status in 1923 and became the University of the Witwatersrand. In 1930, the Transvaal University College followed suit to become the University of Pretoria. As a result of the collapse of the federal system, UNISA was restructured and became a distance education institution in 1946.<sup>259</sup> Other universities established after the World war II include, the University of Natal in 1949, the University of Orange Free State in Bloemfontein in 1950, Rhodes University in 1951, Potchefstroom University in the Western Transvaal in 1951, the University of Port Elizabeth in 1964, and the Rand Afrikaans University in Johannesburg in 1967. All these were historically white universities.

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<sup>255</sup> 23.

<sup>256</sup> A number of university colleges had emerged during this period in the colonial centres of Cape Town and surrounding towns, including Grahamstown and Durban, as well as in the Boer republic capitals of Pretoria and Bloemfontein in the Transvaal and Orange Free State Republics respectively. See Teferra & Altbach *African Higher Education* 546.

<sup>257</sup> 23.

<sup>258</sup> 546-547.

<sup>259</sup> 546-547.

For black people, the University of Fort Hare was established in 1959 and between 1960 and 1961 the University of the North and University of Zululand were established. Others were the University of Transkei established in 1977, the Medical University of South Africa in 1978, the University of Bophuthatswana in 1980, the University of Venda in 1982, and Vista University in 1982.<sup>260</sup> However, between 2004 and 2005, in line with the government policy of transformation and restructuring of higher education, most of these universities (together with the technikons) were merged to provide for a non-discriminatory higher educational system.

The apartheid system of governance had a severe impact on higher education in South Africa in the sense that public education and higher education were developed and administered along ethnic and racial groups.<sup>261</sup> The Department of Education and Culture (House of Assembly) was responsible for educating white people, the Department of Education and Culture (House of Delegates) was responsible for Indians' education; the Department of Education and Culture (House of Representatives) was responsible for Coloured people's education and the Department of Education and Training was responsible for Africans' education.<sup>262</sup> This arrangement had implications for access since all higher education institutions were designed for a particular "race" and students from other races could not be admitted without special permits obtained by the higher education institution from its administering government department.<sup>263</sup>

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<sup>260</sup> 547-548.

<sup>261</sup> According to Ajayi *et al*, as long as apartheid lasted, the Afrikaner universities never admitted blacks, Rhodes and Natal hardly ever. After a lot of pressure, Natal began in 1936 to admit a few, mostly Asians, to special classes, only at weekends and at Adams College during the long vacation. After World War II, the Natal Medical School for a few Africans filled an important gap. Even at Cape Town and Wits, campus facilities, including sports, were all segregated though teaching and examining took place together. Thus, the facilities of Fort Hare were all the Africans could look up to. The white universities even used them as an excuse to refuse admission to Africans. The Extension of University Education Act established four new University Colleges of UNISA for specific ethnic groups. The University College of the North at Turfloop, near Pietersburg in north Transvaal, for the Sotho-Tsonga and Venda; University College of Zululand, at Ngoya in Natal, for the Zulu and Swazi; University College of the Western Cape, at Bellville, for the Coloured, and University College of Durban for Asians. Fort Hare was taken over and made a University College exclusively for the Xhosa, and the Sotho of Ciskei. All these took degrees and Certificates of UNISA. But they were under the control of the Minister for Bantu Education. It required the permission of the Minister for non-Europeans to be admitted to even the "Open" Universities of Cape Town, Witwatersrand, Natal or Rhodes in subjects not available in the University Colleges, such as engineering and medicine. He controlled appointments and promotions of staff, including academic staff. The presence of non-whites with whites on the Senate or Council of the University Colleges was considered undesirable, provision was made for Advisory Senates and Councils on which non-whites could sit, but they did not work, and appointment of non-European staff or council members was thus discouraged. See Ajayi, *et al African Experience with Higher Education* 71-72 & 562.

<sup>262</sup> See CHE *South African Higher Education in the First Decade of Democracy* 23.

<sup>263</sup> 23.

## 4 2 Restructuring the Higher Education Landscape through Mergers

It is noted that by 1994 there were in South Africa 36 public higher institutions, which were structured along racial and ethnic lines and characterised by a sharp distinction between universities and technikons.<sup>264</sup> In addition to the universities and the technikons, there were a number of colleges of education and agriculture and nursing colleges also administered along racial and ethnic lines.<sup>265</sup> Based on what was perceived as geographic dispersion, racial fragmentation, structural inefficiencies and institutional duplication within the system, policy makers and reformers concluded that the field of higher education during apartheid rule was less of a “system” than a “collection” of different kinds of higher educational institutions.<sup>266</sup>

Apart from its impact on access and admission, this different legal status and racial basis of differentiation also led to complex differentiation in governance and funding arrangements of the various higher institutions.<sup>267</sup> In this regard, Khoza submits that “under apartheid, education was structured along racial lines to prepare learners of different race groups for the role they were expected to serve in a divided South Africa. The main features of the apartheid education system were huge inequality in the financing of education, different curricula for different race groups and restricted access of black learners to higher education.”<sup>268</sup>

The Education White Paper 3 provides a policy framework within which the South African higher education system is to operate. In terms of this document, the key challenges facing the South African higher education system were outlined as follows: “to redress past inequalities and to transform the higher education system to serve a new social order, to meet pressing national needs, and to respond to new realities and opportunities.”<sup>269</sup> The following

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<sup>264</sup> During this period, out of the 21 universities, four were English-medium universities originally reserved for white students; six were Afrikaans-medium universities originally reserved for white students; seven technikons were reserved for White students; six universities and five technikons located in “Bantustans” and self-governing territories were reserved for African students; two urban universities and two technikons were reserved for Coloured and Indian students; two urban universities were reserved for African students; and there were two distance education providers (one university and one technikon). See OECD *Reviews of National Policies for Education: South Africa* 333.

<sup>265</sup> During the pre-1994 period, it was noted that there were 120 colleges of education, 24 colleges of nursing and 11 agricultural colleges. However, in 2001, all colleges of teacher education were incorporated into universities and technikons. See OECD *Reviews of National Policies for Education: South Africa* 333-334.

<sup>266</sup> 335.

<sup>267</sup> See CHE *South African Higher Education in the First Decade of Democracy* 23, 173- 186 & 187-210; OECD *Reviews of National Policies for Education: South Africa* 326.

<sup>268</sup> See Khoza (ed) *Socio-Economic Rights in South Africa* 2 ed (2007) 412-413. See also, OECD *Reviews of National Policies for Education: South Africa* (2008) 325; Dlamini *The Administrative Law of a Typical South African University* (1994) 214.

<sup>269</sup> Department of Education (Education White Paper 3) 1:1.

priorities were identified as key to the achievement of restructuring process: to reduce duplication and overlap in programmes and service provision; to promote the joint development and delivery of programmes; to enhance responsiveness to regional and national needs for academic programmes, research and community service; to refocus and build academic and administrative capacity; and to refocus and reshape the institutional culture and missions of the institutions as South African institutions.<sup>270</sup>

The apartheid experience prompted the Department of Education to restructure the higher education landscape through mergers and incorporations of institutions and programmes. The new public higher education landscape resulted in 24 public higher educational institutions: 11 “traditional” universities that focus on research and a mix of discipline-based and professional degree qualifications; seven universities of technology that offer a mix of technological, vocational, career-oriented and professional programmes leading to a certificate, diploma or degree; and six “comprehensive universities” that combine both types of higher educational programmes. In addition there are two National Institutes of Higher Education.<sup>271</sup>

The overall goals of the Higher Education Act are to ensure equity, access, quality and efficiency. The idea of institutional mergers was, therefore, designed to address the inequality of apartheid education and to ensure equal access and transformation in the South African higher education sector in line with the above goals.<sup>272</sup> The pertinent issue, therefore, is the extent to which the institutional mergers have been able to achieve those identified goals. Beckmann submits that much of the discussion of redress and transformation of higher education seems to have a myopic view of higher education as a self-contained system.<sup>273</sup> According to him, the discussion tends to seek to find in the system solutions that may be found wholly or partially in other subsections of the education system or in the external environment.<sup>274</sup>

The merger of universities and technikons impacted greatly on the South African higher education sector. While some merged institutions have made progress, some others are facing numerous difficulties and challenges.<sup>275</sup> Common problems associated with mergers have been identified and include racial tension, disparities in salaries, downgrading and freezing of posts,

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<sup>270</sup> See Tyobeka “The Rationale for Reviewing Mergers” *The Mail & Guardian* (October 2009) 2.

<sup>271</sup> OECD *Reviews of National Policies for Education: South Africa* 335.

<sup>272</sup> Elliott “Merging Rights: Question of Access and Merit in South African Higher Education Reforms, 1994-2002” (2005) 23(1) *Perspectives in Education* 69-76 71.

<sup>273</sup> Beckmann (2008) 22(4) *SAJHE* 774.

<sup>274</sup> 774.

<sup>275</sup> See Higher Learning “A Special Focus” *The Mail & Guardian* (October 2009) 1.



mistrust, cronyism and nepotism, neglect of some campuses, refusal to embrace new cultures or tradition and transportation.<sup>276</sup> Dibetle noted that four years into university mergers, students and staff are still grappling with problems such as transportation between campuses, mistrust, downgrading and freezing of posts, and “neglect” of township-based campuses.<sup>277</sup> It is pointed out that when the merger took effect some staff members’ posts were downgraded to achieve equality of status. Most vacant posts still remain frozen with lack of information about the filling of those posts.<sup>278</sup> Distances between the campuses constitute a great impediment to academic progress as it is difficult for students to attend lectures across different campuses.<sup>279</sup>

It is argued that mergers in the case of some universities did not make sense while in some, it did. For instance, Stumpf queries why the country should have a general university and a university of technology in Bloemfontein, which hardly qualifies as an industrial hub, and yet Johannesburg, which is the country’s prime business and industry hub, does not have a designated university of technology.<sup>280</sup> He submits that the effects of geographical distance on establishing and sustaining cohesive and integrated new institutions seem to have been grossly underestimated.<sup>281</sup> He argues, for example, that the rationale for the mergers between the University of the North and Medunsa to form a new University of Limpopo and the Border Technikon, outside East London with the Walter Sisulu University, Mthatha defy logic.<sup>282</sup>

It is observed that with regard to personnel issue, the mergers were a difficult and horrible exercise to manage. People and their careers were affected by mergers in many different ways.<sup>283</sup> While some were able to continue their careers relatively uninterrupted in the system, others had to make switches; many more had to cope with prospects of diminished career advancement while some had to face the inevitability of retrenchment.<sup>284</sup> These factors caused great personal tension and distress, as well as severe institutional trauma, negatively affecting work performance with many merging institutions experiencing a drop in research

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<sup>276</sup> See Higher Learning “Eight Common Problems” *The Mail & Guardian* (October 2009) 1.

<sup>277</sup> Dibetle “Merger Headaches” *The Mail & Guardian* (October 2009) 1.

<sup>278</sup> 1.

<sup>279</sup> 1.

<sup>280</sup> Stumpf “Mergers: Where Are We Now” *The Mail & Guardian* (October 2009) 3.

<sup>281</sup> 3.

<sup>282</sup> 3.

<sup>283</sup> 3.

<sup>284</sup> It is noted for example that at the Nelson Mandela Metropolitan University, merger resulted in the retrenchment of about 15 staff while about 120 made use of voluntary severance opportunities. See Stumpf *Mail & Guardian* (October 2009) 3.

output.<sup>285</sup> It is observed that merger has greatly impacted upon the management of the institutions. It is noted, for example, that the greatest challenge for the Nelson Mandela Metropolitan University,<sup>286</sup> like any other comprehensive university, lay in merging three sets of staff structures and harmonizing three sets of conditions of employment within the strict confines of the Labour Relations Act.<sup>287</sup>

Notwithstanding these problems and challenges, the solution is not that the various mergers should be undone. Mergers have helped in transforming the higher education sector in the country. They have also helped in bridging the apartheid-induced divide between historically white and historically black institutions, enhancing the efficient use of resources and improving institutional responses to national and regional needs.<sup>288</sup> Mergers have also offered multiple opportunities to students.<sup>289</sup> What is needed, however, is for all the merging institutions to have a period of institutional consolidation and to receive more designated funding to cope with the many financial challenges brought about by merger.<sup>290</sup>

#### **4 3 Access and Quality in Higher Education in South Africa**

One of the fundamental goals of higher education transformation in South Africa is the achievement of equity in the higher education system. In this regard, Beckmann submits that equity has been a cornerstone of South Africa's new education policies since 1994 and is also a constitutional principle.<sup>291</sup> The Higher Education Act provides the legal basis of a single, national higher education system on the basis of the rights and freedoms in the Constitution. Against the background of an apartheid past where the majority of African students were denied opportunities for higher education, the Act directs institutions to develop and implement policies and programmes that deal with this legacy. To ensure access, for example, selection tests have been developed to assess the potential of students whose school results may not

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<sup>285</sup> 3.

<sup>286</sup> Nelson Mandela Metropolitan University was formed with the University of Port Elizabeth incorporating the local campus of Vista University and Port Elizabeth Technikon.

<sup>287</sup> Stumpf *Mail & Guardian* (October 2009) 3.

<sup>288</sup> Qhobela "Why Mergers Matter" *The Mail & Guardian* (October 2009) 4.

<sup>289</sup> See Qhobela *Mail & Guardian* (October 2009) 4. For instance, the University of the North-West has attributed most of the progress in the University to mergers. A comparison between 2004 and 2008 shows the following: the undergraduate pass rate increased from 75.2 per cent in 2004 to 81.2 per cent in 2008; total degrees increase by 21.7 per cent during the same period; doctoral degrees awarded rose by 13 per cent; the number of research articles published increased by 85 per cent as well as many recognitions and awards. See Eloff "Progress Despite Hurdles" *The Mail & Guardian* (October 2009) 9.

<sup>290</sup> Stumpf *Mail & Guardian* (October 2009) 3.

<sup>291</sup> Beckmann 2008 22(4) *SAJHE* 773.

ordinarily qualify them for direct university entrance but who demonstrate an ability to succeed at the university.<sup>292</sup>

Two approaches on access to higher education which offer significantly different outcomes are discernible in South African policy since 1994.<sup>293</sup> In the period following 1994, policy documents resolved to address the problem of access as one of increasing the participation of black learners at institutions previously denied to them.<sup>294</sup> Higher education institutions in that period adopted an “access as participation” approach in responding to the problem. Recently, there has been a shift to an “access with success” approach, which is designed to ensure the success of black students.<sup>295</sup> The National Plan for Higher Education sets the agenda for higher education restructuring in South Africa. The policy suggests strategies directed at “access as participation” as well as “access with success”.<sup>296</sup> Specific “access as participation” strategies range from calls for more liberal selection procedures to appeals to widen the net of national students funding in order that more disadvantaged students can participate.<sup>297</sup>

As regards “access with success”, specific strategies including funding of institutional academic development programmes, improving the quality of schooling to provide better quality of incoming students and student financial aid schemes.<sup>298</sup> Underpinning these considerations is the view that students who enter institutions are essentially ill equipped to handle the complexities of academia, leaving institutions themselves free of the responsibility of student failure.<sup>299</sup>

Given the provision of section 29(1)(b) of the South African Constitution which obliges the State, through reasonable measures to progressively make available and accessible, the right to further (higher) education, the government has a responsibility to fund higher education institutions. Funding for these institutions should be fair and transparent, and should also consider racial inequalities of the past. Although higher education institutions in the country can

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<sup>292</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 432.

<sup>293</sup> Akoojee & Nkomo 2007 21 (3) *SAJHE* 390.

<sup>294</sup> 390.

<sup>295</sup> 390.

<sup>296</sup> Department of Education “The National Plan for Higher Education” (2001) available online at <http://www.polity.org.za>

<sup>297</sup> Akoojee & Nkomo 2007 21 (3) *SAJHE* 391.

<sup>298</sup> Department of Education “The National Plan for Higher Education” (2001) available online at <http://www.polity.org.za>

<sup>299</sup> Akoojee & Nkomo 2007 21 (3) *SAJHE* 391.

charge fees, a national student aid scheme has been established under the National Student Aid Scheme Act to enable poor students to gain access to a higher education. The Act provides for the establishment of a board to allocate funds for loans and bursaries to qualified students, and to develop the criteria and conditions for granting and withdrawing loans and bursaries. Funding under this Act is provided from various sources, such as State allocation, private funding and the repayment of loans. The scheme has to consider the difficult circumstances under which students from historically disadvantaged communities learn.<sup>300</sup>

It is observed that responding appropriately to the equity challenges is one of the most critical challenges facing the reconfiguration of higher education in South Africa given its historical legacy of exclusion.<sup>301</sup> It is therefore submitted that equity should mean more than access to higher education but should incorporate equity of opportunity- environments in which learners, through academic support, excellent teaching and mentoring and other initiatives, genuinely have every chance of succeeding. Equity, to be meaningful, must also ensure that learners have access to quality education, and graduate with the relevant knowledge, competencies, skills and attributes that are required for any occupation and profession.<sup>302</sup>

To achieve the desired transformation, access and quality cannot be separated.<sup>303</sup> It is argued that quality can be achieved through, and by means of, open and unfettered institutional access, and that real access cannot be achieved without attention being paid to quality.<sup>304</sup> The notion therefore is: “quality through access and access with quality.”<sup>305</sup> Access is critical for the achievement of quality and “the more diversified the people and resources of an educational institution are...the greater is the potential quality of education, research, scholarship and community service at the institution.”<sup>306</sup> It is therefore posited that there is a need to ensure that access and quality do not exist in contradiction to one another and that quality is to be achieved

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<sup>300</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 433.

<sup>301</sup> Council on Higher Education “Towards a New Higher Education Landscape: Meeting the Equity, Quality and Social Development Imperatives of South Africa in the 21<sup>st</sup> Century” (2000) 22.

<sup>302</sup> Council on Higher Education Towards a New Higher Education Landscape 10.

<sup>303</sup> It is submitted that transformation in higher education goes beyond the idea of just rectifying the injustices of the apartheid era. It involves “empowering those involved in the higher education process, to develop the critical ability of students and educators to the extent that they become self-determines and reflexive.” See Waghid (2002) 43 *Higher Education* 459; see also, Toni “Breaking Down Subtle and Implicit Racial Divides in Higher Education Institutions: An Educational Management Perspective” (2009) 66.

<sup>304</sup> Berquist *Quality through Access: Access with Quality: The New Imperative for Higher Education* (1995) 25.

<sup>305</sup> Akoojee & Nkomo 2007 21 (3) *SAJHE* 394.

<sup>306</sup> Berquist *Quality through Access: Access with Quality* 26.

by increasing diversity and access.<sup>307</sup> In this regard, Badat suggests that quality and equity should not be considered as separate parallel vectors but should be “brought together as two sides of the same coin.”<sup>308</sup>

However, the term “quality education” is an elusive and a philosophical concept; it is difficult to articulate precisely what it means. Definitions of quality vary and, to some extent, reflect different perspectives of the individual and society. There is no single definition of quality that is correct to the exclusion of all others.<sup>309</sup> Green submits that the term quality is a value-laden term: it is subjectively associated with that which is good and worthwhile.<sup>310</sup> The traditional concept of quality is associated with the notion of providing a product or service that is distinctive and special, and which confers a status on the owner or user.<sup>311</sup> The concern for quality in higher education comes from several quarters namely, government, which in most countries is the paymaster; citizens, who pay taxes to government; employers of graduates; students and their parents; teachers, professors and managers in universities.<sup>312</sup>

Although there is clearly an international consensus that quality in higher education is important, there is no agreement either between, or within countries about what is meant by quality.<sup>313</sup> “Quality in higher education” is a pervasive but elusive concept. It is multi-faceted and embraces three broad aspects namely, the goals of education; the process deployed for achieving goals and how far these goals are achieved.<sup>314</sup> It is submitted that there is no single definition or way of measuring quality. The best that can be done, however, is for experienced people in the field of education to make judgments about each of these three aspects and the interaction between them.<sup>315</sup> The goals, process and achievements can refer to institutions, to parts of institutions (faculties, departments, course teams) or to individual researchers and teachers. But above all, quality must be about scholarship and learning.<sup>316</sup>

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<sup>307</sup> Akoojee & Nkomo 2007 21 (3) *SAJHE* 394-395.

<sup>308</sup> Badat S “Introductory Address for the Master of Business Administration Re-Accreditation Consultative Workshop (20 February 2003, Council on Legal Education Office, Pretoria) 3, available online at <http://www.che.ac.za>

<sup>309</sup> Green *What is Quality in Higher Education?* 17.

<sup>310</sup> 12.

<sup>311</sup> 13.

<sup>312</sup> 101-102.

<sup>313</sup> 103.

<sup>314</sup> 103.

<sup>315</sup> 103.

<sup>316</sup> 103.

While South African education policies place priority on addressing historical education imbalances, they should also be sensitive to the demands of an ever-increasing global knowledge-driven environment.<sup>317</sup> It is contended that the educational system cannot be dominated by the needs of the domestic educational system of South Africa to the exclusion of the trends exerted by the global world.<sup>318</sup> Steynberg *et al* suggest that higher education institutions in South Africa should realise that they operate and function in a knowledge-driven global environment in which both domestic and foreign students demand access to the best quality education at the best reputable institutions of higher education in the world.<sup>319</sup> South African higher education should therefore implement programmes and courses that will attract quality foreign students; they should ensure that all courses offered meet international accepted criteria as defined by the leading institutions of higher education in the developed world. They should also create conducive learning environments equipped with the latest learning technologies.<sup>320</sup>

It is submitted that increased student access to higher education institutions in the post-apartheid South Africa has been associated with the recent reforms of higher education.<sup>321</sup> However, recent research indicates significantly poor levels of both adjustment of black students at previously white institutions, decline in performance of black students compared to their white counterparts and the consequent effect on their dropout rates.<sup>322</sup> It is observed that black students make up fewer than 25 per cent of all who graduate in regulation time.<sup>323</sup> It is, therefore, submitted that the transformation of a society struggling to undo the ravages of its past requires that black South Africans be provided opportunities to realise their potential.<sup>324</sup> There should be an integrated and coordinated system of higher education which should meet the learning needs of citizens and development of society and the economy.<sup>325</sup>

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<sup>317</sup> Steynberg, Grundling, de Jager & Ekulugo "Evaluation of South African Tertiary Institutions' Competitive Orientation Towards Internationalisation" (2005) 19 *SAJHE* 1267-1281 1267.

<sup>318</sup> 1267.

<sup>319</sup> 1267-1268.

<sup>320</sup> 1280.

<sup>321</sup> Akoojee & Nkomo 2007 21 (3) *SAJHE* 385.

<sup>322</sup> 386.

<sup>323</sup> Beckmann (2008) 22(4) *SAJHE* 780.

<sup>324</sup> Akoojee & Nkomo 2007 21 (3) *SAJHE* 386.

<sup>325</sup> See Toni Breaking Down Subtle and Implicit Racial Divides in Higher Education Institutions: 64-65; Van Wyk identifies key features that need to be achieved in order to make transformation in education possible. He puts these key features into four clusters, namely: (1) equity and redress (gender and racial equality); (2) critical inquiry (knowledge production, rethinking, abandoning old ways of doing, fundamental change, transmutation,

## 5 The Right to Higher Education in Nigeria

History and development of higher education in Nigeria is also associated with the missionary and colonial incursion into the territory. By the 1920s, the quest for higher education was rife in the country and people started agitating for the establishment of tertiary institutions. Due to lack of higher institutions in the country at that time, those that had the means went overseas to acquire higher knowledge.<sup>326</sup> The first Nigerian higher education institution was established in 1934 when the colonial government set up the Yaba Higher College in Lagos to produce middle level workers to meet the needs of the colonial civil service.<sup>327</sup> This college failed to fulfil the aspirations of Nigerians for true higher education and recorded a very high drop-out rate.<sup>328</sup> In response, the colonial government set up the Elliot Commission in 1943 to advise it on higher education needs of British West Africa. As a result of the Commission's recommendations, a University College was established in Ibadan in 1948 as a campus of the University of London. University College, Ibadan continued as the only university institution in Nigeria until 1960.<sup>329</sup>

With the independence date set for 1 October 1960, the Nigerian Government decided to review the development of all post-secondary education against expected manpower requirements over the following two decades.<sup>330</sup> In April 1959, the Government commissioned an inquiry under the chairmanship of Sir Eric Ashby to advise it on the higher education needs of the new nation for its first two decades.<sup>331</sup> The Commission submitted its report in 1960 and

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controversy); (3) communicative praxis (effective communication, participation), and (4) citizenship (cultural change). See Van Wyk "Performativity in Higher Education Transformation in South Africa" (2005) 19(1) *South African Journal of Education* 5-19 6.

<sup>326</sup> See Ezeh "Legislation, University Education and Economic Performance: the Nigerian Experience" in Tulasiewicz & Strowbridge (eds) *Education and the Law (International Perspectives)* (1994) 71-81 73.

<sup>327</sup> See Teferra & Altbach *African Higher Education* 493.

<sup>328</sup> 493.

<sup>329</sup> 493. See also, Ezeh "Legislation, University Education and Economic Performance: the Nigerian Experience" in Tulasiewicz & Strowbridge (eds) *Education and the Law* 73.

<sup>330</sup> See Ajayi, et al *African Experience with Higher Education* 79.

<sup>331</sup> Sir Eric Ashby, then Master of Clare College, Cambridge, was a leading reformer of British higher education in the Post-World war II period, the inquiry was tagged "the Ashby Commission". Other British members of the Commission include, Sir John Lockwood of the University of London, (a crucial member of IUC who personally played prominent roles in the development of the University of East Africa, and the University of Zambia) and GE Watts, Principal of Brighton Technical College. The three American Members were, RG Gustavson, (former Chancellor of the University of Nebraska and President of the Fund for the Resources of the Future), HW Hannah (former Associate Dean of Agriculture and President of Michigan State University), and Frank Keppel, (former dean of graduate School of Education at Harvard and later Secretary for Education, Health and Social Welfare in the US Government). The three Nigerian members were, KO Dike, (Vice-Principal and later, Principal of the University College, Ibadan), Sir Shettima Kashim, (former Federal Minister of Education, and Later Governor of Northern Region), and SD Onabamiro, (Senior Research Fellow at the University of Ibadan and later, Minister of Education in Western Nigeria). In addition, an American, Frederic Harbison of Princeton University, was

recommended the establishment of four autonomous universities that were to have a combined total enrolment of 7,500 students by the year 1970. It advocated improved access and a wider range of courses in those universities. According to the Commission,

“There must be more diversity and more flexibility in university education if it is to be relevant to the needs of the Nigerian people... A much greater diversity of demand is likely to be made on Nigerian universities than on their British counterparts. We believe that Nigerian universities should meet this demand on one condition: that what is required of them is indeed greater diversity and not lower standards.”<sup>332</sup>

The diversity which the Commission recommended were both in terms of the range of courses available at the university and also in terms of a variety of institutions of tertiary education. It argued that while Nigeria needed professionals at the graduate level, it also needed even more complementary staff at the sub-professional level. The Commission recommended therefore that while the universities continued to admit students at the Advanced Level, a variety of other institutions admitting students at the School Certificate Level should be established to train teachers, and technicians of different types.<sup>333</sup> It was recommended that the university should “sponsor” these institutions to guarantee the quality of their Diplomas and Certificates. It was also recommended that the universities themselves should maintain diversity in the sense of undergraduate courses for a variety of professional training. Thus, bachelors’ degrees in education which incorporated pedagogy into the content of arts and science subjects, degrees in applied social sciences and in applied sciences and other vocational courses were recommended.<sup>334</sup>

Between 1960, when the Commission submitted its report, and 1962, universities were established in Lagos,<sup>335</sup> Nsukka,<sup>336</sup> Ile-Ife<sup>337</sup> and Zaria.<sup>338</sup> Apart from that of Lagos, the remaining three universities were established as regional universities.<sup>339</sup> Also during this period, the University College, Ibadan was separated from the University of London and became an

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commissioned to study manpower needs for university graduates and professionally qualified personnel. His study entitled “High level manpower and Nigeria’s future” formed Part II of the Commission’s report. See Ajayi, et al *African Experience with Higher Education* 79.

<sup>332</sup> See Ashby, et al *Investment in Education: the Report of the Commission on Post-School Certificate and Higher Education* (1960) 22.

<sup>333</sup> See Ajayi, et al *African Experience with Higher Education* 80.

<sup>334</sup> 80.

<sup>335</sup> Known as University of Lagos.

<sup>336</sup> Known as University of Nigeria, Nsukka.

<sup>337</sup> Formerly University of Ife, now known as the Obafemi Awolowo University, Ile-Ife.

<sup>338</sup> Formerly University of Northern Nigeria, Zaria, now known as the Ahmadu Bello University, Zaria.

<sup>339</sup> Then Nigeria had three regions namely, the Eastern, Western and Northern Regions.



autonomous full-fledged university in 1962. Further, in 1970, another university was established in Benin as the University of Benin.<sup>340</sup> This university was established by the Mid-Western State, an off-shoot of the Mid-Western Region created in 1963. In 1975, the Federal Government took over the four existing regional universities and between 1975 and 1977 it established an additional seven new universities. With the creation of more states, nearly all the 36 States in the country now have their own universities and other tertiary institutions. Since its return to a civilian regime in 1999, there has been an emergence of several private universities in the country.

The Education (National Minimum Standards and Establishment of Institutions) Act<sup>341</sup> sets the purposes of higher education in Nigeria, which include the acquisition, development and inculcation of the proper value-orientation for the survival of individuals and society; the development of intellectual capacities of individuals to understand and appreciate their environment; the acquisition of both physical and intellectual skills to enable individuals to develop into useful members of the community; the acquisition of an objective view of local and external environment; the making of optimum contributions to national development through the training of higher level of manpower; the promotion of national unity by ensuring that admission of students and recruitment of staff into universities and other institutions of higher learning shall, as far as possible, be on a broad national basis; and the promotion and encouragement of scholarship and research.<sup>342</sup>

Until recently, the federal and the state governments were the main proprietors of higher educational institutions in Nigeria and they account for most of the funding that goes to those institutions.<sup>343</sup> In 1977, the Federal Government adopted a National Policy on Education, a document that set out broad objectives for education at the various levels and the ways to achieve them. To ensure access, the government abolished the payment of tuition fees in all federal universities for full time undergraduate courses and also set hostel accommodation charges at a fixed rate.<sup>344</sup> This policy still remains in force today, at least in principle. The Constitution also obliges the government to provide free university education when

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<sup>340</sup> The six universities established between 1960 and 1970 are referred to as the Nigerian first-generation universities.

<sup>341</sup> Cap E3, LFN 2004.

<sup>342</sup> See s 11(a)-(g) of the Education Act (Nig).

<sup>343</sup> However, with the establishment of private universities in the country, private individuals and religious organizations have become proprietors of higher institutions.

<sup>344</sup> See Teferra & Altbach *African Higher Education* 493-494.

practicable.<sup>345</sup> However, States universities charge tuition fees for students from their respective States and higher fees for out-of-states students.<sup>346</sup> Government shoulders the bulk of the funding burden for higher education, with the resultant consequence that the financial needs of the system are not adequately addressed. With the low funding levels, students and parents bear the consequences with the higher institutions charging sundry fees (except tuition fees) to augment the inadequate funding from the government.

### **5 1 Access, Equity and Quality in Nigerian Tertiary Education**

The challenges of access in tertiary education remain formidable in Nigeria. The students' enrolment figures as at 2009 are: 1,131,312 in the universities; 360,535 in the polytechnics; and 354,387 in the colleges of education respectively.<sup>347</sup> The current rate of admission of 6% into tertiary level education as against the generally accepted minimum of 16% for meaningful economic development brings out the challenges clearly.<sup>348</sup> This is as a result of the low carrying capacity of tertiary institutions which stands at 150,000 for the Nigerian University System (NUS) while annual demand is about 1 million.<sup>349</sup> For the Polytechnics, the gross carrying capacity is 158,370 while the actual demand is 340,535 (more than 100% over-enrolled); and for the colleges of education the carrying capacity is put at 118,129 while the actual demand is 354,387.<sup>350</sup>

This situation is exacerbated by preference for university education. On the other hand, Polytechnics and Colleges of Education are having difficulty attracting qualified candidates. For instance, the JAMB records show that in 2008/2009 academic session, a total of 957,172 applied for placement in universities as against 232,598 and 58,819 for Polytechnics and Colleges of Education respectively.<sup>351</sup> There is an inadequate number of universities and polytechnics to accommodate prospective candidates. There is also the shortage of qualified candidates to meet the 70 to 30 percentage policy in favour of science and technology-based programmes in the Polytechnics.

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<sup>345</sup> See s 18(3)(c) of the CFRN, 1999.

<sup>346</sup> See Teferra & Altbach *African Higher Education* 495.

<sup>347</sup> See FME *Roadmap for Nigerian Education Sector* (2009) 52.

<sup>348</sup> 54.

<sup>349</sup> 54.

<sup>350</sup> 54.

<sup>351</sup> 54.

In terms of equity, there are disparities in the provision of tertiary education. Some segments of the Nigerian population, especially those with special needs and other disadvantaged groups, seem to be under-served. There are also disparities in gender participation, quality of education across the States and the location of government-owned tertiary institutions in the country.<sup>352</sup> In terms of quality, it is observed that the quality of graduate dropped from 72 percent in 1979 to 68 percent in 1999.<sup>353</sup> The quality of the graduates of tertiary institutions has continued to be an issue of concern among various stakeholders. This concern has been related to instability of the academic calendar, infrastructural decay and obsolescence of equipment in the face of population explosion and academic staff shortages, among others.<sup>354</sup>

### **5 1 1 Quality Assurance and Regulatory Bodies for Higher Education in Nigeria**

The administration of universities involves highly technical questions and no Ministry of Education could expect to have among its civil servants all the necessary experience, expertise and wisdom to perform this function.<sup>355</sup> An independent body which enjoys the confidence of both the government and the universities is always needed. The body must have the interests of both at heart: to protect the universities at all times from outside control and to protect the public against needless duplication or wastage of scarce resources. On all matters relating to universities both sides must be willing to listen to its advice with respect. It must at the same time be a counsellor and a watchdog.<sup>356</sup> The Ashby Commission felt strongly that the most effective way of determining the needs of universities in Nigeria and apportioning the money voted to them by the Government would be through a Committee functioning in virtually the same way as the British University Grant Committee,<sup>357</sup> and it urged the establishment of a National Universities Commission on this model.<sup>358</sup>

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<sup>352</sup> 54.

<sup>353</sup> 53.

<sup>354</sup> 56.

<sup>355</sup> See Sir Eric Ashby Commission; See Ashby, et al *Investment in Education* 32.

<sup>356</sup> See Ashby, et al *Investment in Education* 32; see also, Burns *African Education: An Introductory Survey of Education in Commonwealth Countries* (1965) 131.

<sup>357</sup> The Committee assesses the needs of the universities, it receives from the Government a block grant for the universities which it distributes among them entirely according to its own discretion, it advises the Government on the needs of universities and it is consulted before new universities are set up. The Committee is a body consisting of a full-time chairman and sixteen members drawn from universities, industry and education departments or independent schools whose members (apart from the chairmen) serve without pay. The chairman is a Treasury

Thus, the NUC was established on the recommendation of the Ashby Commission. It was vested with the powers to control the affairs of the universities, particularly, in terms of finance, staffing, conditions of service, programmes and postgraduate studies. Part of the functions of the Commission was to advise the Government on the creation of new universities and other degree-granting institutions in Nigeria.<sup>359</sup> However, with the structure of the NUC today, the Commission is now performing more than mere advisory functions. It is, in fact, today the main policy formulation body with regard to university education in Nigeria. It determines the creation of new universities; it makes plans for balanced development, including the determination of the programmes and the establishment of new faculties and postgraduate institutions. It advises the Government on the financial needs of each university and it undertakes periodic reviews of the condition of service of personnel in order to make recommendations to the federal government.<sup>360</sup>

To ensure quality of tertiary education, the Commission is saddled with the accreditation of the universities; a similar function is performed by the National Board for Technical Education (NBTE) for the Polytechnics and the National Commission for Colleges of Education (NCCE) for colleges of education. In the periodic accreditation exercise, the courses and facilities (including human resources) are examined as to their standard, quality and adequacy. For a course to pass the accreditation exercise, it must meet Minimum Academic Standards/Minimum Accreditation Requirements set by the Commission. Reports are usually categorised according to full accreditation, partial accreditation, and denied accreditation.<sup>361</sup> Accreditation serves the purpose of being an avenue for making improvement on academic programmes and facilities in the various higher institutions. A checklist of deficiencies to be corrected in order to win full accreditation is usually supplied and, as such, the need or desire to meet accreditation requirements has the tendency of enhancing the funding prospects of higher institutions.<sup>362</sup>

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official, though he is always drawn from the ranks of the universities and no heads of universities, politicians or civil servants are ever appointed as members. See Burns *African Education* 131-132.

<sup>358</sup> 131-132.

<sup>359</sup> See Ukeje & Aisiku "Education in Nigeria" in Fafunwa & Aisiku (eds) *Education in Africa: A Comparative Survey* (1982) 205-234 223.

<sup>360</sup> Ukeje & Aisiku "Education in Nigeria" in Fafunwa & Aisiku (eds) *Education in Africa* 228.

<sup>361</sup> Courses denied accreditations are scrapped until improvement is made and further accreditation is invited. Partial accreditation is expected to improve on the existing facilities within the space of two years when further accreditation would be necessary.

<sup>362</sup> See Teferra & Altbach *African Higher Education* 495-496.

## **5 2 The Challenges and Problems facing Tertiary Education in Nigeria**

The demand for opportunities for higher education in Nigeria is increasing at a rate with which existing institutions can hardly cope.<sup>363</sup> Thus, the influx of more students than a university has been designed for has a negative impact on the existing facilities leading to overcrowding, poor teaching, impoverished research, frustration, embittered students and academic staff, and unsatisfactory academic delivery.<sup>364</sup> The coincidence of deteriorating quality and accelerating demand of education is a serious and fundamental threat to higher education in the country which needs to be addressed without delay. This is because if the training of the graduates is poor in quality and substance, their contribution to society will be inferior and a stumbling-block to real national development and progress.<sup>365</sup> As the influx of students continues unabated, there are serious misgivings about the quality of education and services being offered and rendered by these institutions.<sup>366</sup> These problems are considered below.

### **5 2 1 Brain Drain and Lack of Adequate Academic Staff**

One of the most serious challenges facing Nigerian academic community is the departure of most of its best scholars and scientists away from universities, leaving those institutions with inadequate staff. Due to neglect of tertiary institutions by government and poor working condition, there has been a large exodus of qualified academics from the country to some industrialized nations across the globe.<sup>367</sup> Mobility of Nigerian academics from the universities is not limited to overseas migration and scholars also move from the universities to better-paying government agencies and private institutions and firms.<sup>368</sup> As the state of the universities deteriorates, academics have sought employment opportunities outside universities, consequently draining institutions of their faculty members.

Also, in many cases, academic staff are lured away by a variety of government agencies, where salaries are often better and working conditions are more comfortable. In many cases, the

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<sup>363</sup> See Ajayi, et al *African Experience with Higher Education* 203-204.

<sup>364</sup> 204.

<sup>365</sup> 205.

<sup>366</sup> 204.

<sup>367</sup> Academics and professionals in Nigeria have migrated to other countries, most notably the United States, South Africa, Saudi Arabia, and other European countries. According to Munzali Jibril, it is estimated that there are at least 10,000 Nigerian academics and 21,000 Nigerian doctors in the United States alone. See Teferra & Altbach (eds) *African Higher Education* 11, 12 & 495.

<sup>368</sup> 11.

salaries and benefits in the universities are lower than comparable positions in and outside of the civil service.<sup>369</sup> Many public institutions in Nigeria have lost significant numbers of their key faculty members to emerging private universities and other commercially oriented institutions. Those who remain show little or no commitment and loyalty to their duties. In some cases, faculty often hold more than one job outside the university to help make ends meet with consequential negative effect on their primary university responsibilities of teaching and research.<sup>370</sup>

The demand for higher education in the country has resulted in the rapid increase in the number of tertiary institutions without the commensurate increase in the number of academic staff. The *figure 5:1* below shows the staffing situation as at June 2008. The data suggests that a significant short-fall in academic staff is observed across the various strata of tertiary institutions.<sup>371</sup> Also in this regard, shortage of very senior lecturers in tertiary institutions is observed. For instance, over 60% of academic staff in the Nigerian University System is in the category of Lecturer I and below.<sup>372</sup> The state of tertiary education in Nigeria is characterised by inadequate academic staff in both number and quality. The total number of academic staff in the Nigerian university system as at 2006 is put at 27,394, while it is estimated that about 50,000 academic staff are required for effective course delivery across the disciplines. For the Polytechnics system, the required number of academic staff is 22,702 while the actual number now is 12,938. For Colleges of Education, the actual number of academic staff is 11,256 while the required number is 26,114.<sup>373</sup> The shortfall is reflected in *figure 5:1* below.

Noting the impact of poor working conditions of academics on the realisation of the right to education, the CESCR submits as follows:

“While the Covenant requires that ‘the material conditions of teaching staff shall be continuously improved’, in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many States parties in recent years. Not only is this inconsistent with article 13(2)(e), but it is also a major obstacle to the full realisation of students’ right to education. The Committee...draws the attention of States Parties to the joint UNESCO-ILO Recommendation Concerning the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997); and urges States parties

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<sup>369</sup> 11.

<sup>370</sup> 11.

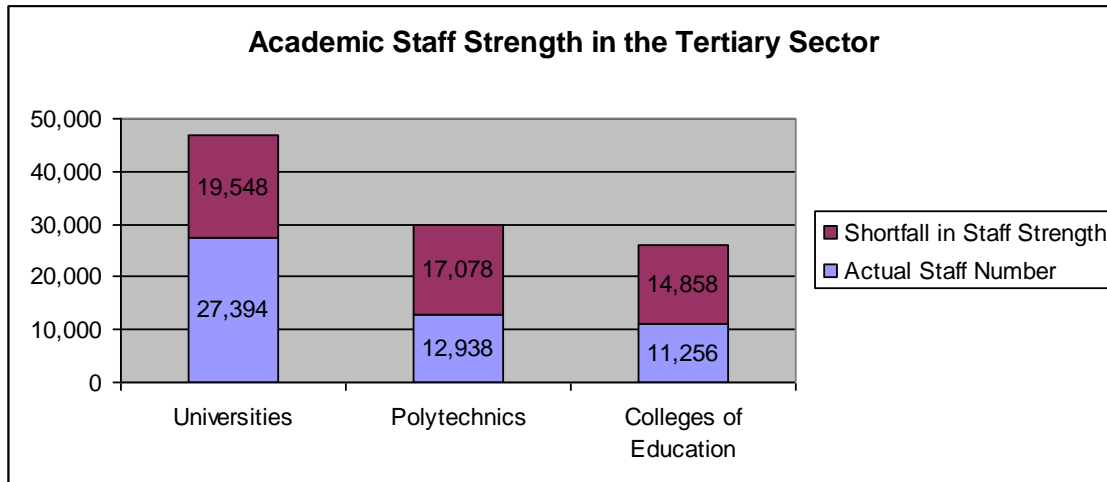
<sup>371</sup> See *FME Roadmap for Nigerian Education Sector* 58.

<sup>372</sup> 58.

<sup>373</sup> 53.

to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.<sup>374</sup>

Fig: 5.1 Showing the Shortfalls in Staff Strength in Nigerian Tertiary Institutions



Source: *The Roadmap to Nigerian Education Sector* (FME, Abuja, 2009) 53.

## 5 2 2 Inadequate Funding

Low level of funding is another major challenge to tertiary education in Nigeria. Over the years, the national budgetary allocation and funding of tertiary education has been decreasing annually. The tertiary institutions draw a significant part of their funds from the proprietors (Federal Government and State Governments) while the remaining part is internally generated from levies/charges/fees, international development partners, support from alumni associations, and linkages with industries in Nigeria and abroad. Funds have not been adequate for the institutions because the allocation from the proprietors always falls short of what is actually required. According to the Federal Ministry of Education, in 2004 for example, the sum of ₦216, 622, 706, 206.00 was requested by the federally-funded universities while the Federal Government released only the sum of ₦53, 466, 287,486.01 representing 24.7% of the budget request from the universities.<sup>375</sup> This has hampered education delivery, monitoring, inspection and other quality assurance activities.<sup>376</sup>

<sup>374</sup> General Comment No 13, para 27.

<sup>375</sup> See *Roadmap for Nigerian Education Sector* 65-66.

<sup>376</sup> It is observed that there is leap in funding of Nigerian education sector from over N11 billion in 1999 to over N90 billion in 2008, yet funding remains a major challenge. See *Roadmap for Nigerian Education Sector* 53.

### 5 2 3 Other Problems

Other challenges facing tertiary education in Nigeria include the poor quality of prospective entrants. It is observed that only about 23.7% of candidates passed SSCE with credit in Mathematics and English between 2000 and 2004.<sup>377</sup> This is not improving considering the dismally poor pass rate in the SSCE results in 2009 as reflected in chapter three of this thesis. Over-stretching of existing facilities, obsolete infrastructure and equipment as well as poor library facilities have adverse consequences on the quality of teaching, learning and research. It is noted that about 15% to 30% of the infrastructure, equipment and books are non-functional, obsolete or dilapidated.<sup>378</sup>

Other challenges include inadequate internal and external quality control mechanisms; an out-dated legal framework; illegal institutions/ satellite campus; curriculum inadequacy; inadequate capacity in the institutions to undertake internal/peer quality assessment; weak support structure for Students Industrial Work Experience Scheme (SIWES); disruption in learning activities and academic calendar due to strike and students demonstrations; unethical behaviour in teaching and learning; insecurity of life and property due to cultism and many more.<sup>379</sup>

Curriculum is crucial to effective teaching, learning, research and community service for national development. However, it is observed that the existing curriculum at the tertiary level is out-dated and no longer relevant to national needs and global competitiveness. It also does not adequately cover critical and relevant aspects of science and technology and is not project-based. Other challenges include the absence of benchmark Minimum Academic Standards for post-graduate programmes in the Nigerian University Sector (except for a few programmes) and the low capacity of curriculum developers and implementers.<sup>380</sup> All these problems call for immediate attention and should be addressed in order to maintain a good standard higher education in the country.

## 6 Summary of the Chapter

In summing up this chapter, some salient issues have emerged on the right to higher education which should be emphasised. First, from all the human rights instruments examined, it is clear

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<sup>377</sup> 54.

<sup>378</sup> 54.

<sup>379</sup> 56-57.

<sup>380</sup> 59.



that the right to higher education is a right that is given recognition at the global, regional and national levels. At the global level, the ICESCR provides that higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.<sup>381</sup> Thus, international human rights treaties do not oblige States to make higher education “generally available” (as the case with the primary and secondary education), but only “accessible to all on the basis of capacity.”<sup>382</sup> This notwithstanding, the right to higher education includes the elements of availability, accessibility, acceptability and adaptability,<sup>383</sup> and the “capacity” of individuals should be accessed by reference to all their relevant ability, expertise and experience.<sup>384</sup>

Also, States parties are obliged to make higher education institutions generally accessible to all and without discrimination. The ICESCR further requires States to use “every appropriate means” to make higher education accessible, in particular by, progressive introduction of free higher education.<sup>385</sup> Thus, the failure to take deliberate, concrete and targeted measures towards the progressive realisation of higher education in qualitative and quantitative terms would violate a State’s obligation. The cut in tertiary-level education funding, introduction of cost-sharing policy in state-owned tertiary institutions and other deliberately retrogressive measures such as the (re)introduction or the raising of fees which may impact negatively on the access of the students from less-privileged backgrounds is also a violation of a State’s obligation to make higher education accessible to all.

Secondly, at the national level, both South Africa and Nigeria have assumed this international obligation to make higher education accessible to all and this is reflected in their various Constitutions and other national laws. Prior to this, in the case of South Africa, the apartheid system of governance had a severe impact on higher education in the sense that public education and higher education in particular were developed and administered along ethnic and racial groups. The education sector was characterised by an apartheid-induced divide between historically white and historically black institutions and access was restricted along that divide. Apart from its adverse impact on access and admission, the different legal status and racial basis of differentiation also led to complex differentiation in governance and funding arrangements of

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<sup>381</sup> Article 13(2)(c) of the ICESCR; see also, art 28(1)(c) of the CRC 1989.

<sup>382</sup> See Ssenyonjo *Economic and Cultural Rights in International Law* 384.

<sup>383</sup> Para 17 of the General Comment 13.

<sup>384</sup> Para 19 of the General Comment 13.

<sup>385</sup> See art 13(2)(c), ICESCR.

the various higher institutions.<sup>386</sup> The main features of the apartheid education system were huge inequality in the financing of education, different curricula for different race groups and restricted access of black learners to higher education.<sup>387</sup> This experience was a violation of the international obligation to make higher education accessible to all without discrimination.

Merger of tertiary institutions helped in transforming the higher education sector in the country. It bridged the apartheid-induced divide between historically white and historically black institutions; enhanced the efficient use of resources and generally improved institutional responses to national needs.<sup>388</sup> The Higher Education Act also fortifies a single, national higher education system on the basis of the rights and freedoms in the Constitution. Against the background of an apartheid past where the majority of African students were denied opportunities of higher education, the Act directs institutions to develop and implement policies and programmes that deal with this legacy. To ensure access to all, selection tests have been developed to assess the potential of students whose school results would not ordinarily qualify them for direct university entrance but who, nevertheless, demonstrate an ability to succeed at the university.<sup>389</sup>

Also, the policy of “access as participation” and “access with success” was adopted to ensure adequate access to higher education.<sup>390</sup> It is emphasised that equity means more than access to higher education but also incorporates equity of opportunity, that is, an environment in which learners, through academic support, excellent teaching and mentoring and other initiatives, genuinely have every chance of succeeding. The various policies ensure that learners have not only access to higher education, but also access to quality education. The policies ensure that learners graduate with the relevant knowledge, competencies, skills and attributes that are required for any occupation and profession.<sup>391</sup> However, while South African higher institutions charge tuition and other fees, a national student aid scheme has been put in place to assist poor students in an attempt to ensure an enhanced access and equity. The National

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<sup>386</sup> See CHE *South African Higher Education in the First Decade of Democracy* 23, 173- 186 & 187-210; OECD *Reviews of National Policies for Education: South Africa* 326.

<sup>387</sup> See Khoza (ed) *Socio-Economic Rights in South Africa* 2 ed (2007) 412-413. See also, OECD *Reviews of National Policies for Education: South Africa* (2008) 325; Dlamini *The Administrative Law of A Typical South African University* (1994) 214.

<sup>388</sup> Qhobela “Why Mergers Matter” *The Mail & Guardian* (October 2009) 4.

<sup>389</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 432.

<sup>390</sup> Akoojee & Nkomo 2007 21 (3) *SAJHE* 390.

<sup>391</sup> Council on Higher Education *Towards a New Higher Education Landscape* 10.

Student Aid Scheme Act provides for the establishment of a Board to allocate funds for loans and bursaries to qualified students. This is one of the measures advocated by the CESCRR for States parties to ensure access to higher education to all within their territories.

In Nigeria on the other hand, in principle, tuition is free in all the federal tertiary institutions and government shoulders the bulk of the funding. Over the years, the national budgetary allocation and funding of tertiary education has been on the decrease. This has hindered education delivery, monitoring, inspection and other quality assurance activities. As a result of this decline, the financial needs of the system are not adequately catered for in the government subvention. With the low funding levels, students and parents bear the consequences with higher institutions introducing cost-sharing measures by charging sundry fees (except tuition fees) to augment the inadequate funding from the government. While the arrangement of free tuition is in line with the constitutional objective of making tertiary education free in the country, the cost-sharing approach is capable of defeating this objective.

The Nigerian tertiary education sector faces a number of problems and challenges which call for urgent government attention. In terms of access, the carrying capacities of the existing institutions are very low; universities, polytechnics and other tertiary institutions are insufficient in number to accommodate all prospective candidates. The effect of this is that many qualified students are denied access to higher education which violates Nigerian obligation under the international human rights instrument to make higher education accessible to all on the basis of capacity. Disparity in gender participation with lower percentage of females having access to higher education in the country is also a militating factor to achieving equal access and education to all without discrimination as stipulated under the ICESCR and other human rights instruments which Nigeria has adopted. Further, due to neglect of tertiary institutions by government and poor working condition, there is an exodus of qualified academics from the country leading to a brain drain in those institutions which impacts negatively on the quality and standard of education in the country. Tertiary institutions also do not have adequate facilities conducive to learning; the existing facilities are over-stretched and obsolete. Poor library facilities also have adverse consequences on the quality of teaching, learning and research.

Another important issue which this chapter discussed is the issue of academic freedom. It emphasised that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students and the enjoyment of academic freedom requires the autonomy of

institutions of higher education.<sup>392</sup> The study reveals that both South Africa and Nigeria accept that academic freedom and institutional autonomy are indispensable for realisation of the right to higher education and that the South African Constitution specifically guarantees this right.<sup>393</sup> While academic freedom is a constitutionally guaranteed right in South Africa, it is not guaranteed in Nigeria but is accepted as a fundamental concept which is necessary for the effective functioning of higher institutions. As pointed out earlier in the chapter, academic freedom and institutional autonomy entails the fourfold dimensions of an institution to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.<sup>394</sup> However, the concept of academic freedom in that sense does not exist in the two countries. It is obvious that interference with the university's right to determine its own academic standard, for example, by choosing how many students to accept and deciding the standard of its degree leaves it without real academic freedom.<sup>395</sup>

In the case of South Africa, it is noted that the adoption of the Higher Education Act and other legislative initiatives or policies infringe academic freedom and institutional autonomy.<sup>396</sup> Also in Nigeria, it is found that the provisions of the National Universities Commission Act and the Joint admission Matriculation Board Act impugned the university autonomy to determine for itself on academic ground, who may teach, what may be taught, how it should be taught and who may be admitted. Those functions which traditionally belong to the universities have been transferred to the NUC and the JAMB respectively. The chapter advocates a system which adequately guarantees academic freedom and institutional autonomy given its impact on the effective enjoyment of the right to education.

## **7 Conclusion**

This chapter has examined the right to higher education. It started with an examination of the concept of academic freedom given its impact on the enjoyment of the right to higher education. It analysed the right to higher level of education as guaranteed under the ICESCR, the South African Constitution, the Nigerian Constitution and other relevant laws. Thus far, the

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<sup>392</sup> General Comment No.13, paras 38 & 40.

<sup>393</sup> See s 16(1)(d) of the 1996 South African Constitution.

<sup>394</sup> Smith 1995 *SALJ* 680; see also, Albert van de Sandt Centlivres *et al* (ed. Committee) *The Open Universities in South Africa* (1957) 11-12.

<sup>395</sup> See Russell *Academic Freedom* 107.

<sup>396</sup> Malherbe 2000 (4) *European Journal for Education Law and Policy* 62-63 & 66.

substantive right to education at the three main levels namely, primary, secondary and tertiary levels has been discussed. While chapter three examined the right to primary education, chapter four discussed the right to secondary education. The instant chapter concludes this aspect with discussion on the right to higher education. While these three chapters focused on the right *to* education, the next chapter will examine the rights *in* education, that is, those rights that impact on the enjoyment or exercise of the right to education. They are fundamental rights which are given recognition at the global, regional and national levels, and are indispensable for the enjoyment and realisation of the right to education. The chapter will also establish the nexus or the interdependence of the right to education with other constitutional rights.

# Chapter 6

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## Rights in Education

“Education is not only a right in itself, it also empowers people to claim and realise their other rights”<sup>1</sup>

### 1 Introduction

The right to education is often classified under three interrelated imperatives namely, the right to education, the right in education and the right through education.<sup>2</sup> The “right to education” relates to the provisions regarding the practical organisation and content of education,<sup>3</sup> which the preceding chapters have examined. The “rights in education” refers to the protection rights, participation rights of the child in education,<sup>4</sup> as well as other fundamental rights which impact on the right to education. Generally, the right to education is often understood to mean the right of the child “to be sent to school” and “to be fed with information”- the state, teachers and parents deciding upon what is to be taught and how, with the child seen as passive recipient of knowledge.<sup>5</sup> This chapter will argue that the right to education is more than that and that the participation rights of the child demands that the learner should be recognised as the bearer of rights in educational process.<sup>6</sup> The third notion of “right through education” refers to the indirect implementation of human rights standards by means of human rights education.<sup>7</sup> This third aspect of the right to education will be examined together with other issues in the next chapter, which deals with the implementation of the right to education.

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<sup>1</sup> Lake & Smith *South African Child Gauge 2008/2009* (2009) 21.

<sup>2</sup> Tomasevski *Right to Education Primer 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (2001) 12; Cattrijsse “Children’s Rights and Education: The Right TO, IN and THROUGH Education: Three Interrelated Imperatives” in Verhellen (ed) *Understanding Children’s Rights 2000-No.6* (2001) 619-640; Verhellen *Convention on the Rights of the Child* (2000) 105-111.

<sup>3</sup> See Verheyde *A Commentary on the United Nations Convention on the Rights of the Child: Article 28: The Right to Education* (2006) 2.

<sup>4</sup> 2.

<sup>5</sup> Beiter *The Protection of the Right to Education by International Law* (2006) 503.

<sup>6</sup> See generally, Tomasevski *Removing Obstacles in the Way of the Right to Education* (2001) (Right to Education Primers No. 1) 44-47.

<sup>7</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 2.

As pointed out in chapter one, education is not only a right in itself but also a right which empowers people to claim and realise their other rights.<sup>8</sup> The right to education is a central facilitative right; it empowers individuals with the skills and abilities necessary to realise, reinforce and enhance other rights.<sup>9</sup> Through education, people are better able to appreciate and exercise the full range of their human rights.<sup>10</sup> Where the right to education is effectively guaranteed, it enhances the enjoyment of all individual rights and freedoms. Conversely, where the right to education is denied, violated or disrespected, this deprives people of their awareness and enjoyment of many other rights and freedom.<sup>11</sup> An examination of the various international human rights instruments as well as the South African and Nigerian human rights instruments will reveal that the right to choice of language of instruction as well as other fundamental rights such as the right to freedom of religion and a cultural right; the right not to be treated or punished in a cruel or degrading way; the equality principle and right to freedom from discrimination; the right to freedom of expression; the right to freedom of assembly and association and the right to establish independent/private schools are essential for the enjoyment of the right to education and they all impact on this right.

As Malherbe rightly argues, in the South African context, apart from the fact that the right to education is constitutionally guaranteed, various other rights in the bill of rights also impact on education.<sup>12</sup> Broader constitutional values and principles as well as laws and policies created since the country's returns to constitutional democracy in 1994 support this notion of "rights in education."<sup>13</sup> Unlike the position in South Africa, the Nigerian Constitution categorised the right to education under the fundamental objectives and directive principles of the state policies. However, Nigeria has enacted laws and also formulated policies which support the right to education. The relevant laws in this category include the Child's Rights Act,

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<sup>8</sup> See Woolman & Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 117-118.

<sup>9</sup> See Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 356.

<sup>10</sup> Lake & Pendlebury "Children's Right to Basic Education" in Lake & Smith *South African Child Gauge* 19 21.

<sup>11</sup> 21.

<sup>12</sup> See Malherbe "The Constitutional Dimension of the Best Interests of the Child as Applied in Education" (2008) 2 *TSAR* 267-285 271.

<sup>13</sup> In terms of s 7(2) of the 1996 South African Constitution, government is obliged to pass laws, develop policies and establish programmes that protect, respect, promote and fulfil the right to education. The attainment of a democratic dispensation in South Africa brought about fundamental changes to all spheres of life, including education. New laws have been enacted which reflect the wishes and aspiration of the people and are also in tune with the constitutional principles. The National Education Policy Act, the South African Schools Act and the 1996 South African Constitution regulate the right to education. These laws further recognise certain other rights relevant to the right to education.

2003; the National Policy on Education Act, 2004; the Compulsory, Free, Universal Basic Education Act, 2004; and the Education (National Minimum Standards and Establishment of Institutions) Act, 2004. These laws and policies have been analysed in chapter two. These laws together with the Constitution, in addition to guaranteeing the right to education, also recognise the fundamental rights listed above as impacting on the right to education. These rights are the focus of this chapter and will now be examined. Given that these rights have been adequately articulated upon in the South African constitutional jurisprudence, the South African position will serve as a blueprint for discussions in the chapter.

## **2 Right to Choice of Language of Instruction**

Language is central to knowledge and every intellectual tradition.<sup>14</sup> At the global level, the right to choice of language of instruction is implicitly recognised in a number of instruments protecting the rights of the indigenous and minority groups.<sup>15</sup> For instance, article 5(1)(c) of the UNESCO Convention against Discrimination in Education provides that it is essential to “recognise the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each state, the use or the teaching of their own language”, provided that “this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty.”<sup>16</sup> Although, the provision of this article does not

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<sup>14</sup> Achmat “Intellectual Dispossession and the Post-Apartheid Struggle for Equal Education and Dignity in South Africa” A Paper delivered at the Conference of Community of Mandela Rhodes Scholars, Rhodes University, Grahamstown (6-9 September, 2009) 3.

<sup>15</sup> Art 1(3) of the UN Charter for instance says that one of the purposes of the organization is “[t]o achieve international co-operation...in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to...language.” See also, arts 13 & 55 of the Charter; art 2(1) of the UDHR, 1948; art 1 of the UNESCO Convention against Discrimination in Education, 1960; arts 2(1) & 26 of the ICCPR, 1966; art 2(2) of the ICESCR, 1966; art 1 of the American Convention on Human Rights, 1969; art 2 of the African Charter on Human and Peoples’ Rights, 1981.

<sup>16</sup> Similarly, art 27 of the ICCPR, 1966 provides: “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” This provision is essentially repeated in art 30 of the CRC except that it additionally provides for the right of indigenous peoples. It says: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with the other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”



expressly accord a right to choice of language in education to persons belonging to minorities, nevertheless, this right may be implied in the provision of the article.

However, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities<sup>17</sup> clearly provides for the right to use one's language freely and without interference or any form of discrimination. Article 2(1) of the Declaration states: "[p]ersons belonging to national or ethnic, religious and linguistic minorities...have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination." Article 4(3) of the Declaration provides further that "States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother-tongues or have instruction in their mother tongue." It is submitted that the State's obligation in respect of this provision is phrased in a restricted manner given the use of the word "should" rather than "shall" in the provision.<sup>18</sup> Also, the phrase "have instruction in..." as used in the provision is rather ambiguous if the intention is to convey the right to be taught through the medium of one's mother-tongue.<sup>19</sup> In this regard, Hodgson has criticised the language of the article as being very weak when considering its use of an open-ended phrase "wherever possible".<sup>20</sup>

The right to be taught in a mother-tongue or language of choice belongs to the core content of the right to education.<sup>21</sup> The importance of mother-tongue education is expressed as follows:

"It is undoubtedly true that a mother tongue is not merely a linguistic system which can, with impunity, be replaced by another language. A child's mother tongue is the language which allows him to impose a structure on the universe. It is associated with his thought processes, his sense of identity and his solidarity with his family and environment. As he matures, his mother tongue may become a symbol of regional or national pride, a means of gaining access to knowledge and wisdom. And it will usually be associated with feelings of warmth, intimacy, spontaneity."<sup>22</sup>

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<sup>17</sup> The Declaration was proclaimed by the UN General Assembly on 18 December, 1992.

<sup>18</sup> See Beiter *The Protection of the Right to Education* 147.

<sup>19</sup> See Thornberry "Education" in Weller (ed) *Universal Minority Rights* (2007) 325-362 336 fn 59; See also, *Commentary of the Working Group on Minorities to the United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (E/CN.4/Sub.2/AC.5/2005/2 of April 2005) paras 59-64.

<sup>20</sup> Hodgson *The Human Right to Education* (1998) 94 & 105-106.

<sup>21</sup> See Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation" in Donders & Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 203.

<sup>22</sup> See Kennedy (ed) *Language Planning and Language Education* (1983) 165.

Given that the mismatch between home language and language of instruction is acknowledged as one of the many reasons for the poor performance of learners in most African countries, the importance of this topic and its impact on the right to education is evident. The right to be taught in mother-tongue language at the national level will now be considered.

## 2 1 Right to Language of Choice in South African Schools

South Africa is a multi-racial society characterized by a diversity of languages, cultures and religions.<sup>23</sup> As a result, language has always been a contentious issue in education in South Africa.<sup>24</sup> Woolman and Fleisch note that the language issue began to smoulder in the ashes of the South African civil war (1899-1902) when British introduced English as the sole official language in the ex-republics.<sup>25</sup> During this period, there was a consistent battle of ascendancy between the English and Afrikaans languages.<sup>26</sup> Prior to this time, the Dutch and English languages were mainly used in schools.<sup>27</sup> African languages only received a degree of recognition in policies during the apartheid era when mother-tongue education was proposed for at least the first couple of years of education.<sup>28</sup> The Bantu Education Act stipulated that the

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<sup>23</sup> See Mpedi & Vrancken “Language and Culture” in Govindje & Vrancken (eds) *Introduction to Human Rights Law* (2009) 187.

<sup>24</sup> Achmat pointed out that language has been used as an instrument of intellectual dispossession. He noted that citizenship and equality was indistinguishable from the movement to recognise Afrikaans as an official language with English. See Achmat “Intellectual Dispossession and the Post-Apartheid Struggle for Equal Education and Dignity in South Africa” A Paper delivered at the Conference of Community of Mandela Rhodes Scholars 9; see also, Woolman & Fleisch *The Constitution in the Classroom* 46; Giliomee “The Rise and Possible Demise of Afrikaans as Public Language” (2004) 10(1) *Nationalism and Ethnic Politics* 25-58.

<sup>25</sup> Woolman & Fleisch *The Constitution in the Classroom* 46.

<sup>26</sup> Achmat aptly captures the situations when he writes: “At the end of the nineteenth century, the Dutch settlers were oppressed by the English colonial administration at the Cape. After crushing the Afrikaner republics and creating the Union of South Africa in 1910, this oppression continued in more or less open ways. Since colonial times, the English had denied language equality for Afrikaans or Dutch-speaking people. Every white Afrikaans-speaking citizen was mobilized from infants singing Afrikaans lullabies in concentration camps to children refusing to buy from shops where only English was spoken, ordinary women and men participated in this movement. This was not in the first instance a movement to promote Afrikaner domination. Afrikaans as a language became the badge of dignity and equality. Progressive intellectuals and activists contributed to this movement.” See Achmat “Intellectual Dispossession and the Post-Apartheid Struggle for Equal Education and Dignity in South Africa” A Paper delivered at the Conference of Community of Mandela Rhodes Scholars 9.

<sup>27</sup> See “*South Africa: Language & Education*” available online at: <http://www.cyberserv.co.za/users/-jako/lang/education.htm> (accessed on 2008/11/27).

<sup>28</sup> See “*South Africa: Language & Education*” <http://www.cyberserv.co.za/users/-jako/lang/education.htm>

black learners should receive mother-tongue teaching in lower and higher primary grades with transition to English and Afrikaans thereafter.<sup>29</sup>

Recognising the historically diminished use and status of the indigenous languages in South Africa, the South African Constitution recognises eleven different official languages.<sup>30</sup> It obliges the State to take practical and positive measures to elevate the status and advance the use of these languages.<sup>31</sup> The South African Constitution further provides that the national government and provincial governments, by legislative and other measures, must regulate and monitor the use of these official languages and that all official languages must enjoy parity of esteem and must be treated equitably.<sup>32</sup> Section 29(2) guarantees the right to receive educational instruction in ones' preferred language in the following terms:

“Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the State must consider all reasonable educational alternatives, including single medium institutions, taking into account- (a) equality; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.”<sup>33</sup>

This provision guarantees the right of everyone to be educated in the language of his/her choice in public educational institutions. The provision was inserted in the Constitution as a compromise on the argument for and against the retention of the then existing separate schools for the different language groups.<sup>34</sup> The South African Constitution, however, provides for the

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<sup>29</sup> See “*South Africa: Language & Education*” <http://www.cyberserv.co.za/users/-jako/lang/education.htm>; see also, Chisholm *Changing Class: Education and Social Change in Post-Apartheid South Africa* (2005) 18; Achmat “*Intellectual Dispossession and the Post-Apartheid Struggle for Equal Education and Dignity in South Africa*” A Paper delivered at the Conference of Community of Mandela Rhodes Scholars 3 & 9.

<sup>30</sup> Those languages include, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. See s 6(1) of the Constitution.

<sup>31</sup> See s 6(2) of the Constitution.

<sup>32</sup> See s 6(4) of the Constitution.

<sup>33</sup> See also s 30 of the Constitution which provides: “[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.” It is observed that the outcome of s 29(2) is a compromise during the negotiations in the Constitutional Assembly. While the National Party viewed single-medium public schools as the last vestige of public power in the new dispensation and canvassed for it, the ANC saw it as vehicle for continued racial exclusion and perpetration of minority privilege. See Woolman & Fleisch *The Constitution in the Classroom* 49-50; on the history of the negotiations for the Interim Constitution, see du Plessis “*A Background to Drafting the Chapter on Fundamental Rights*” in de Villiers (ed) *Birth of a Constitution* (1994) 89; Corder “*Towards a South African Constitution* (1994) 57 *Modern Law Review* 491.

<sup>34</sup> In this regards Malherbe notes, “[t]his was the clause that nearly derailed the constitutional negotiations and on which an uncomfortable compromise was reached. The essence of the crisis was that some parties tried to protect the existing separate schools for the different language groups by means of a constitutional right to single-medium schools as opposed to the ANC’s ideal of equal, non-racial education that would eradicate the injustices and disparities of the past. On the other hand, in other words, there was the fear that existing white schools would be

guarantee of this right in an expressly qualified term; it can only be claimed in situations in which education in the language of choice is reasonably practicable.<sup>35</sup> In implementing language rights, educational authorities must give serious consideration to the specified relevant factors mentioned in section 29(2) of the South African Constitution quoted above. They must be guided in the first instance by what is educationally appropriate, and secondly by the listed factors of equity, practicability and the need to redress the results of past racially discriminatory laws and practices.<sup>36</sup>

In considering the choice of language in a particular institution, the State must take into account the need to ensure equity among the various groups who may be seeking education in different languages of choice in a particular area.<sup>37</sup> Thus, where there are approximately equivalent numbers of pupils wanting education in two different languages in an area with only one school, the most equitable solution would be to provide dual-medium instruction in the school.<sup>38</sup> Further, the South African Schools Act provides that the Minister of Education may by notice in the gazette determine norms and standards for language policy in public schools.<sup>39</sup> The

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over-crowded by pupils from other language and cultural groups. On the other hand, there was the suspicion that this fear was inspired by racism, and that a right to single-medium institutions would perpetuate existing inequalities and would frustrate the redress of inequalities and the transformation of the education system.” See Malherbe “A Fresh Start I: Education Rights in South Africa” (2000) 4 *European Journal for Education Law and Policy* 49-55 52.

<sup>35</sup> In this respect, Bekink and Brand assert that the right to instruction in the official language of one’s choice is a qualified right. The right recognises the importance of children receiving education in their mother-tongue, but balances this imperative with the requirements of practicality by providing that the instruction in official language of choice must be provided where “reasonably practicable.” The right is, however, not a right to mother-tongue instruction, but only a right to instruction in the official language of one’s choice out of the constitutionally recognised eleven official languages. See Bekink & Brand “Constitutional Protection of Children” in Davel (ed) *Introduction to Child Law in South Africa* (2000)169 180; Malherbe “Equal Educational Opportunities in South Africa: the Constitutional Framework” 2004 (3) *TSAR* 427-447 439.

<sup>36</sup> See Malherbe 2008 (2) *TSAR* 267-285 283-284; Malherbe (2000) 4 *European Journal for Education Law and Policy* 49-55 52; Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 300.

<sup>37</sup> See *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA) para 49; see also, the Canadian case of *Mahe v Alberta* 1 SCR 342 (1990) where factors such as student numbers, costs, availability of facilities and educators, and the distance to the nearest similar institution that is able to provide education in the chosen language were used to determine where provision for mother-tongue education should be made for French-speaking students outside of the province of Quebec. See also, s 23(3)(a) of the Canadian Constitution; Hogg *Constitutional Law of Canada* (1992) 1224-1225.

<sup>38</sup> Liebenberg “Education” in Davis *et al Fundamental Rights in the Constitution* 300.

<sup>39</sup> See s 6(1) of the SASA; see also, s 29(2) of the Constitution; the National Education Policy Act, 1996 as well as the Language-in-Education Policy was adopted in 1997; Par 5 of the Policy states its main aims which are: (i) to promote full participation in society and the economy through equitable and meaningful access to education; (ii) to pursue the language policy most supportive of general conceptual growth amongst learners, and hence to establish additive multilingualism as an approach to language in education; (iii) to promote and develop all the official languages; (iv) to support the teaching and learning of all other languages required by learners or used by communities in South Africa, including languages used for religious purposes, languages which are important for

language policy of a public school is determined by the governing body subject to the South African Constitution, the Schools Act and any applicable Provincial law.<sup>40</sup> In *Western Cape Ministry of Education and others v Governing Body of Mikro Primary School and Another*,<sup>41</sup> the Supreme Court of Appeal interpreted the actual content of the constitutional right to receive education in one's official language. The court emphasized the right/power of the school governing bodies to determine and retain their language policies in schools. But in exercising this right, there must not be any form of discrimination in admission policy on account of language.<sup>42</sup>

Mother-tongue education is a highly emotional issue in South Africa.<sup>43</sup> It has attracted a considerable amount of education litigation giving rise to a sizeable body of case law on the issues of language, culture and religion and their place in public and independent schools.<sup>44</sup> In *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Others*,<sup>45</sup> the Constitutional Court decided on the right to receive education in the official language of one's choice in a public educational institution. The dispute in this case arose from the school's language policy, which stipulated Afrikaans as the only medium of instruction. Following the failure of the Hoërskool Ermelo to accede to the request of the Mpumalanga Department of Education that it should admit 27 grade 8 learners who could not be accommodated at any of the English medium schools in Ermelo at the beginning of 2006, the HOD appointed an Interim Committee for three months to perform the function of the governing body.

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international trade and communication, and South African Sign Language, as well as Alternative and Augmentative Communication; (v) to counter disadvantages resulting from different kinds of mismatches between home languages and languages of learning and teaching; (vi) to develop programmes for the redress of previously disadvantaged languages.

<sup>40</sup> See s 6(2) of the Schools Act.

<sup>41</sup> 2005 (10) BCLR 973 (SCA).

<sup>42</sup> See *Seodin Primary School and Others v MEC of Education, Northern Cape and Others* 2006 (4) BCLR 542 (N), at 572 para 56 D-F, where the court held as follows: "[i]t would be a sad day in the South African historical annals that hundreds of children remained illiterate or dropped out of school because they were excluded from under-utilised schools purportedly to protect and preserve the status of certain schools as single-medium Afrikaans schools. That there are two competing interests at play in this case has clearly manifested itself: The right to receive an education in a language or medium of choice on one hand and the right to receive a basic education or an education up to the level contemplated in the various Education Act on the other."

<sup>43</sup> Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 312.

<sup>44</sup> See Fleisch & Woolman "On the Constitutionality of Single-Medium Public Schools" (2007) 23 *SAJHR* 34 39; Woolman & Fleisch *The Constitution in the Classroom* 51.

<sup>45</sup> 2010 (3) BCLR 177 (CC).

This Interim Committee adopted a new language policy, which included English as a medium of instruction.<sup>46</sup> Following this development, the School launched an application to the High Court to set aside the decision of the HOD to withdraw the function of determining the language policy from the governing body.<sup>47</sup> The full bench of the High Court dismissed the substantive application.<sup>48</sup> On appeal, the Supreme Court of Appeal reversed the decision of the High Court.<sup>49</sup> Further appeal to the Constitutional Court was not successful. The court dismissed the appeal on the ground that the Department breached the constitutional principle of legality<sup>50</sup> and procedural fairness requirements in appointing the Interim Committee.<sup>51</sup> It held that the HOD had no power to constitute the interim committee and in turn, the Interim Committee did not have the requisite power to fashion the new language policy for the school.<sup>52</sup>

However, the court affirmed that the right to receive education in the official language of one's choice in a public educational institution where it is reasonably practical is located in section 29(2) of the South African Constitution. It held that in order to give effect to this right, the provision imposes a duty on the State to consider all reasonable educational alternatives, including single medium institutions, taking into account what is equitable and practicable and addressing the results of past racially discriminatory laws and practices.<sup>53</sup> The court therefore directed the Governing Body of Hoërskool Ermelo to review and determine a language policy in terms of section 6(2) of the Schools Act and the Constitution, and report to it regarding the process that was followed to review its language policy and provide a copy of the language policy. It also directed that the HOD, Mpumalanga Department of Education should lodge a report with the Court setting out the likely demand for grade 8 English places at the start of the school year in 2010 and the steps that the Department had taken to satisfy the likely demand for an English or parallel medium high school in the circuit of Ermelo.<sup>54</sup>

In summary, the right to receive education in one's preferred language is constitutionally guaranteed in South Africa. However, the right is internally qualified since the choice of

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<sup>46</sup> Para [21].

<sup>47</sup> Para [25].

<sup>48</sup> Para [29].

<sup>49</sup> Para [33].

<sup>50</sup> Para [89].

<sup>51</sup> Para [92].

<sup>52</sup> Paras [93] & [94].

<sup>53</sup> Para [42].

<sup>54</sup> Para [106].

language of instruction is available only when it is “reasonably practicable.” Whether or not it is reasonably practicable to receive tuition in a language of one’s choice will depend on all the relevant circumstances of each particular case. The factors determining this would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices learners and their parents make and the curriculum options offered.<sup>55</sup> Courts have always affirmed that only the school governing body of a particular school has the power to determine language policy in that school.

From the cases examined above, it is shown that the determination of the schools language policies in the South African schools may be polarised along a racial divide, which may not be in the best interests of the country. Rather than polarising this issue, the best interest of the children within a particular school’s catchment areas should be the paramount consideration. Children should not be denied access to education in a particular school on account that a school wishes to protect and/or preserve its status as a single-medium school. The South African Constitution guarantees to all the right to education without any form of discrimination. Denial of access to schools within the learners’ vicinity on account of a schools’ language policy may amount to racial discrimination within the meaning of the South African Constitution.<sup>56</sup> To achieve the constitutional right to education, government should support the schools by providing them with the required resources and the manpower to maintain dual-medium of instruction.

## **2 2 Right to Language of Choice in Nigerian Schools**

Nigeria is a country with three dominant indigenous languages namely, the Hausa, Ibo and Yoruba languages. In addition, it has over 300 other minority languages.<sup>57</sup> The Hausa language is largely spoken in the Northern part of the country, while the Ibo language is a dominant language in the Eastern part of the country and the Yoruba language in Western Nigeria. Unlike

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<sup>55</sup> See *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Others* (supra) par [52]; see also, Malherbe “Equal Educational Opportunities in South Africa: the Constitutional Framework” 2004 (3) *TSAR* 427-447 440; Malherbe (2000) 4 *European Journal for Education Law and Policy* 53.

<sup>56</sup> See s 9(3) & (5) of the Constitution.

<sup>57</sup> Linguists profess their inability to establish the exact number of languages in Nigeria. It is observed, however, that there are some over 300 distinct languages the country. See Ezeh “Legislation, University Education and Economic Performance: the Nigerian Experience” in Tulasiewicz & Strowbridge (eds) *Education and the Law (International Perspectives)* (1994) 71-81 72.

in the South African Constitution, the Nigerian Constitution does not have any provision guaranteeing the right to choice of language of instruction in schools.<sup>58</sup> Notwithstanding the diversity of languages, language of instruction in schools has never been a contentious issue in Nigerian schools. As Fafunwa pointed out, Western type of education was first introduced into Nigeria by Christian Missionaries just before the middle of the nineteenth century and for about four decades after that initial date both the nature and main thrust of language education in the country were completely left to those missionaries to decide.<sup>59</sup>

Though the English language has enjoyed the pride of place in Nigerian educational system, teaching and learning of indigenous languages received equal attention in the early days of western education in Nigeria.<sup>60</sup> This was motivated by the perception that the interests of Christianity would best be served by actually propagating that religion in indigenous languages.<sup>61</sup> Thus, some indigenous languages were introduced and taught in schools together with the English language. After the attainment of independence in 1960, the agitations that the English language be replaced as the official language by one of the Nigerian indigenous languages did not materialise.<sup>62</sup> In 1977, the Federal Government formulated a National Policy on Education which recognised the importance of language in education in the following terms:<sup>63</sup>

“Government appreciates the importance of language as a means of promoting social interaction and national cohesion; and preserving cultures. Thus every child shall learn the language of the immediate environment. Furthermore, in the interest of national unity it is expedient that every child shall be required to learn one of the three Nigerian [main] languages: Hausa, Igbo and Yoruba.”<sup>64</sup>

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<sup>58</sup> However, s 21 of the Constitution obliges the State to protect, preserve and promote the Nigerian cultures which enhances human dignity and that are consistent with fundamental objectives. Given that language and culture go hand in hand, this provision may be interpreted as protecting languages and not guaranteeing the right to choice of language in educational institutions.

<sup>59</sup> See Fafunwa *History of Education in Nigeria* (1974) 92; see also, Taiwo *The Nigeria Education: Past, Present and Future* (1980) 10-11.

<sup>60</sup> See 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 on 2008/11/27).

<sup>61</sup> The then elites criticized that arrangement and were of the view that the people turned out under that system of education were not well enough suited to the job market of those days whose unsatisfied needs were for persons with training in English rather than in the indigenous language. See Taiwo *The Nigeria Education System* 11.

<sup>62</sup> See Bambgose “Language in National Integration: Nigeria as a Case Study” *A Paper read at the 12<sup>th</sup> West African Languages Congress*, University of Ife, Ile-Ife, Nigeria (March 15-20, 1976) 12-13; Awobuluyi “Language Education in Nigeria: Theory, Policy and Practice” *Fafunwa Foundation Internet Journal of Education*; see also Osaji *Language Survey in Nigeria* (1979) 159.

<sup>63</sup> This policy was revised in 1981, 1998 and 2004 respectively. See Federal Republic of Nigeria *National Policy on Education* 4 ed (2004) iii.

<sup>64</sup> Para 10(a) of the National Policy on Education, 2004.



The Policy as revised in 2004 provides *inter alia* that the primary school curriculum shall include the language of the environment where the school is located, the English language, French and Arabic languages.<sup>65</sup> It states further that the medium of instruction in the primary school shall be the language of the environment for the first three years, but during this period, the English language shall be taught as a subject.<sup>66</sup> From the fourth year, the English language shall progressively be used as a medium of instruction.<sup>67</sup> It is submitted that the initial three years of primary education are the formative years for children, as such, the exclusion of the English language as mode of instruction during this period may have a lasting negative impact on the use of this language in the later years of one's education. The more advantageous approach would have been a combined use of both the English language and an indigenous language.

In the Junior Secondary School (JSS), which is three years' duration, a learner is to study three languages namely: his/her mother-tongue (if available for study) or an indigenous language of wider use in his area of domicile; the English language, and any one of the three major indigenous languages in the country namely, Hausa, Igbo, and Yoruba, provided that the language chosen is distinct from the child's mother-tongue.<sup>68</sup> In the Senior Secondary School (SSS), which also lasts three years, a learner is to study two languages namely an indigenous language and the English language.<sup>69</sup> In terms of the National Policy on Education, from primary four up to the university level, the medium of instruction is the English language. Thus, the English language remains the main official language of instruction at all levels of education except for the first three years of primary education.<sup>70</sup> However, the English language as a medium of instruction should be distinguished from the English language as a subject of study in the context in which other indigenous languages are also studied. Given its wide usage globally, having the English language as language of instruction in Nigerian schools will be beneficial to learners and promote their interaction with people.

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<sup>65</sup> Para 19(b)(i) of the National Policy on Education, 2004.

<sup>66</sup> Para 19(e) of the National Policy on Education, 2004.

<sup>67</sup> Para 19(f) of the National Policy on Education, 2004.

<sup>68</sup> Para 24(a) of the National Policy on Education, 2004.

<sup>69</sup> Para 25(a) &(b) of the National Policy on Education, 2004.

<sup>70</sup> However, to ensure smooth interaction with neighbouring countries, the National Policy on Education further deems it desirable for every Nigerian to speak French and it accordingly recognised French as the second official language in Nigeria and it shall be compulsory in Primary and Junior Secondary Schools but Non-Vocational Elective at the Senior Secondary School. See Para 10(b) of the National Policy on Education, 2004.

To ensure smooth interaction with neighbouring countries, the National Policy on Education also considered it desirable for every Nigerian to speak the French language and, as such, it recommends the French language as the second official language in Nigerian schools.<sup>71</sup> It was expected that this Policy if backed up by necessary support efforts, would be beneficial to learners given that Nigeria is surrounded by two Franco-phone countries. On the contrary, the experiences in Nigerian schools have shown that this was just a mere grandiose policy statement on paper which has not been given serious attention in terms of implementation. Very few schools in Nigeria today have French language teachers and government is doing little or nothing to remedy the situation. Inadequate number of teachers has been acknowledged as one of the major challenges facing Nigerian education sector and this is confirmed in a recent document by the Federal Ministry of Education.<sup>72</sup> Despite the importance of choice of language(s) as medium of instruction, many schools, especially in the rural areas, do not have languages teachers. This is impacting negatively on the right of learners to a quality education. Government should therefore double its efforts and commit resources towards learning and teaching the English language, the indigenous languages and the French Language respectively.

### **3 The Right to Freedom of Religion and a Cultural Right**

Culture, education, and religion are interwoven.<sup>73</sup> Religion is part of the culture of a people while education is the instrument through which both culture and religion are transmitted from one generation to another.<sup>74</sup> Religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. Religious practices are frequently informed by faith and custom and “while it is possible for a belief or practices to be purely religious...it is possible for it to be both religious and cultural.”<sup>75</sup> Culture for this purpose denotes all those practices, institutions, and beliefs of a group of people which uniquely identify the group. These are adopted as a means of survival or for purposes of

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<sup>71</sup> Para 10(b) of the National Policy on Education, 2004.

<sup>72</sup> The document put the existing shortfalls of teachers at primary education level at 338,147 and 581 for the Junior Secondary School. The document states *inter alia*: “[t]he major challenges include inadequate number of qualified teachers with a large number of Grade II teachers and secondary school leavers teaching; uneven distribution of teachers between urban and rural schools; poor remuneration and motivation and low teacher support.” See *Roadmap for the Nigerian Education Sector* (2009) 27.

<sup>73</sup> Dlamini “Culture, education, and religion” in Van Wyk, Dugard, de Villiers & Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 573.

<sup>74</sup> 573.

<sup>75</sup> *MEC for Education, KwaZulu-Natal & Others v Pillay & Others* 2008 (1) SA 474 (CC) para 47.

enriching life.<sup>76</sup> It also includes knowledge, belief, art, law, morals, customs, and all other capabilities and habits, acquired by man as a member of society.<sup>77</sup> Religion on the other hand entails the norms that regulate the relationship between human beings and their creator or deity and between members of a community.<sup>78</sup>

Freedom of religion entails “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”<sup>79</sup> The right to freedom of religion as well as a cultural right is given recognition in a number of international human rights instruments.<sup>80</sup> Article 18(1) of the ICCPR for instance provides that “[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” Article 18(2) of the ICCPR fortifies this right by providing that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

In terms of article 18(4) of the ICCPR, the States Parties undertake to have respect for the liberty of parents and when applicable, legal guardians, to ensure that religious and moral education of their children are in conformity with their own convictions. A similar provision was included in article 13(3) of the ICESCR. Commenting on the provision of article 18(4) of the ICCPR, the Human Rights Committee stated:

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<sup>76</sup> Van Wyk, et al *Rights and Constitutionalism* 573.

<sup>77</sup> Malinowski *The Dynamics of Culture Change* 5 Imp (1958) 1; see also Van Wyk, et al *Rights and Constitutionalism* 573.

<sup>78</sup> See Van Wyk, et al *Rights and Constitutionalism* 573-574.

<sup>79</sup> See *S v Lawrence* 1997 (10) BCLR 1348 (CC); 1997 (4) SA 1176 (CC) para 92, Chaskalson P; see also, *R v M Drug Mart* [1985] 1 SCR 295 336.

<sup>80</sup> See art 18 of the UDHR which provides, “Everyone has the right to freedom of thought, conscience and religion; this right includes the right to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” See also, art 27(1) of the UDHR which stipulates that everyone has the right to freely participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits. Other instruments on this issue include, Art 15 of the ICESCR 1966 which recognises the right of everyone to take part in cultural life; art 27 of the ICCPR which makes provision for persons who belong to ethnic, religious, or linguistic minorities not to be denied the right, in community with other members of their group, to enjoy their own culture; art 5 of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 which enjoins states which are parties to the Convention to recognise the right of every person, irrespective of race, colour, or national or ethnic origin, to equality before the law as regards cultural rights.

“The Committee is of the view that article 18(4) permits public school instruction in subject such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.”<sup>81</sup>

In principle it appears that the above comment equally applies even in the context of article 13(3) of the ICESCR. However, respect for parents’ religious convictions does not permit a parent to object to the integrated teaching of religious or philosophical information conveyed “in an objective, critical and pluralistic manner.”<sup>82</sup> The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and moral (or philosophical) convictions.<sup>83</sup> Given that religious instructions often form part of the school curriculum and that religious observances may as well be conducted at schools, this right is capable of impacting on the right of learners to education.

In *Sahin v Turkey*,<sup>84</sup> the Grand Chambers (GC) of the European Court of Human Rights considered, *inter alia*, the question of whether there was a violation of the applicant’s right to education arising out of the applicant insisting on wearing the Islamic headscarf. The applicant, a university medical student and a practising Muslim, who considered it her religious duty to wear the Islamic headscarf, was refused access to a lecture and a written examination at Istanbul University because she refused to comply with a university circular forbidding admission of students to lectures who wore the headscarf. The applicant submitted that the ban imposed by the public authorities on wearing the Islamic headscarf clearly constituted interference with her right to education, which had resulted in her being refused access to lectures and examinations. The applicant asked the court to find that the decision to refuse her access to the university when wearing the Islamic headscarf amounted to a violation of her right to education.

Although, the GC accepted that the regulations on the basis of which the applicant was refused access to various lectures and examinations for wearing the Islamic headscarf

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<sup>81</sup> HRC, General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18) UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 6.

<sup>82</sup> *Kjeldesen, Busk Madsen and Pedersen v Denmark*, Judgment of 7 December 1976, Series A, No. 23; (1979-80) 1 EHRR 711 para 53.

<sup>83</sup> *Kjeldesen, Busk Madsen and Pedersen v Denmark*, para 53.

<sup>84</sup> Judgment of 10 November 2005, 41 EHRR 8.

constituted a restriction on her right to education,<sup>85</sup> the GC, by sixteen votes to one, held that “there has been no violation of the first sentence of article 2 of Protocol 1 [to the ECHR]”<sup>86</sup> for several reasons. First, the right to education is not absolute, but may be subject to limitations; these are permitted by implication since the right of access “by its very nature calls for regulation by the State.”<sup>87</sup> Second, the right to education does not in principle exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with internal rules.<sup>88</sup> Third, the restriction was foreseeable to those concerned and it pursued the legitimate aims of protecting the rights and freedoms of others and to maintain public order. The obvious purpose of the restriction was to preserve the secular character of educational institutions.<sup>89</sup> Fourth, it would be unrealistic to imagine that the applicant, a medical student, was unaware of Istanbul University’s internal regulations restricting the places where religious dress could be worn or had not been sufficiently informed about the reasons for their introduction.<sup>90</sup>

The guarantee of this right at the international level forms the basis on which the right to freedom of religion and cultural rights in South Africa and Nigeria will now be examined.

### **3 1 The Right to Freedom of Religion and a Cultural Right in the South African Schools**

The South African Constitution guarantees the rights to freedom of religion, belief and opinion and preserves the right of cultural, religious and linguistic communities.<sup>91</sup> Section 30 of the South African Constitution provides that everyone has the right to use the language and to participate in the cultural life of their choice. It provides further that persons belonging to a cultural, religious or linguistic community may not be denied the rights, with other members of that community to enjoy their culture, practice their religion and use their language.<sup>92</sup> These rights intersect and are relevant to proper consideration of the right to education and must be respected in the processes of imparting education to an individual. Given the multi-racial nature of South Africa and its diverse cultures and religions, the enjoyment of the right to freedom of

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<sup>85</sup> At para 157.

<sup>86</sup> Para 162.

<sup>87</sup> Para 154.

<sup>88</sup> Para 156.

<sup>89</sup> Para 158.

<sup>90</sup> Para 160.

<sup>91</sup> See ss 15, 29, 30 and 31 of the Constitution respectively.

<sup>92</sup> See s 31(1)(a) of the Constitution.

religion and cultural right is easier said than done.<sup>93</sup> The fact that these rights are also linked with other fundamental rights such as the right to equality and language compounds the problem in the sense that there are often conflicting factors or interests which may have to be balanced. For instance, a school may have difficulty in balancing the conflicting interests/rights of learners to religious practices and the extent to which the school should accommodate them.

Section 15(1) of the South African Constitution guarantees the right to freedom of conscience, religion, thought, belief and opinion as well as the observances of such rights in educational institutions. Section 15(2) provides that “religious observances may be conducted at the state or state-aided institutions, provided that- (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.”<sup>94</sup> Governing bodies of public schools are allowed to issue rules relating to religious observances if such are conducted on an equitable basis and the attendance at them by learners and staff is free and voluntary.<sup>95</sup> The provision of section 15(2) qualified the freedom of religion clause in section 15(1) and puts it beyond doubt that religion in schools is constitutionally protected.<sup>96</sup>

It is observed that the right to freedom of religion as enshrined in section 15(2) of the South African Constitution is comparable with that in the United States and Canada and, as such, the decisions on the issue in those countries will be of help in interpreting the content of this right.<sup>97</sup> In terms of the Constitution, religious observances must be conducted on an equitable basis and attendance at them should be free and voluntary. In the Canadian case of *Zylberberg v Sudbury Board of Education*,<sup>98</sup> a subordinate legislation required a public school to open or close each day with “religious exercise consisting of the scriptures or other suitable readings and repeating of the Lord’s Prayer or other suitable prayer.” By a majority decision,

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<sup>93</sup> See Mpedi & Vrancken “Language and Culture” in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* 187.

<sup>94</sup> See also, s 7 of the South African Schools Act; *S v Lawrence* 1997 (4) SA 1176 (CC) para 119; see also s 31(1) of the Constitution which provides: “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

<sup>95</sup> See s 7 of the Schools Act & s 15(1) of the South African Constitution.

<sup>96</sup> See Malherbe (2000) 4 *European Journal for Education Law and Policy* 53.

<sup>97</sup> See Devenish “Aspects of the Right to Education in the Constitution” 1998 31(2) *De Jure* 224 233.

<sup>98</sup> (1988) 65 OR (2d) 641, 654 (CA).

the Ontario Court of Appeal held that the regulation was unconstitutional, since it “imposed Christian observances upon non-Christian pupils and religious observances on non-believers.”<sup>99</sup> Compulsory attendance at school prayers would infringe freedom of religion.<sup>100</sup> Also, any endorsement of a religion which has the effect of coercing persons, directly or indirectly, to observe the practices of a particular religion or of placing constraints on people in relation to the observance of their own different religion will also contravene section 15(2).<sup>101</sup> In *S v Lawrence*,<sup>102</sup> the court expressed the view that in the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could amount to the coercion of pupils to participate in the prayers of the favoured religion.<sup>103</sup> However, private schools may legitimately restrict admission to pupils from a particular religious group and will not have to treat all religions equitably when it comes to religious observances and religious education.<sup>104</sup> Nonetheless, private schools may not compel learners to attend religious observances as this would amount to a violation of the freedom of religion.<sup>105</sup>

Religious freedom entails the right to believe privately as one may choose, but also to manifest those beliefs by expressing, confessing and observing them publicly.<sup>106</sup> It entails that one may individually professes and manifest one’s beliefs, but one may also manifest them

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<sup>99</sup> Similarly, in *Canadian Civil Liberties Association v Ontario* (1990) 71 OR (2d) 341 (CA), the Ontario Court of Appeal invalidated a regulation requiring public schools to devote two periods a week to “religious education.” The court found that the purpose of the regulation was the indoctrination of Christian belief, as opposed to multi-cultural religious education, and that it was not saved by the exemption because parents would be reluctant to use it for fear of embarrassing their children.

<sup>100</sup> *S v Lawrence* 1997 (10) BCLR 1348 (CC); 1997 (4) SA 1176 (CC) para 103.

<sup>101</sup> *S v Lawrence* para 104.

<sup>102</sup> *S v Lawrence* (supra).

<sup>103</sup> According to Chaskalson P, para 103, “the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion... s 14(2) makes clear that there should be no such coercion. It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis. I doubt whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the ‘non-believer’.”

<sup>104</sup> Currie & de Waal *The Bill of Rights Handbook* 354; see also, *Wittmann v Deutscher Schulverein, Pretoria* 1998 4 SA 423 (T), where the court enforced the contract between a mother and the private school in which she had put her daughter, and rejected the mother’s application for her daughter’s exemption from compulsory religious instruction.

<sup>105</sup> Currie & de Waal *The Bill of Rights Handbook* 354; see also, Govender & Bernard “To Exempt or not to Exempt- Some Lessons for Educators and Administrators” (2009) 30(1) *Obiter* 1-16.

<sup>106</sup> Malherbe (2008) 2 *TSAR* 279; Malherbe (2000) 4 *European Journal for Education Law and Policy* 53.

collectively by associating with others in worship, confession and other acts of observance.<sup>107</sup> The right to conduct religious observances in schools may cover for example, individual and collective Scripture reading, prayers, worship, moments of silence and display of religious symbols.<sup>108</sup> Freedom of religion also includes both the right to a belief and the right to express that belief in practice. The right may be violated by measures that pressurise persons into acting or abstaining “from acting in a manner contrary to their beliefs” for the sake of conforming to certain religious beliefs or practices.<sup>109</sup>

The South African Policy on Religious Education prescribes a compulsory section of the life orientation learning area which maintains a neutral approach to religious education.<sup>110</sup> In terms of this Policy, learners are to be taught about a world of religious diversity, and at the same time, be encouraged to think in terms of new national unity in South Africa.<sup>111</sup> In a democratic system, the right of people to hold and express different beliefs from other people should be recognised, and children should learn to respect such a right.<sup>112</sup> Given the South Africa nature as a multi-religious society, it is important that children learn about various religions adhered to in society.<sup>113</sup> In terms of this Policy, all religions must be treated equally and religious observances must be conducted on an equitable basis. Accordingly, the Policy states: “there is no place in the classroom...for an education that promotes any one creed or belief over any other.”<sup>114</sup> This requires the governing body to ensure that one religion is not put at an advantage or disadvantage vis-à-vis others.<sup>115</sup>

Although, the right to freedom of religion, belief and opinion is undoubtedly fundamental, balancing the exercise of this right with other fundamental rights may pose some difficulties. For instance, determining how far an educational institution should go in accommodating learners to observe their religious practices when such practices are in conflict with the school’s rules and regulations may pose considerable difficulties to school

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<sup>107</sup> See Malherbe (2000) 4 *European Journal for Education Law and Policy* 53.

<sup>108</sup> 53.

<sup>109</sup> See *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC); 2000 (4) SA 757 (CC) para 19.

<sup>110</sup> Ministry of Education *Manifesto on Values, Education and Democracy*, Pretoria (2001) 45.

<sup>111</sup> 45.

<sup>112</sup> Horn *Tydskrif Christelike Wetenskap* 29.

<sup>113</sup> Horn “South African Education Policy and the Right to Religious Freedom” *Tydskrif Christelike Wetenskap* – 2006 (1<sup>st</sup> & 2de Kwartaal) 23-34 29.

<sup>114</sup> Ministry of Education *Manifesto on Values, Education and Democracy* 43.

<sup>115</sup> Malherbe (2000) 4 *European Journal for Education Law and Policy* 54.



administration. The case of *MEC for Education, Kwazulu-Natal & Others v Pillay*,<sup>116</sup> examined below, aptly addressed such a situation.<sup>117</sup> The case raised vital questions about the nature of discrimination under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act (“the Equality Act”)<sup>118</sup> as well as the protection afforded to cultural and religious rights in the public school setting. This case is fundamental as it intersects with many constitutional issues such as the right to equality and freedom from unfair discrimination on account of culture and religion;<sup>119</sup> freedom of religion, belief and opinion;<sup>120</sup> right to education;<sup>121</sup> language and culture right<sup>122</sup> among others.

The facts of this case were as follows: the first and second applicants were the Members of the Executive Council for Education in KwaZulu-Natal and School Liaison Officer for the KwaZulu-Natal Education Department. The third and fourth applicants were the headmistress of Durban High School and the Chairperson of the Governing Body of the School respectively. The respondent, Ms Navaneethum Pillay sued on behalf of her daughter, Sunali Pillay, who was at the material time a learner at the Durban Girls High Schools. She returned from the school holiday in the first week of the fourth term in the year 2004 wearing a nose stud, having had her nose pierced during the holiday. The nose stud was categorised as outside the jewellery (earrings) which the school’s code of conduct allowed.

The third applicant sought an explanation from the respondent for her daughter’s decision to wear the nose stud. The respondent explained that she allowed the piercing for several reasons, including the fact that it was a time-honoured tradition of South India, from where the Pillay family originated. She maintained that her daughter was not wearing the nose stud for adornment and fashion purposes but as part of the family traditions and culture. The fourth appellant took a decision that the respondent’s daughter should not be allowed to wear the nose stud. The respondent then addressed a letter to the first applicant appealing and asserting that 4<sup>th</sup> applicant’s decision was a violation of her daughter’s constitutional rights to

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<sup>116</sup> 2008 (1) SA 474 (CC).

<sup>117</sup> See also, *Antonie v Governing Body, Settlers High School* 2002 4 SA 738 (C). In that case, a learner who embraced the Rastafarian religion was suspended by the governing body for serious misconduct after she came to school wearing her dreadlocks under a cap. The suspension was set aside because in view of the court adhering to religious dress codes did not amount to serious misconduct under the disciplinary code of the school.

<sup>118</sup> No. 4 of 2000.

<sup>119</sup> S 9 of the Constitution.

<sup>120</sup> S 15.

<sup>121</sup> S 29.

<sup>122</sup> Ss 30 & 31.

practice the religious and cultural traditions of her choice, especially when they were common practice to the rest of the family. She argued that this right took precedence over any school code and that the wearing of a nose stud had no bearing on the actual manner, attitude and conduct of the learner at the school.

The appeal was rejected and Sunali was directed to remove the stud, failing which the matter would be referred to the 4<sup>th</sup> applicant for disciplinary action to be taken against her. This prompted the respondent, as complainant, to institute proceedings at the Equality Court and obtained an interim order restraining the school from interfering, intimidating, harassing, demeaning, humiliating or discriminating against Sunali. However, after hearing the parties, the Durban Equality Court came to the conclusion that the school's actions against the respondent's daughter were reasonable and fair in the circumstances and that the school did not unfairly discriminate against her. It held further that Sunali's wearing of nose stud was in violation of the school code and that any harm that might have been caused was as a result of Sunali and her mother's own doing. This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court. The High Court allowed the appeal and held that the school code of conduct prevented the appellant's daughter from wearing a nose stud which is of cultural and/or religious significance to her and her group.<sup>123</sup>

The school then brought an application to the Constitutional Court against the High Court decisions. The Constitutional Court declared that the decision of the Governing Body of Durban Girls' High School to refuse Sunali Pillay an exemption from its Code of Conduct to allow her to wear a nose stud discriminated unfairly against her.<sup>124</sup> The court expressed the view that "culture and religion sing with the same voice and it is necessary to understand the nose stud in that light as an expression of both religion and culture."<sup>125</sup> It found that Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act.<sup>126</sup>

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<sup>123</sup> For the High Court judgment, see *Pillay v MEC for Education, Kwazulu-Natal & Others* 2006 (6) 363; 2006 (10) BCLR 1237 (N)).

<sup>124</sup> Para 119.

<sup>125</sup> Para 60.

<sup>126</sup> Para [68]. According to the court: "[t]he discrimination has had a serious impact on Sunali and, although the evidence shows that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exception. Allowing the stud would not have imposed an undue burden on the school. A reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud. I would therefore confirm the High Court's finding of unfair discrimination." See Langa CJ, at para 112.

What is interesting about this decision is that the Court downplayed its earlier religion decisions. For example, the Court held that the plaintiff had a strong accommodation case unlike the Rastafarian lawyer in *Prince v President of the Law Society of the Cape of Good Hope*.<sup>127</sup> Unlike the decision in *Pillay's case*, the court showed little sympathy for the profound conflict between Mr. Prince's faith and his career. The majority in *Prince's case* did not appear to give sufficient protection to the appellant's right to freedom of religion. The decision appears to be excessively deferential in accepting that the State's interest in banning all consumption of cannabis outweighed the possibility of even a circumscribed exemption.<sup>128</sup>

### **3 2 The Right to Freedom of Religion and Cultural Right in the Nigerian Schools**

Nigeria is a multi-religious country and, as such, the Constitution forbids the federation or any component part thereof from adopting any religion as the state religion.<sup>129</sup> In terms of section 10 of the Nigerian Constitution, the government of the federation or of a state shall not adopt any religion as state religion. As a secular state, Nigeria is not expected to base its legislation or direct its laws with regard to morality, education and economics to any particular religion.<sup>130</sup> Section 38 of the Nigerian Constitution preserves the right to freedom of thought, conscience and religion in these words:

(1) "Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance."

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<sup>127</sup> 2002 (3) BCLR 231 (CC). In his dissenting judgement in *Prince's case*, Ngcobo J at paras 64, 65 & 66 advocated that given the South Africa's religion provisions which were designed to promote diversity such accommodation/exemption permitting Prince to use cannabis for religious purpose was necessary. The majority concluded that an exemption or permit system would have inherent administrative problems because a police officer could not determine whether particular cannabis stashes were illicit or religious. The government's justification for banning cannabis outweighed the burden on Mr Prince because the state's goal was to cut off the supply of potentially dangerous drug. See Chaskalson J, paras 116, 129-130 & 134.

<sup>128</sup> See Lenta "Judicial Restraint and Overreach" (2004) 20 *South African Journal of Human Rights* 544 565.

<sup>129</sup> Taiwo "Justifications, Challenges and Constitutionality of the Penal Aspects of Shari'ah Law in Nigeria" (2008) 17(1) *Griffith Law Review* 183-202 188.

<sup>130</sup> See also, the First Amendment to the US Constitution which recognises the freedom of religion, but adds that "Congress shall make no law respecting an establishment of religion." In *Everson v Board of Education of the Township of Ewing* 330 US 1 (1947) 15-16, Black J said: "[t]he 'establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer some religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion... In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" See also, Taiwo (2008) 17(1) *Griffith Law Review* 188; see also, Eso *Thoughts on Law and Jurisprudence* (1990) 297.

(2) “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.”

(3) “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 and denomination.”

Education laws of the various states of the federation also contain provisions protecting pupils from compulsory religious instruction in schools.<sup>131</sup> The wishes of the parents are very important with regards to religious instruction of the pupils. In other words, a parent may withhold his or her child from participating in the religious instruction even when it accords with his/her religious denomination.<sup>132</sup> Section 25(1) of the Oyo State Education Law<sup>133</sup> recognises this as it states: “if the parent of any pupil in attendance at any public institution requests that he [or she] be wholly or partly excused from attendance at religious worship or religious instruction, then until the request is withdrawn, the pupil shall be excused from such attendance accordingly.” However, the proprietor of “a voluntary agency institution” or private school has discretion to determine what religious worship and religious instruction pupils in such an institution should be given.<sup>134</sup> A voluntary agency institution is defined as one wholly financed by an agency other than government.<sup>135</sup> For schools that are financed by a community, the local education authority is to direct what religious worship should be given.<sup>136</sup>

Given the constitutional guarantees of the freedom of choice,<sup>137</sup> and the right to privacy,<sup>138</sup> it is submitted that no student or learner may be compelled to observe religious

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<sup>131</sup> For example, section 22 of the Oyo State Education Law (Cap 36 Laws of Oyo State 1978) provides: “Subject to the provisions of section 23, 24 and 25 there shall be provided in the curriculum of every public school a reasonable period during which, *subject to the wishes of their parents*, children of the same religious denomination or faith may together worship and receive religious instruction in accordance with the tenets of such religious denomination or faith.” Italics are for emphasis. See also, s 30 of the Education Law, Laws of Northern Nigeria which applies to all the states carved out of the former Northern Region; s 18 of the Education Law, Laws of Bendel State 1976 (applicable in Delta and Edo States); s 9 Education Law of Cross Rivers State; s 22 of the Oyo State Education Law 1978 among others.

<sup>132</sup> See Chianu *School Law for Proprietors, Teachers and Parents* 2 ed (2007) 77.

<sup>133</sup> Oyo State is one of the 36 component States that make up Nigeria.

<sup>134</sup> S 23 of the Oyo State Education Law.

<sup>135</sup> S 2 of the Oyo State Education Law.

<sup>136</sup> S 24 of the Law.

<sup>137</sup> See *Agbai v Okagbue* (1991) 2 NSCC 499 at 527 & 538; *Nkpa v Nkume* [2001] 6 NWLR (pt 710) 543.

<sup>138</sup> See s 37 of the CFRN, 1999. The right to privacy has been construed to mean a right to be let alone so long as a person’s conduct does not impinge on the rights of others. See Chianu *School Law for Proprietors, Teachers and Parents* 80.

worship or associate with others for any religious activities in schools.<sup>139</sup> It is submitted that while the secular nature of Nigeria as a country does not impose an outright prohibition of religious worship or prayer in schools, such should be done on equitable basis. Schools should not promote one religion at the expense of the other. While it is customary in Nigerian schools to start schools' daily assembly with devotion, schools administrators should make a conscious effort at balancing between Christianity and Islam, which are the two dominant religions in the country. In this regard, decisions on the place of religious activities in educational institutions from other jurisdictions such as the United States of America may be helpful when interpreting the Nigerian Constitution on this issue.<sup>140</sup>

The right to freedom of religion or religious observance in constitutional context should, however, be distinguished from religion as a subject of study in schools. Religious knowledge is usually a part of the school curriculum. But in teaching this subject, schools and teachers should endeavour to expose the students to religious knowledge without giving a particular religion a priority. A particular religion or denomination should not be promoted or relegated at the expense of the other, and this is paramount in view of the sensitive nature of religion in a volatile society such as Nigeria. In the same vein, where a learner has an option of choosing between two or more religions as subject of study, he or she may not be compelled to choose a particular religious education. While a school teacher has the duty to provide religious teaching in accordance with the school curriculum, he or she should not use the avenue to indoctrinate or

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<sup>139</sup> The Child's Rights Act, 2003 also guarantees this right by providing that every child has a right to freedom of thought, conscience and religion. It states further that parent and, where applicable, legal guardians should provide guidance and direction in the exercise of the right having regard to the evolving capacities and the best interest of the child. The Act obliges all persons, bodies, institutions and authorities to respect the duty of the parents and legal guardians providing guidance and direction in the enjoyment of this right guaranteed under the Act. See s 7(1)-(3) of the Act.

<sup>140</sup> For instance, in *School District v Schempp* 374 US 203, 83 S.Ct 1560, 10 L.Ed 2d 844 (1963), children in public schools were made to read the Bible (without comment) and recite the Lord's Prayer as part of daily opening exercise. Some professed atheist parents challenged this activity and the Supreme Court held that the practice violated the First Amendment. Similarly, in *Engel v Vitale* 370 US 421, 82 S.Ct, 8 L.Ed 2d 601 (1962), the New York State composed a prayer that a public school is instructed to be said aloud daily by each class. When the prayer is recited, if a child or his parents feel that he cannot participate, he may stand or sit, in respective attention, while the other children take part in the ceremony. Or he may leave the room. The Supreme Court struck down the prayer as it violates the First Amendment. The court, per Black J., held as follows: "In this country it is not part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government... [The colonists] knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval [upon] one particular kind of prayer or one particular form of religious services... When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain... Governmentally established religions and religious persecutions go hand in hand."

impose a particular religious view on the learners. Doing this will violate the constitutional right of the learners to freedom of thought, conscience and religion, including freedom to change his or her religion or belief as articulated above.

#### **4 The Right not to be Treated or Punished in a Cruel or Degrading Way**

School discipline and corporal punishment in schools is always a contentious issue, the reason being that it usually impacts on the children's right to education, the right to privacy, and the right to freedom and security of the person, specifically, the right not to be treated or punished in a cruel, inhuman or degrading way.<sup>141</sup> Given that learners have the right to receive education in an orderly and safe environment and for that purpose, sound and reasonable disciplinary measures are necessary.<sup>142</sup> The fact that some learners are unruly and behave in a dangerous manner unless there is strict discipline in schools makes this issue a complicated and contentious one. Discipline is about positive behaviour management aimed at promoting appropriate behaviour and developing self-discipline and self-control in learners.<sup>143</sup>

The UDHR, the CRC as well as other international and regional human rights instruments all provide children with an absolute right not to be subjected to torture, inhuman or degrading treatment.<sup>144</sup> The interpretation of these provisions<sup>145</sup> has effectively ended the use of corporal punishment in schools in many countries.<sup>145</sup> The CRC presents the most comprehensive and irresistible case for such interpretation as it contains many provisions prohibiting corporal punishment.<sup>146</sup> In this regard, article 19(1) of the CRC provides:

“State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”<sup>147</sup>

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<sup>141</sup> Malherbe (2008) 2 *TSAR* 281.

<sup>142</sup> 281.

<sup>143</sup> See Squelch *Discipline* (2000) 2; see also, Van der Bank “Codes of Conduct for Learners” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 302-303.

<sup>144</sup> See art 5 of the UDHR, 1948; art 7 of the ICCPR, 1966; art 5 of the ACHPR, 1981.

<sup>145</sup> See Lundy “Schoolchildren and Health: The Role of International Human Rights Law” in Harris & Meredith (eds) *Children, Education and Health (International Perspectives on Law and Policy)* (2005) 9.

<sup>146</sup> Bitensky *Corporal Punishment of Children: A Human Rights Violation* (2006) 50.

<sup>147</sup> See also art 37(a) of the CRC which prohibits torture or other cruel, inhuman or degrading treatment or punishment.

This provision protects children from all forms of physical and mental maltreatment perpetrated by parents, legal guardians or any other person who takes care of the child.<sup>148</sup> The phrase “any person who has the care of the child” in the provision includes teachers and other personnel in schools.<sup>149</sup> The CRC Committee in its concluding observations on Bolivia has confirmed the applicability of the provision of this article to schools and other educational institutions.<sup>150</sup> The CRC goes further in article 28(2) by mandating State parties to take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the Convention.<sup>151</sup> The CRC Committee has unequivocally interpreted this provision as mandating all nations to abolish corporal punishment of children in schools. The Committee asserts:

“Education must also be provided in a way that represents the strict limits on discipline reflected in article 28(2) and promote non-violence in school. The Committee has repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline....”<sup>152</sup>

The Committee has also taken the position that corporal punishment of children is inconsistent with the CRC as a whole. It declares, “[i]n the framework of its mandate, the Committee has paid particular attention to the child’s right to physical integrity. In the same spirit, it has stressed that corporal punishment of children is incompatible with the Convention and has often proposed the revision of existing legislation, as well as the development of awareness and education campaigns, to prevent child abuse and the physical punishment of children.”<sup>153</sup> Similarly, the UN Special Rapporteur on Torture posits that all corporal punishment of children, regardless of its level of severity, the degree of suffering caused, or any other aspects of it, is inimical to the prohibition on torture and other cruel, inhuman, or degrading treatment or punishment, under the Children’s Convention and other international human rights document.<sup>154</sup> States parties are therefore called upon to take adequate measures, in

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<sup>148</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child - Article 28*: 60.

<sup>149</sup> 60.

<sup>150</sup> See CRC Committee, Concluding Observations: Bolivia (UN Doc. CRC/C/80, 1998) para 108.

<sup>151</sup> See also, art 37(a) of the CRC which provides in part that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...”

<sup>152</sup> CRC General Comment No. 1: The Aims of Education CRC/GC/2001/1 (17/04/2001) para 8.

<sup>153</sup> See Report of the UN Committee on the Rights of the Child on the Seventh Session, UN Doc. CRC/C/34, Annex IV, at 63 (Nov. 1994).

<sup>154</sup> See Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A57/173 (2002) para 53.

particular legal and educational ones, to ensure that the right to physical and mental integrity of children is well protected in the public and in the private spheres.<sup>155</sup>

Bitensky has argued that corporal punishment serves no lasting good because there are other more effective ways of changing children's misbehaviour other than through corporal punishment.<sup>156</sup> She asserts that corporal punishment of children is gratuitous and that there are many nonviolent approaches to discipline that are more productive than spanking and which can assist the child to develop inner controls.<sup>157</sup> She concludes that corporal punishment is ethically repugnant.<sup>158</sup> It is also argued that corporal punishment constitutes a violation of the right against torture.<sup>159</sup> These arguments have been used to advocate for the abolition of corporal punishment in schools.

It should be noted, however, that there is a thin line of demarcation between school discipline and corporal punishment in the sense that a breach of school rules and regulation is often sanctioned with corporal punishment. Corporal punishment is associated with school discipline and to enforce discipline, corporal punishment may, at times, be administered on erring learners.<sup>160</sup> Having the foregoing as background, the positions under the South African and Nigerian laws will now be examined.

#### **4 1 School Discipline and Corporal Punishment in South African Schools**

The South African Schools Act provides that a code of conduct aiming at establishing a disciplined and purposeful school environment dedicated to the improvement and maintenance of the quality and of the learning process may be adopted by a governing body.<sup>161</sup> The code of conduct has to contain provisions of due process which safeguard the interests of the learners and any other party involved in disciplinary proceedings.<sup>162</sup> The Act states further that a learner may be suspended by a governing body after a fair hearing for a period not longer than one

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<sup>155</sup> Report of the Special Rapporteur of the Commission on Human Rights on Question of Torture para 53.

<sup>156</sup> Bitensky *Corporal Punishment of Children* 2; see also, Newell *Children are People Too: The Case against Physical Punishment* (1989) 19; Samalin, *Loving your Child is not enough: Positive Discipline that Works* (1987) 74.

<sup>157</sup> Bitensky *Corporal Punishment of Children* 2-3.

<sup>158</sup> Bitensky *Corporal Punishment of Children* 3; Kersey *Don't Take It Out on Your Kids! A Parent's Guide to Positive Discipline* (1994) 60-61.

<sup>159</sup> See art 2(1), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which requires states parties to prevent torture.

<sup>160</sup> See Bitensky *Corporal Punishment of Children* 2.

<sup>161</sup> The guidelines to be considered by the governing bodies in adopting a code of conduct are determined by the Minister after consultation with the council of education ministers. S 8(1) & (2) of the Schools Act.

<sup>162</sup> See s 8(5) of the Schools Act & s 33 of the 1996 Constitution.



week as a corrective measure, or may be suspended for such period pending a decision by the head of department.<sup>163</sup> A learner may be expelled only by the head of department if found guilty of serious misconduct after a fair hearing.<sup>164</sup> A right of appeal against such expulsion lies to the member of the executive council.<sup>165</sup>

In terms of section 8(2) of the South African Schools Act, the purpose of the code of conduct is to establish a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process. It is essential that disciplinary measures meet the requirements of fairness, justice, reasonableness and legality in order to be effective.<sup>166</sup> Fairness implies that the punishment must discipline the learner but must not cause physical or psychological trauma while the requirement of justice entails that the punishment must fit the offence.<sup>167</sup> Reasonableness requires that the type of punishment must not be unreasonable while legality on the other hand indicates that corporal punishment as a type of punishment is not legally permissible.<sup>168</sup> This implies, *inter alia*, that the learner or the parent of the learner may not give permission to any educator to use corporal punishment as a disciplinary measure.<sup>169</sup>

The school code of conduct must comply with the principles of due process of the law; in that when the right of a learner is likely to be adversely affected, he or she has to be informed on time of any action that may be taken against him or her and be afforded an opportunity to be heard. Furthermore, written reasons must be given for any action taken in terms of such code of

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<sup>163</sup> See s 9(1)(a) and (b) of the Schools Act.

<sup>164</sup> See s 9(2)(a), (b) &(3) of the Schools Act.

<sup>165</sup> See s 9(4) of the Schools Act.

<sup>166</sup> Davel (ed) *Introduction to Child Law in South Africa* 310.

<sup>167</sup> See *Antonie v Governing Body of Settlers High School and Others* 2002 (4) SA 738 (C) where it was held that a learner's conduct must be of a particularly serious or aggravating nature before it can be classified as serious misconduct. The court was of the view that an offence against the school code of conduct could not be classified as such behaviour and that it was inappropriate to categorise the growing of dreadlocks or wearing of a cap, even if in conflict with a code of conduct, as a serious misconduct.

<sup>168</sup> See s 10 of the South African Schools Act 84 of 1996; s 3(4)(k) of the National Education Policy Act 27 of 1996; see also, *S v Williams* 1995 (7) BCLR 861 (CC), 1995 (3) SA 632 (CC) para 90, where it was held: "the deliberate infliction of pain with a cane on a tender part of the body, as well as the institutionalized nature of the procedure, involves an element of cruelty in the system that sanctions it... The juvenile is, indeed, treated as an object and not as a human being." See also, ss 10, 12(1)(c)-(e) & 28(d) of the 1996 South African Constitution; de Kock & de Kock "Society, Human Rights and Corporal Punishment: *Quo Vadimus?*" 1999 20(1) *Obiter* 133-144 138; see also, Pete "To Smack or Not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment on their Children? 1998 *SAJHR* 430.

<sup>169</sup> Davel (ed) *Introduction to Child Law in South Africa* 310-311; Naisu, Joubert, Mestry, Mosoge & Ngcobo *Education Management and Leadership A South African Perspective* (2008) 31; see also, s 10 of the SASA.

conduct.<sup>170</sup> Disciplinary action and procedures adopted must comply with the right to just administrative action.<sup>171</sup> The procedure must comply with the rule of fair hearing such as the requirements in respect of due notice, and opportunity to state their case.<sup>172</sup> Serious forms of discipline such as suspensions and expulsions, or dismissal of a learner from class for misbehaviour may negatively impact on the right to education, as such, that kind of punishment can only be justified if it complies with the requirements of the provision of section 36 of the South African Constitution.<sup>173</sup>

The issue of the legality of corporal punishment in South African schools was fiercely contested in *Christian Education South Africa v Minister of Education*.<sup>174</sup> The central question in that case was whether Parliament, by enacting the South African Schools Act 84 of 1996 which prohibited corporal punishment in schools, violated the rights of parents of children at independent schools who, in line with their religious convictions, had consented to its use. The appellant averred that corporal correction was an integral part of the active Christian ethos which it sought to provide its learners attending its member schools and that the blanket prohibition of its use in those schools invaded individual, parental and community rights to practice religion freely. Having been unsuccessful in the court *a quo*, the appellant was granted leave to appeal to the Constitutional Court on the grounds that the blanket prohibition contained in section 10 of the Schools Act infringed the provisions relating to privacy; freedom of religion, belief and opinion; education; language and culture; and cultural, religious and linguistic communities articulated respectively in the South African Constitution.

Dismissing the appeal, the Constitutional Court held that the respondent had established that the prohibition of corporal punishment was part and parcel of a national programme to transform the education system and bring it in line with the letter and spirit of the South African Constitution. The creation of uniform norms and standards for all schools was crucial for

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<sup>170</sup> See s 33 of the Constitution.

<sup>171</sup> It is submitted that a code of conduct for learners is a form of subordinate legislation, and should, therefore, reflect the democratic principles of the Constitution by supporting the values of human dignity, equality and freedom. See Naisu, et al *Education Management and Leadership* 155.

<sup>172</sup> Malherbe (2008) 2 *TSAR* 282; see also, *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 3 SA 476 (T); *Administrator, Transvaal v Traub* 1989 4 SA 731 (A).

<sup>173</sup> Malherbe (2008) 2 *TSAR* 281-282.

<sup>174</sup> 2000 (4) SA 757 (CC).

educational development as was a coherent and principled system of discipline.<sup>175</sup> According to the Court,

“The state is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious or Belief declares in art 5(5) that: ‘practices of a religious or belief in which a child is brought up must not be injurious to physical or mental health or to his full development...’<sup>176</sup>

Although corporal punishment or a punitive approach may not necessarily facilitate constructive learning or lead to a permanent change of behaviour, positive discipline or self-discipline, in most cases, instilled discipline. Research indicates that there is a massive and worsening lack of discipline in South African schools which is attributed partly to the ban on corporal punishment, as the available alternatives do not seem to address the problem effectively.<sup>177</sup> In this regards, Malherbe wonders whether it is in the best interest of learners to be subjected to the dire consequences of poor discipline in schools, such as physical danger, emotional uncertainty and disruption of their education simply because some schools and teachers have abused corporal punishment in the past.<sup>178</sup> It is submitted, however, that the effect of the decision of the Constitutional Court in *Christian Education South Africa* is that corporal punishment remains outlawed in the South African schools.

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<sup>175</sup> Para 39.

<sup>176</sup> Para 40. See also, the Canadian case of *P v S*, 108 DLR (4<sup>th</sup>) 287 at 317, where L’Heureux-Dube J held as follows: “in ruling on a child’s best interests, a court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by parent throughout his or her right to access affects the child’s best interests. I am of the view, finally, that there would be no infringement of the freedom of religion provided for in s. 2(a) were the Charter to apply to such orders when they are made in the child’s best interests. As the court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others whereas parents are free to choose and practice the religion of their choice, such activities can and must be restricted when they are against the child’s best interests, without thereby infringing the parents’ freedom of religion.”

<sup>177</sup> See Malherbe (2008) 2 *TSAR* 282; de Kock & de Kock 1999 20(1) *Obiter* 144; Crocker & Pete “Cutting the Cane: A Comparative Analysis of the Struggle to Banish Corporal Punishment from Schools in Britain and South Africa” (Part 1) (2009) 30(1) *Obiter* 44-62; Crocker & Pete “Cutting the Cane: A Comparative Analysis of the Struggle to Banish Corporal Punishment from Schools in Britain and South Africa” (Part 2) (2009) 30(2) *Obiter* 224-242.

<sup>178</sup> Malherbe (2008) 2 *TSAR* 282.

## 4 2 Discipline and Corporal Punishment in Nigerian Schools

In Nigeria, there is no direct statutory provision banning corporal punishment in schools. In fact, the latest law on child issues in the country, the Child's Rights Act makes no reference to corporal punishment in schools other than in its section 221 which prohibits judicial corporal punishment for children less than 18 years of age. However, the Nigerian Constitution guarantees the right to dignity in the following terms: "[e]very individual is entitled to respect for the dignity of his person, and accordingly, no person shall be subjected to torture or to inhuman or degrading treatment."<sup>179</sup> The pertinent issue is whether corporal punishment of students constitutes torture, inhuman or degrading treatment within the constitutional contemplation. Guidance is taken in this respect from judicial interpretation in jurisdictions with similar provisions as Nigeria. Coming at hand is the provision of article 8(2)(b) of the Namibian Constitution which is *impari material* with section 34(1)(a) of the Nigerian Constitution under consideration. It says: "[n]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

In *Ex parte Attorney General Namibia: In re Corporal Punishment by the Organs of State*,<sup>180</sup> the issue was whether the infliction of corporal punishment in government schools was contrary to article 8 of the Namibian Constitution. Mahomed AJA held that although punishing male students at government schools was regulated by a code issued by the Ministry of Education, Culture and Sport, such punishment inflicted as some kind of sentence for acts of indiscipline "... remains an invasion on the integrity of the student sought to be punished. It is equally clearly open to abuse. It is often retributive. It is equally alienating. It is equally degrading to the student sought to be punished..."<sup>181</sup> Declaring corporal punishment unconstitutional, the court held: "I am accordingly of the view that any corporal punishment inflicted upon students at Government schools pursuant to the provisions of the relevant code issued by the Ministry of Education, Culture and Sport would be in conflict with art 8(2) of the Namibian Constitution."<sup>182</sup>

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<sup>179</sup> S 34(1)(a) of the 1999 Nigerian Constitution.

<sup>180</sup> 1991 (3) SA 76 (NmSC).

<sup>181</sup> *Ex parte Attorney General Namibia: In re Corporal Punishment by the Organs of State* 93G-I.

<sup>182</sup> Mahomed, AJA at 95A-B. In his concurring judgment, Berker CJ held as follows: "[i]t seems to me that once one has arrived at the conclusion that corporal punishment *per se* is impairing the dignity of the recipient or subjects him to degrading treatment or even to cruel or inhuman treatment or punishment, it does not on principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a

A similar position was taken in the Zimbabwean case of *S v A Juvenile*.<sup>183</sup> In that case, the court held that “the imposition of sentence of whipping or corporal punishment upon juveniles is an inhumane or degrading punishment or treatment which violates the prohibition against such punishment contained in s 15(1) of the Constitution of Zimbabwe. In my opinion, judicial corporal punishment is unconstitutional and breaches s 15(1), whether it is imposed on an adult or a juvenile...”<sup>184</sup> Notwithstanding that these cases are to the effect that corporal punishment in school is illegal, it is submitted that the correct interpretation of this provision should be that corporal punishment within the school system designed to ensure discipline is outside the contemplation of this provision of the Nigerian Constitution.<sup>185</sup> There is no way in which the words “corporal punishment could come within the meaning of the word “torture” as defined under the international human rights instruments.<sup>186</sup>

There are Nigerian cases which by implication sanction corporal punishment by school teachers. *Olusa’s case* and *Aliri’s case* examined below are examples.<sup>187</sup> In *Olusa v Commissioner of Education, Ondo State and Olaniyan*,<sup>188</sup> the second defendant was the plaintiff’s schoolteacher at Christ Apostolic Church Grammar School, Akure, Ondo State. The schoolteacher invited the plaintiff to serve her in her quarters after regular school hours. Later,

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substantial kind- even if very moderately applied and subject to very strict controls, the fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment.” At 97C-E.

<sup>183</sup> 1990 (4) SA 151 (ZS).

<sup>184</sup> Dumbutshena, CJ at 162 H-I. See also, *S v Ncube*; *S v Tshuma*; *S v Ndhlovu* 1988 (2) SA 702 (ZS) at 721H-722D, where Gubbay JA held: “I am firmly of the opinion, reached, I must confess, with little hesitation, that the whipping each appellant was ordered to receive breaches s 15(1) of the Constitution of Zimbabwe as constituting a punishment which in its very nature is both inhuman and degrading...”

<sup>185</sup> See also, the American case of *Ingraham v Wright* 97 S Ct 1401 (1977) where the US Supreme Court by a majority of five to four, held that the Eight Amendment which provides, “[e]xcessive bail shall not be requires, nor excessive fine imposed, nor cruel and unusual punishment inflicted”, was not violated as corporal punishment within the school system was outside the contemplation of the Constitution. See also, *Glaser v Marietta* 351 Federal Supplement 555 (1972).

<sup>186</sup> Art 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines “torture” as follows: “For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” Similarly, in *Uzoukwu v Ezeonu II* [1991] 6 NWLR (pt 200) 708 at 764, the Nigerian Court of Appeal defined “inhuman treatment” to mean “any barbarous or cruel act or acting without feeling for the suffering of the other.”

<sup>187</sup> See also, the decision of the European Commission of Human Rights in *Campbell and Cosans v United Kingdom* (1980) 3 EHRR 531; (1982) 4 EHRR 293, where majority held that teachers who inflicted corporal punishment upon school children did not offend art 3 of the European Convention.

<sup>188</sup> (1985) HCNLR 1133.

she discovered that her money was missing from the house and, suspecting the plaintiff, she flogged her and locked her up in a room in a bid to extract a confession from her. Two years later, the plaintiff sued the defendants for false imprisonment. The action was held to be statute barred under the Public Officers Protection Law for not being brought within three months from the date of the cause of action. In the alternative, the court held that section 32(1)(d) of the 1979 Nigerian Constitution (now section 35(1)(d) of the 1999 Constitution) empowered the teacher to act as she did. The court held:

“It is the teacher’s public duty to discipline a student and the punishment to be inflicted except specifically forbidden by law is within the discretion of the teacher. The exercise of the aforesaid power is in accord with public duty... The [second] defendant in flogging the plaintiff and locking her up in the room was exercising a disciplinary act which...is a public duty vested in her in relation to her students.”<sup>189</sup>

Similarly, in *Ekeogu v Elizabeth Aliri*,<sup>190</sup> Aliri was a student in primary school. After an incident of theft within the neighbourhood of the school, the culprit was apprehended and the crowd that gathered at the scene mobbed him. The appellant, the girl’s class teacher, instructed his pupils to go and see how thieves were treated so that they could learn a lesson from that. The pupils obeyed and ran to the scene. A while later the school bell was rung recalling the pupils to class. As the pupils ran into the class, the teacher whipped them indiscriminately. One of the whips was discharged across the face of Aliri which permanently damaged her left eye.

The girl sued the teacher and succeeded at the trial court and the Court of Appeal. On further appeal to the Supreme Court, it was held that the punishment was excusable on the ground of accident. The court held the view that it was by sheer accident that the respondent was hit on the left eye and that no criminal intent was discernible from the act. By way of an obiter remark, Wali, JSC said: “a teacher, *vis-à-vis* his pupils, stands *in loco parentis* to them. In that capacity he has the opportunity to discipline them. It is a public duty.”<sup>191</sup> Although these decisions have not been overruled, their applicability may no longer be supported in view of the global trend towards abolishing corporal punishment as well as the concept of the best interest

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<sup>189</sup> Adeloje, J at 1139. See also, the English case of *Spiers v Warrington Corporation* [1954] 1 QB 61 at 68-69 where the court, Lord Goddard CJ held that “the headmistress obviously has the right and power to prescribe the discipline for the school, and in saying that a girl must come to school not wearing a particular costume unless there is a compelling reason of health, surely she is only acting in a matter of discipline, and a matter which must be within the competence of the headmaster or headmistress of any school...”

<sup>190</sup> (1991) 1 NSCC (pt II) 343; [1991] 3 NWLR (pt 179) 258.

<sup>191</sup> At 355.

of the child.<sup>192</sup> Nigeria is signatory to various international human rights instruments which prohibit corporal punishment.

While corporal punishment may no longer be administered in Nigerian schools, other forms of discipline such as suspension, expulsion and exclusion remain extant. This is confirmed by the Nigerian Court of Appeal judgment in *Principal Government Secondary School, Ikachi v Igbudu*.<sup>193</sup> In this case, the appellant suspended the respondent, a female student, from school because she had terminated about two and half months' pregnancy while being a student at the school. This fact was announced to the entire students at a morning assembly. The respondent sued the principal of the school for defamation of character. The court recognised the power of the principal to make such an announcement and impose such disciplinary measures and held:

“It is not in doubt that the principal of the school as well as the school as an institution had the public duty and responsibility to instil discipline and morality in the school so as to check bad habit and instil fear in the students. In that regard, the principal of the school had a duty to announce to the students the decision taken by the authorities of the school against erring student(s). The students also had a corresponding interest to know the decision taken by the school authorities against any erring student and the reason for taking the decision, to guide them against such behaviour in the future.”<sup>194</sup>

The misconduct that should warrant such a serious disciplinary measure should be grave or grievous in view of the negative impact such a disciplinary measure may have on the child's right to education.<sup>195</sup> The Commissioner for Education in each State has the duty to lay down the grounds for suspension or expulsion of pupils, and who may impose such sanction.<sup>196</sup> Some States in Nigeria also required that records of punishment be entered in the punishment books kept by the schools stating the details of the punishment; the administering staff; the nature of the offence; the name of the pupil punished; the nature of the punishment and the date of the

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<sup>192</sup> Art 5 of the ACHPR, 1981 for instance provides: “[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

<sup>193</sup> [2005] 12 NWLR (pt 940) 543.

<sup>194</sup> Per Obadina, JCA at 574.

<sup>195</sup> The offences that may ground suspension or expulsion include, truancy, tardiness, insubordination, disobedience, insulting a teacher, hitting a teacher, fighting, smoking, use of drugs or alcohol, destruction of school property, and many other serious breach of the school regulations. See Chianu *School Law for Proprietors, Teachers and Parents* 65-66.

<sup>196</sup> 66.

punishment.<sup>197</sup> In administering the punishment, the pupils must be given fair hearing and the procedure employed must comply with the rule to fair trial.<sup>198</sup>

Where sanction to a pupil is suspension, it should be either for a definite period or until such a time as a lawful and reasonable condition is fulfilled. An indefinite suspension may adversely impact on the pupil's right to education and may as well destabilize the learner emotionally.<sup>199</sup> It is submitted that expulsion being a grave sanction, should be imposed sparingly. It should be imposed only where it is evident that it would be in the overall best interest, safety and welfare of the generality of the school population, pupils, and the staff.<sup>200</sup> This precaution is necessary so as to safeguard the right to education which expulsion from school may defeat if not sparingly used.

## **5 The Equality Principle and the Right to Freedom from Discrimination**

At the global level, human rights instruments guarantee the right to equality and freedom from discrimination. The UDHR, the ICERD, the ICCPR, the CEDAW and the CRC all assert the equality of all persons and prohibit discrimination in every form.<sup>201</sup> Articles 1 and 2 of the

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<sup>197</sup> See for instance, Regulation 1(15) Part A Schedule I to the Education Law of Bendel State 1976 applicable in Delta and Edo States of Nigeria.

<sup>198</sup> See *Chiekwe Ikwunze Esiaga v University of Calabar & 2 Others* [2004] 7 NWLR (pt 872) 366 at 389-390 (SC); *Akintemi v Onwumechili* [1985] 1 NWLR (pt 1) 68; *Yesufu Amuda Garba & 8 Others v University of Maiduguri* [1986] 1 NWLR (pt 18) 550 (SC). In Garba's case, the Supreme Court held that the courts would respect the decision of the University where students have been given a fair hearing before disciplinary decisions and will decline to assume jurisdiction until the remedies available within the university system have been exhausted. Similarly, in *Omodolapo Adeyanju v West African Examinations Council* [2002] 13 NWLR (pt 785) 479 at 499, the Nigerian Court of Appeal held inter alia: "WAEC is an administrative body specifically established by statute to conduct examinations and award certificates. Its relationship with the candidates for its examination has statutory flavour. Consequently, it cannot punish any of its candidates without compliance with the due process of the law. In the instant case, the respondent cannot punish the appellant for purportedly engaging in examination malpractice without giving the appellant the opportunity of being heard." See also, *Goss v Lopez* 419 US 565, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975), where the US Supreme Court held that pupil should not be suspended until he has been given fair hearing. In this case, some nine pupils were engaged in disruptive conduct which was witnessed by the school administrator who suspended them. They sued for a declaration that the suspension was irregular as they were not given opportunity to defend themselves on the allegation upon which they were suspended. The court held that the suspension was irregular. Justice White who expressed the view of the majority said: "[due process requires] that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story... Total exclusion from the educational procedure for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child..."

<sup>199</sup> Chianu *School Law for Proprietors, Teachers and Parents* 68.

<sup>200</sup> 69.

<sup>201</sup> Explaining the term "discrimination", the UN Human Rights Committee states: "[t]he term 'discrimination' is used in the Covenant and should be understood to imply any distinction, exclusion, restriction or reference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other exercise by all persons and an equal footing of all rights and freedoms. Not every



UDHR for instance preserve the right to equality and freedom from discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In article 3, the ICERD condemns racial discrimination and apartheid and obliges State parties to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdictions.<sup>202</sup> Article 5 of the ICERD states: “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...The right to education and training.”<sup>203</sup> In the same vein, the ICCPR proclaims:

“All persons are equal before the law and are entitled without any discrimination to the equal protection before the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>204</sup>

In 1960, the UNESCO Assembly also adopted the Convention against Discrimination in Education.<sup>205</sup> The Convention has a twofold purpose: the elimination of discrimination in education, and the promotion of equality of opportunity and treatment. In terms of article 4 of this Convention, the States parties undertake to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education. Accordingly, the Convention obliges States parties to eliminate and prevent discrimination “against any person or group of person” including vulnerable groups such as refugees,<sup>206</sup> stateless persons,<sup>207</sup> person

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differentiation or treatment will constitute discrimination. If the criteria for such differentiation are reasonable and objective and if their aim is to achieve a purpose which is legitimate under the Covenant.” See UN Human Rights Committee, General Comment No.18 (1989) para 7.

<sup>202</sup> Defining the term “racial discrimination, article 1(1) of the ICERD, 1966 says: “[i]n this Convention, the term ‘racial discrimination’ means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

<sup>203</sup> See art 5(e)(v) of the ICERD.

<sup>204</sup> Art 26 of the ICCPR, 1966.

<sup>205</sup> Adopted by UNESCO General Conference on 14 December 1960 and entered into force on 22 May 1962.

<sup>206</sup> See art 22(1) of the Convention Relating to the Status of Refugees, 189 UNTS 150 (1952), entered into force on 22 April, 1954.

<sup>207</sup> See arts 1 & 22 of the Convention Relating to the Status of Stateless Persons, 360 UNTS 117 (1954), entered into force on 6 June 1960.

with disabilities<sup>208</sup> and mentally retarded persons<sup>209</sup> in education. Also, the Declaration on the Right to Development<sup>210</sup> proclaims: “States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to...education.”<sup>211</sup>

It is widely recognised that people with disabilities and children in particular are especially vulnerable to exploitation, abuse, exclusion and marginalization all over the world.<sup>212</sup> Although, there is no general or all encompassing definition of the term “disability” (since the definition depends on the context within which it is used),<sup>213</sup> the common sense approach to disability rests on the notion of clinically defined impairment and is helpful in this context. Both the Declaration on the Rights of the Child and the CRC contain provisions on the right to education and apart from recognising the right of the child to education generally.<sup>214</sup> The CRC further contains specific provision on the right of children with disabilities to education. Article 23(3) of the CRC obliges States parties to the Convention to ensure that the disabled child has effective access to education and training.

Apart from the instruments earlier mentioned, a number of other global and regional instruments address the right to education as it applies to disabled persons.<sup>215</sup> These include the Declaration on the Rights of Disabled Persons, 1975;<sup>216</sup> the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993;<sup>217</sup> the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities and Convention on the Rights of Persons with Disabilities (CRPD), 2006.<sup>218</sup> The CRPD makes provision for the right to education for persons (especially children) with disabilities.<sup>219</sup>

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<sup>208</sup> See Principle 6, Declaration on the Rights of Disabled Persons (1975), proclaimed by GA Res 3447 (xxx) of 9 December, 1975.

<sup>209</sup> See principle 2, Declaration on the Rights of Mentally Retarded Persons (1971).

<sup>210</sup> Adopted on 4 December 1986, GA Res 41/128 UN GAOR, 41<sup>st</sup> Session, at 3, Annex, UN Doc. A/Res/41/128 Annex (1987).

<sup>211</sup> Art 8(1) of the Declaration.

<sup>212</sup> Bekink & Bekink “Children with Disabilities and their Right to Education: A Call for Action” 2005 (1) *Stellenbosch Law Review* 126.

<sup>213</sup> See Truter “Disability: The Quest for Reform” 2000 (1) *Law, Democracy and Development* 75-86 76.

<sup>214</sup> See arts 28 & 29 which guarantee the right of the child to education.

<sup>215</sup> See generally, Hodgson *The Human Right to Education* (1998) 155-168.

<sup>216</sup> UN General Assembly Resolution 3447 (XXX) of 9 December 1975.

<sup>217</sup> UN General Assembly 48/96 of 20 December 1993.

<sup>218</sup> Adopted by the United Nations on 13 December, 2006.

<sup>219</sup> See art 24 of the Convention.

Discrimination against the disabled in education varies from the outright denial of educational opportunities to a more subtle form of discrimination such as isolation and segregation through the imposition of physical and social barriers.<sup>220</sup> It is noted that the effects of disability based discrimination have been particularly severe in the field of education due in part to the “relative invisibility of persons with disabilities.”<sup>221</sup> People with disabilities often have their lives handicapped by physical and social barriers in society which hamper their full participation.<sup>222</sup> Because of this, millions of children and adults in all parts of the world often face a life that is segregated and debased.<sup>223</sup>

It is submitted that learners with disabilities should have equal treatment and rights as their colleagues without disabilities and they deserve even a greater protection because of their disabilities. They should be entitled to education that maximizes their potential.<sup>224</sup> Article 23(3) of the CRC explicitly imposes obligations on the States to take measures ensuring that disabled children have effective access to and receive education.<sup>225</sup> In this regard, the CRC Committee has recommended the establishment of special education programmes for children with disabilities and, where feasible, integrating them into mainstream schools.<sup>226</sup> Hodgkin and Newell argued correctly that the phrase “in a manner conducive to the child’s achieving the fullest possible social integration” in article 23(3) of the CRC reveals a preference for inclusive education.<sup>227</sup> Inclusive education requires that teachers and schools have to adapt to learners

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<sup>220</sup> See Report of the United Nations High Commissioner for Human Rights to Economic and Social Council: Social and Human Rights Questions: Human Rights UN Doc E/2001/64 (18 May 2001) para 48.

<sup>221</sup> Bekink & Bekink 2005 (1) *Stellenbosch Law Review* 127.

<sup>222</sup> Cotter *This Ability: An International Legal Analysis of Disability Discrimination* 15.

<sup>223</sup> 15-16.

<sup>224</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child - Article 28*: 44.

<sup>225</sup> Article 23(3) of the CRC states: “[r]ecognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.”

<sup>226</sup> See among others, CRC Committee, Concluding Observations: Azerbaijan (UN Doc. CRC/C/66, 1997) para 296; CRC Committee, Concluding Observations: the United Kingdom of Great Britain and Northern Ireland-Isle of Man (UN Doc. CRC/C/100, 2000), para 195; CRC Committee, Concluding Observations: Niger (UN Doc. CRC/C/118, 2002) paras 179-180; CRC Committee, Concluding Observations: New Zealand (UN Doc. CRC/C/133, 2004), para 152; CRC Committee, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child (UN Doc. CRC/GC/2003/4, 2003) para 19.

<sup>227</sup> Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* (2002) 415; see also, Tomasevski, *Right to Education Primer 3: Human Rights Obligations: making Education Available, Accessible, Acceptable and Adaptable* (2001) 32; Rule 6 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted on 20 December 1993 (UN Doc. A/RES/48/96).

with divergent abilities and needs.<sup>228</sup> In this regard, the CESCR asserts that in order to implement genuinely inclusive approach to the right of children with disabilities to access to education in regular schools, “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.”<sup>229</sup>

As canvassed elsewhere in this thesis, one of the fundamental elements of right to education is that it should be provided in a non-discriminatory manner to all.<sup>230</sup> There are a number of ways in which discrimination may occur in education. For instance, failure to provide the necessary support and access for learners with disabilities or a refusal to admit them to a particular school would constitute an act of discrimination.<sup>231</sup> However, The CRC Committee notes the financial and practical consequences of inclusive education and therefore specifies that inclusive education should be implemented only where feasible.<sup>232</sup>

Similarly, the UNESCO Declaration on Race and Racial Prejudice, 1978<sup>233</sup> explicitly rejects theories that claim that specific race or ethnic groups are inherently superior or inferior. It urges States to take all appropriate steps, *inter alia*, by legislation, particularly concerning education, to prevent, prohibit and eradicate all forms of racial discrimination. As regards discrimination against women in education, the CEDAW obliges States parties to take “all appropriate measures” to eliminate discrimination against women in order to ensure to them equal rights with men in education.<sup>234</sup> At the Africa regional level, the ACHPR equally proclaims that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social

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<sup>228</sup> CESCR Committee, General Comment No. 5: Person with Disabilities (1994) (UN Doc. HRI/GEN/1/Rev.7, 2004) 32 para 35.

<sup>229</sup> See UN CESCR *General Comment No. 5 (1994): Persons with Disabilities*.

<sup>230</sup> See art 28(1) of the CRC.

<sup>231</sup> See Australian Case of *Welsh v Commissioner, Soil Conservation Service of NSW* (1991) EOC 92-330; *L v Minister for Education* (1996) EOC 92-787.

<sup>232</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 45.

<sup>233</sup> Adopted unanimously and by acclamation by the General Conference on 27 November 1978.

<sup>234</sup> See art 10 of the CEDAW.

origin, fortune, birth or other status.”<sup>235</sup> Equality of opportunity for all in their access to education is essential to achieve the full respect for and protection of all human rights.

Also, there should not be discrimination on account of religion. In *Tengur v The Minister of Education and the State of Mauritius*,<sup>236</sup> the Supreme Court of Mauritius considered a claim of alleged discrimination on the basis of religion in education. In that case, the applicant alleged that the practice of reserving 50 per cent of the seats in secondary schools managed by the Roman Catholic Authority and funded out of public funds for children of Catholic faith was discriminatory against non-Catholics. The court stated that the overall purpose behind the ICESCR is to combat all form of discrimination in education. The court noted that “[t]he prohibition against discrimination enshrined in article 2(2) of the Covenant [ICESCR] is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.”<sup>237</sup> The court concluded that the admission policy of the co-defendants, whereby they reserved 50 per cent of seats in secondary schools for pupils of Catholic faith, was in violation of section 16(2) of the Constitution of Mauritius.<sup>238</sup>

## **5 1 The Right to Freedom from Discrimination in South African Schools**

Equality is one of the core values on which the Republic of South Africa is founded as a sovereign democratic state.<sup>239</sup> The right to education, as guaranteed under the Constitution, does not refer in express terms to a right to equal access to education, but it is accepted that this aspect of the right is covered implicitly by the equality principle in section 9 of the South African Constitution.<sup>240</sup> The equality principle underpins other rights in that it guarantees the full and equal enjoyment of all other rights, and its protective ambit overlaps with those other rights.<sup>241</sup> The equality principle is thus supportive of other rights and, accordingly, impacts on

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<sup>235</sup> Art 2 of the ACHPR. Article 3(1) & (2) also adds that “[e]very individual shall be equal before the law” and “entitled to equal protection of the law.” Art 19 provides that “All people shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”

<sup>236</sup> Record No 77387, Supreme Court of Mauritius, 2002 SCJ 48.

<sup>237</sup> Paras 13-14. It should be noted that the judgment was delivered by AG Pillay, CJ, a member of the CESC.

<sup>238</sup> The defendants lodged an appeal against this declaratory judgment to the Judicial Committee of the Privy Council. The appeal was heard in December 2003 and decided in favour of the plaintiff/applicant.

<sup>239</sup> See s 1(a) of the Constitution; *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC), 1996 (4) SA 197 (CC) para 39; see also, Vrancken & Stone “Equality” in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* 71.

<sup>240</sup> Malherbe (2008) 2 *TSAR* 272.

<sup>241</sup> See *National Coalition for the Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC), 1999 1 SA 6 (CC) paras 32, 112; Currie & de Waal *The Bill of Rights Handbook* 231.

education in different ways.<sup>242</sup> It should be pointed out, however, that “equal access” does not imply total equality, but equal opportunities to education according to every person’s abilities and potential.<sup>243</sup>

Prior to 1994, the education system in South Africa was extremely complex, divided along the racial groups and there were different educational authorities following the racial grouping.<sup>244</sup> This arrangement was based largely on the policy of apartheid, which legalized inequality in education based on racial separation.<sup>245</sup> On this ground, education in South Africa had always been open to serious criticism.<sup>246</sup> The apartheid system was characterized with gross inequality in the financing of education, with the black population being the worst funded.<sup>247</sup> In this regard, Currie and de Waal submit that South Africa’s long history of official racism explains the obduracy of racial inequality in modern South Africa and the necessity for positive measures to remove it.<sup>248</sup>

The foregoing informed the guarantee of the rights to education and equality in the Interim Constitution and subsequently in the South African Constitution.<sup>249</sup> Section 9(1) of the South African Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) states that “the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>250</sup>

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<sup>242</sup> Malherbe (2008) 2 *TSAR* 272; Malherbe (2004) 3 *TSAR* 443.

<sup>243</sup> Malherbe (2008) 2 *TSAR* 272; Malherbe (2004) 3 *TSAR* 442.

<sup>244</sup> Montola & Pampallis (eds) *Education and Equity: The Impact of State Policies on South African Education* (2001) 147.

<sup>245</sup> Dlamini notes that the government supported not simply the policy of “separate but equal” but the more obnoxious policy of “separate and unequal.” See Van Wyk, *et al* (eds) *Rights and Constitutionalism* 589; Robertson also opines that educational system in the country was characterized by central state control with the purpose to entrench inequality. See Robertson *Human Rights for South Africans* (1991) 189.

<sup>246</sup> Van Wyk, *et al* (eds) *Rights and Constitutionalism* 589.

<sup>247</sup> 589-590.

<sup>248</sup> Currie & de Waal *The Bill of Rights Handbook* 231; see also, *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA) para 7.

<sup>249</sup> See *Prinsloo v Van de Linde* 1997 6 BCLR 708 (CC), 1997 3 SA 1012 (CC), paras 31-32, where the court held that the meaning of “unfair discrimination” as prohibited by section 9(3) should be determined against the background of the past unequal treatment of people in which their inherent dignity was denied. See also, *Harksen v Lane NO* 1997 11 BCLR 1489 (CC); 1998 1 SA 300 (CC) paras 50-53.

<sup>250</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act gives further effect to section 9 of the Constitution. This Act identifies practices constituting unfair discrimination prohibited by section 9, and in respect of education, the following are listed: (i) unfair exclusion of learners from educational institutions, including learners with special needs; (ii) unfair withholding of scholarships, bursaries, or any other form of assistance from

In line with the policy of non-discrimination, public schools are obliged to admit learners and serve their educational requirements without any unfair discrimination.<sup>251</sup> Admission on the basis of an admission test administered by a governing body or the principal of a school (whether directly or indirectly authorized by such governing body), is prohibited.<sup>252</sup> Previously, children could be refused admission on the basis of failing an admission test which entailed proficiency in the language of instruction but the South African Schools Act has now outlawed this. This is regarded as discrimination in terms of this Act and the South African Constitution, which forbids unfair discrimination based on, *inter alia*, language, culture or gender.<sup>253</sup> An important point needs to be made here that reasonable and justifiable admission test and requirements based on performance, and language proficiency when imposed by schools to determine merit, would amount to fair discrimination.

Racial, gender, disability, age limitations and other forms of discrimination are contentious issues relating to the equality principle.<sup>254</sup> This is exemplified in the case of *Mutukane and Others v Laerskool Potgietersrus*<sup>255</sup> as earlier discussed in chapter four where the court found that the school discriminated on racial grounds against the applicants' children by denying them admission to the school. Also, schools may not discriminate in its admission policy on account of sex or gender. While gender specific schools are permitted, however, regulations requiring the obligatory suspension of a female student at education colleges who fall pregnant had been held discriminatory on the basis of sex.<sup>256</sup> Similarly, as held in *Minister of Education v Harris*,<sup>257</sup> schools may not discriminate in its admission policy on account of age.

As canvassed earlier, an aspect of the right to education is that it must be without discrimination which therefore entails an inclusive education. The White Paper on an Integrated National Disability Strategy, 1997 offers some policy guidelines on the rights of people with

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learners of particular groups identified by the prohibited grounds; and (iii) the failure to reasonably and practicably accommodate diversity in education. See generally, s 29(1) & (2), read with item 2 of the schedule, and s 1(xxii) of the Equality Act which extends the grounds in section 9(3) of the Constitution. See the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>251</sup> See s 5(1) of the SASA 1996 & s 9 of the Constitution.

<sup>252</sup> See s 5(2) of the SASA 1996.

<sup>253</sup> See Robinson (ed) *The Law of Children and Young Persons in South Africa* 258.

<sup>254</sup> See Malherbe (2008) 2 TSAR 273.

<sup>255</sup> 1996 (3) SA 223 (TPD).

<sup>256</sup> See *Mfolo v Minister of Education, Bophuthatswana* 1994 1 BCLR 136 (B).

<sup>257</sup> 2001 (4) SA 1297 (CC).

disabilities. The White Paper has three pillars; first, it reiterates the human rights principle and states that the disabled have right to enjoy citizenship; the second principle is the belief in the social model of disability while the third principle states that disabled people should be consulted and involved in reconstructing their lives. According to the White Paper, “the social model, therefore, implies that the reconstruction and development of our society involves a recognition of and intention to address the developmental needs of disabled people within a framework of inclusive development. Nation building, where all citizens participate in a single economy, can only take place if people with disabilities are included in the process.”<sup>258</sup> This White Paper advocates equal access, non-discrimination, transformation and redress in the education of disabled South Africans.<sup>259</sup>

The Education White Paper 6 on Special Education: Building and Inclusive Education and Training System, 2001 primarily covers the education of disabled pupils. The White Paper notes that learners with disability experienced great difficulty in gaining access to education and very few special schools existed and they were limited to admitting learners according to rigidly applied categories.<sup>260</sup> The central objective of the White Paper is to extend the existing policy for all bands of education and training to accommodate the diverse range of learning needs.<sup>261</sup> Inclusivity implies that the system has to adapt to make it possible for each learner to reach his full potential. The focus is on overcoming the barriers in the system so that the full range of learning and other needs of all learners can be met. This system will be organised in such a way that various levels and kinds of support can be provided in a wider range of learning sites to all learners and educators.<sup>262</sup> The Policy is premised on the understanding that all children, youth and adults have the potential to learn within all bands of education and that they all require support. It observed that many learners experience barriers to learning or drop out primarily because of the inability of the system to recognise and accommodate the diverse range of learning needs typically through inaccessible physical plants, curricula, assessment, learning materials and instructional methodologies.<sup>263</sup>

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<sup>258</sup> Office of the Deputy President, White Paper on an Integrated National Disability Strategy, 1997 (Pretoria) 11.

<sup>259</sup> White Paper on an Integrated National Disability Strategy 41.

<sup>260</sup> Para 1, Education White Paper 6 on Special Education: Building and Inclusive Education and Training System, July 2001.

<sup>261</sup> Para 2.1.1 of White Paper 6.

<sup>262</sup> Department of Education Building an Inclusive Education and Training System: A Guide for Parents, Caregivers and Communities Based on the Education White Paper 6- Special Needs Education (2003) s 2a.

<sup>263</sup> Para 2.1.2 of the White Paper 6.



An inclusive education and training system therefore requires changes to mainstream education so that learners experiencing barriers to learning can be identified early and so that appropriate support may be provided. It will require changes to special schools and specialized settings so that learners who experience mild to moderate disabilities can be adequately accommodated within mainstream education through appropriate support from district-based support teams including special schools.<sup>264</sup> The White Paper recommends curriculum change and provides: “central to the accommodation of diversity in our schools, colleges, and adult and early childhood learning centres and higher education institutions, is a flexible curriculum and assessment policy that is accessible to all learners irrespective of the nature of their learning needs.”<sup>265</sup> Accordingly, new curriculum and assessment initiatives focusing on the inclusion of the full range of diverse learning needs are put in place.<sup>266</sup> The White Paper expresses two policy goals. The long-term policy goal is the development of an inclusive education and training system that will uncover and address barriers to learning, and recognise and accommodate the diverse range of learning needs.<sup>267</sup> The short-term to medium-term goals focus on addressing the weaknesses and deficiencies of the system then and on expanding access and provision to those of compulsory school-going age who are not accommodated within the education and training system.<sup>268</sup>

The Ministry of Education gave the reasons for an inclusive education policy in South Africa as follows: educational services were denied the majority of learners with disabilities who needed them; and that only very few special schools existed and they could only accommodate 20 per cent of all learners with disabilities in the country.<sup>269</sup> This resulted in a significant number of learners with special needs not being educated at all. It pointed out that between 260 000 and 280 000 learners with disabilities or impairments were not catered for in the special education and thereby were out of school.<sup>270</sup> Only learners categorised as having medical disabilities had access to support programmes provided by Specialised Education and this is limited in focus. Whereas, many learners experience barriers to learning which originate

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<sup>264</sup> Para 2.1.2 of the White Paper 6.

<sup>265</sup> Para 2.2.6.1 of the White Paper 6.

<sup>266</sup> Para 2.2.6.2 of the White Paper 6.

<sup>267</sup> Para 4.1.1 of the White Paper 6.

<sup>268</sup> Para 4.2.1 of the White Paper 6.

<sup>269</sup> Education White Paper 6, Para 1.

<sup>270</sup> Department of Education, Building an Inclusive Education and Training System: A Guide for Parents, Caregivers and Communities Based on the Education White Paper 6-Special Needs Education (2003) s 1.

from, for example, poverty, experience of emotional trauma such as violence and/or the death of a family member or being over aged. Such learners were not receiving proper support to overcome these barriers.<sup>271</sup> An inclusive education policy as introduced by the Department of Education addressing these disabilities is a step in the right direction toward ensuring equal education to all without discrimination.

## 5 2 The Right to Freedom from Discrimination in Nigerian Schools

Nigeria as a nation had a long history of discrimination based on sex.<sup>272</sup> Culturally, discrimination against women is widespread in many Nigerian societies, and customary law systems differentiate between sexes over distribution of rights, powers, duties, functions and wealth.<sup>273</sup> Such discrimination was rationalized by an attitude of “romantic paternalism” which, in practical effect, put women not on a pedestal, but in a cage.<sup>274</sup> However, the Nigerian Constitution has outlawed any form of discrimination on the ground of the ethnic affiliation, places of origin, sex, religions or political opinions. Section 42(1)(a) of the Constitution which guarantees the right to freedom from discrimination provides:

“A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such person- be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject.”<sup>275</sup>

In terms of this provision, every citizen must be treated equally in both private and public life and no one may be discriminated against on any of the prohibited grounds. It is submitted that the constitutional prohibition of irrational discrimination is an important expansion in the area of the legal protection of human rights in Nigeria.<sup>276</sup> Applying this constitutional provision to education sector, it means that no school may put in place any

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<sup>271</sup> Building an Inclusive Education and Training System: A Guide for Parents, Caregivers s 1.

<sup>272</sup> For instance under the 1960 and 1963 Constitutions, women in the Northern Nigeria were not allowed to vote. See Akande *Introduction to the Constitution of the Federal Republic of Nigeria* 106 fn 121.

<sup>273</sup> See Taiwo “The Customary Law Rule of Primogeniture and its Discriminatory Effects on Women’s Inheritance Rights in Nigeria: A Call for Reform” (2008) 22(2) *Speculum Juris* 104-122 105.

<sup>274</sup> Taiwo (2008) 22(2) *Speculum Juris* 105; Akande *Introduction to the Constitution* 107.

<sup>275</sup> See also, s 10 of the Child’s Rights Act which also provides: (1) “A child shall not be subjected to any form of discrimination merely by reason of his belonging to a particular community or ethnic group or by reason of his place of origin, sex, religion or political opinion.” (2) “No child shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.”

<sup>276</sup> Akande *Introduction to the Constitution* 104-105.

admission policy which directly or indirectly discriminates on account of sex, ethnicity, places of origin, religions or political opinions or any other grounds including disabilities. An extension of discrimination on account of sex or gender is that no one may be discriminated against on account of pregnancy. In this regard, section 15(5) of the Child's Rights Act provides that a female learner who becomes pregnant, before completing her education should be given the opportunity, after delivery, to continue with the education, on the basis of her ability.<sup>277</sup>

While there is constitutional provision as well as other laws prohibiting discrimination on account of sex, experience in Nigeria has shown that wide disparity exists in terms of male and female enrolment in schools. Fewer girls than boys enrol in schools and far more drop out. Enrolment figures in Nigerian schools show gender disparity, especially in the Northern part of the country. As explained in chapter three, for instance, in 2006, about 65 per cent of the primary school enrolments in the Northern Nigeria were male while 35 per cent were female. At the national level, 54.5 per cent of the enrolments and 45.5 per cent of the enrolments during this same period are male and female respectively.<sup>278</sup> This pattern of enrolment reflects the age-long cultural perception of the role of male and female in society. Studies have attributed girls' lack of access to education in Nigeria to various factors including traditional attitudes of parents and society to girls' education; early marriage; socialization and seclusion of women particularly in Northern Nigeria; religion, social and economic factors; tradition and lack of awareness.<sup>279</sup>

While sharing the above reasons with other scholars, it is submitted that lack of access of girls to education at all levels in Nigeria particularly since the decade of the 1980s has been largely due to economic factors. The current economic crisis with dwindling value of the naira, spiral inflationary trends and a fall in standard of living is biting hard on Nigerians. Under such economic realities, most parents are unable to cater for education of their children, and worst affected are female given the cultural perception of women in society. Although government

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<sup>277</sup> See *Principal Government Secondary School Ikachi v Igbudu* [2005] 12 NWLR (pt 940) 543 where a female student, who was found to have aborted a two and half month pregnancy was suspended from school but was permitted to write her final examinations as an external student. This case can be contrasted, however, with the South African case of *Mfolo v Minister of Education, Bophuthatswana* 1994 1 BCLR 136 (B) where the regulations requiring the obligatory suspension of female students at education colleges who fall pregnant were held to discriminate unfairly on the basis of sex.

<sup>278</sup> See Federal Ministry of Education *Road Map for the Nigerian Education Sector* (2009) 18.

<sup>279</sup> See Mbanefoh "Access of Girls to Primary and basic education in Nigeria" *UNESCO Regional Office, Dakar* (1994) 21.

has introduced free basic education for the first nine years of schooling, however, hidden fees such as Parents Teachers Association (PTA) levy, cost of books, transportation to and from schools, and many more are militating against the equal right of everyone to education. Economic barriers are pricing out most learners, especially those from poor backgrounds from achieving their right to education. Concerted efforts towards removing those obstacles are necessary to ensure equal access to education for all by 2015 – the deadline set by the MDGs.

As emphasised above, achieving equal right to education and education without discrimination will require an inclusive education. An inclusive education refers to the full-time placement of children with mild, moderate and severe disabilities in regular classrooms.<sup>280</sup> In terms of the National Policy on Education 2004, the disabled refers to people with impairments, physical or sensory, and who because of this impairment or disability cannot cope with regular school or class organisation and methods without formal special educational training.<sup>281</sup> Nigeria has categorised the education of the children with disabilities as special education. In terms of the Education Act, special education means “education either in the normal schools or in special institutions established- (a) for children and adults who have learning difficulties because of certain handicaps such as blindness, partial sightedness, deafness, hardness of hearing, mental retardation or other physical or mental handicap including social maladjustment due to circumstances of birth, inheritance, social position, mental or physical health pattern or accident in latter life; or (b) in respect of children who are specially gifted.”<sup>282</sup>

The National Policy on Education states that the education of children with special needs shall be free at all levels.<sup>283</sup> The policy further obliges the government to provide all necessary facilities to ensure easy access to education for children with disabilities.<sup>284</sup> It recommends that government should provide inclusive education or ensure integration of special classes and units into ordinary/public schools; provide regular census and monitoring of

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<sup>280</sup> See Garuba “Inclusive Education in the 21<sup>st</sup> Century: Challenges and Opportunities for Nigeria” (2003) 14(2) *Asia Pacific Disability Rehabilitation Journal* 191-200 192.

<sup>281</sup> Para 94(i) of the National Policy on Education 2004. In this category are: visually impaired (blind and the partially sighted); hearing impaired (deaf and the partially hearing); physically and health impaired (deformed limbs, asthmatic); mentally retarded (educable, trainable and bed-ridden); emotionally disturbed (hyperactive, hypoactive/the socially maladjusted/behaviour disorder); speech impaired (stutterers); learning disabled (psychological/neurological educational phobia or challenges); and multiple handicapped. See Para 94(i)(a)-(h) of the National Policy on Education 2004.

<sup>282</sup> See s 25 of the Education (National Minimum Standards and Establishment of Institutions) Act Cap E.3, LFN 2004.

<sup>283</sup> Para 96(b) of the National Policy on Education 2004.

<sup>284</sup> Para 96(c) of the National Policy on Education 2004.

people with special needs to ensure adequate educational planning and welfare programmes; provide special education equipments and materials; special education training; special training and re-training of the personnel to develop capacity building and to keep abreast of the latest teaching techniques for the various categories of disabilities.<sup>285</sup> It recommends that buildings should take into account special needs of the handicapped incorporating, for example, ramps instead of steps; wider doors for wheel chairs, lower toilets and the like.<sup>286</sup> Architectural designs of the school buildings should therefore be disability friendly in which barriers to free access are removed.

It is submitted that this Policy, while appearing to be good on paper, requires absolute commitments on the part of government to turn it into reality. The experiences in the country show that persons with disabilities are often neglected and discriminated against in terms of education, health, and social facilities. While learners with disabilities are not yet integrated into the main stream schools, the very few schools for persons with disabilities in the country are in a state of neglect and are not adequately funded. It is essential that learners with disabilities and handicapped persons should be granted benefits on the basis of their special needs. Achieving this requires more than a mere policy formulation as currently experienced in Nigeria there should be better commitment towards implementing an inclusive education programmes for children with disabilities at the various levels of education.

## **6 The Right to Freedom of Expression**

The right to freedom of expression and to hold opinions has also been recognised in a number of important international and regional human rights instruments. Article 19 of the UDHR preserves the right to freedom of opinion and expression. Similarly, article 9 of the ACHPR provides that every individual shall have the right to receive information. Article 19 of the ICCPR is more elaborate in its provision on the right to freedom of expression and to hold opinions. In terms of article 19(1) of the ICCPR, everyone has the right to hold opinions without interference. Article 19(2) preserves the right to freedom of expression thus: “[e]veryone 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 written or in print, in the form of art, or through any other media of his choice.” Similarly, article 12 of the

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<sup>285</sup> Para 96(c)(i)-(v) of the National Policy on Education 2004.

<sup>286</sup> Para 97 of the National Policy on Education 2004.

CRC requires states parties to “assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” This provision requires systematic attempts to ensure that pupils’ voices are heard in the major decisions in school, through the establishment of appropriate mechanisms for consulting with pupils such as student councils.<sup>287</sup>

The right to receive information and to expression as guaranteed in those instruments are core to the right to education. This is so because for the right to education to be meaningful, both the teachers and learners must have the right to express themselves without any inhibition or hindrance. Similarly, the right of the learners to receive educative information should be guaranteed and respected. A school serves as a means through which information and ideas are imparted to the learners. As examined in chapter five, a corollary to this right is the right to academic freedom which should be guaranteed everyone in any academic institution. Having the foregoing as background, the right to receive information and to expression as guaranteed under the South African and Nigerian laws is now examined below.

## **6 1 Freedom of Expression as Applied to Right to Education in South Africa**

Section 16(1) of the South African Constitution provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. The provision of section 16(1) of the South African Constitution is intended to grant everyone a generous measure of expression protection in the wide range of issues listed above.<sup>288</sup> The concept of “expression” encompasses amongst other things, the display of paraphernalia, the publication of photographs, dancing, dress, the propagation of controversial academic and other opinions and even acts of symbolism such as saluting.<sup>289</sup> The right to freedom of expression intersects with many other rights, particularly, the right to

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<sup>287</sup> See Lundy “Schoolchildren and Health: The Role of International Human Rights Law” in Harris & Meredith (eds) *Children, Education and Health (International Perspectives on Law and Policy)* (2005) 14.

<sup>288</sup> This right is, however, limited in terms of s 16(2) which provides that the right in subsection (1) does not extend to propaganda for war; incitement of imminent violence; or hate speech. See Malherbe “The Mohammed Cartoons, Freedom of Expression and the Infringement of the Right to Religious Dignity” 2007 *TSAR* 332.

<sup>289</sup> See Govindjee “Freedom of Expression” in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* 119 120; see also, *MEC for Education, KwaZulu-Natal, and Others v Pillay* (supra) where the Constitutional Court held that that a ban on the wearing of a nose stud to school limited a person’s right to express her religion and culture which expression is central to the right to freedom of expression.

education in many respects. Given that there are so many ways to express oneself there is some overlap between the right to freedom of expression and the right to assemble, the right to privacy, the right to freedom of religion, and the right to freedom of association.<sup>290</sup>

Particularly, the right to freedom of expression finds pervasive application in education, which is all about expressing, conveying and receiving of information and ideas.<sup>291</sup> This right stipulates that no one should be prohibited from expressing his or her views and from receiving information, unless it is harmful or it can disrupt or otherwise detrimentally affect the education process.<sup>292</sup> The right affects the kind of books prescribed in the curriculum, the literature distributed among learners, and the use of official notice boards on campuses.<sup>293</sup>

It should be noted, however, that the enjoyment of the right to freedom of expression may clash with the right to freedom of conscience, religion, thought and opinion, for example, when learners are confronted with study materials that offend their personal religious beliefs, or those of their parents or legal guardians.<sup>294</sup> Such cases would require the application of limitation of rights under section 36 of the South African Constitution in order to determine which of the competing rights should prevail, and to what extent under the particular circumstances.<sup>295</sup> Another important issue of paramount consideration should be the best interests of the child as well as one's values. As Malherbe rightly submits, the best interests of the child would forbid exposing a learner to blasphemous or obscene material, or to existentialist struggles of some second-rate scientist or philosopher.<sup>296</sup>

## **6 2 Freedom of Expression as Applied to the Right to Education in Nigeria**

Section 39(1) of the Nigerian Constitution provides for the right to freedom of expression in the following terms: “[e]very person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.” The section further clothes individuals with the right to own, establish, and operate any medium for

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<sup>290</sup> See *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N); *Vista University (Bloemfontein Campus) v Student Representative Campus Vista* 1998 4 BCLR 514 (O); see also, Malherbe 2008 (2) TSAR 278.

<sup>291</sup> Malherbe 2008 (2) TSAR 278.

<sup>292</sup> 278.

<sup>293</sup> 278.

<sup>294</sup> See *Board of Education, Island Trees Union Free School District No 26 v Pico* (1982) 102 S Ct 2799; Malherbe 2008 (2) TSAR 278.

<sup>295</sup> Malherbe 2008 (2) TSAR 278.

<sup>296</sup> 278.

dissemination of information, ideas and opinions.<sup>297</sup> In terms of this provision, not only is every person entitled to hold and express opinions freely but he or she also has the right to receive and impart ideas and information through lawful means. In the exercise of this right, an individual may establish or operate any medium for the dissemination of such opinions and ideas.

The impact of the right to freedom of expression on the enjoyment of the right to education is clearly brought out in the case of *Anthony Olubunmi Okogie v Attorney-General of Lagos State*<sup>298</sup> where the court interpreted the similar provisions on the freedom of expression in the defunct 1979 Nigerian Constitution to the effect that the medium for dissemination of opinion and ideas include schools. According to the court, the word “medium” is not limited only to the orthodox mass communication media but could reasonably include schools. It concluded that any statutory abolition of private primary schools in Lagos State as directed by the state government would constitute a violation of the right of proprietors of those schools to freedom of expression.<sup>299</sup>

In terms of this right, no one should be prohibited from expressing his or her views and from receiving information, unless it is harmful to the learners or is capable of disrupting or otherwise detrimentally affect the child’s education. As earlier submitted, the right to freedom of expression impacts on the right to education in several ways; the right will extend to cover the kind of books prescribed in the curriculum and the literature distributed among learners in schools. Given that the Ministries of Education together with examination bodies determine the content of school curriculum and also prescribe textbooks in Nigeria, the best interests of the students are always put into consideration in the types of books and literature they often recommend.

## **7 The Right to Freedom of Assembly and Association**

The right to freedom of association and freedom to peaceful assembly is treated together because of their close link. The right to assemble is proclaimed in all major international human rights instruments.<sup>300</sup> This right is resorted to by those who feel that their demands are not being given serious consideration by the State, thereby addressing feelings of helplessness and

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<sup>297</sup> See s 39(2) of the 1999 Nigerian Constitution.

<sup>298</sup> (1981) 1 NCLR 105.

<sup>299</sup> See also, *Adewole v Alhaji Jakande & Ors* (1981) 1 NCLR 262.

<sup>300</sup> See art 21 of the ICCPR and art 11 of the ACHPR.



isolation.<sup>301</sup> Freedom of Association on the other hand gives people the comfort, security, pleasure and human companionship of interacting with other people of their choice.<sup>302</sup> Article 22 of the ICCPR protects the right to freedom of association with others. Within the African human rights system, article 10 of the ACHPR protects the right of everyone to associate freely provided that he or she abides by the law.<sup>303</sup> In the context of employment, the right to association is also given recognition.<sup>304</sup> The right to freedom of association is important and fundamental in every aspect of human endeavours. It helps the weak and vulnerable in society. According to Dickson CJ, “association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to obtain their purpose and fulfil their aspirations. It has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and perhaps conflict.”<sup>305</sup>

The right to freedom of association and freedom to peaceful assembly is relevant to both the educators and students in any educational institution. Student activism for instance, has historically been a crucial aspect of student life in higher education internationally.<sup>306</sup> Student activism is prevalent in many African countries and the right to freedom of association has been used to articulate this. Students have protested alleged social, economic, cultural, political, and personal injustices, and are vocal in defending their interests and benefits.<sup>307</sup> Students have also unrepentantly fought to resist poor student services and increase in tuition and other fees. However, there have been cases of violation of this right by governments in many instances where government officials conscious of their possible consequences, often use brutal force to crush and subdue them. Hundreds of students have been seriously hurt, imprisoned, persecuted,

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<sup>301</sup> See Stone & Vrancken “Assembly, Demonstration, Picket and Petition” in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* 127; see also, Currie & de Waal *The Bill of Rights Handbook* 396.

<sup>302</sup> See Stone & Vrancken “Freedom of Association” in Govindjee & Vrancken *Introduction to Human Rights Law* 131.

<sup>303</sup> The right to association also implies a right of dissociation. See African Commission in Communication 101/93, Civil Liberties Organisation in Respect of the Nigerian Bar Association v Nigeria, Eighth Activity Report 1994-1995, Annex VI (Documents of the African Commission, p. 394), para 17.

<sup>304</sup> See ILO Convention 87 on Freedom of Association and the Protection of the Right to Organize, 1948.

<sup>305</sup> *Alberta Union of Provincial Employees v Alberta (AG)* 1987 1 SCR 313 at 341.

<sup>306</sup> Teferra & Altbach (eds) *African Higher Education* 117.

<sup>307</sup> 13.

and even killed during such protests.<sup>308</sup> The right to freedom of association as guaranteed in South Africa and Nigeria will now be examined.

## **7 1 The Right to Freedom of Assembly and Association in South Africa**

The South African Constitution provides everyone with right to freedom of assembly, demonstration, picketing and petition as well as the right to freedom of association.<sup>309</sup> The right to freedom of association is particularly important because associations make it possible for people to strive together for the more effective realisation of their constitutionally guaranteed rights.<sup>310</sup> As such, students or learners have the right to form association in schools. The South African Schools Act equally provides that learners have a right to establish a representative council at every public school enrolling learners from the eighth grade and higher.<sup>311</sup> The guidelines for the establishment, election and functions of representative council are determined by the Member of the Executive Council by notice in the Provincial Gazette.<sup>312</sup> The right to assemble and hold a peaceful demonstration is now a constitutionally guaranteed right which may not be denied anyone including students of educational institutions. The right to freedom of association implies that an individual has the right to choose his/her associates or a group of persons to associate with.<sup>313</sup>

South African history of apartheid was characterised with various student protests in opposition to government policies and governmental invasions of educational and civil liberty.<sup>314</sup> But during this period, courts had held that the right to freedom of association is sacrosanct. In *S v Turrell & Others*,<sup>315</sup> for instance, the court held:

“Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and parliament guards these rights jealously for they are part of the very foundations upon which parliament itself rests. Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly.”<sup>316</sup>

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<sup>308</sup> 13.

<sup>309</sup> See ss 17 & 18 of the South African Constitution respectively.

<sup>310</sup> See Currie & de Waal *The Bill of Rights Handbook* 421.

<sup>311</sup> See s 11(1) of the Schools Act 1996.

<sup>312</sup> See s 11(2) of the Schools Act 1996.

<sup>313</sup> *Taylor v Kurtstag NO* [2004] 4 All SA 317 (W) para 37.

<sup>314</sup> Details accounts of these demonstrations were given in *The Open Universities in South Africa and Academic Freedom 1957-1974* (1974) 32-35

<sup>315</sup> 1973 (1) SA 248.

<sup>316</sup> Van Zijl, AJP & Steyn, J at 256.

The massacre of several South African students as witnessed in 1976 was a restraint on the exercise of the freedom of association and freedom to engage in protest and demonstration.<sup>317</sup> Although assemblies played a central role in anti-apartheid politics, they played that role in the face of legal sanction. Many laws were put in place limiting the exercise of this right.<sup>318</sup> Real change began only in February 1990 with the agreement of most political parties to the National Peace Accord which marked the South Africa's first successful attempt to reconcile the right of assemblers with the State's interest in public order.<sup>319</sup> The rights to assemble and freedom of association are now guaranteed under section 17 and 18 of the South African Constitution. These rights are particularly important because they make it possible for people to strive together for the more effective realisation of their constitutionally guaranteed rights.<sup>320</sup>

## **7 2 The Right to Freedom of Assembly and Association in Nigeria**

The Nigerian Constitution guarantees the right to peaceful assembly and association. Section 40 provides that “[e]very person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests...” The freedom to engage in association for the advancement or protection of one's interests is an inseparable aspect of liberty.<sup>321</sup> As applied to educational institution, this provision preserves the right of both staff and students to assemble and form staff and students unions to channel their course. In *Adewole v Jakande*,<sup>322</sup> by expansive interpretation, the Lagos State High Court held that the abolition of fee paying primary schools in the State constitutes a violation of the right to freedom of assembly of the children because they would be forced into schools which were not their own choosing.

It is submitted that though the word “peaceably” is not inserted in the Nigerian Constitution, nonetheless, freedom to assemble must be limited in so far as it would affect

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<sup>317</sup> See *The Open Universities in South Africa and Academic Freedom 1957-1974* 34.

<sup>318</sup> They include the Suppression of Communism Act 44 of 1950 which section 9 empowered the Minister of Justice to prohibit a gathering or an assembly whenever there was, in his opinion, reason to believe that the objects of communism would be furthered at such a gathering; Criminal Law Amendment Act 8 of 1953 which increased penalties for crimes committed in the context of political protest; the Internal Security Act 74 of 1982; the Riotous Assemblies Act 17 of 1956.

<sup>319</sup> See Currie & de Waal *The Bill of Rights Handbook* 398-399.

<sup>320</sup> 421.

<sup>321</sup> Akande *Introduction to Nigerian Constitution* 98.

<sup>322</sup> (1981) 1 NCLR 218; see also, *Okogie v Attorney-General of Lagos State* (1981) 1 NCLR 218.

public peace and security.<sup>323</sup> This means that in demonstrating their grievances, various associations and unions must maintain peace and may only hold peaceful procession. There have been cases of violation of this right in Nigeria especially during the military era when many students as well as staff that were sympathetic to students' causes were arrested and detained.<sup>324</sup> These arbitrary restrictions also have the effect of interfering drastically with freedom of expression. As pointed out under the section on academic freedom considered in chapter five, in 2001 for instance, some 49 lecturers of the University of Ilorin, Ilorin, Nigeria were sacked for participating in a national strike called by the ASUU. This violated the right to freedom of association and caused a lot of unrest in the Nigerian universities with many strikes called out to press for their reinstatement. The Nigerian Supreme Court declared their dismissal a nullity and ordered their reinstatement into their respective positions in the university after a legal battle spanning over eight years.<sup>325</sup> This judgment from the Nigeria's apex court has been hailed within the academic community as invigorating not only the academic freedom but also the citizens' right to freedom of association.

## **8 Right to Establish Independent/Private Schools**

Article 26(3) of the UDHR declares the right of parents to "choose the kind of education that should be given to their children." This provision guarantees parents and legal guardians a right of choice between state-organised (public) and private (fee-paying) education.<sup>326</sup> The ICESCR also recognises the right to establish private educational institutions. In terms of article 13 of the ICESCR, all education, whether public or private, must be directed towards the aims and objectives of education set out in the various human rights instruments. Also, State must ensure that the two categories of schools (private and public) maintain equal standard and that no one

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<sup>323</sup> Akande *Introduction to Nigerian Constitution* 99.

<sup>324</sup> The 1978 national students protest is an example in this regard. In April 1978, the National Union of Nigerian Students (NUNS) embarked on a nation-wide protest against the increase in school fees. The Federal Government responded with repression, resulting in the death of a number of students. In consequence, the Government banned the union, expelled its leaders from the universities and sacked a number of academics from some universities for their views in expressing support for students' cause. Two Vice-Chancellors were also compulsorily retired on the issue. See Ya'u *Academic Staff Union of Universities under Attairu Jega: A Leadership Profile* 7; Ojo, *Law and University Administration in Nigeria* 53-64.

<sup>325</sup> See *Dr Taiwo Oloruntoba-Oju & Others v Prof Shuaib O. Abdul-Raheem & Others* [2009] 13 NWLR (pt 1157) 83 at 142-143, where the Supreme Court held *inter alia* that section 15(1) of the University of Ilorin Act guarantees to the administrative, academic and professional staff fair hearing before their appointment can be terminated and thus gives the exercise of such disciplinary powers a statutory flavour. In the instant case, there was no evidence that the procedure for termination of appellants' employments as to fair hearing was observed.

<sup>326</sup> See Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 360.

should be inferior to the other. In order to guarantee the right to establish and direct private educational institutions while at the same time maintaining minimum standards, article 13(4) of the ICESCR provides:

“No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

At the national level, the South African Constitution expressly provides for the right of everyone to establish and maintain independent educational institutions.<sup>327</sup> Section 29(3) of the Constitution which regulates the right to independent educational institutions provides: “[e]veryone has the right to establish and maintain, at their own expense, independent educational institutions that- (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions.” Independent or private educational institutions must comply with certain constitutionally defined standards as mentioned in section 29(3) above. Thus, race must not be the reason for the establishment of, or a criterion for admission to an independent educational institution; and the institution must be registered with the State and maintain standards that are not inferior to those of comparable public educational institutions.<sup>328</sup>

In line with the constitutional provisions, the South African Schools Act also makes provisions for independent schools. In terms of this Act, everyone has a right to establish and maintain an independent school at their own cost.<sup>329</sup> Such independent schools must be registered with the State.<sup>330</sup> The head of department is obliged to register an independent school upon his satisfaction that the standards to be maintained by such school will not be inferior to the standards in comparable public schools; that the admission policy of the school does not

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<sup>327</sup> See s 29(3) of the Constitution. See also, *Ex parte Gauteng Provincial Legislature in re Dispute Concerning the Constitutionality of the Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) where the court held that the right was a right of everyone/individual (and not government) to establish such schools.

<sup>328</sup> Robinson (ed) *The Law of Children and Young Persons in South Africa* 314; see also, Bray “Law Education and the Learner” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 276.

<sup>329</sup> See s 45 of the South African Schools Act (SASA) 84 of 1996.

<sup>330</sup> It is an offence under the South African School Act for any person to operate an unregistered independent school. Any person who operates independent school without registration is guilty of an offence liable to a fine or imprisonment for a period of three months. See s 46(4) of SASA.

discriminate on the ground of race,<sup>331</sup> and the school complies with the grounds for registration determined by members of the executive council.<sup>332</sup>

Although, independent educational institutions are established and maintained at the founders' own expense, this does not preclude the State from subsidizing an independent educational institution. In terms of section 48(1) of the South African Schools Act, section 27 of the National Education Policy Act, and section 29(4) of the South African Constitution, government subsidy may be granted to independent schools out of funds appropriated by the provincial legislature for that purpose.<sup>333</sup> When the State chooses to extend subsidies to independent educational institutions, it may not discriminate unfairly between various independent institutions in violation of the equality clause in the Constitution.<sup>334</sup> Differences in the nature and extent of subsidies granted to independent institutions are permissible if based on relevant, rational and *bona fide* criteria. The State cannot seek to secure an advantage for a particular independent school based on race, culture or religion. It must treat all independent educational institutions equally and fairly.<sup>335</sup> An independent school may be declared a public school by means of an agreement between the member of the executive council with the concurrence of the member of the executive council responsible for finance and the owner of an independent school.<sup>336</sup> Notice of such change of status is required to be published in the Provincial Gazette.<sup>337</sup> In the same vein, the head of department may withdraw the registration of an independent school.<sup>338</sup> The owner of such school has the right of appeal to the member of the executive council against the withdrawal of registration of such school.<sup>339</sup>

The right to establish independent educational institutions or private schools (as they are referred to in Nigeria) is not expressly guaranteed under the Nigerian Constitution. However, various States ministries of education regulate the registration and activities of private schools

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<sup>331</sup> Any independent educational institution that discriminate on the basis of race loses its constitutional shield under s 29(3) of the Constitution and the state may prohibit its establishment and maintenance. See Davis et al *Fundamental Rights in the Constitution: Commentary and Cases* 301.

<sup>332</sup> S 46(3) of the SASA; Robinson (ed) *The Law of Children and Young Persons in South Africa* 252.

<sup>333</sup> However, where the conditions subject to which subsidy was granted is not complied with; the head of department may terminate or reduce the subsidy from a date determined by him or her. How the owner of the independent school has a right of appeal against such decision to the member of the executive council. See s 48(2)-(5) of the SASA.

<sup>334</sup> See s 9 of the 1996 South African Constitution.

<sup>335</sup> See Davis et al *Fundamental Rights in the Constitution: Commentary and Cases* 301.

<sup>336</sup> S 49(1) of the SASA.

<sup>337</sup> S 49(2) of the SASA.

<sup>338</sup> See s 47(1)(a)-(c) of the SASA.

<sup>339</sup> See s 47(2) of the SASA.

in the country. Courts have given expansive interpretation to section 39 of the Constitution which guarantees the freedom of expression as including the right to establish private schools. Thus, in *Anthony Olubunmi Okogie v Attorney-General of Lagos State*,<sup>340</sup> it was held that the word “medium” as used in the Constitution is not limited only to the orthodox mass communication media but could reasonably include schools. The court held accordingly that any statutory abolition of private primary schools would constitute a violation of the right of proprietors of those schools to freedom of expression. A similar position was taken in *Adewole v Alhaji Jakande & Others*.<sup>341</sup> Also, in *Dr Basil Ukaegbu v Attorney-General of Imo State*,<sup>342</sup> Imo State of Nigeria instituted proceedings challenging the right of the appellant, a private operator, to establish a private university. The Supreme Court upheld the rights of private individuals to establish and operate tertiary and post-primary institutions.

In Nigeria today, private schools contribute to the development of the Nigerian education sector. There are not enough public schools to accommodate all the prospective applicants to all the levels of education in Nigeria but private schools have been able to lessen this problem by accommodating at least a substantial percentage of the prospective applicants. In this way, private schools have been able to contribute to the actualisation of the right to education in the country.

## **9 Summary of the Chapter**

In summary, this chapter has argued that the right to education is an empowerment right which intersects with other fundamental rights guaranteed in the national constitutions. While the right to education is a central facilitative right which empowers individuals with the skills and abilities necessary to realise, reinforce and enhance other rights, at the same time, the denial of other fundamental rights will limit the enjoyment of the right to education. The chapter has also shown the interdependent and symbiotic relationship between the right to education and other constitutional rights such as the right to freedom of religion and a cultural right; the right not to be treated or punished in a cruel or degrading way; the equality principle and right to freedom from discrimination; the right to freedom of expression; the right to freedom of assembly and association and the right to establish independent/private schools. As examined in

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<sup>340</sup> (1981) 1 NCLR 105.

<sup>341</sup> (1981) 1 NCLR 262.

<sup>342</sup> (1983) NSCC 160.

this chapter, all these rights impact on the right to education and as such, where the right to education is effectively guaranteed, it enhances the enjoyment of all those constitutional rights and freedoms and vice versa.

Another issue examined in this chapter is the notion that learners are also bearers of rights. The chapter has argued that the right to education entails more than the right of the child “to be sent to school” and “to be fed with information” with the State, teachers and parents deciding upon what is to be taught and how. The chapter argues that learners are no longer passive recipients of knowledge but are also bearers of rights in educational process. On the issue of the right to language of instruction, the chapter argues that while the right to language of instruction is given constitutional recognition in South Africa, it is not given such a pronounced attention under the Nigerian Constitution. Unlike the case in South Africa, the issue of language of instruction has not generated much tension and controversy in Nigeria. In addition, the chapter examined the application of the right to freedom of religion in South African and Nigerian schools and concludes that this right is a constitutional right which requires a reasonable accommodation should a learner wishes to exercise this right in the school environment.

The right of the learners not to be subjected to torture, inhuman or degrading treatment which includes the issue of school discipline and corporal punishment was also canvassed. Corporal punishment has been outlawed in South African schools. In the Nigerian context, it is revealed that there is no express provision banning corporal punishment in schools. The chapter argues that with the international trend which no longer favours corporal punishment in schools, educators and teachers in Nigeria may not legally use corporal punishment to instil discipline. As such, the judicial decisions which impliedly sanction its use are in conflict with the international trend and development on the issue. In the same vein, the chapter articulates on the issue of equal education opportunity to all and freedom from discrimination. It posits that learners may not be discriminated upon on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It argues that while no form of discrimination is allowed, subtle discrimination in terms of disparity in the enrolment of learners in school remains rampant, especially in Nigeria. The chapter calls for concerted effort on the parts of the government and the citizens towards removing this form of inequality. Also, the chapter shows that learners with disabilities are often discriminated against



in terms of access to education and therefore advocates for the policy of inclusive education as a means of removing this discrimination.

The chapter asserts that the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research is an important component of the right to education. The Nigerian courts have interpreted this right and the medium for dissemination of opinion and ideas as not limited to only mass media but also to include schools. It is argued that the restraints on the exercise of this right include prohibition of harmful information and materials which may have the effect of disrupting a child's education or otherwise detrimentally affect the child's education. The chapter further asserts that the right to freedom of association and freedom to peaceful assembly impact on the right to education and that the enjoyment of these rights is opened to both the learners and the educators. The violation of these rights limits the enjoyment of the right to education. Parents and legal guardians have a right of choice between state-organised (public) and private (fee-paying) education and a State may not limit the establishment of private educational institutions. The right to establish private educational institutions has widened the range of educational choices in South Africa and Nigeria.

## **10 Conclusion**

This chapter has examined some relevant constitutional rights that impact on the right to education. These rights are fundamental, being constitutional rights, and should be observed by educational institutions since their violation limits the enjoyment of the right to education in any country. Apart from the right to establish and maintain independent or private schools, which is a right accruing to the general public; all other rights as examined in this chapter have specific and direct application to both the learners and educators in the educational institutions. The next chapter, which is the penultimate chapter, will be devoted to examining the implementation of the right to education in South Africa and Nigeria. The chapter is the core of the study as it reviews the various laws and policies on the right to education as examined in chapter two to determine the level of the implementation of the right to education in both South Africa and Nigeria.

# Chapter 7

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## Implementation of the Rights to Education

“By having ratified international agreements in which the right to education is protected, states parties thereto assume obligations under international law, enjoining them to realise the right to education and to respect freedom in education.”<sup>1</sup>

### 1 Introduction: Meaning and the Process of Implementation

The right to education, like all other human rights, brings with it a set of globally agreed norms or standards, which give rise to state obligations in relation to which effective and transparent monitoring and accountability mechanisms are required.<sup>2</sup> The importance of the right to education has been stressed in chapter one while chapter two has examined the various human rights instruments in which the right to education is guaranteed. Chapters three, four and five examined the nature and content of the right to education at the primary, secondary and tertiary levels of education respectively while chapter six examined some relevant constitutional rights that impact on the right to education. The present chapter examines the nature of states’ obligations and the implementation of the right to education in terms of the ICESCR. In determining the level of the implementation of the right to education in South Africa and Nigeria, this chapter will review those laws and policies on the right to education earlier examined in chapter two. The chapter will also identify some obstacles impeding the effective implementation of the right to education in the two countries with the aim of suggesting an effective means through which the right to education can be better realised.

It is pertinent to state at the onset that the term “implementation” is a loose concept which defies absolute definition.<sup>3</sup> According to Mazmanian and Sabatier, it may refer to “those events and activities that occur after the issuing of authoritative public policy directives, which

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<sup>1</sup> Beiter *The Protection of the Right to Education by International Law* (2006) 2.

<sup>2</sup> Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 399.

<sup>3</sup> Victor, Raustiala and Skolnikoff state: “implementation is a complex process that...is ill-suited to the construction of parsimonious theories. Yet implementation is what turns grand principles and commitments into actual practice...” See Victor, Raustiala & Skolnikoff “Introduction and Overview” in Victor, Raustiala & Skolnikoff (eds) *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998) 14 & 29.

include the effort to administer and the substantive impacts on people and events.”<sup>4</sup> In this context, implementation connotes the process of converting normative content of the right to education into practical realities; it denotes a process of putting the human rights instruments and standards into effect.<sup>5</sup> Implementation is regarded as the central process that turns commitments into action.<sup>6</sup> In this chapter, the term “implementation” is used to denote the process of translating international human rights commitments into action, as well as the process of implementing those commitments at the national level. It includes the myriad of governments’ acts such as promulgation of laws and regulations and formulation of policies towards achieving these commitments.<sup>7</sup> It also extends to cover the activities of international institutions monitoring and assisting national governments as they put international commitments into practice.<sup>8</sup>

As pointed out in chapter one, the right to education is given a wide recognition in several international, regional and national human rights instruments.<sup>9</sup> Despite the universal recognition of the right to education as a fundamental right, the realisation of this right remains elusive especially in the developing countries.<sup>10</sup> The enjoyment of the right to education, especially for girls and women, remains a distant goal for millions of individuals throughout the

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<sup>4</sup> See Mazmanian & Sabatier *Implementation and Public Policy* (1983) as quoted by Victor, Raustiala & Skolnikoff “Introduction and Overview” in *The Implementation and Effectiveness of International Environmental Commitments* 4.

<sup>5</sup> This is what Halliday and Schmidt referred to as bringing “law on the book” into “law-in-action.” See Galligan & Sandler “Implementing Human Rights” in Halliday & Schmidt (eds) *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in National Context* (2004) 7, 26 & 29.

<sup>6</sup> Victor, Raustiala & Skolnikoff “Introduction and Overview” in *The Implementation and Effectiveness of International Environmental Commitments* 15.

<sup>7</sup> 4.

<sup>8</sup> 4.

<sup>9</sup> See art 26, UDHR; arts 13 & 14, ICESCR, art 19(2), ICCPR, arts 28, 29, 30, 31 & art 32 of the Convention on the Rights of the Child (CRC), art 10 of the Convention on the Elimination of Discrimination Against Women (CEDAW) 1979; arts 23, 24 and 29 of the Convention on the Rights of the Child (CRC) 1989; art 17 of the African Charter on Human and Peoples’ Rights (ACHPR) 1981; African Charter on the Rights and Welfare of the Child 1990; the UNESCO Convention Against Discrimination in Education 1960; the World Declaration on Education for All-Meeting Basic Learning Needs, adopted by the World Conference on Education for All on 9 March 1990; European Convention 1953; American Declaration of the Rights and Duties of Man 1948 among others. See also, s 29 CRSA, 1996 & s 18, CFRN, 1999.

<sup>10</sup> As UNESCO recently observed, “at the dawn of the century 875 million of the world’s citizens are illiterate. One out of every five children aged 6-11 in developing countries- an estimated 113 million- is not in school, 60 percent of them are girls. Nine countries- Bangladesh, Brazil, China, Egypt, India, Indonesia, Mexico, Nigeria and Pakistan (E9) - are home to 70 per cent of the world’s illiterates. Girls and women are most at risk. See UNESCO *Education for All: An Achievable Vision* (2000) 3.

world, especially in sub-Saharan Africa.<sup>11</sup> It is observed that discrimination against girls and women in societies impedes access to education and constitutes a big problem towards achieving equal education for all.<sup>12</sup> The problem statement postulated in this study asserts that millions of school-age children have no access to any kind of basic education service across the globe.<sup>13</sup> Also, several million adults are illiterates out of which almost two-thirds are women.<sup>14</sup> The discussions in the preceding chapters have also shown that despite the MDGs aiming at ensuring that children everywhere in the world are able to complete a full course of good quality education at all levels by 2015, sub-Saharan Africa still has a large number of out-of-school children and illiterate adults. In terms of quality, it is observed that the quality of education is poor with millions entering schools but not learning enough to meet their basic learning needs.<sup>15</sup>

In South African and Nigerian schools in particular, it is observed that the link between access and success is weak.<sup>16</sup> The problem becomes more revealing given the progressive slide in the school certificate examinations results in the two countries.<sup>17</sup> It is accepted that school

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<sup>11</sup> Asserting this, Coomans states: “[i]t is a commonplace to say that everyone has a right to education. However, it is a matter of common knowledge that there is a big gap between the right to education laid down by international texts and the persistence of some disenchanting realities.” See Coomans “Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation” in *Human Rights in Education, Science and Culture* 183.

<sup>12</sup> Ssenyonjo *Economic, Social and Cultural Rights* 358.

<sup>13</sup> Dall “Children’s Right to Education: Reaching the Unreached” in Himes (ed) *Implementing the Convention on the Rights of the Child* (1995) 143; see also, Coomans “Content and Scope of the Right to Education as a Human Right and Obstacles to Its realisation” in *Human Rights in Education, Science and Culture* 183.

<sup>14</sup> See Coomans “Content and Scope of the Right to Education as a Human Right and Obstacles to Its realisation” *Human Rights in Education, Science and Culture* 183.

<sup>15</sup> Capturing this problem globally, Paul submits thus: “[m]ost educational commentators and most of the general public seem to agree on at least one thing: the schools are in deep trouble. Many graduates, at all levels, are characterized as lacking the abilities to read, write and think with a minimum level of clarity, coherence and a critical/analytical exactitude...” See Paul “McPeck’s mistakes” in Scheffler, Howard & McPeck (eds) *Teaching Critical Thinking* (1990) 102; see also, Dall “Children’s Right to Education: Reaching the Unreached” in *Implementing the Convention on the Rights of the Child* 143; Coomans “Content and Scope of the Right to Education as a Human Right and Obstacles to Its realisation” in *Human Rights in Education, Science and Culture* 183.

<sup>16</sup> See Berger “The Right to Education under the South African Constitution” 2003 103 *Columbia Law Review* 614, 619-620 & 661; Jansen “Reflections on Meaningful Access to Education” in Pendlebury, Lake & Smith (eds) *South African Child Gauge 2008/2009* (2009) 7-8; DFID Document on Education in Nigeria available at: [http://www.dfid.gov.uk/document/publications/PSA/E\\_Nigeria.pdf](http://www.dfid.gov.uk/document/publications/PSA/E_Nigeria.pdf) (accessed on 08-08-2009); UNESCO Education for All Global Monitoring Report 2009 available at [http://www.unesco.org/education/gmr2009/press/GMR2009\\_RO\\_SSA.pdf](http://www.unesco.org/education/gmr2009/press/GMR2009_RO_SSA.pdf) (accessed on 08-08-2009).

<sup>17</sup> See Statement by the Minister of Basic Education, Mrs Angie Motshekga, MP, on the announcement of the National Senior Certificate Grade 12 Examination results for 2009 on 07-01-2010 at Pretoria, available at [http://www.news24.com/Content/SouthAfrica/News/1059/dfaaa691ee6e44529f716638cd4ba931/07-01-2010-08-27/Matric\\_results\\_Ministers\\_full\\_speech](http://www.news24.com/Content/SouthAfrica/News/1059/dfaaa691ee6e44529f716638cd4ba931/07-01-2010-08-27/Matric_results_Ministers_full_speech) (accessed on 07/01/2010); for Nigeria, see “Mass Failure in WAEC and NECO Exams” *The Guardian* of 19-10-2009 available online at:

certificate examination results are a major visible indicator of the strengths and weaknesses in the national educational system. The poor secondary schools results in the two countries, as pointed out in chapter four, should therefore provide the opportunity for analysing what is accountable for the failure rate and the possibilities for improving the educational system in both countries. The ICESCR stipulates the obligation of a State party to ensure full realisation of the rights recognised under the Covenant including the right to education. It is observed, however, that measuring the progress in realizing economic, social and cultural rights poses problems.<sup>18</sup> This is so because the process does not only require an assessment of current programmes and performance, but also a determination as to whether a State is moving expeditiously towards the goal of full implementation, using the full extent of available resources.<sup>19</sup>

The pertinent issue, therefore, is how to determine the actual nature of the States parties' implementation of their obligations under the ICESCR. What are the indicators to determine when a violation of economic, social and cultural rights has occurred? The Limburg Principles provide some guidance by stating that "a failure by a State Party to comply with an obligation contained in the International Covenant on Economic, Social and Cultural Rights is, under international law, a violation of the International Covenant on Economic, Social and Cultural Rights."<sup>20</sup> This chapter will now proceed with an overview of the nature of the States' obligations and the implementation strategies put in place under the ICESCR and other allied human rights instruments. This approach will, it is submitted, provide a solid foundation to identify the content of the right to education and the corresponding states' obligations in South Africa and Nigeria.

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<http://www.nigeriamasterweb.com/paperfrmes.html> (accessed on 19-10-2009); "WASSCE: Huge Resources, Poor Performance" *The Punch Newspaper* (19 March, 2010) 36.

<sup>18</sup> Rishmawi *The Nature of States Parties Obligations (A Commentary on the United Nations Convention on the Right of the Child)* (2006) 33 para 87.

<sup>19</sup> Para 87.

<sup>20</sup> See "The Limburg Principles on Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 122 par 70. Relating this to the right to education, Beiter submits that the failure of a state to comply with the right to education as laid down in international agreements amounts to a violation of international law, entailing the international responsibility of the states. See Beiter *The Protection of the Right to Education* 2 & 3.

## 2 The Nature of the States Obligations

Article 2(1) of the ICESCR provides: “[e]ach States 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.” Similarly, article 4 of the CRC says: “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”<sup>21</sup> It should be noted that these provisions use the formulation “in all appropriate means, including particularly the adoption of legislative measures” in qualifying the states obligations.

The nature and scope of the states parties’ obligations under the ICESCR, and the nature and scope of violations of the economic, social and cultural rights and appropriate responses and remedies, have been examined by groups of experts in international law who adopted the Limburg Principles on the Implementation of the ICESCR in 1986<sup>22</sup> and Maastricht Guidelines on Violations of Economic, Social and Cultural Rights in 1997.<sup>23</sup> Although, the Limburg Principles and Maastricht Guidelines are not legally binding *per se*, they provide a subsidiary means for the interpretation of the Covenant as “teachings of the most highly qualified publicists of the various nations.”<sup>24</sup> The participants who adopted the Maastricht Guidelines considered them to reflect the evolution of international law since 1986. The CESCR has also in

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<sup>21</sup> See a similar provision in art 2(2) of the ICCPR which states: “[w]here not already provided for by existing legislative, or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.” Art 1 of the African Charter on Human and Peoples’ Rights, 1981 also contains similar provision. It states: “[t]he Member States of the Organization of African Unity, Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.” See also, art 1(1) of the African Charter on the Rights and Welfare of the Child (ACRWC) adopted by the OAU in 1990 (OAU Doc. CAB/LEG/24.9/49).

<sup>22</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 6 June 1986 (UN Doc. E/CN.4/1987/17, 1987) & (1987) 7 *Human Rights Quarterly* 122-135. The Limburg Principles were adopted by a group of 29 participants.

<sup>23</sup> See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (UN Doc. E/C.12/2000/13/2000); see also, (1998) 20(3) *Human Rights Quarterly* 691-704. The Maastricht Guidelines were adopted by a group of more than 30 experts.

<sup>24</sup> Ssenyonjo *Economic, Social and Cultural Rights* 52.

its numerous General Comments spelt out the content of the obligations and rights under the Covenant, to which no State has ever raised any formal objections.

While these General Comments are not binding, they carry substantial weight in the interpretation of the rights they address.<sup>25</sup> In respect of a human rights treaty that was drafted in such a way as to accommodate disparities among State parties, the interpretations given to its contents by the ESCR Committee are indeed invaluable.<sup>26</sup> A striking feature of the General Comments is the consistent effort of the ESCR Committee at identifying aspects of each right that are capable of immediate implementation.<sup>27</sup> Over the course of time, the General Comments of the ESCR Committee have become highly instructive and materially instrumental in the interpretation of conventional human rights law at regional and national levels.<sup>28</sup> For instance, in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,<sup>29</sup> the African Commission on Human and Peoples' Rights (African Commission) relied extensively on General Comments Nos. 3, 4, 7, and 14 to hold that the Federal Government of Nigeria had violated the rights to housing, food and health. Prior to this decision, in interpreting the "reasonableness" of the housing policy of the South African government, the Constitutional Court of South Africa applied General Comments Nos. 3 and 4 in *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>30</sup> to define the nature and scope of the constitutional provisions on the subject.

In terms of the provisions of article 2(1) of the ICESCR and article 4 of the CRC, the nature of States parties' obligations consists of three important elements. First, States parties are to take "all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in those instruments. Secondly, in implementing socio-economic and cultural rights, States parties "undertake [to take] such measures to the maximum extent of their available resources." Finally, where needed, the progressive nature of the implementation of economic, social and cultural rights should be undertaken within the framework of international co-operation.<sup>31</sup> The Limburg Principles clearly state that it is the responsibility of the States to "use all appropriate means, including legislative, administrative, judicial, economic, social and

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<sup>25</sup> Olowu *An Integrative Right-Based Approach to Human Development in Africa* (2009) 39.

<sup>26</sup> 39.

<sup>27</sup> 39.

<sup>28</sup> 39.

<sup>29</sup> (2001) AHRLR 60 (ACHPR 2001).

<sup>30</sup> (2000) 11 BCLR 1169 (CC)

<sup>31</sup> Rishmawi *A Commentary on the United Nations Convention on the Rights of the Child* 1.

educational measures” in order to fulfil the obligations under the ICESCR.<sup>32</sup> The Principles state further that the legislative measures alone are not sufficient,<sup>33</sup> and as such, appropriate remedies including judicial remedies, where applicable, should be provided.<sup>34</sup>

In the same vein, the Maastricht Guidelines state that economic, social and cultural rights, like civil and political rights, impose obligations to respect, protect and fulfil.<sup>35</sup> Each of these obligations includes elements of obligation of conduct and result, and these occur through acts of omission and acts of commission.<sup>36</sup> In relation to legislative measures regarding economic, social and cultural rights, the Guidelines state that the violation by acts of commission occurs, for example, by removing or suspending legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed; or through the adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the rights.<sup>37</sup> Also, violations through acts of omission occur through the failure to reform or repeal existing legislation.<sup>38</sup> The three levels of states obligations will now be examined.

## **2 1 Levels of States Obligations: Obligations to Respect, Protect and Fulfil**

A combined reading of articles 2-5 and articles 13-14 of the ICESCR as well as articles 4 and 28 of the CRC shows that most of the obligations enshrined in these provisions are of a positive nature. These require a more active policy of the States and can be categorized as obligations to respect, protect and fulfil.<sup>39</sup> The three levels of obligations on the States arising from the right to education as protected in the ICESCR were addressed by the CESCR in its General Comment 13.<sup>40</sup> The Committee states: “[t]he right to education, like all human rights, imposes three types

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<sup>32</sup> The Limburg Principles on the Implementation of the ICESCR para 17.

<sup>33</sup> Para 18.

<sup>34</sup> Para 19.

<sup>35</sup> Maastricht Guidelines, Guideline 6.

<sup>36</sup> Maastricht Guidelines, Guideline 7; see also, Rishmawi *A Commentary on the United Nations Convention on the Rights of the Child* 6.

<sup>37</sup> Maastricht Guidelines, Guideline 14(a) & (d).

<sup>38</sup> Maastricht Guidelines, Guideline 15(b).

<sup>39</sup> See CESCR Committee, General Comment 13 para 47; See also, the Maastricht Guidelines 6; Eide “Economic, Social and Cultural Rights as Human Rights” in Eide, Krause & Rosas (eds) *Economic, Social and Cultural Rights* (2001) 23-24.

<sup>40</sup> See generally, Olowu *An Integrative Right-Based Approach to Human Development* 28-31; see also, Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010)82-85.



or levels of obligations on States parties: the obligations to *respect, protect* and *fulfil*. In turn, obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.”<sup>41</sup>

The obligations “to respect” requires the States parties to take measures that hinder or prevent third parties from interfering with the enjoyment of the right to education.<sup>42</sup> This obligation requires the States to guarantee the exercise of the right to education in horizontal relations.<sup>43</sup> In this sense, States must *inter alia* take measures, for example, to prevent and fight against discrimination in education organized by private educational institutions, and make sure that parents and employers do not stop children (especially girls) from going to school.<sup>44</sup> This obligation requires a State party to refrain from all measures that directly or indirectly interfere, impair, hinder or prevent the enjoyment of the right to education for all those within its jurisdiction.<sup>45</sup> For example, States must refrain from denying or limiting equal access for all individuals and groups to all levels of education, primary or fundamental, secondary or higher, on prohibited grounds. In addition, States are obliged to refrain from acts such as the closure of public or private schools that comply with minimum educational standards; approving corporal punishments in schools, limiting access to means of maintaining education, censoring or withholding education-related information, and limiting access to education services as a punitive measure.<sup>46</sup>

The obligation “to protect” the right to education requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education.<sup>47</sup> In terms of this obligation, States are required to take measures, through legislation or by other means, to prevent and prohibit third parties (private groups and individuals) from interfering with the enjoyment of the right to education.<sup>48</sup> This will require, for example, that the State adopt legislation or other measures to ensure equal access to education provided by third parties by ensuring that private educational institutions do not discriminate in making admissions. Similarly, the State must ensure that third parties, including parents and employers, do not

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<sup>41</sup> General Comment 13, para 46. Emphasis added.

<sup>42</sup> General Comment 13, para 47.

<sup>43</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child - Article 28: The Right to Education* (2006) 51.

<sup>44</sup> 51.

<sup>45</sup> Ssenyonjo *Economic, Social and Cultural Rights* 389.

<sup>46</sup> 389.

<sup>47</sup> General Comment 13, para 47.

<sup>48</sup> Ssenyonjo *Economic, Social and Cultural Rights* 390.

prevent girls, women and other disadvantaged or marginalised groups from having access to education. The States also have the obligation to prevent early marriage that interferes with the child's education. Protection also demands that States establish "minimum educational standards" to which all educational institutions, including private institutions, are required to conform. A State must also ensure that teachers and other education professionals meet appropriate standards of education, skill and ethical codes of conduct.<sup>49</sup>

The obligation "to fulfil" on the other hand requires a variety of positive measures from the States in order to make the various types of education available and accessible for all and to maintain that level of realisation.<sup>50</sup> In this regard, States are required to adopt appropriate measures, legislative, administrative, budgetary, judicial, promotional and other measures, towards the full realisation of the right to education. This obligation involves both an obligation of conduct (to take certain steps) and an obligation of result (to achieve a specific result) such as free and compulsory primary education or progressive introduction of free secondary and higher education. In order to achieve this, a State is obliged, *inter alia*, to give sufficient recognition to the right to education in the national political and legal systems, preferably by way of legislative implementation.<sup>51</sup>

The obligation to fulfil also contains obligations to facilitate and to provide.<sup>52</sup> The obligation "to facilitate" requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. For example, it imposes an obligation on the States to reduce school drop-outs and to prohibit child labour that interferes with child education.<sup>53</sup> A State is, in addition, obliged to facilitate the availability of education by taking positive measures to ensure that schools and teachers are available in sufficient quantity.<sup>54</sup> Further, in terms of this obligation, the States have the primary responsibility for the direct provision of education at the levels of primary, secondary and higher education.<sup>55</sup> States

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<sup>49</sup> 390.

<sup>50</sup> General Comment 13, para 47; see also, Coomans "In Search of the Core Content of the Right to Education" in Chapman & Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 220 243.

<sup>51</sup> Ssenyonjo *Economic, Social and Cultural Rights* 390.

<sup>52</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 51; Ssenyonjo *Economic, Social and Cultural Rights* 390.

<sup>53</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 51.

<sup>54</sup> See art 12(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which obliges states to facilitate the realisation of the women's rights to education.

<sup>55</sup> General Comment 13 para 48.

are also obliged to ensure that education meets the requirement of adaptability by designing and providing resources for curricula that reflect the contemporary needs of students in a changing world. States are, furthermore, to fulfil (provide) the requirement of availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.<sup>56</sup> Finally, States may fulfil the right to education by assisting, for example, through a system of scholarships for those who cannot afford fees charged for education.<sup>57</sup>

Summarising the foregoing, the nature and the content of the three levels of education as examined in chapters three, four and five will impose the following obligations on the States: provision of primary/basic education that is free and compulsory;<sup>58</sup> progressive introduction of free secondary and higher education;<sup>59</sup> access to public educational institutions and programmes on a non-discriminatory basis;<sup>60</sup> educational quality that conforms to the internationally recognised objectives;<sup>61</sup> encouraging regular attendance at schools and ensuring reduction of drop-out rates;<sup>62</sup> development of a system of schools at all levels, establishment of an adequate fellowship system and continuously improving material conditions of teaching staff;<sup>63</sup> and guarantee of parental choice in the education of their children without interference from the state or third parties, subject to conformity with “minimum educational standards.”<sup>64</sup>

In terms of article 2(1) of the ICESCR earlier quoted, States may fulfil the obligations imposed on them “progressively” and “to the maximum extent of their available resources.”<sup>65</sup> It should be noted that the inclusion of “progressive realisation” in the provision is in recognition of the fact that full realisation of these rights may generally not be achieved in a short period of

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<sup>56</sup> General Comment 13 para 50.

<sup>57</sup> In this regard, art 11(3)(e) of the African Charter on the Rights and Welfare of the Child (ACRWC) obliges States to “take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.”

<sup>58</sup> See art 13(2), ICESCR; art 28(1), CRC & art 11(3)(a), ACRWC.

<sup>59</sup> Art 13(2)(b) & (c), ICESCR; art 28(1)(b), CRC & art 11(3)(b), ACRWC.

<sup>60</sup> See art 26(1), UDHR; art 13(1), ICESCR; art 29(1), CRC; art 3 UNESCO Convention; art 5, CERD & art 10, CEDAW.

<sup>61</sup> See art 26(2), UDHR; art 13(1), ICESCR; art 29, CRC & art 12(2) ACRWC).

<sup>62</sup> See art 28(1)(e) of the CRC.

<sup>63</sup> See art 13(2)(e) of the ICESCR.

<sup>64</sup> See art 13(3) & (4), ICESCR & CESCR General Comment 13, para 57.

<sup>65</sup> See also, arts 4 & 28(1) of the CRC; see also, Olowu *An Integrative Right-Based Approach to Human Development* 27.

time because of a lack of financial and other resources.<sup>66</sup> Notwithstanding the notion of progressive realisation, it is submitted that this provision does not diminish the clear obligation on the States parties to fully realise the right in the end. States parties are obliged to take steps within a reasonably short time after adopting these Covenants in order to move towards this goal as expeditiously and effectively as possible.<sup>67</sup> Such steps must be deliberate, concrete and targeted towards the full realisation of the right to education.<sup>68</sup> The budgetary allocation for education is one of the indicators to determine the commitment of the State parties to education. Thus, regressive measures such as a decrease or reduction in the education budget will be incompatible with the interpretation of the word “progressively”.<sup>69</sup> Such measures will also constitute a violation of the ICESCR,<sup>70</sup> and are therefore impermissible.<sup>71</sup>

In its reporting guidelines, the CRC Committee asks the States to provide information on the proportion of the overall budget devoted to children and allocated to the various levels of education.<sup>72</sup> In its concluding observations to State parties reports, the Committee expressed concern about insufficient resources allocation to education and therefore encouraged States parties to raise budgetary allocations to education services.<sup>73</sup> However, the Committee refrained from stating what proportion of the national budget should precisely be allocated to education thereby leaving a “margin of discretion” to the States as to the means to accomplish these

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<sup>66</sup> See CESCR Committee, General Comment No. 3 on the Nature of States Parties Obligations 1990 (UN Doc. HRI/GEN/1/Rev.5, 2001) para 9; CRC Committee, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (UN Doc. CRC/GC/2003/5, 2003) para 7.

<sup>67</sup> General Comment 3, paras 2 & 9; the Limburg Principles para 21; CESCR Committee, General Comment 13 para 44.

<sup>68</sup> General Comment 13 para 43; General Comment 3 paras 2 & 9.

<sup>69</sup> Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* (2002) 411; see also, Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 52-53.

<sup>70</sup> The Maastricht Guidelines 14(g) states: “violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include: (g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.”

<sup>71</sup> General Comment 3 para 9.

<sup>72</sup> CRC Committee, General Guidelines Regarding the Form and Contents of the Periodic Reports (UN Doc. CRC/C/58, 1996) para 106.

<sup>73</sup> See for example, CRC Committee, Concluding Observations: Nigeria (UN Doc. CRC/C/50, 1996) para 63; CRC Committee, Concluding Observations: Lebanon (UN Doc. CRC/C/54, 1996) para 36; CRC Committee, Concluding Observations: Zimbabwe (UN Doc. CRC/C/54, 1996) paras 85 & 98; CRC Committee, Concluding Observations: Portugal (UN Doc. CRC/C/46, 1995) para 149; CRC Committee, Concluding Observations: Yemen (UN Doc. CRC/C/50, 1996) paras 45 & 51; CRC Committee, Concluding Observations: Burundi (UN Doc. CRC/C/100, 2000) para 104; CRC Committee, Concluding Observations: Nigeria (UN Doc. CRC/C/118, 2002) para 75; CRC Committee, Concluding Observations: Pakistan (UN Doc. CRC/C/133, 2004) para 187.

obligations.<sup>74</sup> The precise content of these obligations is therefore likely to vary from one State to another and over time in relation to the same State.<sup>75</sup> This omission makes the question as to when exactly the failure of a State to use the available resources to the maximum extent would amount to a breach of its international obligation a difficult one to answer.<sup>76</sup> However, the concept of “the minimum core content” has been developed to determine a violation of socio-economic rights. The next part of this chapter is therefore devoted to examining this concept as it applies to the right to education.

## 2.2 The “Minimum Core” Concept as a Determinant of Violation

When a State ratifies a covenant, the ultimate result is to implement fully all the components of the rights recognised under the covenant.<sup>77</sup> In order to fulfil this obligation, a State should first tackle certain “elements of the right that are the most essential or fundamental” in circumstances where resources are highly scarce.<sup>78</sup> Such elements constitute the “minimum core content” of a right, which translates into “minimum core entitlements” for individual or groups, and “minimum core obligations” for States.<sup>79</sup> The minimum core content is that part of a right, which must be respected and protected at all times, whatever the state’s level of development and available resources.<sup>80</sup> It is an absolute international minimum, and constitutes a basic level of subsistence necessary to live in dignity. Alston described it as “an absolute minimum entitlement, in [the] absence of which a state party is considered to be in violation of its obligations.”<sup>81</sup>

The notion of “minimum core content” refers to the essence and core substance of a right, which may not be violated by any State, including developing States in respect of a

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<sup>74</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 54; see also, Ssenyonjo *Economic, Social and Cultural Rights* 54.

<sup>75</sup> See Hunt *State Obligations, Indicators, Benchmarks and the Right to Education* (UN Doc. E/C.12/1998/11, 1998) para 6.

<sup>76</sup> See Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 53-54.

<sup>77</sup> CRC General Comment 5 para 2; see also, Ssenyonjo *Economic, Social and Cultural Rights* 65.

<sup>78</sup> Chapman & Russell “Introduction” in Chapman & Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 1-19 9.

<sup>79</sup> Russell “Minimum State Obligations: International Dimensions” in Brand & Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) 11-21; see also, Olowu *An Integrative Right-Based Approach to Human Development* 31.

<sup>80</sup> Ssenyonjo *Economic, Social and Cultural Rights* 66.

<sup>81</sup> Alston “Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 332 353.

particular right.<sup>82</sup> It ensures the satisfaction of, at the very least, minimum essential levels of each of the rights.<sup>83</sup> It is the essential element or elements without which a right loses its substantive significance as a human right and in the absence of which a State party should be considered to be in violation of its international obligations.<sup>84</sup> It is regarded as a “floor” below which condition should not be permitted to fall.<sup>85</sup> Noting this, the CESCR submits:

“[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State Party in which any significant number of individuals is deprived of basic foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être* ...”<sup>86</sup>

It should be pointed out that the purpose of the minimum state obligations approach is not to give a State an escape route for avoiding its responsibilities under the ICESCR.<sup>87</sup> Rather, it is a way to take into account the fact that many economic, social and cultural rights require resources that are simply not available in developing countries. Today, there is positive appreciation of the concept of “progressive realisation” as implying the avoidance of retrogressive measures that reduce either the number of beneficiaries who have access to the rights or the substance of the benefits.<sup>88</sup> Even in highly austere circumstances, a State has an irreducible obligation that it is assumed to be able to meet, and it shifts the burden of proof to the State if it claims that it cannot meet these most minimal obligations.<sup>89</sup> Therefore, even where the available resources are demonstrably inadequate, the obligation remains on a State party to strive to ensure the widest possible enjoyment of the relevant rights under the

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<sup>82</sup> Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 54; CESCR Committee, General Comment 3 para 10; Arambulo *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights, Theoretical and Procedural Aspects* (1999) 130-136; Coomans “In Search of the Core Content of the Right to Education” in Chapman & Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 220 225-246.

<sup>83</sup> Maastricht Guidelines 9.

<sup>84</sup> Brand & Russell *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) 11-21 14 & 15.

<sup>85</sup> Roithmayr “Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education” 2003 19(3) *SAJHR* 382 402; Brand & Russell *Exploring the Core Content of Socio-Economic Rights* 15.

<sup>86</sup> CESCR General Comment 3 para 10.

<sup>87</sup> Olowu *An Integrative Right-Based Approach to Human Development* 33.

<sup>88</sup> 33.

<sup>89</sup> Russell “Minimum State Obligations: International Dimension” in *Exploring the Core Content of Socio-Economic Rights* 16.

prevailing circumstances.<sup>90</sup> In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its dispositions in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>91</sup> It is also expected of such a State to seek international assistance and co-operation in this respect.<sup>92</sup>

It should be noted, however, that the fact that the minimum core content of a right must be realised immediately does not suggest that the remainder of such a right is unimportant so as to justify inertia or its neglect or denial. Rather, the minimum core should only be seen as a “springboard” for further action by the States.<sup>93</sup> After a State has substantially met its minimum core obligations, it is still obliged to progressively realise the remainder of a right.<sup>94</sup> While there still remains quite a long way to go in arriving at an objective “universal” standard of minimum essentials for each right in the ICESCR, it is obvious that the central concern of the ESCR Committee is to ensure that State parties demonstrate their unwavering commitment to the protection of vulnerable members of society.<sup>95</sup> However, in order to implement the content of the right to education, States are obliged to make education available, accessible, acceptable and adaptable referred to earlier in this thesis as the 4-A typology.<sup>96</sup> The 4-A typology of education denotes access to education on a non-discriminatory basis (accessibility); the right to enjoy free and compulsory primary education (availability); the right to quality education (adaptability); and the right to free choice of education (acceptability).<sup>97</sup>

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<sup>90</sup> CESCR General Comment 3 para 11; see also, Russell “Minimum State Obligations: International Dimension” in *Exploring the Core Content of Socio-Economic Rights* 16

<sup>91</sup> CESCR General Comment 3 para 10.

<sup>92</sup> It should be noted that the term “resources” in terms of ICESCR refers to both the resources existing within a State and those available from the international community through international cooperation and assistance. See General Comment 3 para 13; Limburg Principles 26 & art 2(1), ICESCR. A State claiming that it does not have enough resources to fulfil these core obligations has the burden to prove that this is due to reasons beyond its control and that it has unsuccessfully sought to obtain international support. See Eide “Economic, Social and Cultural Rights as Human Rights” in *Economic, Social and Cultural Rights* (2001) 23-24.

<sup>93</sup> Van Bueren “The Minimum Core Obligations of States” in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* 160.

<sup>94</sup> Ssenyonjo *Economic, Social and Cultural Rights* 67.

<sup>95</sup> See Olowu *An Integrative Right-Based Approach to Human Development* 32.

<sup>96</sup> See Tomasevski “The Special Rapporteur on the Right to Education: preliminary Report” (UN Doc E/CN.4/1999/49 of 13 January 1999) para 50; Ssenyonjo *Economic, Social and Cultural Rights* 386. It has been argued that there exists a clear relationship of minimum core concept with elements of the “4-A” typology in respect of the right to education. See Coomans “Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation” in *Human Rights in Education, Science and Culture* 197.

<sup>97</sup> Coomans “Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation” in *Human Rights in Education, Science and Culture* 197-203.

The following elements have therefore been identified as constituting the “core content” or the “minimum claims” of the right to education: the right to enjoy free and compulsory primary education; the right to special facilities for persons with an educational deficit or who would otherwise have no access to education at all, such as girls, children in rural areas, working children, street children, and so on; and thirdly, the right to quality education at each educational level.<sup>98</sup> The concept of the minimum core content with regard to the right to education has also been elaborated upon by the CESCR.<sup>99</sup> The Committee states that in the context of article 13 of the ICESCR, this core includes:

“[A]n obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’ (art.13 (3) and (4)).”<sup>100</sup>

The foregoing forms the basis or foundation on which the implementation of the right to education in South Africa and Nigeria will be assessed in this chapter. In doing this, the right to primary, secondary and higher education as examined in chapters three, four and five will be reviewed. The measures on implementing the right to education will be examined under two heads namely, measures at the national and international levels.

### **3 National Measures towards Implementing the Right to Education**

Apart from enumerating the nature of the States’ obligations, article 2(1) of the ICESCR further states the measures or steps required towards implementing the rights guaranteed under the Covenant. In terms of article 2(1) of the ICESCR, each State party 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 Covenant by *all appropriate means*, including

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<sup>98</sup> See Coomans “In Search of the Core Content of the Right to Education” in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* 217-246 220 & 225-231; Van Bueren “The Minimum Core Obligations of States under Article 10(3) of the International Covenant on Economic, Social and Cultural Rights” in Chapman & Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 147-160 150-153; Verheyde *A Commentary on the United Nations Convention on the Rights of the Child* 54-56.

<sup>99</sup> At its 21<sup>st</sup> Session, 15 November - 3 December 1999.

<sup>100</sup> See CESCR General Comment 13 para 57.



particularly *the adoption of legislative measures*.<sup>101</sup> In the same vein, article 4 of the CRC provides that “States Parties shall undertake all appropriate *legislative, administrative, and other measures* for the implementation of the rights recognised in the present Convention...”<sup>102</sup> These provisions are comparable with the provision of article 2(2) of the ICCPR which also recommends legislative and other measures.<sup>103</sup>

It should be noted that international human rights are meaningless and worthless if they cannot be implemented.<sup>104</sup> It has been argued that the implementation of international human rights should primarily be done through action at the national level. In this regard, Verheyde and Goedertier submit that the implementation of the rights enshrined in the UN Conventions is primarily a matter of national legislation, policies and litigation.<sup>105</sup> It is, therefore, submitted that the efficacy or otherwise of a human rights treaty can only be assessed on the basis of its domestic effect, that is, its status within a particular legal system.<sup>106</sup> Implementation at the national level implies, in the first place, the inclusion of the international human rights provisions in the national legal order by adopting national legislation.<sup>107</sup>

However, the texts of both the ICESCR and the CRC show that the implementation of these Conventions cannot be considered solely as a national concern.<sup>108</sup> For instance, articles 43 to 45 of the CRC provide for an implementation system on the international level performed by

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<sup>101</sup> Emphasis added. The term “progressive realisation” has been interpreted to mean the dismantling of a range of legal, administrative, operational and financial obstacles which impede access to the rights, and the expansion over time of such access, to a larger number and broader range of people. See *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) para 45; see also, Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 187.

<sup>102</sup> Emphasis added.

<sup>103</sup> Art 2(2) of the ICCPR states: “[w]here not already provided for by existing legislative, or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.” A similar provision is also contained in article 1 of the African Charter on Human and Peoples’ Rights which provides: “[t]he Member States of the Organization of African Unity, Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. See also, art 1(1), ACRWC adopted by the OAU in 1990 (OAU Doc. CAB/LEG/24.9/49).

<sup>104</sup> Ramolotja quarries the purpose of rights if they cannot be implemented thus: “what is the purpose of listing rights in the Constitution if they are not implementable or if nobody has a duty to implement them? What is the purpose of acknowledging a myriad of rights if there are no mechanisms for their implementation or enforcement?” See Ramolotja “The Role of the Courts in the Implementation of Human Rights: The South African Perspective” 1997 XXXVIII (2) *Codicillus* 31.

<sup>105</sup> See Verheyde & Goedertier *A Commentary on the United Nations Convention on the Rights of the Child: Articles 43-45 The UN Committee on the Rights of the Child* (2006) 1 para 1.

<sup>106</sup> Olowu *An Integrative Right-Based Approach to Human Development* 73.

<sup>107</sup> Verheyde & Goedertier 1, n 2.

<sup>108</sup> See art 2(1) of the ICESCR.

the CRC Committee on the Rights of the Child.<sup>109</sup> Also, the existence of the CRC Committee is based on the belief that absence of an international system of control would probably lead to failure by the States parties to fulfil their obligations under the Convention. It should, therefore, be noted also that the Committee was established to assist the governments to strengthen the national mechanisms in the process of realising the provisions of the CRC.<sup>110</sup>

As explained earlier, implementation is the process whereby States parties take action to ensure the realisation of all rights in a particular convention in their jurisdictions. While it is the State that takes on obligations under a particular instrument, nonetheless, its task of implementation should engage all sectors of societies.<sup>111</sup> State parties are obliged to take all appropriate legislative, administrative, and other measures for the implementation of the rights guaranteed.<sup>112</sup> While article 2(1) of the ICESCR mentioned the adoption of legislative measures as part of “all appropriate” means, the CESCR asserts that the phrase “by all appropriate means” must be given its full and natural meaning.<sup>113</sup> The measures considered appropriate for implementing the ICESCR by the CESCR in addition to legislation include, the provision of judicial remedies; administrative; financial; educational; and social measures.<sup>114</sup> The next part of this chapter examines the implementation mechanisms under two heads namely, the legislative measures and non-legislative measures.

### **3 1 Legislative Measures**

The legislature is perhaps the main institution responsible for the national protection of human rights because it represents “the will of the people” as the basis of the authority of government.<sup>115</sup> As Olowu rightly notes, the place of legislation in giving tangible meaning to basic social, economic and political priorities in any nation cannot be over emphasised.<sup>116</sup> Most

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<sup>109</sup> See Verheyde & Goedertier *A Commentary on the United Nations Convention* 1-2 para 1.

<sup>110</sup> Verheyde & Goedertier 2 para 1.

<sup>111</sup> Verheyde & Goedertier 1, para 1; CRC General Comment 5 para 2.

<sup>112</sup> See art 4 of the CRC. In addition, the Committee on the Rights of the Child has identified a wide range of measures that are needed for effective implementation, including the development of special structures and monitoring, training and other activities in government, parliament and the judiciary at all levels. See CRC General Comment 5 para 2.

<sup>113</sup> CESCR General Comment 3 paras 3 & 4.

<sup>114</sup> CESCR General Comment 3 paras 5 & 7.

<sup>115</sup> See art 21 of the UDHR which provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives and that the will of the people shall be the basis of the authority of government. See also, Marie “National Systems for the Protection of Human Rights” in Symonides (ed) *Human Rights: International Protection, Monitoring, Enforcement* (2003) 257-280 260.

<sup>116</sup> Olowu *An Integrative Right-Based Approach to Human Development* 98.

international human rights instruments require States parties to take, undertake and adopt “legislative measures” to guarantee the exercise of the right recognised.<sup>117</sup> Thus, the organization and guarantee of rights and freedoms are regulated by laws prepared and adopted by an assembly elected by the people.<sup>118</sup> Even when limitations or restrictions on the exercise of certain rights and liberties are necessary, such limitations or restriction must also be provided for in the national law.<sup>119</sup> Thus, the legislature has a central role to play in the protection and implementation of human rights in any country. The CESCR asserts that in many instances legislation is highly desirable and in some cases indispensable.<sup>120</sup> For example, it may be difficult to combat discrimination in education effectively in the absence of a sound legislative foundation for the necessary measures.

Legislative measures in terms of implementation of human rights will require a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the relevant conventions.<sup>121</sup> It will also require States parties to ensure that the provisions of the relevant conventions are given legal effect within their domestic legal system.<sup>122</sup> On the obligation to pass relevant legislation, as examined in chapter two, both South Africa and Nigeria have enacted laws towards realising the right to education.

In South Africa, for example, the post-apartheid South African educational system has witnessed a plethora of wide-ranging reform and transformation policies. The starting point is the Constitution itself. The South African Constitution is particularly seen as a role model in terms of its provisions on socio-economic rights in Africa by including socio-economic rights as enforceable rights in its provisions.<sup>123</sup> The South African Constitution guarantees the right to

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<sup>117</sup> See art 2 of the ICESCR, art 4 of the CRC & art 2 of the ICCPR.

<sup>118</sup> See Marie “National Systems for the Protection of Human Rights” in *Human Rights: International Protection, Monitoring, Enforcement* 260. According to Olivier, the implementation of obligations in terms of international law mainly occurs by way of legislation and policy. See Olivier “The Status of International Children’s Rights Instruments in South Africa” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 200.

<sup>119</sup> Marie “National Systems for the Protection of Human Rights” in *Human Rights: International Protection, Monitoring, Enforcement* 260.

<sup>120</sup> CESCR General Comment 3 para 3.

<sup>121</sup> See CRC General Comment 5 para 18.

<sup>122</sup> CRC General Comment 5 paras 19 & 23.

<sup>123</sup> South African Constitution’s socioeconomic rights provisions have been celebrated internationally. See Kende *Constitutional Rights in Two World South Africa and the United States* (2009) 244-245; Mubangizi, “The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation” (2006) 2(1) *African Journal of Legal Studies* 1-19 2-3; Brand “Introduction to Socio-economic Rights in the South African Constitutions” in Brand & Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1-56 1.

education and, specifically, the right to basic education and further education.<sup>124</sup> Apart from the South African Constitution, other laws that have been made in this respect include the National Education Policy Act, which was enacted to pave the way for bringing the South African education policy in line with constitutional provisions; the South African Schools Act; and the Higher Education Act, among others.

The South African Schools Act for instance states the government policies and commitments on education. The purpose and object of this Act is clearly set out in its preamble. The long title of the Act states that the Act was passed in order: “[t]o provide for a uniform system for the organization, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith.” To ensure education without discrimination, the Act abolished the previously racially-based education system in the country and provides for a uniform system for the organisation, governance, standard and funding of schools.<sup>125</sup> It also obligates the Provinces to take all reasonable measures to ensure that physical facilities at public schools are accessible to disabled persons.<sup>126</sup> The Act gives legal backing to the government policy of compulsory education; it provides *inter alia* for compulsory school attendance, exception from such attendance and admission and expulsion from public schools.<sup>127</sup> These measures are in compliance with international obligations of ensuring compulsory primary education as well as education without discrimination as provided for in the ICESCR.

Addressing the imbalances at historically disadvantaged schools has been a central concern in the various South African education policies. It is observed that while redress has existed as an important policy vision, the mechanisms to implement redress have been extremely limited.<sup>128</sup> For instance, one of the major criticisms of the South African Schools Act when it was passed was that while it allows for the possibility of redress, this was not made obligatory. Section 3(1) of the SASA provides for “the funding of public schools on an equitable basis in order to ensure the proper exercise of the right of learners to education”, but

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<sup>124</sup> See s 29 of the Constitution.

<sup>125</sup> See Bray “The South African Schools Act 84 of 1996” in *Introduction to Child Law in South Africa* 285.

<sup>126</sup> See s 12(5) of the SASA.

<sup>127</sup> See ss 3-11.

<sup>128</sup> Motala “Reviewing Education Policy and Practice: Constraints and Responses” in Chisholm, Motala & Vally (eds) *South African Education Policy Review 1993-2000* (2003) 497-532 506.

this appears vague and open to many interpretations.<sup>129</sup> However, the Act did provide for the minister to set norms and standards in conjunction with the Financial and Fiscal Commission. Legislating on these norms and standards has been welcomed as part of the overall strategy to achieve redress and equity in South African schools. Also, the main provisions of the Act deal with new norms and standards in the allocation of funding to public schools, subsidies to independent schools and the provision for school fee exemption based on socio-economic criteria.<sup>130</sup> The new funding policy has been welcomed given its purpose of addressing the imbalances at historically disadvantaged schools.

As mentioned above, States are obliged to remove every obstacle to access to education. Fees and charges constitute such an obstacle; so does discrimination. As argued in chapter three, imposition of school fees constitutes discrimination on economic grounds. The South African Constitution gives everyone the right to a basic education but does not specify that it should be free.<sup>131</sup> The pertinent issue here is whether the State would be fulfilling its positive duties if it provides exemptions from school fees for those who were unable to pay, as is the practice in South Africa. The South African Schools Act permits fees to be charged but provides exemptions for those who cannot afford them. This is defended on the grounds that, first, if parents are responsible for paying fees, they will take more responsibility for their children's education. It is difficult to discover any concrete evidence for this view. Secondly, it is argued that by charging fees to wealthier parents, the government is able to cross-subsidize poorer learners.<sup>132</sup> However, given that individual exemptions are costly to administer, a fairer and more efficient approach would have been the use of general taxation, where the poorest, who do not earn enough to be liable for taxation, are exempted.<sup>133</sup>

The exemption policy cannot therefore be defended in terms of effectiveness, nor can it be defended on principle. This is because, despite appearing as a benefit to the poorest in society, exemptions in effect discriminate against them. In terms of the South African Schools Act, it is unlawful to exclude learners because of parental inability to pay fees.<sup>134</sup> Also, schools are required to grant full or partial exemptions for learners whose families fall within the

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<sup>129</sup> 506.

<sup>130</sup> 506.

<sup>131</sup> See s 29(1) of the Constitution.

<sup>132</sup> See Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 217.

<sup>133</sup> Tomasevski *Preliminary Report of the Special Rapporteur on the Right to Education* (1999) para 35.

<sup>134</sup> S 5 of the SASA.

prescribed means test.<sup>135</sup> However, the State does not provide corresponding subsidy for the resulting absence of fee revenue.<sup>136</sup> The rational response of any individual school, as Fredman rightly argues, is to attempt to maintain its fee income by minimizing its intake of exempt children.<sup>137</sup> It is observed that schools across the country have taken this path. They have done so in various ways: by concealing from learners their right to claim exemptions; by charging registration fees which poor learners are unable to afford; and even by suing parents in court for defaults in fees.<sup>138</sup>

It should be noted that even if a child succeeds in gaining an exemption in the payment of school fees, other costs such as transport costs, school uniforms, and books remain enormous. Also, the quality of the school often reflects the fee-paying ability of its pupil body, as such; schools serving poorer communities are inevitably providing a lower quality of education.<sup>139</sup> Government has taken a more proactive step lately by putting in place a framework whereby schools which service very poor communities are declared fee free. As Fredman rightly argues, however, this brings its own problem of classification, since schools in middle class areas frequently serve children from severely deprived neighbouring areas, such as informal settlements.<sup>140</sup> It is therefore argued that such selective exemptions from fees will inevitably breach both the duty not to obstruct access to education and the duty not to discriminate.<sup>141</sup> It is submitted that placing responsibility on parents is a ready pretext for a State abdicating its own duties to provide education. While reciprocal responsibilities (as argued to support the imposition of school fees) are part of the concept of active citizenship, this should not permit a transfer of the States' duties onto parents. At most, reciprocal responsibilities on parents should consist of duties outside of the State's reach, such as ensuring that learners attend school, or do their homework.

The system of school fees fundamentally impairs a large number of learners' access to a basic education.<sup>142</sup> No doubt, schools fees and other hidden costs make schooling inaccessible

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<sup>135</sup> S 5 of the SASA.

<sup>136</sup> Fredman *Human Rights Transformed* 217.

<sup>137</sup> 217.

<sup>138</sup> 217-218.

<sup>139</sup> 218.

<sup>140</sup> 218.

<sup>141</sup> 218.

<sup>142</sup> See Roithmayr "The Constitutionality of School Fees in Public Education" in Education Rights Project, Center for Applied Legal Studies Issue Paper, University of the Witwatersrand (2002) 39-46.

to poor learners.<sup>143</sup> In this context, the South African Human Rights Commission Public Hearing on the Right to Basic Education confirmed that transport and uniform costs are often more of a burden on parents than school fees.<sup>144</sup> The Report suggested a holistic approach addressing all the barriers to education by recommending the abolition of school fees at primary level; that government should move rapidly to increase the number of fee-free schools available for poor learners; and that poor learners who live far from their nearest schools should receive state transport assistance.<sup>145</sup>

In terms of article 2(1) of the ICESCR, Nigeria has also assumed obligations to take legislative measures towards implementing the rights in the Covenant. In this regard, the Nigerian Constitution recognises the right to education, albeit as a non-justiciable right.<sup>146</sup> However, laws such as the Child's Rights Act, the Compulsory, Free and Universal Basic Education Act, the National Policy on Education, as well as various policies and legislation earlier examined in chapter two were enacted to transform this right into a justiciable one. In terms of section 15(1) of the Child's Rights Act, every child has the right to free, compulsory and universal basic education and the government has the duty to provide such a free and compulsory education. This is further emphasised by section 2(1) of the UBE Act which obliges every government in Nigeria (federal, state or local governments) to provide free, compulsory and universal basic education for every child until junior secondary school level.<sup>147</sup> In terms of these laws, it is obligatory for children of school-going age to attend schools. It is also a criminal offence for parents or guardians not to send their children to schools while the government has the duty to provide education.

The compulsory nature of primary education in terms of the UBE Act bestowed on the government the duty to provide free and compulsory basic education for every child of primary and junior secondary school-going age.<sup>148</sup> It imposes on a parent or guardian a duty not only to

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<sup>143</sup> Khoza (ed) *Socio-Economic Rights in South Africa* 2 ed (2007) 430; Jansen "Reflections on Meaningful Access to Education" in Pendlebury, Lake & Smith (eds) *South African Child Gauge 2008/2009* (2009) 8.

<sup>144</sup> See *South African Human Rights Commission Report of the Public Hearing on the Right to Basic Education* (2006) paras 39-40.

<sup>145</sup> Paras 39-40.

<sup>146</sup> See s 18 of the 1999 Nigerian Constitution read with s 6(6)(c) of the Constitution.

<sup>147</sup> See the decision of the ECOWAS Court in *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit No: ECW/CCJ/App/0808) delivered on 27/10/2009, para 17, where the court held that in terms of Art 17 of the African Charter on Human and Peoples' Rights, every Nigerian has the right to education.

<sup>148</sup> See UBEC *The Compulsory, Free, Universal Basic Education Act, 2004 and other Related Matters* (2005) 28.

send his or her child to school, but also a duty to ensure that a child continues to attend such a school until after he or she finishes the compulsory terms of schooling.<sup>149</sup> The Act also provides that “services” provided in public school shall be free of charge.<sup>150</sup> Services to be provided free of charge include books, instructional materials, classrooms, furniture and launch.<sup>151</sup> To ensure that these services remain free, the Act makes it a criminal offence for any person to receive fees from parents or guardians of children. Any person who receives or obtains any fee contrary to the provisions of the Act commits an offence and, upon conviction, he or she may be liable to a fine or imprisonment.<sup>152</sup> Schooling is free in terms of this provisions and no one may charge pupils for tuition or any other fees.<sup>153</sup> While the Act provides for free lunch in public primary school, the reality, however, is that such free lunch programmes are yet to be implemented throughout the country.

Also, while the Act provides for free services in the public primary school, hidden costs still abound in Nigerian schools. Books are not provided in sufficient quantity and in a few cases where governments provide books and learning materials, they remain inadequate and parents are always forced to complement this through a levy and PTA contributions. Thus, notwithstanding the existence of laws and legislative measures towards ensuring the right to education in Nigeria, access to education in the country is still bedevilled by many factors which include non-availability of schools, distant location of schools from homes, high cost, inadequacies of physical facilities and inability of the curriculum to meet basic learning needs of education.<sup>154</sup> The challenges of the Nigerian educational system are enormous and this is acknowledged by the government and other role-players in education.<sup>155</sup> The problems identified constitute a violation of the Nigerian government’s obligation to provide education and to make qualitative education accessible to all.

In summary, in view of the laws so far analysed in this chapter, the details of which chapter two of this thesis has examined, the inevitable conclusion is that there are ample laws in

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<sup>149</sup> 22; see also, s 3 of the UBE Act.

<sup>150</sup> S 3(1) of the Act.

<sup>151</sup> S 15 of the Act.

<sup>152</sup> S 3(2) of the Act.

<sup>153</sup> See s 15(1) of the Child’s Rights Act, Cap C50, LFN, 2004.

<sup>154</sup> See Afonja “The Right of the Child to Education” in Ayua & Okagbue (eds) *The Rights of the Child in Nigeria* (1996) 66-67; see also, Nwonwu “The Role of Universal Primary Education in Development- Implementation Strategies and Lessons from Past Mistakes” 2008 37(4) *Africa Insight* 137 138-139.

<sup>155</sup> See the Federal Ministry of Education *Roadmap to Nigeria Education* (2009) 26 & 35.



both South Africa and Nigeria on the right to education. The two countries have done well in complying with their international obligations to take legislative measures towards implementing the right to education. Notwithstanding the provisions in both the South African and Nigerian Constitutions and other laws guaranteeing the right to education, there are still gaps between the laws in the statute-books and the realities experienced by members of both societies. While laws and legislation are essential and necessary for implementing the right to education, the experiences from the two countries show that legislation alone is not sufficient. Effective implementation of the right to education will also require concerted non-legislative measures backed up with good government policies and political will.

### **3 2 Non-Legislative Measures**

By requiring States parties to use “all appropriate means”, the ICESCR adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each state, as well as other relevant considerations to be taken into account.<sup>156</sup> There are several non-legislative measures such as the provision of judicial or other effective remedies, administrative, financial, educational and social measures that are regarded as “appropriate means.”<sup>157</sup> As noted earlier, the transformation of economic, social and cultural rights into positive law, whether in a national constitution or in legislation is not enough. Instead, the rights must be translated into realities so that they are realised in fact and this requires comprehensive administrative measures and social action.<sup>158</sup>

#### **3 2 1 Administrative Measures**

Administrative measures are recognised as one form of “appropriate measures” mentioned in article 2 of the ICESCR and article 4 of the CRC towards implementing the right to education.<sup>159</sup> It is submitted that the responsibility for ensuring the conditions and specific resources for implementing human rights within each State lies above all with the executive and its organs, which operate in the framework of government and various government

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<sup>156</sup> General Comment 9 para 1.

<sup>157</sup> General Comment 3 paras 5 & 7.

<sup>158</sup> See Eide “Economic, Social and Cultural Rights as Human Rights” in *Economic, Social and Cultural Rights* 17; see also, General Comment 9 para 2.

<sup>159</sup> See CESCR General Comment 3 para 7; CRC General Comment 5 paras 26-27.

departments.<sup>160</sup> The executive and state administration, through adoption of policies or through executive or administrative decisions, often interprets socio-economic rights and self-defines the duties imposed on them.<sup>161</sup> The executive has the task of applying or implementing at the national level the laws adopted by Parliament and must act with due respect for constitutional principles and norms. It is also responsible for fulfilling the human rights commitments undertaken on behalf of a state and to report to the appropriate international bodies when the relevant instruments so require.<sup>162</sup> This makes the executive the central machinery for the effective observance of human rights at the national level.<sup>163</sup>

In terms of section 7(2) of the South African Constitution, government is enjoined to “respect, protect, promote and fulfil the rights in the Bill of Rights”, and in this case, the right to education guaranteed in section 29 of the South African Constitution. The implication here is that the State must not only refrain from interfering with the enjoyment of the right to education, but must also act so as to protect, enhance and realise its enjoyment.<sup>164</sup> The State may do this not only through the legislature by enacting the relevant laws, in addition, it is required to do this by formulating policies and making appropriate administrative decisions.<sup>165</sup> The policy formulation or administrative decisions in this sense will translate these rights into enforceable legal entitlements.<sup>166</sup> In terms of policy formulation, the South African government, through the Department of Education, has done well; it has issued several White Papers on transformation of education in the country. The value and principles which “drive the national policy” in education and training are set out in the 1995 White Paper on Education which re-

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<sup>160</sup> Marie “National Systems for the Protection of Human Rights” in *Human Rights: International Protection, Monitoring, Enforcement* 262.

<sup>161</sup> Brand “Introduction to Socio-economic Rights in the South African Constitutions” in *Socio-Economic Rights in South Africa* 16.

<sup>162</sup> Marie “National Systems for the Protection of Human Rights” in *Human Rights: International Protection, Monitoring, Enforcement* 262.

<sup>163</sup> 262-263.

<sup>164</sup> See Brand “Introduction to Socio-economic Rights in the South African Constitution” in *Socio-economic Rights in South Africa* 9; see also, Liebenberg “Reflections on Drafting a Bill of Rights: A South African Perspective” in *Constitution in Transition: Academic Inputs for a new Constitution in Zimbabwe* (2009) 4-5; *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic, Social and Cultural Rights v Nigeria*, Communication n. 155/96 (2001) AHRLR 51 (ACHPR 2001) paras 44-48.

<sup>165</sup> Mubangizi “The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation” (2006) 2(1) *African Journal of Legal Studies* 1 5-6.

<sup>166</sup> Brand “Introduction to Socio-economic Rights in the South African Constitutions” in *Socio-Economic Rights in South Africa* 16.

affirms that education and training are basic human rights and imposes an obligation on the State to advance and protect.<sup>167</sup>

Further, in terms of this White Paper, the State's obligation includes the duty to provide "advice and counselling" in respect of people "fragmented by such factors as past unjust laws, migratory labour practices, and marital breakdown, and handicapped by illiteracy" together with "appropriate care and educational services for parents, especially mothers, and young children within the community."<sup>168</sup> The principle also reaffirms the commitment to provide access to lifelong learning, education and training of good quality. In making these commitments, the White Paper also commits itself to redress of educational inequalities among those sections of people who have suffered particular disadvantages; the principle of equity; rehabilitation of schools and colleges; the idea of democratic governance in every levels of the system; restoration of the culture of teaching, learning and management involving the creation of a culture of accountability; sustainable and productivity.<sup>169</sup>

On the issue of non-discrimination in education, the Education White Paper 6 on Special Needs Education, Building an Inclusive and Training System 2001 strengthens the government policy on education without discrimination.<sup>170</sup> The White Paper provides a framework for a single inclusive system of education and training in South Africa. It outlines what an inclusive education and training system is, and how it should be built.<sup>171</sup> The White Paper declares the commitment of the government to the provision of educational opportunities, especially for those learners who experience barriers to learning or who have dropped out of learning, because of the inability of the education and training service to accommodate their learning needs. It

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<sup>167</sup> White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System, *Government Gazette*, 357 (16312) (1995) 21.

<sup>168</sup> White Paper on Education and Training in a Democratic South Africa, para 5.

<sup>169</sup> White Paper on Education and Training in a Democratic South Africa 21-22; see also, Montola & Pampallis (eds) *Education and Equity: The Impact of State Policies on South African Education* 26.

<sup>170</sup> See also, the White Paper on Further Education and Training, 1998 provides for the framework for further education and training and aims at pursuing government's constitutional obligations on education. The document outlines government's vision and policy framework for a nationally coordinated system of Further Education and Training (FET). The White Paper ensures access to high quality education and training; it offers a wide range of learning options to a diverse range of learners, including school-going young people, out-of-school youth, young adults and the larger adult population. See the White Paper on Further Education and Training: Preparing for the Twenty-first Century through Education, Training and Work, Department of Education, Pretoria (1998) 6

<sup>171</sup> See Williams *Inclusive Education: A Model for In-Service Teachers* DEd thesis, NMMU (2007) 40.

also outlines how the education and training system must transform itself to assist in building and securing a caring and humane society.<sup>172</sup>

Like South Africa, the Nigerian government has equally formulated policies towards implementing the right to education in the country. The government policy on education is spelt out in the 2004 National Policy on Education. The Policy sets out *inter alia* that government shall take various measures to implement the policy and goals set out. This Policy states that education should be highly rated in the national development plans because education is the most important instrument of change, any fundamental change in the intellectual and social outlook of any society has to be preceded by an educational revolution.<sup>173</sup> It states that life-long education shall be the basis of the nation's educational policy;<sup>174</sup> education and training facilities shall continue to be expanded in response to societal needs and be made progressively accessible to afford the individual a far more diversified and flexible choice;<sup>175</sup> educational activities will centre on the learner for maximum self-development and self-fulfilment.<sup>176</sup>

The Policy further states that universal basic education, in a variety of forms depending on needs and possibilities, should be provided for all citizens and that effort should be made to relate education to overall community needs.<sup>177</sup> The Policy also states that educational assessment and evolution should be liberalized by their being based in whole or in part of continuous assessments of the progress of the individual.<sup>178</sup> It requires that modern educational techniques should be increasingly used and improved upon at all levels of the education system;<sup>179</sup> that the education system should be structured to develop the practice of self-learning.<sup>180</sup> It states further that opportunity should continue to be made for religious instruction; and that no child should be forced to accept any religious instruction which is contrary to the wishes of his or her parents.<sup>181</sup> It also provides that physical and health education

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<sup>172</sup> See Department of Education, *Education White Paper 6 on Special Needs Education, Building an Inclusive and Training System* (2001) 20.

<sup>173</sup> Para 9(a) of the Policy.

<sup>174</sup> Para 9(b) of the Policy.

<sup>175</sup> Para 9(c) of the Policy.

<sup>176</sup> Para 9(d) of the Policy.

<sup>177</sup> Para 9(e) & (f) of the Policy.

<sup>178</sup> Para 9(g) of the Policy.

<sup>179</sup> Para 9(h) of the Policy.

<sup>180</sup> Para 9(i) of the Policy.

<sup>181</sup> Para 9(k) of the Policy.

are to be emphasized at all levels of the education system.<sup>182</sup> Also, the Roadmap for Nigerian Education Sector released in 2009 constitutes the government latest policy on education. It identifies the major problems facing Nigerian education and the ways of solving them.<sup>183</sup> The Roadmap is proactive and looks into the future; it strengthens government policy on free, compulsory and universal basic education among others.

Administrative measures in terms of policies formulations in South Africa and Nigeria are encouraging considering that there are ample government policies ensuring equal access to education. It is submitted, however, that governments in both countries need to do more by effectively implementing and monitoring those policies. An issue that needs to be emphasized is that unlike the position in South Africa, the Nigerian government is yet to develop a clear cut policy on inclusive education for persons with disabilities. In Nigeria, learners with disabilities are often neglected and discriminated against in terms of education, health, and social facilities. The few schools available for this category of people in the country are often in a state of neglect and are not properly maintained. This is a violation of Nigeria's obligation in terms of the ICESCR to provide education for all without discrimination. The adoption of an inclusive education policy, as per the South African experience will help the Nigerian government to adequately guarantee the right of learners with disabilities, thereby ensuring equal treatment. Contrary to what is obtainable now, there should be an adequate commitment at the various levels of government to education of children with disabilities.

### **3 2 2 Judicial and Quasi-Judicial Measures**

According to the CESCR, among the measures which are considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable.<sup>184</sup> The Committee notes further "that the enjoyment of the rights recognised, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies..."<sup>185</sup> Thus, in this section, the implementation of the right to education through judicial and quasi-judicial measures is examined. The judicial measure is the avenue through the court while quasi-judicial measures are the implementation through entities such as human rights commissions. Although

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<sup>182</sup> Para 9(1) of the Policy.

<sup>183</sup> *Roadmap to Nigeria Education* 26 & 35.

<sup>184</sup> General Comment 3 para 5.

<sup>185</sup> General Comment 3 para 5.

there are other institutions established under both the South African and Nigerian Constitutions for the protection of human rights,<sup>186</sup> given their limited impact on the realisation of the right to education, the discussion in this part will be limited to the two institutions mentioned above.

### 3 2 2 1 Courts of Law

In the absence of an independent, courageous and vigorous judiciary, a Bill of Rights cannot fulfil its objectives. Its transformative potential will remain unrealised.<sup>187</sup> Courts may protect socio-economic rights, and in this case, the right to education, in two ways. Firstly, through their law-making powers of interpreting legislation and developing the rules of the common law and, secondly, by adjudicating constitutional and other challenges to state measures that are intended to advance those rights.<sup>188</sup> Once human rights have been recognised in the constitution and laid down in legislation, their observance and guarantee make it necessary to provide remedies in the event of their violation.<sup>189</sup> It is the judiciary that ensures that everyone has the right to an effective remedy for acts violating the fundamental rights granted by the constitution or by law.<sup>190</sup> Failure to effectively implement relevant legislation and disputes about the content of statutory provisions introduces the role of the national judiciary. Even if rights are relatively clearly formulated, disputes about their content may still arise. Activist courts may, therefore, use constitutional provisions to invigorate impasses about the implementation of social and economic rights.<sup>191</sup>

Section 8(3)(a) of the South African Constitution provides that when applying the Bill of Rights to a natural or juristic person, a court in order to give effect to a right in the Bill, must apply or develop the common law to the extent that legislation does not give effect to that

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<sup>186</sup> See s 181 of the 1996 South African Constitution which establishes the Public Protector, the Commission for the Promotion and Protection of Rights of Cultural, religious and Linguistic Communities, the Commission for Gender Equality among others. See also, s 315(5)(b) of the 1999 Nigerian Constitution which recognises and validates the Public Complaints Commission.

<sup>187</sup> See Liebenberg “Reflections on Drafting a Bill of Rights: A South African Perspective” in *Constitution in Transition* 1.

<sup>188</sup> See Brand “Introduction to Socio-economic Rights in the South African Constitution” in *Socio-economic Rights in South Africa* 38-39.

<sup>189</sup> Marie “National Systems for the Protection of Human Rights” in *Human Rights: International Protection, Monitoring, Enforcement* 261.

<sup>190</sup> 261; see also, *The Federal Republic of Nigeria v Ifegwu* [2003] 15 NWLR (pt 842) 113 at 184 (SC).

<sup>191</sup> See Viljoen “The Justiciability of Socio-economic and Cultural Rights: Experience and Problems” in *Human Rights in Education, Science and Culture* 58.

right.<sup>192</sup> The South African Constitution also obliges a court or tribunal to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. The courts are also obliged to consider international law and may also consider foreign law.<sup>193</sup> A significant number of cases involving socio-economic rights generally have come before the South African courts.<sup>194</sup> These cases have been hailed as torch bearers to the judicial enforcement of socio-economic rights.<sup>195</sup> South Africa is one of the few countries in the world whose highest court treats socio-economic rights with the same reverence as civil and political rights.<sup>196</sup> In the process of adjudication, the courts have helped in giving meaning and content to socio-economic rights guaranteed in the South African Constitution and thereby assisted in advancing the process of implementation.

Unlike the South African courts, the Nigerian courts have not articulated so much on the socio-economic rights and the right to education in particular. In a number of cases coming

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<sup>192</sup> See also s 39(2) of the Constitution. However, the court may also develop rules of common law to limit the right accordance with limitation in s 36(1) of the Constitution. See s 8(3)(b) of the Constitution.

<sup>193</sup> See s 39(1)(a)-(c) of the Constitution.

<sup>194</sup> See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), in this case, a group of adults and children had been rendered homeless as a result of eviction from their informal dwellings situated on private land ear-marked for low cost housing. They applied for an order directing the local government to provide them with temporary shelter, adequate basic nutrition, health care and other social services. The Constitutional Court held that the State had failed to meet the obligations placed on it by section 26 and therefore declared that the state's housing programmes was inconsistent with section 26(1) of the Constitution. See also, *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 (CC). In the *Treatment Action Campaign case*, the TAC, a non-governmental organization, in a bid to force government to provide anti-retroviral drug that could reduce by half the rate of HIV transmission from mothers to babies, be freely distributed to women infected with HIV. The Constitutional Court held that the government's policy and measures to prevent mother to child transmission of HIV at birth fell short of compliance with section 27(1) and (2) of the Constitution. It ordered the state to provide the required medication and remedy its programme. This case can be contrasted with an earlier decision of the same court in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696. This case involved an application for an order directing a state hospital to provide the appellant with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit. The Constitutional Court held that the applicant could not succeed in his claim and found that the denial of the required treatment did not breach the provision of section 27(1) of the Constitution which guarantees the right of everyone to have access to health care services, and section 27(3) on the right to emergency medical treatment. Another case is *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC). In *Khosa*, legislation that excluded permanent residents and their children from access to social assistance was successfully challenged and found to be inconsistent with sections 27(1) and 9(3) of the Constitution which guarantees everyone the right of access to social security and assistance and prohibits unfair discrimination respectively. Other cases in this respect include, *Bav Biljon v Minister of Correctional Services* 1997 (4) SA 441; 1997 (6) BCLR 789 (C); *Resident of Bon Vista Mansion v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W); *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); *Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC); *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

<sup>195</sup> Mubangizi 2006 2(1) *African Journal of Legal Studies* 6.

<sup>196</sup> See Kende *Constitutional Rights in Two Worlds* 262.

before the courts on this issue, the issue of non-justiciability has often been raised.<sup>197</sup> Most of the rights constituting socio-economic and cultural rights are categorised under the Nigerian Constitution as fundamental objectives and directive principles of the State policies, which in terms of section 6(6)(c) of the Nigeria Constitution, are non-justiciable.<sup>198</sup> It is submitted that the expansive interpretation approach of the India judiciary is necessary to invigorate the right to education from a non-justiciable right to a justiciable right in Nigeria. The Indian experience demonstrates that directive principles may, in practice, become justiciable.<sup>199</sup> Also in this regard, providing for this right as a justiciable right in the Constitution, as has been the case in South Africa, will be of immense benefit to Nigeria.

The recent ruling of the ECOWAS Court in *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission*<sup>200</sup> leans toward the direction of an expansive interpretation. In that case, the court held that in terms of article 17 of the African Charter on Human and Peoples' Rights, 1981 every Nigerian has the right to education.<sup>201</sup> This ruling has recently been confirmed by the unanimous judgement of the court.<sup>202</sup> In the current climate, where economic and social rights are not deemed legally enforceable in Nigerian courts and where victims of violations of these human rights are denied access to an effective remedy, this unanimous judgment of the ECOWAS Court of Justice is a welcome landmark. It reaffirms that States are obliged to promote and ensure the universality and indivisibility of all human rights as recognised by the African Charter on Human and Peoples' Rights.

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<sup>197</sup> See *Archbishop Anthony Olubunmi Okogie & Others v Attorney General of Lagos State* (1981) 1 NCLR 218; see also, Olowu "Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees" (2006) 69(1) *Saskatchewan Law Review* 39-78 56-60; Olowu "The Right to Social Security in Nigeria: Taking Up the Gauntlet" (2007) 1(2) *CALS Review of Nigerian Law and Practice* 91-107 101.

<sup>198</sup> See *Uzoukwu v Ezeonu II* [1991] 6 NWLR (pt 200) 708 at 761-762, where the Court of Appeal observed as follow: "There are other rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter 2 of the Constitution."

<sup>199</sup> The Indian Supreme Court held in *Unni Kkrishnan v State of Andhra Pradesh* (1993) 1 SCC 645, that the Directive Principles that compulsory education should be provided to children up to the age of 14 years had matured into a fundamental right.

<sup>200</sup> Suit No: ECW/CCJ/App/0808, delivered at Abuja, Nigeria on 27/10/2009.

<sup>201</sup> Para 17.

<sup>202</sup> *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit No: ECW/CCJ/App/12/07; Judgement No: ECW/CCJ/JUD/07/10, delivered at Abuja, Nigeria on 30/11/2010) para 26.



It should be noted, however, that the applicability of the African Charter on Human and Peoples' Rights (ACHPR) in Nigeria is not in doubt with the enactment of the African Charter Act into law by the Nigerian National Assembly.<sup>203</sup> In *Ogugu v State*,<sup>204</sup> the Supreme Court held: "...by virtue of the provisions of sections 6(6)(b), 236 and 230 of the 1979 Constitution as amended by the Constitution (Suspension and Modification) Decree 107 of 1993, it is apparent that the human and people's rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules and practice of each court."<sup>205</sup>

Given the supremacy of the Nigerian Constitution, it should be noted that the rights in the ACHPR are recognised to the extent which the Nigerian Constitution permits.<sup>206</sup> The Nigerian Constitution which is the supreme law says the government can only provide free education when it can (as when practicable). Thus, despite the Nigeria's level of international obligation in ECOWAS treaties and protocols, it should be recognised that the Nigerian Constitution still prevails until it is amended to be in tune with the judgment of ECOWAS Court. In terms of sections 1 and 12 of the Nigerian Constitution, the African Charter on Human and Peoples' Rights is not superior in hierarchy to the Nigerian Constitution; the Nigerian government therefore needs to do more to give the right to education a constitutional status.

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<sup>203</sup> See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of Federation of Nigeria, 2004.

<sup>204</sup> [1994] 9 NWLR (pt366) 1.

<sup>205</sup> See also, *Chief Gani Fawehinmi v General Sani Abacha* (supra), at 756 where the Court of Appeal, Per Pats-Acholonu, JCA held: "the African Charter is enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practices and procedure of each court... By not merely adopting the Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest the Act with a great vigour and strength than mere decree for it has been elevated to a higher pedestal. Its violability becomes actionable. Indeed in the realms of jurisprudence and citizen's right to seek for remedy where there is a violation of right and law, it cannot be said that no remedy exists. The intention of Cap.10 is that it be accorded force of law."

<sup>206</sup> The supremacy of the Nigerian Constitution was stressed by the Supreme Court in the case of *General Sani Abacha v Chief Gani Fawehinmi* (2001) 1 CHR 20. The court held: "No doubt Cap.10 is a statute with international flavour. Being so, therefore, I would think that it is presumed that the legislature does not intend to breach an international obligation. To this extent, I agree with the Lordships of the court below that the Charter possesses 'a greater vigour and strength' than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegboruwa, learned counsel for the respondent. Nor can its international flavour prevent the National Assembly, or the Federal Military Government before it removes it from our body of municipal laws by simply repealing Cap 10. Nor also is validity of another statute being necessarily affected by the mere fact that it violates the African Charter or any other treaty for that matter..."

A final and crucial aspect of the implementation of the socio-economic rights by the court is the kind of remedies which a court may provide for violations of these rights. As has previously been argued, once human rights have been recognised in the constitution and laid down in legislation, their observance and guarantee make it necessary to provide remedies in the event of their violation.<sup>207</sup> A remedy in this sense is an order made by a court in response to a proven violation of a person's rights.<sup>208</sup> Ensuring an effective remedy is an integral part of the implementation of any human rights.<sup>209</sup> It is the judiciary that ensures that everyone has the right to an effective remedy for an act violating the fundamental rights granted by the constitution or by law.<sup>210</sup> In terms of the South African Constitution, the courts may declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.<sup>211</sup> In addition, they enjoy broad powers to "make any order that is just and equitable."<sup>212</sup> Such orders include a suspended declaration of invalidity for a period and on any conditions to allow the competent authority to correct the defect;<sup>213</sup> a declaration of rights;<sup>214</sup> prohibitory or mandatory orders; exercising a supervisory jurisdiction, judicial review;<sup>215</sup> and compensation (or constitutional damages). In the absence of a broad array of remedial tools such as those listed above, it may be impossible to achieve the constitutional objectives.

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<sup>207</sup> Marie "National Systems for the Protection of Human Rights" in *Human Rights: International Protection, Monitoring, Enforcement* 261.

<sup>208</sup> See Mbazira *You Are the "Weakest Link" in Realizing Socio-Economic Rights: Goodbye- Strategies for Effective Implementation of Court Orders in South Africa* (2008) 3-4.

<sup>209</sup> Rishmawi *A Commentary on the United Nations Convention on the Rights of the Child* 49; see also, CRC Committee General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child (UN Doc. CRC/GC/2003/5, 2003) para 24.

<sup>210</sup> Marie "National Systems for the Protection of Human Rights" in *Human Rights: International Protection, Monitoring, Enforcement* (2003) 261.

<sup>211</sup> See s 172(1)(a) of the South African Constitution; ss 1 & 6 of the Nigerian Constitution.

<sup>212</sup> See s 172(1)(b) of the South African Constitution & s 6(6)(a) of the Nigerian Constitution which vests in the courts all the inherent powers and sanctions of a court of law. In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para [19], the court held: "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights." See also, *Mohamed and Another v President of RSA and Another* 2001 (3) SA 893 (CC), par [71]; *City of Cape Town v Rudolph and Others* [2003] 3 All SA 517 (C); *Pretoria City Council v Walker* 1998 (2) 363 (CC), para [96].

<sup>213</sup> See s 172(b)(ii) of the 1996 South African Constitution & s 6(6)(a) of the 1999 Nigerian Constitution.

<sup>214</sup> See s 38(1) of the 1996 South African Constitution & s 6(6)(a) of the 1999 Nigerian Constitution.

<sup>215</sup> Saharaj *The Constitution of India: An Analytical Approach* 3ed (2002) 672.

### 3 2 2 2 National Human Rights Bodies

Specialised human rights institutions perform a complementary function to the traditional institutions such as the legislature, the executive and the judiciary.<sup>216</sup> The idea that each State should set up bodies specifically concerned with the progress and observance of human rights on its territory is not recent. It coincides with the introduction at international level of the early institutions for the promotion and protection of human rights worldwide.<sup>217</sup> In order to protect constitutional democracy and enhance the implementation of human rights, both the South African and Nigerian Constitutions provide for the establishment of the national human rights commissions. In addition to these commissions, the two Constitutions also establish other similar human rights institutions.<sup>218</sup>

The South African Constitution, for instance, established the South African Human Rights Commission and assigned to it a mandate to promote, monitor and assess the observance of human rights in South Africa.<sup>219</sup> The main functions of the Commission are to promote respect for human rights and a culture of human rights and to monitor and assess the observance of human rights in South Africa.<sup>220</sup> In the context of socio-economic rights, the South African Constitution obliges relevant organs of the State to provide the Commission with information on the measures they have taken towards the realisation of those rights on a regular basis.<sup>221</sup> In order to fulfil this mandate, the Commission has developed a series of reporting protocols, which has been periodically revised. The Commission has used the data collected along with

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<sup>216</sup> Marie “National Systems for the Protection of Human Rights” in *Human Rights: International Protection, Monitoring, Enforcement* 264.

<sup>217</sup> 268.

<sup>218</sup> In Nigeria for instance, there is the Public Complaint Commission while in South Africa, there is the Office of the Public Protector. The Office of the Public Protector plays a more indirect but important role in the enforcement of human rights in South Africa. In terms of section 182(1)(a) of the Constitution, the Office of the Public Protector is to perform threefold functions namely, to investigate any improper conduct in state affairs or public administration; to report such conduct; and to take appropriate remedial action. It is submitted that in performing these functions, the Public Protector not only curbs human rights abuses resulting from state misconduct and public maladministration but also protects and enforces constitutional rights including socio-economic rights. See Mubangizi 2006 2(1) *African Journal of Legal Studies* 7-8.

<sup>219</sup> See s 181(1)(b) of the 1996 South African Constitution.

<sup>220</sup> See s 184 of the Constitution.

<sup>221</sup> See s 184(3) of the Constitution which provides: “[e]ach year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”

supplementary information to write detailed reports on the status of the realisation of human rights in the country.<sup>222</sup>

In this direction, in the much cited case of *Government of the Republic of South Africa v Grootboom*, the Constitutional Court appointed the SAHRC to monitor the implementation of its order that the State should devise and implement a housing programme that would cater for people in a situation of homelessness.<sup>223</sup> In this way, the Commission plays an active role in implementing the order of the court on socio-economic rights. However, the Commission has been criticised on account of lack of guidelines regarding what exactly should be monitored and timeframes for feedback.<sup>224</sup> According to Pillay, the SAHRC should only be used in supervisory interdicts where the court retains jurisdiction over a matter and can place strict time frames on the monitoring and reporting activity to be undertaken by the Commission.<sup>225</sup>

It is submitted that the SAHRC is one of the effective means through which the right to education can be implemented. On the issue that costs of education make schooling inaccessible to poor learners, the Commission conducted a public hearing on the right to basic education and observed that transport and uniform costs are often more of a burden on parents than school fees.<sup>226</sup> The Report suggested some recommendations on improving accessibility of learners to education which include abolition of school fees at primary level; and that government should move rapidly to increase the number of fee-free schools available for poor learners; and that poor learners who live far from their nearest schools should receive State transport assistance.<sup>227</sup> In line with these recommendations, while State transport assistance is not yet in place,

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<sup>222</sup> See Chapman “Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefits of Science” in *Human Rights in Education, Science and Culture* 127.

<sup>223</sup> Similarly, in *August v Electoral Commission* 1999 (3) BCLR 1 (CC), para 42, the court ordered the government to marshal its resources to protect a prisoner’s right to vote and went on to ensure the effective implementation of its order. The court gave clear directions for the implementation of its order to the Electoral Commission. The SAHRC was ordered to make arrangements for the prisoners to register and once registered to vote in the elections. The SAHRC was also required to furnish an affidavit setting out the manner in which the order would be complied with and to serve a copy on the attorneys for the applicants and on the Registrar of the Constitutional Court. A period of two weeks was given for the SAHRC to prepare the affidavit.

<sup>224</sup> See Govindjee *The Constitutional Rights to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* LLD thesis, NMMU (2005) 96; see also, Ntlama “Unlocking the Future: Monitoring Court Orders in Respect of Socio-economic Rights” (2003) Paper written for the Constitutional Law and Legal Theory Conference at the University of Western Cape 8, cited in Govindjee *The Constitutional Rights to Social Assistance* 96.

<sup>225</sup> Pillay “Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights” (2002) 6(2) *Law, Democracy & Development* 255 274.

<sup>226</sup> See *South African Human Rights Commission Report on the Right to Basic Education* paras 39-40.

<sup>227</sup> Paras 39-40.

government has consistently over the years increased the number of “no fee schools” in the country.

Similarly, in Nigeria, the National Human Rights Commission Act established the National Human Rights Commission.<sup>228</sup> The Commission was established for the protection of human rights, dignity and freedom. In terms of section 5 of the Act, the Commission shall deal with all matters relating to the protection of human rights as guaranteed by the Nigerian Constitution, the African Charter of Human and Peoples’ Rights, the United Nations Charter and Universal Declaration of Human Rights and other international treaties on human rights to which Nigeria is a signatory. Although the Commission has concentrated on the violation of the civil and political rights at the expense of the socio-economic and cultural rights, the multi-faceted functions of the Commission suggest that it is capable of assisting in the implementation of the socio-economic and cultural rights which include the right to education. No visible impact has yet been made by the Commission on socio-economic and cultural rights, perhaps due to the non-justiciability of these rights in Nigeria.<sup>229</sup> However, the existence of this body gives enough succour to the view that at any time the Commission could play a complementary role to the courts in protecting socio-economic and cultural rights and the right to education in particular.

#### **4 International Measures on the Implementation of the Right to Education**

Apart from the obligation put on the States parties on the implementation of the socio-economic and cultural rights considered in part three above, additional measures have been put in place at the international level. As international concern for the promotion and protection of human rights around the world has increased, different strategies have been developed to ensure compliance with international norms. The most basic of all of these procedures are that of state reporting system and the practice of appointment of special rapporteurs.<sup>230</sup>

As noted earlier, the obligations in terms of the ICESCR are binding on every State party<sup>231</sup> and, as such, every State must ensure that the measures adopted are reasonable,

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<sup>228</sup> See s 1 of the National Human Rights Commission Act Cap N46, LFN 2004.

<sup>229</sup> See s 6(6)(c) of the 1999 Nigerian Constitution.

<sup>230</sup> Evans & Murray “The State Reporting Mechanism of the African Charter” in Evans & Murray (eds) *African Charter on Human and People’s Rights- The System in Practice, 1986-2006* 2 ed (2008) 49-75 50; see also, Evans, Ige & Murray “The Reporting Mechanism of the African Charter on Human and Peoples’ Rights” in Evans & Murray (eds) *African Charter on Human and People’s Rights- The System in Practice, 1986-2000* (2002) 36-60 37.

<sup>231</sup> See art 2 of the ICESCR in particular.

effective and produce results compatible with the Covenant.<sup>232</sup> Although the Covenant gives each State party a measure of discretion to decide for itself which means are the most “appropriate” for implementing a particular right, the ultimate determination as to whether “all appropriate” measures have been taken is subject to the CESCR’s review.<sup>233</sup> It is in this context that states reports are required to indicate the basis upon which the steps taken may be considered to be “appropriate.”<sup>234</sup> It should be noted, however, that the measures put in place at the international level are in the forms of supervisory mechanisms.

#### 4 1 State Reporting System

At the global level, state reporting is one of the main supervisory mechanisms provided by the major UN human rights treaties.<sup>235</sup> It should be noted that the fact that the rights protected under the ICESCR requires positive implementation in accordance with the availability of resources renders them less capable of judicial determination.<sup>236</sup> For this reason, no provision was made for inter-state claims or individual complaints, as with the ICCPR, until December 2008 when the General Assembly unanimously adopted the Optional Protocol to the ICESCR. Instead, a supervisory body, that is, the CESCR receives national reports.<sup>237</sup> Prior to this time, the national reports constituted the only method of “enforcement” under the ICESCR.<sup>238</sup> Like the CESCR, the CRC Committee also adopts the procedure of States reporting system.<sup>239</sup> States parties are

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<sup>232</sup> See Sepulveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 337-338.

<sup>233</sup> General Comment 3 para 4.

<sup>234</sup> General Comment 3 para 4.

<sup>235</sup> See Olowu *An Integrative Right-Based Approach to Human Development* 34-37; see also, Mugwanya *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (2003) 152. See in this regard, arts 9 (CERD), 40 (ICCPR), 21 (CEDAW), 19 (CAT), 16(1) (ICESCR) & 43(1) (CRC). This procedure is also employed at the regional level. For instance, art 62 of the African Charter provides: “[e]ach State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.” See also, Evans, Ige & Murray “The Reporting Mechanism of the African Charter on Human and Peoples’ Rights” in *African Charter on Human and People’s Rights* 36.

<sup>236</sup> Dugard “International Human Rights” in Van Wyk, Dugard, de Villiers & Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171 177.

<sup>237</sup> 177.

<sup>238</sup> 177-178.

<sup>239</sup> Currently, the monitoring mechanism of the CRC is that of reporting, combined with the provision of technical advice and assistance. See Verheyde & Goedertier *A Commentary on the United Nations Convention on the Rights of the Child* 15 para 14.

obliged to report to the CRC Committee on measures they have taken to give effect to all the rights contained in the Convention.<sup>240</sup>

Articles 16 and 17 of the ICESCR require States to submit reports, at intervals defined by the ECOSOC, on the measures which they have adopted and the progress made in achieving the observance of the rights in the Covenant. Reports should be made in accordance with the reporting guidelines, and the compliance of States with their obligations under the Covenant is monitored by the CESCR.<sup>241</sup> The state reporting system in international human rights procedures aims to achieve multiple objectives including initial review by the implementing or oversight institution by which it is apprised of relevant domestic laws, content, practice and problems; monitoring with a view to addressing systematically associated problems of implementing and compliance; policy formulation which may help a State party improve its compliance with treaty obligations through appropriate adjustments in domestic policy; ensuring public scrutiny and accountability to both national and international constituencies; benchmarking and evaluation over time of any changes, information and exchange; and standard clarification and setting.<sup>242</sup>

In submitting their reports to the Committee, the States parties are to make their reports widely available to the public in their States and are further required to provide the Committee with sufficient information on how the Convention is being implemented within their territories.<sup>243</sup> The report should include both factors and difficulties affecting the degree of fulfilment under the relevant Convention. The requirement that the States parties should include in their reports any difficulties which they have encountered in implementing the Convention's rights is designed to prevent such reports from becoming a thinly disguised public relations

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<sup>240</sup> The first of these reports are due within two years of a state ratifying or acceding to the Convention, and thereafter every five years. See art 44(1) of the CRC; Verheyde & Goedertier *A Commentary on the United Nations Convention on the Rights of the Child* 15 para 16.

<sup>241</sup> The Committee was established in 1985 by a decision of ECOSOC to merely "assist" in the "consideration" of state reports. Thus, the Committee is not a body established by treaty, but a subsidiary body of ECOSOC. It has the primary responsibility for "monitoring" the implementation of ESC rights protected under the ICESCR. The Committee is composed of 18 experts with recognised competence in the field of human rights, serving in their personal capacity, elected with due consideration given to equitable geographical distribution and to the representation of different forms of social and legal systems." See ECOSOC Decision 1985/17, para b; ECOSOC Res 1985/17, 28 May 1985 (in UN Doc E/1985/85, 15), para f; Report of the CESCR, UN Doc E/1999/22, para 24.

<sup>242</sup> See Alston "The Purposes of Reporting", in *United Nations Manual on Human Rights Reporting Under Six Major International Human Rights Instruments*, UN Doc. HR/PUB/91/1 (1991) 13-16; see also, Odinkalu "Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights" in *African Charter on Human and People's Rights* 178-218 202.

<sup>243</sup> See art 44(6) of the CRC.

exercise.<sup>244</sup> It is expected that the reports should generate contributions to national debates on the prioritization of resources to combat such difficulties and measures necessary to overcome them, and also to indicate where technical advice and assistance is needed.<sup>245</sup> In this context, states reports provide a useful comparative gauge for measuring progress on the implementation of the Covenant's rights.<sup>246</sup>

It is observed, however, that the periodic reporting system has particular weaknesses.<sup>247</sup> In many cases, there is a back-log of reports;<sup>248</sup> and the reports themselves often lack details.<sup>249</sup> Many states reports were given in an inadequate manner; they often do not properly follow the CESCR's guidelines regarding the form and contents of state reports.<sup>250</sup> Since reports are always drawn up by national officials, they often try as much as possible to present their governments in a positive manner and conceal flagrant violations of human rights in their territories. In that context, those reports, in most cases, often lack objectivity and therefore unreliable.<sup>251</sup> Fundamentally, many States often fail to submit any reports with the Committee doing little or nothing to enforce compliance.<sup>252</sup> Contrary to the guidelines, most reports do not indicate the difficulties affecting the implementation of the Covenant rights in their territories and therefore present little or no useful guidance to the CESCR. Also, many state reports are superficial and omit to include detailed descriptive and statistical information regarding the state

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<sup>244</sup> See Van Bueren in *Introduction to Child Law in South Africa* 211.

<sup>245</sup> 211.

<sup>246</sup> 211.

<sup>247</sup> See Kedzia "United Nations Mechanisms to Promote and Protect Human Rights" in *Human Rights: International Protection, Monitoring and Enforcement* 30.

<sup>248</sup> In this regard, it was reported by the Office of the Human Rights Commissioner for Human Rights that as of January 2005, a total of 129 States reports were overdue for the CRC. See Verheyde & Goedertier *A Commentary on the United Nations Convention on the Rights of the Child* 44 para 56; see also, Evans, Ige & Murray "The Reporting Mechanism of the African Charter on Human and Peoples' Rights" in *African Charter on Human and People's Rights* 38.

<sup>249</sup> See Kedzia "United Nations Mechanisms to Promote and Protect Human Rights" in *Human Rights: International Protection, Monitoring and Enforcement* 30-37; Olowu *An Integrative Right-Based Approach to Human Development* 35.

<sup>250</sup> Beiter *The Protection of the Right to Education* 623.

<sup>251</sup> See Verheyde & Goedertier *A Commentary on the United Nations Convention on the Rights of the Child* 46 para 56.

<sup>252</sup> It is evident that many States treat the rules of international law with disdain and the occasional threats of collective economic sanctions and the use of force against a violating State have proved ineffectual. See Dugard "International Human Rights" in *Rights and Constitutionalism* 177; Mubangizi *The Protection of Human Rights in South Africa: A Legal and Political Guide* (2004) 14.



of realisation of Covenant rights to enable the CESCR to properly evaluate State performance under a particular instrument.<sup>253</sup>

In view of the above shortcoming, it is submitted that this mechanism of implementation is in need of an overhaul.<sup>254</sup> It is therefore suggested that in submitting a state report on the right to education, the Ministry or the Department of Education need to contribute in a meaningful way to the preparation of the states reports. This should not be left to the Ministry or Department of Foreign Affairs which often co-ordinates the preparation of the state reports. For a state report to be complete, comprehensive and holistic in nature, it is important that the Non State Actors (NSAs) and the Non Governmental Organisations (NGOs) be afforded the opportunity of being actively involved in the preparation of reports. In addition, teachers' as well as students' unions should be involved in the preparation of state reports on education.

The importance of a good and adequate state report cannot be over-emphasised. As the Limburg Principles note:

“[T]he effectiveness of the supervisory machinery provided in Part IV of the Covenant depends largely upon the quality and timeliness of reports by States parties. Governments are therefore urged to make their reports as meaningful as possible. For this purpose they should develop adequate internal procedures for consultations with the competent government departments and agencies, compilation of relevant data, training staff, acquisition of background documentation, and consultation with relevant non-governmental and international institutions.”<sup>255</sup>

It is also recommended that the draft of such reports be made available for public discussions before the final report is submitted. The NSAs and NGOs should play an additional role by submitting independent “shadow reports” on the situation of the right to education in their territories.<sup>256</sup> This will balance the possibility of any biased information presented on behalf of the States by government officials.

The foregoing will enhance the effectiveness of the system and improve the quality of the content of state reports. Although from the available data it appears as if neither South Africa nor Nigeria has presented any state report on the state of education to the CESCR, the existence of such a mechanism will help the two countries in advancing their international

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<sup>253</sup> See generally, Coomans *The International Protection of the Right to Education* (1992) 213-214; Beiter *The Protection of the Right to Education* 623.

<sup>254</sup> See Lundy “Schoolchildren and Health: The Role of International Human Rights Law” in Harris & Meredith (eds) *Children, Education and Health: International Perspectives on Law and Policy* (2005) 21.

<sup>255</sup> Limburg Principles, para 74.

<sup>256</sup> Beiter *The Protection of the Right to Education* 624.

obligations on the ICESCR. The state reporting system, therefore, presents a valuable advantage to South Africa and Nigeria since states reports and recommendations are often published. With the availability of the reports and recommendations thereon, both countries will have the opportunity of familiarizing themselves with common problems and utilise the appropriate solutions adopted by other states on educational issues. Apart from the states' reporting system, another mechanism put in place, that is, the rapporteur system, will now be examined.

## 4 2 Special Rapporteur System

The practice of appointing Special Rapporteurs to explore the human rights situation either in a particular State or pertaining to a particular theme has become a well-established feature of the United Nations human rights machinery and ranks among its most innovative achievements.<sup>257</sup> The rapporteur system is widely accepted as an important weapon in the arsenal of human rights monitoring mechanisms.<sup>258</sup> The system has also been adopted within other systems of human rights protection, including the African regional mechanism.<sup>259</sup> The United Nations has the power to appoint Special Rapporteurs to report on human rights compliance within particular themes. It gives independent experts the opportunity to take multi-disciplinary perspectives on a specific area of concern with individual countries. The UN Special Rapporteur on the Right to Education was first appointed in 1998,<sup>260</sup> and the Rapporteurs have made far reaching findings on the realisation of the right to education globally.<sup>261</sup>

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<sup>257</sup> Murray "The Special Rapporteurs in the African System" in *African Charter on Human and People's Rights* 2 ed 344-378 344.

<sup>258</sup> See Lundy "Schoolchildren and Health: The Role of International Human Rights Law" in *Children, Education and Health* 23.

<sup>259</sup> Murray "The Special Rapporteurs in the African System" in *African Charter on Human and People's Rights* 2 ed 344; see also, Evans & Murray "The Special Rapporteurs in African System" in *African Charter on Human and People's Rights- The System in Practice, 1986-2000* 280-304 280.

<sup>260</sup> At the African regional level, Special Rapporteur has not been appointed on the right to education, but such Rapporteurs have been appointed on extrajudicial execution; prisons and other conditions of detention; on women's rights in Africa; Refugees, Asylum Seekers and Internally Displaced Persons; and freedom of expression in Africa. See Mbelle "The Role of Non-Governmental Organisations and National Human Rights Institutions at the African Commission" in *African Charter on Human and People's Rights* 2 ed 289-315 302; Evans & Murray "The Special Rapporteurs in African System" in *African Charter on Human and People's Rights- The System in Practice, 1986-2000* 280.

<sup>261</sup> See Tomasevski *Economic, Social and Cultural Rights: The Right to Education*, (Preliminary Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Education) (1999), UN Doc. E/CN.4/1999/49; Tomasevski *Economic, Social and Cultural Rights: The Right to Education*, (Annual Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Education) (1999), UN Doc. E/CN.4/2004/45; Tomasevski *Economic, Social and Cultural Rights: The Right to Education*, UN Doc. E/CN.4/2000/6 (Progress Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Education, 2000); Tomasevski *Annual Report of the Special Rapporteur on the Right to Education*

Notwithstanding its usefulness, the rapporteurs system is faced with a specific weakness and problem of lack of powers of investigation or enforcement, which hampers its efficacy. This weakness is recognised as a major obstacle on the Rapporteurs' duties. For instance, Katarina Tomasevski, the first Special Rapporteur on the Right to Education resigned her appointment citing her frustration at the obstacles and difficulties in carrying out her mandate.<sup>262</sup> Thus, changes aiming at improving the quality of the states reports as well as the administrative and specialist support available to the Rapporteurs have been advocated.<sup>263</sup> Aside from this issue, it is acknowledged that the system ensures immediate, independent and *in situ* investigation on issues of specific concern, something which is not feasible within the states periodic reporting procedure.<sup>264</sup> The system is therefore an important mechanism towards realisation of the right to education. The newly introduced complaints procedure is considered next.

#### **4 3 A Complaints Procedure under the ICESCR and the Optional Protocol**

Before 2008, the ICESCR lacked a complaints procedure that could allow individuals and groups to submit complaints involving alleged violations of the rights recognised in the Covenant.<sup>265</sup> The effect of this lacuna was that the CESCR could not carry out an extensive and more in-depth inquiry into the real problems confronting specific individuals and groups, which would in turn lead to the development of international jurisprudence or case law on the ESC rights that would prompt States to ensure the availability of more effective remedies at the national level.<sup>266</sup> In this respect, the system of monitoring the ICESCR based exclusively on a state reporting system and making non-binding concluding observations had been a fairly weak system in terms of accountability.<sup>267</sup> Accordingly, it was recognised that there was a need to strengthen the supervision of the ICESCR by providing for a complaint procedure to

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(Annual Report 2001) 11 January 2001, E/CN.4/2001/52; Tomasevski "Has the Right to Education a Future within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004" (2005) 5(2) *Human Rights Law Review* 205-237.

<sup>262</sup> See *Report of the Special Rapporteur on the Right to Education* (Geneva: UN, 2004) E/CN.4/2004/45.

<sup>263</sup> UN Secretary General, *Strengthening of the United Nations: an agenda for further change* (Geneva: UN, 2002) A/57/387, paras 56-57.

<sup>264</sup> See Lundy "Schoolchildren and Health: The Role of International Human Rights Law" in *Children, Education and Health* 23.

<sup>265</sup> See generally, Olowu *An Integrative Right-Based Approach to Human Development* 41-42.

<sup>266</sup> See the 1993 World Conference on Human Rights (UN Doc A/CONF.157/PC/62/Add.5 of 26 March, 1993) para 32-38.

<sup>267</sup> See Ssenyonjo, *Economic, Social and Cultural Rights* 30.

complement the existing supervisory mechanism in the form of an Optional Protocol (OP) to the ICESCR.<sup>268</sup>

Thus, the need for an OP to the ICESCR providing for a complaint/communication procedure for individuals and groups seeking redress in instances where they considered their human rights guaranteed under the Covenant to have been violated, has been a subject of discussion before the Committee since its fifth session in 1990 and until its fifteenth session in 1996.<sup>269</sup> On 18 June 2008 the UN Human Rights Council adopted without a vote an OP to the ICESCR, and recommended that the General Assembly adopt and open for signature, ratification and accession, the OP. On 10 December, 2008, the General Assembly unanimously adopted the OP.<sup>270</sup> In terms of article 18 of the OP, it entered into force in March 2009.<sup>271</sup> It contains a number of progressive provisions and under it, States parties to the Covenant that become parties to the Protocol recognise the competence of the Committee to receive and consider communications of three types namely: (i) communication by or on behalf of individuals or groups of individuals; (ii) inter-state communications; and (iii) inquiry procedures. While the first one applies to all the States parties to the OP, the last two are optional binding only on States that declare that they have recognised the competence of the Committee in respect of inter-states communications and to conduct an inquiry.<sup>272</sup> The OP would enhance the protection of the ESC rights as it complements the periodic review of the state reports.

It should be noted that despite the several mechanisms put in place both at the international and national levels towards implementing the right to education, the realisation of the right still remains elusive globally. The realisation of the right to education is impeded by many factors or obstacles which the next part of this chapter will now examine.

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<sup>268</sup> See CESCR “Towards an Optional Protocol to the ICESCR” UN Doc E/1993/22.

<sup>269</sup> See Report of the Fifth Session of the CESCR, (UN Docs E/1991/23), para 25 and E/CN.4/1997/105, para 2; Mahon “Progress at the Front: the Draft Optional Protocol to the ICESCR” (2008) 8(4) *Human Rights Law Review* 617.

<sup>270</sup> See Optional Protocol to the ICESCR, (GA Res A/RES/63/117 of 10 December 2008).

<sup>271</sup> Art 18(1) of the OP provides that the Protocol shall enter into force three months after the date of the deposit with the Secretary General of the United Nations of the tenth instrument of ratification or accession.

<sup>272</sup> See Ssenyonjo, *Economic, Social and Cultural Rights* 34.

## 5 Obstacles to the Realisation/Implementation of the Right to Education

The discussions so far in this thesis reveal a number of factors which impede an effective implementation of the right to education in South Africa and Nigeria. This section focuses on those obstacles to the realisation of the right to education from a human rights perspective. It identifies a number of factors that hinder the implementation of the right to education in terms of rights of individuals and obligations of duty bearers. The right to education is a right with budgetary implication. It should therefore be noted that the economies of Africa countries are a major hindrance to the realisation of the human rights with budgetary implications.<sup>273</sup> More salient in this respect is the ineptitude and corruption of most governments' functionaries.<sup>274</sup> Lack of transparency and accountability in the conduct of public affairs makes the realisation of the socio-economic rights difficult to achieve in the sense that in most cases, money meant for public services are often embezzled or diverted into private purses.<sup>275</sup> These obstacles are multifaceted and interrelated and they are considered below.

### 5.1 Financial Obstacles

Given the nature of the right to education, finance constitutes a major obstacle to the implementation or realisation of this right in South Africa and Nigeria, as it does in every other developing country. Most governments use insufficient resources as an excuse to justify their inability to make all forms of education available and accessible to all.<sup>276</sup> Lack of economic growth, an economic recession, lagging tax revenues and choices made in macro-economic policies often leave countries with insufficient resources to invest in education.<sup>277</sup> Finance presents itself as a militating factor from two angles: first, lack of resources available to the government to comply with obligations of providing education for all.<sup>278</sup> The second angle concerns the existence of school fees as an economic and financial barrier for parents to have

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<sup>273</sup> Mugawanya *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (2003) 209.

<sup>274</sup> 209-210.

<sup>275</sup> See *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit No: ECW/CCJ/App/12/07; Judgement No: ECW/CCJ/JUD/07/10, delivered at Abuja, Nigeria on 30/11/2010) paras 16, 18 & 19.

<sup>276</sup> Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation" in *Human Rights in Education, Science and Culture* 209.

<sup>277</sup> 209.

<sup>278</sup> 209.

their children enrolled in school.<sup>279</sup> However, these two aspects intersect because the need to charge school fees is always attributed to lack of government resources to finance education.<sup>280</sup>

As argued in the preceding chapters, the cost of education is a major reason why most parents keep their children and wards away from school and for children to drop out of school. Studies on education have revealed that school fees are an important source of revenue to fund education in South Africa and Nigeria; it is seen as a necessary part of a policy of cost-sharing in education. As argued elsewhere in this chapter, imposition of school fees amounts to a tax on school attendance and human development. The States should not renege on their obligations to provide free and compulsory basic education for all.

Acknowledging that resources are a crucial factor in the implementation of the right to education, the ICESCR gives States the leeway to implement this right progressively. However, “progressive realisation” should not be interpreted to imply that a State has that latitude to defer indefinitely its efforts to ensure full realisation of the right to education.<sup>281</sup> It should be emphasised that the concept of progressive realisation does not mean an indefinite postponement of the States’ obligations to implement; rather, it entails a number of basic and immediate commitments.<sup>282</sup> As earlier submitted, even where the available resources are inadequate, the obligation remains on a State party to ensure the widest possible enjoyment of the relevant rights under the circumstances.<sup>283</sup>

However, it is important to distinguish between the inabilities of a State to comply with its obligations and its unwillingness to do so. A State which is unwilling to use the maximum of its available resources for the realisation of a certain right is in violation of its obligations towards the realisation of that right.<sup>284</sup> On the other hand, if resources constraints render it impossible for a State to comply fully with its obligations, the State still has the burden of justifying that every effort has been made to use all available resources at its disposal in order to

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<sup>279</sup> 209.

<sup>280</sup> 209.

<sup>281</sup> See Maastricht Guidelines, Guideline 21.

<sup>282</sup> Rishmawi *A Commentary on the United Nations Convention on the Rights of the Child* 33; see also, Lundy “Schoolchildren and Health: The Role of International Human Rights Law” in *Children, Education and Health* 14 & 15.

<sup>283</sup> See CRC Committee, Concluding Observations: Jamaica (UN Doc CRC/C/15/ Add. 210, 2003) paras 8, 17 & 18.

<sup>284</sup> See General Comment 14 on the Right to the Highest Attainable Standard of Health (contained in UN Doc. HRI/GEN/1/Rev.7, 2000) para 47.

satisfy, as a matter of priority, the obligations under the Covenant.<sup>285</sup> The development of jurisprudence on economic, social and cultural rights reflects that progressive realisation does not allow for regression, stand-still, or indefinite postponement of implementation.<sup>286</sup> Although South Africa has one of the highest rates of government investment in education in the world,<sup>287</sup> the system of charging school fees negates the country's commitment to remove every obstacle on the right to education. Elimination of tuition fees and other user fees system in South African public schools will facilitate the realisation of the constitutionally-mandate goals and guarantees access to education for all.<sup>288</sup>

In Nigeria, despite the policy of universal, compulsory and free basic education, many children do not have the opportunity of attending schools. The number of out-of-school children in Nigeria is estimated at around seven million.<sup>289</sup> Finance, especially in the poverty-ridden communities, accounts for a large number of out of school children. In terms of the UBE Act, the government is obliged to provide free and compulsory basic education for every Nigerian of school-going age.<sup>290</sup> Despite the government policy of free education, many schools still charge hidden fees such as registration fees and fees for use of computers which most parents cannot afford resulting in children being kept away from schools. Although, there is no accurate data on public expenditure on education in Nigeria, the available materials indicate that funding of education is relatively low. It is noted that between 1999 and 2007, the Federal Government has spent about N782.6 billion on education.<sup>291</sup> Nonetheless, this amount is relatively insufficient to cater for the needs in the Nigeria education sector.

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<sup>285</sup> See General Comment 14 para 47.

<sup>286</sup> Rishmawi *A Commentary on the United Nations Convention on the Rights of the Child* 33.

<sup>287</sup> See *the 2006/07 South African Yearbook* 195; South Africa has one of the highest rates of government investment in education in the world it allocates the sum of R122.8 billion to education in its 2008/09 budget. See <http://www.info.gov.za/aboutsa/education.htm> (accessed on 26/8/2009); the 2008 budget also allocates R121.1 billion to education. See Tucker "Every Child in School, Every Day" *Education Law Project* (Centre for Applied Legal Studies, Johannesburg): <http://www.law.wits.ac.za/cals> (accessed on 2008/09/15); See also, OECD *Reviews of National Policies for Education: South Africa* (2008) 24, which puts South Africa education spending at over 5% of Gross Domestic Product (GDP); UNESCO puts the South Africa GDP at 5.4 per cent. See UNESCO *Global Education Digest 2009: Comparing Education Statistics across the World* (2009) 176.

<sup>288</sup> Woolman & Fleisch *The Constitution in the Classroom* 217-218.

<sup>289</sup> See DFID Document on Education in Nigeria available at: [http://www.dfid.gov.uk/document/publications/PSA/E\\_Nigeria.pdf](http://www.dfid.gov.uk/document/publications/PSA/E_Nigeria.pdf) (accessed on 08-08-2009).

<sup>290</sup> S 2(1) of the UBE Act, 2004; see also, the UBEC *The Compulsory, Free, Universal Basic Education* 28.

<sup>291</sup> The breakdown is as follows: N30.6 billion in 1999; N64.2 billion (2000); N74.9 billion (2001); N45.5 billion (2002); N63.5 billion (2003); N90.3 billion (2004); N106.7 billion (2005); N151.7 billion (2006), and N205.2 billion in 2007. See Nigerian Tribune "FG Spends N782.6bn on Education in 9 Yrs- Minister" <http://www.tribune.com.ng/12092008/news/news10.html> (accessed on 2008/09/12).

## 5 2 Poverty

Another militating factor relating to the one considered above is poverty. While financial obstacles relates to government resources, the issue of poverty essentially applies to parents and guardians. Poverty is described as the inability to acquire the essential material means to maintain life.<sup>292</sup> Describing the ambit of poverty, Fleisch asserts: “poor adults tend to be caught in chronic unemployment and underemployment and, if working, employed in low-paid jobs. Poor people tend to have few household goods, regularly go hungry, and have inadequate housing and limited access to education and health care.”<sup>293</sup> In this sense, it is submitted that poverty is a common occurrence for many South Africans particularly those living in rural areas.<sup>294</sup> While State grants, particularly the old-age pension and the child support grant do provide income to poor families, it is observed that the low family income is still predominantly the consequence of limited formal employment.<sup>295</sup>

South Africa is classified internationally as a middle-income country with large number of the people living below the international poverty line.<sup>296</sup> It is observed that currently, about 35 per cent of the population are vulnerable to food insecurity,<sup>297</sup> while the country has an unemployment rate of over 26 per cent.<sup>298</sup> Recognising this, the South African Constitutional Court once expressed thus:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”<sup>299</sup>

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<sup>292</sup> Barbarin & Richter *Mandela’s Children: Growing up in Post-Apartheid South Africa* (2001) 173-174.

<sup>293</sup> Fleisch *Primary Education in Crisis: Why South African Schoolchildren Underachieve in Reading and Mathematics* (2008) 55.

<sup>294</sup> 55-60; see also, Rose & Charlton “Prevalence of household food poverty in South Africa: Results from a large, nationally representative survey” 2002 5(3) *Public Health Nutrition* 383-389.

<sup>295</sup> Fleisch *Primary Education in Crisis* 55.

<sup>296</sup> Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 245.

<sup>297</sup> 245.

<sup>298</sup> 247.

<sup>299</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), Chaskalson P, para [8].



Poverty is prevalent in Nigeria and it has a negative impact on education. For example, as a result of poverty, parents may not have money to buy standard textbooks, and may be unable to bear other costs associated with going to school. Poverty contributes to school failure; it sets in motion a chain of events that together create intractable impediments in the way of school achievement.<sup>300</sup> There is a link between poverty and school performance, and on average, middle-class children do substantially better than poor children. This difference is primarily due to the manifold effects of poverty.<sup>301</sup> There is a strong correlation between socio-economic background of a learner and academic performance; this is so because a learner's social and economic family characteristics are a powerful influence on his or her relative average achievement.<sup>302</sup> Data shows that the average scores of disadvantaged school children are consistently below that of middle-class learners.<sup>303</sup> This does not rule out some exceptional cases where some disadvantaged children from under-sourced schools perform well in schools despite all obstacles.

The undeniable fact is that poverty is linked to under-achievement. For instance, children that are not adequately fed are likely to have difficulty concentrating in class or performing complex academic tasks.<sup>304</sup> A survey by the Nelson Mandela Children's Fund's study on rural education reveals the link between poverty and academic performance. The study found that 14 per cent of all children surveyed reported having either tea or nothing as breakfast, and 75 per cent reported having tea with bread or porridge. Teachers' testimonies from those rural schools provide powerful evidence that links poverty to under-achievement. One teacher describes the experience of her learners thus: "[t]hey come without food and they eat here at school.... Sometimes they come inadequately dressed, without a jersey or shoes and it is cold and it's a learner who does not have a home. When a child is shivering, he doesn't learn well. That's the reason he has a difficulty. He won't listen to you or concentrate on what you do because of hunger and cold that he is feeling."<sup>305</sup> Further while lack of money to enrol at school

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<sup>300</sup> See Fleisch *Primary Education in Crisis* 53.

<sup>301</sup> 53.

<sup>302</sup> See Rothstein *Class and Schools: Using Social, Economic and Educational Reform to Close the Black-White Achievement Gap* (2004) 16.

<sup>303</sup> See Fleisch *Primary Education in Crisis* 52-53.

<sup>304</sup> Studies have shown that the effects on children that skip breakfast include poor learning. See Sibanda-Mulder "Nutrition and School Performance" *Annual ECOWAS Nutrition Forum* (September 2003) 11.

<sup>305</sup> See Nelson Mandela Foundation *Emerging Voices: A Report on Education in South African Rural Communities* (2005) 54; see also, Fleisch *Primary Education in Crisis* 36.

affect education, irregular income equally has an impact on regular school attendance which is likely to affect children's learning.<sup>306</sup>

School fees, and other school related costs such as uniforms, stationery and transportation are a major obstacle to regular school attendance. To send their children or wards to school, most poor families make huge financial sacrifices to ensure that money is available for education. Apart from the psychological stress that parents pass through to pay their children's fees, school expenses constitute a high portion of their household budget. It is observed that had governments adopted policies in line with their obligations in terms of the minimum core approach, radical improvements would have occurred in the economic position of the worst-off in society within a short period of time.<sup>307</sup> Governments at every level should, therefore, ensure that everyone is provided with the general conditions necessary to realise their potentials through education.

### **5 3 Health Related Problems**

Health of the students or pupils is another important factor on the realisation of the right to education. The relationship between the right to education and the right to health also exemplifies the indivisibility and interdependence of all human rights.<sup>308</sup> There is a link between poverty, food intake and school performance. Poverty impacts on learning through chronic and acute ill-health, in the same vein, under-nutrition is also associated with poor cognitive function, late enrolment and frequent illness.<sup>309</sup> Thus, under-nutrition (as a result of poverty) is associated with delay cognitive development and ultimately poor school achievement.<sup>310</sup> Apart from poverty induced sickness, other health problems that have an impact on education include parasite infection, hearing loss, asthma, fatal alcohol syndrome, malaria and HIV/AIDS.<sup>311</sup> Because of their prevalence and the huge negative impact on the right to education, only the last two diseases, HIV/AIDS and malaria will be examined.

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<sup>306</sup> Fleisch *Primary Education in Crisis* 67.

<sup>307</sup> Bilchitz *Poverty and Fundamental Rights* 260.

<sup>308</sup> See Lundy "Schoolchildren and Health: The Role of International Human Rights Law" in *Children, Education and Health* 3.

<sup>309</sup> See Kloka "Nutrition of school-aged children" Paper presented at the Colloquium on Improving the Health of School-aged Children in an Era of HIV/Aids- Linking Policies, Programmes, and Strategies for the 21<sup>st</sup> Century (2003) 15.

<sup>310</sup> See Fleisch *Primary Education in Crisis* 34.

<sup>311</sup> 32.

Malaria has a significant effect on learning achievement. Although the incidence of malaria poses little or no threat to the South Africa learners,<sup>312</sup> this is not the case in Nigeria where malaria is a common sickness in view of the country's hot weather. It is noted that malaria accounts for three out of every 10 childhood deaths in Nigeria, and more precisely, a child in Nigeria dies of malaria every 30 minutes.<sup>313</sup> This death rate is too high and, therefore, unacceptable.<sup>314</sup> It is pointed out that on the African continent as a whole, malaria accounts for one in five childhood deaths.<sup>315</sup> In addition to high mortality levels, the high prevalence of malaria transmission in children means that a significant portion of school-goers suffer long-term damage of malaria in the form of epilepsy, neurological damage, and health problems that compromise children's normal development and inevitably affects school achievement.<sup>316</sup> Also, repeated episodes of malaria lead to severe anaemia, which is equally linked to delayed intellectual development.<sup>317</sup> Death and disability associated with malaria reduces family resilience to economic shock and, in the long term, children that get malaria will miss school and more frequently and ultimately under-achieve.<sup>318</sup>

Regarding HIV/Aids, it is noted that the impact of the pandemic on education systems is catastrophic in South Africa.<sup>319</sup> South Africa is considered to have one of the highest HIV/Aids prevalence rates in the world.<sup>320</sup> It is estimated that around 12 per cent of the almost 46 million

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<sup>312</sup> 38.

<sup>313</sup> Oguntola "Malaria, Deadly and can kill within Hours" quoting Taiwo Olarinde, an Assistant Manager, Global Fund Malaria Programmes, Society for Family Health (SFH), Ibadan, Nigeria. See *Nigerian Tribune* of 29-04-2010 available online at: <http://www.nigeriamasterweb.com/paperfrmes.html> (accessed on 29-04-2010).

<sup>314</sup> See *The Punch Newspaper*, 25 April, 2010.

<sup>315</sup> Fleisch *Primary Education in Crisis* 37-38; it is observed that about 850,000 persons die daily in sub-Saharan Africa due to malaria. See "US to cut Malaria Related Death by Half in Nigeria" *The Punch Newspaper*, 25 April, 2010 available online at: <http://www.nigeriamasterweb.com/paperfrmes.html> (accessed on 27/04/2010).

<sup>316</sup> Fleisch *Primary Education in Crisis* 37.

<sup>317</sup> 37.

<sup>318</sup> 37-38.

<sup>319</sup> Van Wyk "HIV/AIDS Policy in South African Schools" in *Children, Education and Health* 183-198 184; Coombe "Keeping the education system healthy: Managing the impact of HIV/Aids on education in South Africa" (2000) 3(1) *Current Issues in Comparative Education* 1-13; Fleisch *Primary Education in Crisis* 37-38; Barry *Schools and the Law: A Participant's Guide* (2006) 153.

<sup>320</sup> Brand *Financial Constitutional Law: A Comparison Between Germany and South Africa* (2006) 301. It is noted that by 1992, the annual survey showed that HIV prevalence rate among pregnant women (aged between 15 and 49) who attend public health antenatal clinics was 2.2 per cent. Later by 2002, the prevalence rate had increased to a massive 26.5 per cent. This led to estimates that almost three million South African women between the age 15 and 49 were infected with HIV by the end of 2002. See Department of Health *National HIV and Syphilis Antenatal Zero-Prevalence Survey in South Africa: 2002* (2003) 6 & 11.

South Africans has HIV.<sup>321</sup> This translates into an estimation that between five and six million South Africans are infected. It is further estimated that 800 to 1,000 South Africans die of AIDS per day, which brings the total to approximately 300,000 people per year.<sup>322</sup> Without anti-retroviral treatment, about 30 per cent of the babies born to infected mothers are themselves infected.<sup>323</sup> Thus, children infected with HIV will ultimately form part of the school population and learners may have to take time off to look after themselves or their family members who are infected or have to carry out household tasks for them.<sup>324</sup> In this regard, the pandemic impacts negatively on the education system. Also, HIV/Aids accounts for decline in demand for schooling; it also reduces educator numbers with resultant effects on the quality of education; it creates trauma in the classroom and increasingly embattles school leadership corps.<sup>325</sup> It also reduces number of parents with resultant increase in orphans living in deepening poverty which is capable of impacting negatively on school enrolment rates.<sup>326</sup>

Towards reducing the effect of HIV/Aids on the South African education sector, the Department of Education has put in place the National Policy on HIV/Aids for Learners and Educators in Further Education and Training Institutions.<sup>327</sup> The Policy while acknowledging the increasing prevalence of HIV infection in South African schools recommends some strategies for schools to cope with the epidemic. In drawing up the policy, some important fundamental rights in the Constitution such as freedom from discrimination were taken into consideration.<sup>328</sup> Thus, the Policy prohibits the testing for HIV/Aids as part of schools' admission criteria. The governing body of a public school may not administer any test (including an HIV test) related to the admission of a learner to a public school.<sup>329</sup>

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<sup>321</sup> See Van Wyk "HIV/AIDS Policy in South African Schools" in *Children, Education and Health* 184; Harris & Meredith (eds) *Children, Education and Health* 185.

<sup>322</sup> *National HIV and Syphilis Antenatal Zero-Prevalence Survey* 12; see also, Dorrington, Bradshaw & Budlender *HIV/AIDS profile in the Provinces of South Africa: Indicator for 2002* (2002) 4-5.

<sup>323</sup> *National HIV and Syphilis Antenatal Zero-Prevalence Survey* 11.

<sup>324</sup> See Harris & Meredith (eds) *Children, Education and Health* 185.

<sup>325</sup> Fleisch *Primary Education in Crisis* 37-38; Barry *Schools and the Law: A Participant's Guide* (2006) 153; Harris & Meredith (eds) *Children, Education and Health* 185.

<sup>326</sup> Coombe (2000) 3(1) *Current Issues in Comparative Education* 1-13; see also, Fleisch *Primary Education in Crisis* 37-38 & 45.

<sup>327</sup> General Notice 1926 *Government Gazette* 20372 of 10 August 1999.

<sup>328</sup> These include, the right to equality; the right to dignity; the right to privacy; the right of access to information; the right of access to health care services; the right to freedom of association; the right to life, bodily integrity and an environment that is not harmful to health or well-being, the right to freedom of conscience, religion, thought, belief and opinion; and the right to education. See chap 2 of the 1996 South African Constitution.

<sup>329</sup> See the National Schools Policy, para 4 & s 5(2) of the SASA.

In terms of this Policy, no learner or educator may be compelled to undergo testing to determine his or her HIV status without his or her informed consent.<sup>330</sup> While no learner or educator may be compelled to disclose his or her HIV status, a voluntary disclosure is encouraged so as to effectively prevent spread of the pandemic in schools.<sup>331</sup> The issue of HIV/Aids is not prevalent in Nigeria as in South Africa. Nonetheless, the Nigerian government should put in place clear cut policy measures to ensure that schools are taking reasonable steps towards preventing HIV spread and transmission in schools. It is important that schools should maintain a safe environment for both learners and educators.

#### **5 4 Discrimination, Socio-economic and Cultural Obstacles**

Active discrimination in education may occur through intentional acts or failures to act by government authorities or private persons, leading to a discriminatory situation in terms of article 1(1) of the UNESCO Convention against Discrimination in Education. The essential characteristic of this provision is that discrimination in education leads to an exclusion of people based on certain grounds that obstructs equality of treatment. There are also situations of systemic forms of discrimination in education as a result of more or less structural patterns in society due to financial, social, economic, cultural, historical or geographical reasons.<sup>332</sup> Traditions, customs and social norms and practices within societies and families also impact on the right to education. In many African societies, the notion that boys are productive and should be valued is still rampant, while girls are often downgraded. These views about the perceived roles of girls and boys to a large extent often determine who among the children of a family are sent to school.<sup>333</sup>

The effect of this customary and cultural perception is the issue of gender discrimination in terms of education, as is often reflected in the enrolment disparity between boys and girls.

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<sup>330</sup> See *C v Minister of Correctional Services* 1996 (4) SA 292 (T); see also, *Irvin and Johnson Ltd v Trawler and Line Fishing Union and Others* 2003 (3) SA 212 (LC).

<sup>331</sup> See National Schools Policy, para 6. However, such a disclosure must be kept confidential and any unauthorized disclosure could give rise to legal liability. See *Jansen van Vuuren NNO v Kruger* 1993 (4) SA 842 (A) which dealt with the infringement of the privacy in the context of HIV. A medical practitioner disclosed his patient's HIV infection to another general practitioner and dentist who, the court found, had no right to this information since they were not involved in his immediate care and were not exposed to any risk.

<sup>332</sup> Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation" in *Human Rights in Education, Science and Culture* 214.

<sup>333</sup> See generally, Taiwo "Women Rights and Gender Equality in Nigeria: Socio-cultural Perspectives" (2009) 2(1) *Nigeria Journal of Public Law* 67-76; Taiwo "Customary Law Rule of Primogeniture and its Discriminatory Effects on Women's Inheritance Rights in Nigeria: A Call for Reform" (2008) 22 (2) *Speculum Juris* 104-122.

Gender parity is a quantitative concept which refers to the equal enrolment and participation of both girls and boys in different levels of education. Gender equality on the other hand is a qualitative concept; it refers to equal educational outcomes for boys and girls.<sup>334</sup> While gender disparity is not seen as a problem in the South African education sector, it is a problem in Nigeria. Available data shows that there is still high disparity in the male and female school enrolment rate especially in Northern Nigeria, which impacts negatively on the right of a girl-child to education.<sup>335</sup> Inequalities and gender discrimination within family also affect girls' education. In many cases, as the family get poorer, preference is given to boys in attending schools while girls are denied education.<sup>336</sup> This impedes the realisation of the right to education.

Also, some forms of overt discrimination such as the practice of suspending pregnant girls from school, constitute obstacles to the realisation of the right to education. The South Africa legal framework fares well in this respect by prohibiting the suspension of a learner from school on account of pregnancy. Conversely in Nigeria, as examined in chapter six, schools may suspend a pregnant learner from schools as a form of disciplinary measure. This practice is capable of impacting negatively on the right of a girl-child to education. The measure put in place in terms of the Child's Rights Act is that a female child who becomes pregnant before completing her education should be given the opportunity, after delivery, to continue with her education.<sup>337</sup> Also, girls are often the victims of discrimination, sexual abuse, punishment and intolerance by other pupils and by teachers. These attitudes, no doubt, have the disastrous effect of high drop-out rates and underachievement of girls compared to boys.

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<sup>334</sup> Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation" in *Human Rights in Education, Science and Culture* 215.

<sup>335</sup> Statistics from the 2006 National Personnel Audit show that there are 54,434 public primary schools in Nigeria (while the 2006 School Census states 87,941 as the number of primary schools) with an enrolment figure of 24,422,918 of which the male accounts for 13,302,269 (or 54.5%) while the female accounts for 11,120,649 (or 45.5%) indicating a gender parity of 83.6%. More males are enrolled in the primary schools than females in the North while a near parity is recorded in the South. About 65% of primary school children in the North are male while 35% are female. There are also 7,129 public Junior Secondary Schools in Nigeria with a total enrolment figure of 3,266,780. Gender disparity exists in male and female enrolment figures at the JSS level nationwide. About 55% are male while 45% are female. See *Roadmap to Nigeria Education* (2009) 19.

<sup>336</sup> See Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation" in *Human Rights in Education, Science and Culture* 216.

<sup>337</sup> See s 15(5) of the Child's Rights Act, 2003.

## 5.5 Socio-Political Obstacles

An important obstacle to the realisation of the right to education is also of a political nature coupled with the problem of resource mobilization. The recent Nigerian policy paper on education acknowledges low political will and low commitment as important obstacles on the right to education.<sup>338</sup> Implementing the right to education presupposes the recognition of other concomitant rights that are politically sensitive, such as linguistic freedom and educational rights of the minorities and the recognition of cultural identity of indigenous groups.<sup>339</sup> Another issue is the choices and priorities in government spending. The experience in Nigeria is that the education sector receives one of the lowest government's budgetary allocations with military and defences receiving the highest budgetary allocations. This arrangement has consistently elicited protests and strikes in the Nigerian education sector, especially at the tertiary level.

Another obstacle of a political nature that has a devastating impact on the realisation of the right to education is the consistent communal conflicts or crises experienced in Nigeria. Examples in this regard in the recent time are the Niger Delta and Jos crises which left many people dead with millions worth of properties destroyed. Schools buildings and facilities were destroyed and children were unable to go to schools as long as the crises lasted. Although, the incidence of child soldiers is rare in the country children were in most cases used in one way or the other as troop-shockers. Further, pupils are the victims of communal crisis and the resultant traumas may negatively affect their school performances. The fact that many teachers and parents were killed with several school buildings destroyed makes the period of educational recovery after the end of conflicts a very difficult one.

Also, corporal punishment and bullying are barriers to learning with the impact of raising the number of pupils who drop out of school. It is acknowledged that such practices are contrary to a safe school environment.<sup>340</sup> Another pressing problem is that of an ever-growing number of street children. Even though these children have a legal obligation or a fundamental right to attend school, there is often nobody who enforces this. In terms of the South African Schools Act, parents have the duty to make sure that their children attend school. Where a learner fails to attend school, the provincial authorities may investigate the circumstances of the

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<sup>338</sup> See *Roadmap to Nigeria Education* 35.

<sup>339</sup> See Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation" in *Human Rights in Education, Science and Culture* 219.

<sup>340</sup> See Committee on the Rights of the Child "General Comment No. 1 on Article 29(1): The Aims of Education", (UN Doc. CRC/GC/2001/1), para 19.

learner's absence and take appropriate measures to remedy the situation. The authorities may issue a written notice to the parent of the learner requiring compliance. However, no adequate provision is made for education of street children.<sup>341</sup> In the same vein, the Nigerian UBE Act makes it a criminal offence for any parent who neglects or fails to send his or her child who is within the school age bracket to school,<sup>342</sup> but the Act is silent on the issue of street children. It is clear that no legislation in the two countries deals in a satisfactory manner with the problem of street children who have no parents.

## **5 6 Obstacles Relating to the Quality of Education**

To make education acceptable for pupils and adapted to their needs, it is essential that the quality of education be good.<sup>343</sup> However, educational institutions, teachers and children face a number of obstacles in this respect. Obstacles impeding quality of education include poor school buildings, facilities and lack of adequate personnel resulting in a poor pupil-teacher ratio.<sup>344</sup> Another problem impacting on quality of education is teacher absenteeism, which in most cases is a symptom of poor or low teachers' salaries which forces many teachers to have an additional job.<sup>345</sup> School environment is also very crucial: inadequate facilities such as poor buildings, lack of furniture, inadequate sanitation, and lack of teaching materials seriously hamper a child's ability to concentrate and learn.<sup>346</sup> The negative impact of the above problem on the realisation of the right to education in South Africa and Nigeria has been analysed in chapter three.

In Nigeria, it is noted that many schools lack the essential infrastructure to enable them to function as safe, efficient and effective schools. It is observed that vast majority of schools both in urban or rural areas have no water, sanitation and electricity. The physical state of classrooms is very poor, with floors full of holes, roofs and ceilings broken, overall, the fabric in a poor state of repair.<sup>347</sup> Windows have shutters at best but these and doors are often not lockable leaving most schools without security. Few Nigerian schools have a perimeter fence or

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<sup>341</sup> van Wyk "HIV/AIDS Policy in South African Schools" in *Children, Education and Health* 197-198.

<sup>342</sup> See s 2(4) of the UBE Act, 2004 & s 15(6) of the Child's Rights Act, 2003.

<sup>343</sup> Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realisation" in *Human Rights in Education, Science and Culture* 219.

<sup>344</sup> 219.

<sup>345</sup> 219.

<sup>346</sup> 219.

<sup>347</sup> *Roadmap to Nigeria Education* 26.



enclosure, again making them open to intruders and vandalism. In some circumstances furniture is stolen and classrooms are used as toilets.<sup>348</sup> Equally in South Africa, it is observed that most schools especially in rural areas, lack the resources to provide students with the education they need to participate effectively in society.<sup>349</sup> Also, pupil-to-teacher ratios in most rural schools are as high as 51 to 1, while many school buildings are in weak condition needing repairs.<sup>350</sup> It is further noted that most schools do not have safe drinking water within the walking distance, have no toilets or telephones and are badly overcrowded.<sup>351</sup>

## **5 7 Corruption and Lack of Accountability**

Of all the elements that threaten good governance, corruption is the most destructive. Corruption and mismanagement cripple economic growth and development.<sup>352</sup> Corruption hurts countries, communities and individuals; it is a threat to economic stability and security of countries whose resources have been stolen or diverted.<sup>353</sup> It is submitted that education systems across the developing countries are particularly vulnerable to pervasive corruption, largely for three reasons. First, as one of the few governmental units with high visibility representation all the way down to the community level, education is an attractive structure for patronage and manipulation of local sentiment.<sup>354</sup> Second, decisions perceived to have significant consequences for people's lives are made by those who control decisions at each of those levels, for example, education officers, headmasters, and teachers.<sup>355</sup> Third, a considerable amount of education funds is spent in small amounts, across many scattered sites, most of which have weak accounting and monitoring systems.<sup>356</sup>

It is observed that the major challenges impeding the realisation of the right to education in Nigeria include inability to access and judiciously utilise funds; inefficient resource mobilization and utilization; lack of transparency and accountability.<sup>357</sup> There is also low

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<sup>348</sup> 26.

<sup>349</sup> Berger 2003 *Columbia Law Review* 619-620.

<sup>350</sup> 619.

<sup>351</sup> 619-620.

<sup>352</sup> See EEA *Good Governance and Anti-Corruption Policy and Guide* (2006) 4.

<sup>353</sup> See Zirnask, Clarke & Feith *From Corruption to Good Governance* (2008) 8.

<sup>354</sup> Chapman "Education" in Spector (ed) *Fighting Corruption in Developing Countries* (2005) 65-78 65.

<sup>355</sup> 65-66.

<sup>356</sup> 66.

<sup>357</sup> See *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit No: ECW/CCJ/App/12/07; Judgement No:

budgetary utilization or implementation. In Nigeria, in the basic education sector, it is observed that the FGN-UBE Intervention Funds are not being accessed by the States. As at January 2009 a total of 28 States had not accessed their 2007 intervention funds totalling about N12.513bn, and 34 out of the 36 States had not accessed their intervention funds for 2008 totalling N29.551bn.<sup>358</sup> Failure to access the intervention fund is traced to corruption and lack of accountability. States are to account for the previous years before they can access the current year fund which the affected States failed to do.

High corruption levels constitute a major hurdle on the road to social and economic development.<sup>359</sup> Corruption has a pervasive and troubling impact on the poor since it distorts public choices in favour of the wealthy and powerful, and reduces the State's ability to provide a social safety net.<sup>360</sup> It is submitted that corruption and abuse of power have long been features of Nigeria's economic and political landscape. As corruption impacts negatively on economic growth, it is also politically destabilizing.<sup>361</sup> Curbing corruption, therefore, is an important means to ensure a more accountable, efficient and effective government. It also allows for development that assists those in poverty.<sup>362</sup> Given that corruption only flourishes in an environment where basic human rights are lacking, an effective promotion of good governance devoid of corruption requires respect for basic human rights.<sup>363</sup>

## **5 8 Legal Status or Classification of the Right to Education**

Another condition impeding the realisation of human rights is the legal status or classification of such rights.<sup>364</sup> The most obvious bar to the judicial protection of socio-economic rights is the non-inclusion of such rights in the constitution, or their inclusion in the form of non-justiciable

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ECW/CCJ/JUD/07/10, delivered at Abuja, Nigeria on 30/11/2010) paras 16, 18 & 19; see also, *Roadmap to Nigeria Education* 35.

<sup>358</sup> *Roadmap to Nigeria Education* 34.

<sup>359</sup> See EEA Financial Mechanism and the Norwegian Financial Mechanism 2004-2009 (2009) 4.

<sup>360</sup> See UNDP *Corruption and Good Governance Discussion Paper 3* (1997) 35; see also, Peter & Masabo, "Confronting Grand Corruption in Public and Private Sectors: A Spirited New Initiative from Tanzania" (2009) 1(2) *Namibia Law Journal* 49-71 49; Cremer *Corruption and Development Aid- Confronting the Challenges* (2008) 9-10.

<sup>361</sup> See Fagbadebo "Corruption, Governance and Political Instability in Nigeria" (2007) 1(2) *African Journal of Political Science & International Relations* 28-37 29.

<sup>362</sup> See Zirnask, et al *From Corruption to Good Governance* 8, 9 & 29.

<sup>363</sup> See generally, Taiwo "Executive Immunity under the Nigerian Constitution and Its Impact on the Government's Anti-Corruption Crusade" (A Paper Accepted for Publication in the *East Africa Journal of Peace and Human Rights* (forth-coming in 2010, and on file with the author) 14-16.

<sup>364</sup> Ray & Tarrow "Human Rights and Education: An Overview" in Tarrow (ed) *Human Rights and Education* (1987) 3 12.

directive principles of state policies.<sup>365</sup> The Nigerian Constitution is one of the many constitutions in the modern time that follow the classification of rights into fundamental rights on the one hand and the directive principles of the state policy on the other.<sup>366</sup> The Constitution recognises two sets of “rights” namely, the fundamental human rights and fundamental objectives and directive principles of state policy.<sup>367</sup> There is significant difference between the two set of rights as provided for in the Nigerian Constitution, while fundamental rights are justiciable, the “rights” classified fundamental objectives and directive principles which include the right to education are non-justiciable.<sup>368</sup> In a nutshell, non-justiciability entails the inability of the courts to avail a litigant judicial remedies or relief in view of the inappropriateness of the judicial process in resolving the dispute, which ordinarily should be channelled to another organ of state with requisite competence to deal with the problem.<sup>369</sup>

Owing to their non-justiciability, the value of the directive principles is that they place moral and political, rather than legal obligations on the State.<sup>370</sup> Conversely, the right to education is provided for as a justiciable right under the 1996 South African Constitution. Given the inclusion of socio-economic rights as enforceable rights in its provisions, the South African Constitution presents itself as a model in terms of enforcement of socio-economic rights in Africa.<sup>371</sup> In many of the cases on this issue, government actions, policies and laws denying or impeding the enjoyment of socio-economic rights have been successfully challenged and courts have consistently held that these rights are enforceable under the Constitution.<sup>372</sup> Although there

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<sup>365</sup> See Viljoen “The Justiciability of Socio-economic and cultural Rights: Experience and Problems” in *Human Rights in Education, Science and Culture* 90.

<sup>366</sup> Chap IV of the 1999 Nigerian Constitution contains the fundamental human rights while Chap II contains the fundamental objective and directive of the state policy.

<sup>367</sup> Ss 13-24 deal with objective policy while ss 33-46 contained fundamental rights.

<sup>368</sup> See s 6(6)(c) of the 1999 Nigerian Constitution which provides that the judicial powers vested (by the Constitution) on the courts: “shall not extend ... to any issue or question as to whether any act or 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 the Constitution.” See also, *Uzoukwu v Ezeonu II* [1991] 6 NWLR (pt 200) 708 at 761-762; Agbede “The Rule of Law and the Preservation of Individual Rights” in *Individual Rights under the 1989 Constitution* 35; Aguda “Judicial Attitude to Individual Rights in Nigeria” in *Individual Rights under the 1989 Constitution* 68; Aguda *The Judiciary in the Government of Nigeria* (1983) 77-78; Olowu (2006) 69(1) *Saskatchewan Law Review* 56.

<sup>369</sup> Okpaluba “justiciability, Constitutional Adjudication and the Political Question in a Nascent Democracy: South Africa (Part 1)” (2003) 18 *SAPR/PL* 331-348 332.

<sup>370</sup> de Villiers “Social and Economic Rights” in *Rights and Constitutionalism* 615.

<sup>371</sup> South African Constitution’s socioeconomic rights provisions have been celebrated internationally. See Kende *Constitutional Rights in Two Worlds* 244-245.

<sup>372</sup> See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment*

are positive developments as far as the domestic justiciability of the right to education is concerned, the legal culture in Nigeria classifying it under the directive principles is still a serious obstacle.

To raise the right to education to a constitutional status in Nigeria, an expansive interpretation approach of the India judiciary is essential.<sup>373</sup> Nigerian courts, like their Indian counterparts should always read the directive principles with other justiciable provisions of the Constitution to invigorate the non-justiciable rights. Although, the enactment of the UBE Act making the basic education free and compulsory in the country is a step in this direction the Act has limited focus as it only applies to basic education. Giving the right to education a constitutional flavour as in South Africa will strengthen its implementation in Nigeria.

## **6 Summary of the Chapter**

In summary, the ICESCR as well as the CRC itemised the nature of the States' obligations and the measures required towards implementing the rights guaranteed under those instruments.<sup>374</sup> Each State party 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 Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>375</sup> The chapter has emphasised that these instruments imposed three levels of obligations on the States namely, obligations to respect, protect and fulfil. In terms of these obligations, in order to implement the content of the right to education, States are to make education available, accessible, acceptable and adaptable.

The chapter also summarises the States obligations in terms of the right to education to include the provision of basic education that is free and compulsory; progressive introduction of

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*Action Campaign (No.2)* 2002 (5) SA 721 (CC) *Minister of Health v Treatment Action Campaign (No.2)* 2002 (5) SA 721; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 (9) BCLR 891 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) & *Khosa v Minister of Social development* 2004 (6) SA 505.

<sup>373</sup> It is submitted that although the directive principles of the state policy are not in themselves legally enforceable by the courts, however, where the directive principles are read together with other enforceable parts of the Constitution, they then in that sense become enforceable. See *Okogie v A-G of Lagos State* [1981] 2 NCLR 337; *Adewole v Jakande* (supra); *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Others* [2002] 9 NWLR (pt 772) 222 (SC) 382 & 391; *Adebisi Olafioye v Federal Republic of Nigeria* [2004] 4 NWLR (pt 864) 580 (SC) at 659 & 661; Ghanaian case of *New Patriotic party v Attorney General* (1996-97) SCGLR 729 & Indian case of *Unni Kkrishnan v State of Andhra* (1993) 1 SCC 645.

<sup>374</sup> Art 2(1) of the ICESCR as well as art 4 of the CRC.

<sup>375</sup> Emphasis added.

free secondary, higher and fundamental education; access to public educational institutions and programmes on non-discriminatory basis; educational quality that conforms to the internationally recognised objectives; guarantee of parental choice in the education of their children without interference from the state or third parties, subject to conformity with minimum educational standards. The foregoing elements constitute the core obligations of the States in respect of the right to education. A derogation from these elements will amount to a violation of international obligations.

The chapter posits that international human rights are meaningless and worthless if they cannot be implemented and argues that the implementation of international human rights should primarily be done through action at the national level. At the national level, the ICESCR and CRC envisaged legislative and non-legislative measures. A legislative measure implies in the first place the inclusion of the international human rights provisions in the national legal order by adopting national legislation and policies. The non-legislative measures include administrative, budgetary, judicial, promotional and other measures. However, given that the implementation of socio-economic and cultural rights cannot be considered solely as a national concern, international measures such as States reporting system and the rapporteur system as provided are also examined.

The chapter concludes that despite the recognition of the right to education in the various global, regional and national human rights instruments, the realisation of this right remains elusive due to many factors. The identified militating factors include financial obstacles; poverty; health related problems; classification of the right to education; socio-economic and cultural obstacles; obstacles impeding quality of education include poor school buildings, facilities and lack of adequate personnel resulting in poor pupil-teacher ratio as well as corruption and lack of accountability on the part of the government functionaries. Solutions to these problems will be suggested in the concluding chapter.

## **7 Conclusion**

This chapter has argued that both South Africa and Nigeria has obligations under the ICESCR and the national constitutions to provide a sound basic education. It contends that in order to provide such a sound basic education, the State has a duty to take steps to ensure that the following resources are available to students: sufficient number of qualified teachers and other

personnel; appropriate class sizes; adequate and accessible school buildings; sufficient up-to-date books and technology; suitable curricula; adequate resources for students with extraordinary needs; and a safe, orderly environment.<sup>376</sup> The chapter also posits that the level of the realisation of socio-economic rights in any country is indirectly influenced by the level of its economic development. It observed that the rights protected under the ICESCR require positive implementation based on the availability of resources. This renders the socio-economic and cultural rights less capable of judicial determination. As such, the implementation of the right to education demands more administrative, financial and political measures in comparison to judicial measures.

The discussion in this chapter shows that the implementation of the right to education in South Africa and Nigeria is impeded by many obstacles. Overcoming these obstacles requires political will and a change of views and social norms about the values of education. It also requires concerted efforts on the part of the various actors in education such as the governments at all levels, the human rights monitoring bodies, inter-governmental bodies, the UN specialised agencies and the NGOs. Given that South Africa and Nigeria are developing countries, an effective implementation of the right to education in both countries will require international assistance and cooperation. The next chapter will examine this issue. It will also offer suggestions on how those obstacles to the realisation of the right to education identified in this chapter can be tackled. The thesis will conclude by making some recommendations on how the right to education can be effectively implemented in the two countries.

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<sup>376</sup> See *Campaign for Fiscal Equity & Others v the State of New York & Others*, 719 NYS 2d 475, (2001).

# Chapter 8

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## Conclusion and Recommendations

“We shall not cease from exploration; and the end of all our exploring will be to arrive where we started; and know the place for the first time.”<sup>1</sup>

### 1 Introduction

This thesis has examined the right to education in South Africa and Nigeria. It presents education as an empowerment right. It is a right with a multiplying effect in the sense that where the right to education is effectively guaranteed, it enhances the enjoyment of all other rights and freedoms. When it is denied, it precludes the enjoyment of many other human rights. Chapter one placed the study in a proper perspective by providing the general overview of the study. It started with the background to the study, the research problem, the research questions, aims and objectives, the research motivation/purpose of the study, as well as the justification for the study. It asserts that everyone has the right to education with the obligations imposed on the States under the international, regional and national human rights instruments to provide education for all.

Chapter two took the view that to adequately implement the right to education, a good knowledge of the global and regional human rights standards is essential. This enables the effective adaptation of the set standards to national conditions. In this sense, the chapter gave an overview of the relevant legal instruments guaranteeing the right to education at the global and regional levels. It outlined the core human rights standards contained in those instruments which define government obligations and commitments pertaining to the right to education. It posits that these instruments mandate the incorporation of those commitments and obligations in national education policies and strategies. The chapter also examined significant laws and policies that have been developed at the national level to give effect to the right to education in South Africa and Nigeria.

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<sup>1</sup> Eliot *The Four Quartets: Collected Poems, 1909-1962* (1974) 209.

Chapters three, four and five examined the nature and content of the right to education at the primary, secondary and tertiary levels of education respectively. These chapters emphasised the obligations placed on the States parties on each of the levels of education in terms of those human rights instruments considered in chapter two. The main submission that runs through the three chapters is that, having signed the relevant human rights instruments, both South Africa and Nigeria have accepted to bear the duties of realising the right to education in their territories. As CESCR pointed out in General Comment No.13, the study recognises the fact that the exact standard of the right to basic education may vary according to conditions within a particular country, but education must meet four features namely, availability, accessibility, acceptability and adaptability. These four features were used as the yardsticks on which this study based its assessment of the right to education in South Africa and Nigeria.

These chapters contended further that both governments should ensure that human, material and budgetary resources are sufficient and adequate to ensure education for all (issue of availability); that education systems should not discriminate on any ground and that positive steps should be taken to reach the most marginalised. That is, education should be made accessible, physically and economically (issue of accessibility); that the content of education and teaching methods should be relevant, culturally appropriate and of quality (the issue of acceptability); and finally that education should be flexible so as to respond to the needs and abilities of students, meet the best interests of the child, and adapt to their different contexts (issue of adaptability). In addition to the foregoing, chapter five further advocated for a system which adequately guarantees academic freedom and institutional autonomy given its impact on the effective enjoyment of the right to education.

Chapter six examined the rights in education, that is, the protection rights, the participation rights of the child in education, as well as other fundamental rights which impact on the right to education. The chapter argued that the right to education is more than mere school attendance, but also includes the participation right of the child which demands that a learner should be recognised as bearer of rights in educational process. The chapter posited that the right to education intertwines with other fundamental rights such as the right to freedom of religion and cultural rights; the right not to be treated or punished in a cruel or degrading way; the equality principle and right to freedom from discrimination; the right to freedom of expression; the right to freedom of assembly and association and the right to establish and



maintain independent/private schools. It asserted that all these rights impact on the right to education and vices-versa.

Chapter seven focused on the implementation of the right to education in South Africa and Nigeria. It examined those strategies put in place at the global, regional and national levels to ensure an effective implementation of the right to education. It observed that despite the universal entrenchment of the right to education as a human right, there is a significant gap between the legal guarantee of the right to education and its actual realisation in the two countries. The factors impeding the implementation of the right to education were critically analysed. It concluded that those problems identified as impeding the implementation of the right to education in both countries are compounded by lack of strong political will to convert formal commitments into practical measures to achieve universal access to a quality education.

The pertinent issue in this concluding chapter, therefore, is to address those steps/measures that need to be taken to improve on the right to education in the light of the problems identified in the study. This chapter will address these issues with the aim of proffering some suggestions/recommendations on how to effectively implement the right to education in both countries. It will advocate for a better realisation of the right to education in the light of those problems. Prior to that, a summary of the earlier findings of this thesis will be presented.

## **2 Summary of the Findings**

Based on the available data, the study has argued that compared to South Africa, Nigeria is in a poor position in terms of the overall literacy rate and the access to education. The study shows that Nigeria has an overall literacy rate of 49 percent, which is below the average 57 percent for sub-Saharan Africa.<sup>2</sup> This figure compares very unfavourably with South Africa with 84 percent.<sup>3</sup> It is revealing that Nigeria's performance with respect to access to primary education is very poor, particularly in the light of the huge oil revenues available to the country.

The study also found that there is gender disparity in the Nigerian education sector. Female literacy is much lower in Nigeria compared to South Africa. Statistics from the National Personnel Audit show that males account for 54.5 percent of the enrolment figures in the

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<sup>2</sup> See Hodges (ed) *Children's and Women's Rights in Nigeria: A Wake-up Call* (2001) 143.

<sup>3</sup> 143.

Nigerian primary education sector while females account for only 45.5 percent.<sup>4</sup> More males are enrolled in the primary schools than females in Northern Nigeria while a near parity is recorded in the South. About 65 percent of primary school children in the North are male while 35 percent are female.<sup>5</sup> South Africa presents a striking contrast with a primary school net enrolment rate of 96 percent and almost total gender equity in the area of primary school enrolment.<sup>6</sup>

This pattern of disparity between male and female enrolment is also maintained in the secondary school education level. For instance, it is observed that the overall secondary school General Enrolment Rate (GER) for the year 1995 in Nigeria was about 44 percent far below the South Africa's secondary school GER for the same period which was 88 percent.<sup>7</sup> While the UBE programme has considerably increased the access to junior secondary school in the recent time, at the senior secondary schools level, however, there is the problem of low transition rates from junior secondary to senior secondary schools in Nigeria.<sup>8</sup> For instance, the 2005 Education Sector Analysis (ESA) study report shows that females' enrolment rate in the Nigerian senior secondary schools was only 43.8 percent.<sup>9</sup>

The study also found that at the tertiary education level, Nigeria has limited space and cannot adequately cope with the demand of prospective candidates. It is pointed out that the Nigerian tertiary education sector has space for only one quarter of the prospective students. This is in contrast with the position in South Africa.<sup>10</sup> Access to higher education in Nigeria is restricted both by stringent eligibility requirements and by intake quotas.<sup>11</sup> The stiff competition restricts access for many qualified candidates and, in most cases, resulted in sharp practices in admission procedures, including examination malpractice. While private sector participation has eased some of the pressures on the public tertiary institutions in the country, it has not catered in a significant way for all the huge number of applicants seeking admission to those institutions.

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<sup>4</sup> See Federal Ministry of Education *Roadmap to Nigeria Education* (2009) 19.

<sup>5</sup> 19.

<sup>6</sup> Hodges *Children's and Women's Rights in Nigeria* 147.

<sup>7</sup> 150.

<sup>8</sup> *Roadmap to Nigeria Education* 37.

<sup>9</sup> 37.

<sup>10</sup> This has been discussed in detail in chap 5.

<sup>11</sup> See *Adeyinka A. Badejo v Federal Ministry of Education & 2 Others* [1996] 8 NWLR (pt 464) 15.

The challenges of access in tertiary education in Nigeria remain formidable. Like in primary and secondary education sectors, there is also gender disparity in Nigerian tertiary education.<sup>12</sup>

In terms of the quality and standard of education, the thesis reveals that the right to education is much more than mere school attendance; how well a learner progresses in school is equally important. Given that secondary school results are important indicators of the quality and standard of education in any particular country, the high failure rates and the progressive slide in students' performances in the secondary school examinations as shown in the study illustrate the poor quality and falling standard of education in both countries. Though South Africa enjoys one of the highest rates of formal school enrolment of any developing country, it is pointed out however, that access does not result in success for more than 50 per cent of learners in South African schools.<sup>13</sup> Available data shows that very few children who start school finish the 12 years of formal education while those who write the final examination at the end of 12 years often do not pass or pass well enough to enter university.<sup>14</sup> This justifies the conclusion that the link between access and success is also very weak in South African schools.

The study further reveals that despite the wide recognition of the right to education in the various human rights instruments, the realisation of this right remains elusive in South Africa and Nigeria due to many factors.<sup>15</sup> The militating factors identified in the thesis include financial obstacles, poverty, health related problems, classification of the right to education as a non-justiciable right, socio-economic and cultural obstacles. Other factors include poor school buildings and facilities, lack of adequate personnel resulting in poor pupil-teacher ratio as well as corruption and lack of accountability on the part of the government functionaries.<sup>16</sup> This

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<sup>12</sup> See Hodges *Children's and Women's Rights in Nigeria* 150.

<sup>13</sup> Jansen "Reflections on Meaningful Access to Education" in Pendlebury, Lake & Smith (eds) *South African Child Gauge 2008/2009* (2009) 7-8.

<sup>14</sup> 8.

<sup>15</sup> See chap 7.

<sup>16</sup> For instance, in the recent decision of the ECOWAS Court in *the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Government and Universal Basic Education Commission (UBEC)*, (Suit No: ECW/CCJ/App/0808, delivered at Abuja, Nigeria on 30 November, 2010), the court ruled that the UBEC failed to discharge its legal responsibility pursuant to its foundational instrument to monitor how States are spending and using States' natural wealth and resources in order to ensure that the resources are spent for the purposes for which they were meant. The court also said the Independent Corrupt Practices and Other Related Offences Commission (ICPC)'s report on the diversion of N3.5 billion from the UBE fund by certain public officers in 10 States of the country constituted a prima-facie evidence of theft of the public funds which requires that the officials involved should be prosecuted before national courts. See "ECOWAS Court – Give Every Child Free Education" *This Day Newspaper* of 30/11/2010 available at <http://www.nigeriamasterweb.com/paperfrmes.html> (accessed on 01/12/2010). The judgment is yet to be reported and the certified true copy of the judgment is not yet available at the time of writing this chapter.

chapter will in the next section make some suggestions on how to address the problems. It is hoped that if these suggestions and recommendations are followed, they will go some way to ensure a better realisation of the right to education in South Africa and Nigeria.

### **3 Suggestions and Recommendations for Implementation**

In the light of the discussions, observations and findings in this thesis, the following recommendations become imperative.

- *The Governments Should Make Education Available and Accessible to all and should do so without Discrimination*

First, it is recommended that both the South African and Nigerian governments should ensure that education is available and accessible to all without discrimination. The disadvantaged group identified in this study include girls, street children and the disabled. Given that deprivation of education is difficult (and often impossible) to redress subsequently in life, governments should identify the barriers this disadvantage group face and prioritise attention and funding on the rights of this group so as to eliminate those barriers. This recommendation is fundamental in view of the MDGs of achieving universal education for all without discrimination by the year 2015.

To ensure gender parity, especially in Nigeria, government and policy makers should introduce programmes targeting girls' education and other neglected group of people in society. In addition, the status of girls and women within society as a whole is an issue that needs to be addressed. As revealed in the study, traditional and cultural perceptions on the roles of female children in society often lead to enrolment disparity between boys and girls and this should be addressed. The following specific strategies will help girls gain a basic education: schools should be located closer to communities with safer learning environments; recruitment of more female teachers to serve as role model for female learners; and development of gender-relevant curricula by introducing topics that are of interest to girls and that coincide with their aspirations. Also, the practices such as the early marriage of girls are important causal factors for girls' drop-out from school, especially in northern Nigeria. In this context, the Nigerian government needs to vigorously enforce the provision of the Child's Rights Act prohibiting child marriage.

- *Improved Financial Commitments and Provision of Adequate Resources*

Given that the main obstacle to access and enjoyment of the right to education in the world over is finance, the South African and Nigerian governments should give much more financial commitment to their education sectors. They should strengthen national and international efforts to increase available resources, monitor budgets and spread allocation of resources in an equitable manner. This is achievable by increasing the total annual budgetary allocation to educational institutions, education ministries and departments. Both governments should ensure that all children enjoy their right to free education and that no child should be denied the right to education on account of school fees or related costs. Strategies and policies aiming at eliminating or reducing the costs of attending school, such as total abolition of tuition and other incidental fees, should be put in place. It should be borne in mind that while basic education is supposed to be free in the public sector in view of the governments “no school fees” policy and the UBE programme in the two countries, parents are still responsible for many other direct and indirect costs on items including textbooks, uniforms, transport and other levies. In view of widespread poverty in South Africa and Nigeria, these fees have become one of the main causes of low school enrolments in Nigeria in particular, and low school attendance in the two countries.

To this end, the system of providing stipends, bursaries, scholarships, and free text books for students is hereby recommended to both countries. Both governments should endeavour to provide transportation where schools are far from homes together with free meals in schools. All these measures will go a long way towards alleviating the parents’ financial constraint in sending their children to school. If governments are able to do this, the corresponding obligations that will be left with the parents would be the duty to ensure that their children or wards attend schools regularly and do their assignments. Though this recommendation has some financial implication on the governments in both countries, given that deprivation of education is always difficult to redress in later life, both countries should not do less.

- *Improving the Quality of Schools' Facilities and Infrastructure*

The quality of education is an important factor on the level of implementation of the right to education in any country. The school is the institutional and physical setting for education. The quality of school facilities seems to have a direct and an indirect effect on learning as well as on physical and psychological growth, an effect that is hard to measure. A key issue, therefore, is whether the number and location of schools and classrooms match the school-age population and its distribution and whether the construction of school infrastructure is sufficient to keep pace with the growth of the school-age population. A related issue is whether the physical condition of school buildings is conducive to creating a favourable learning environment. As pointed out in chapter seven, obstacles impeding quality of education include poor school buildings, facilities and lack of adequate personnel resulting in poor pupil-teacher ratio. A clean water supply, classrooms maintenance, space and furniture availability all have an impact on the critical learning, learning output and quality of education.

The physical quality of schools always have a potentially depressing effect on enrolment and attendance, particularly in the case of girls, and even presents a more negative effect on the quality of the learning experience. Location of schools and facilities in those schools are major considerations which many parents consider before sending their children to school. It is therefore important that governments should endeavour to make school environments conducive for learning by constantly improving the school facilities. Also, governments should help by providing assistance in the production of appropriate low-cost learning materials so that each child would be guaranteed a packet of basic learning materials, including textbooks, and exercise books and other writing materials. Governments should also ensure that there are standard laboratories, computer and internet facilities as well as well-equipped libraries in various schools at all levels.

- *Improving the Quality of Teachers and their Conditions of Service*

The number, quality and motivation of teachers have major consequences both for school enrolment, school attendance and learners' achievement. Therefore, an important index of quality of education is the teacher factor. Inadequate number of teachers is one of the likely causes of low educational standards. For quality education, there should be appropriate and low

pupil-teacher ratio at all levels of education, particularly at the primary and secondary levels. In primary, secondary and tertiary education sectors, the low rating of the teaching profession has a profound effect on teachers' quality and motivation for work. In Nigeria in particular, it is observed that since the 1980s due to government neglect and poor working conditions, many qualified teachers are consistently migrating to the developed countries in Europe and America as well as other African countries.

In Nigeria, teachers are poorly motivated and their salaries and emoluments are pitifully inadequate. This impacts negatively on the quality of education since the teacher absenteeism in most cases is a symptom of poor or low teachers' salaries which forces many teachers to have an additional job. Revitalisation of basic education should begin with improvements in the quality and lives of those engaged in education. It is therefore recommended in the light of the foregoing that governments in both countries should as a matter of necessity, review periodically the teachers' emoluments in order to serve as incentive to them and make them more committed to their work.

- *Making the Right to Education a Justiciable Right*

This recommendation is particularly relevant to Nigeria in the sense that South Africa has incorporated as justiciable rights a comprehensive range of justiciable economic, social and cultural rights, including the right to education, in its Bill of Rights.<sup>17</sup> Under the Nigerian Constitution, the right to education is classified under the directive principles of the state policy. The legal classification of the right to education, to some extent, affects its realisation.<sup>18</sup> It is recommended that the Nigerian government should ratify all the relevant international human rights instruments on socio-economic and cultural rights and make them a part of a national legal system as section 12 of the 1999 Nigerian Constitution stipulates. Government should also ensure their strong protection in its national legal systems, including recognising them in the

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<sup>17</sup> See ss 23, 24, 25, 26, 27, 29, 30, 31 & 35(2)(e) of the 1996 South African Constitution.

<sup>18</sup> See in this regard, the Centre on Housing Rights and Eviction (COHRE)'s 2004 Report on Housing Rights in West Africa which summarised the Centre's assessment of the constitutional status of economic, social and cultural rights as well as institutional attitudes to and policy impact of their implementation in Nigeria in three main conclusion thus: "[f]irst, the legal enforcement of constitutionally recognised economic and social rights in Nigeria is difficult. Second, the courts are, at best, reluctant to entertain complaints based on these rights. Third, Nigeria lacks the bureaucratic and institutional capacities to implement these rights." Centre on Housing Rights and Eviction (COHRE) *Housing Rights in West Africa: Reports of Four Fact-Finding Missions* (2004) 21.

Constitution as justiciable rights. It should also provide avenues for redress by providing access to strong remedies at the national level once these rights are violated.

An underlying argument in this work is that economic, social and cultural rights are human rights that have a special role to play in the protection of democratic principles. It is pivotal that civil and political rights are themselves better protected when economic, social and cultural rights are accorded adequate recognition within domestic legal systems.<sup>19</sup> Given that all human rights are interrelated, interdependent, and mutually supporting, one cannot effectively promote ICCPR without also protecting the ICESCR. While it is generally recognised that implementing socio-economic rights has more resource implications compared to civil and political rights, the South Africa constitutional experience has shown that people can claim socio-economic rights from domestic courts without crippling the economy. The Indian experience also demonstrates that directive principles may, in practice, become justiciable. Through judicial activism and expansive interpretation, the Indian judiciary has been able to put life into non-justiciable rights in the Constitution. Nigeria too can afford to guarantee these rights in its Constitution without crippling the economy. It is submitted that CESCER would be acting in proper direction if it begins to assert this and encourage State parties to the ICESCR to facilitate the consideration of economic, social and cultural rights in constitutional drafting and review processes.<sup>20</sup>

Thus, one important area where Nigeria could learn from South Africa is the issue of justiciability and constitutionalising socio-economic and cultural rights. It is observed that South Africa has one of the most admirable constitutions in the world with its range of justiciable socio-economic rights.<sup>21</sup> The Bill of Rights in the South African Constitution embraces both civil and political rights as well as social, economic and cultural rights as justiciable rights. The Nigerian Constitution, on the other hand, only provides for civil and political rights as justiciable rights while socio-economic and cultural rights, on the contrary, are provided for as mere “fundamental objectives and directive principles of state policy” which are non-justiciable.<sup>22</sup>

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<sup>19</sup> See Olowu *An Integrative Right-Based Approach to Human Development in Africa* (2009) 9.

<sup>20</sup> 98.

<sup>21</sup> Kende *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 4.

<sup>22</sup> S 6(6)(c) of the Constitution.



The recent decision of the ECOWAS Court in *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission*<sup>23</sup> leans toward the direction of an expansive interpretation of the right to education. In that case, the court held that in terms of article 17 of the African Charter on Human and Peoples' Rights, 1981 every Nigerian has the right to education.<sup>24</sup> This ruling has recently been confirmed by the unanimous decision of the court.<sup>25</sup> As explained in chapter seven, given the supremacy of the Nigerian Constitution, it should be noted that the rights in the ACHPR are recognised to the extent which the Constitution permits.<sup>26</sup> The Nigerian Constitution which is the supreme law says the government can only provide free education when it can (as when practicable). In terms of sections 1 and 12 of the 1999 Nigerian Constitution, the African Charter on Human and Peoples' Rights is not superior in hierarchy to the Nigerian Constitution; the Nigerian government therefore needs to do more to give the right to education a constitutional status by entrenching it as a justiciable right in the Constitution.

- *Seeking Financial Assistance and Cooperation from International Institutions*

Where a developing State party to the ICESCR considers that taking steps to realise core obligations in respect of socio-economic and cultural rights is beyond the maximum resources available to it, it is appropriate for such a State to seek international assistance to fulfil its core obligations.<sup>27</sup> Given the level of poverty, the quality, and progressive slide of education in South Africa and Nigeria, it would not be out of place for both countries to solicit international financial assistance and collaboration in the form of aid to solve their education problems. This recommendation is particularly relevant in view of the provisions of article 2(1) of the ICESCR which provides *inter alia* that “[e]ach 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...”<sup>28</sup>

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<sup>23</sup> Suit No: ECW/CCJ/App/0808, delivered at Abuja, Nigeria on 27/10/2009.

<sup>24</sup> Para 17.

<sup>25</sup> See *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit No: ECW/CCJ/App/12/07; Judgement No: ECW/CCJ/JUD/07/10, delivered at Abuja, Nigeria on 30/11/2010) para 26.

<sup>26</sup> See *General Sani Abacha v Chief Gani Fawehinmi* (2001) 1 CHR 20 (SC).

<sup>27</sup> Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 81.

<sup>28</sup> Emphasis added.

A similarly provision is contained in article 28(3) of the CRC which states: “States parties shall promote and encourage *international cooperation in matters relating to education*, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.”<sup>29</sup> Of particular note are also the provisions of articles 55 and 56 of the UN Charter. Article 56 creates an obligation for all the UN member States to co-operate and collaborate, jointly and severally, with the UN for the achievement of the purposes set forth in article 55. Article 55(a) and (b), in turn, commits the UN to the promotion of “(a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) *solutions of international economic, social, health, and related problems; and international cultural and educational co-operation;*...”<sup>30</sup>

It is submitted that the obligation on international co-operation and assistance on education accrues to States as collective entities and richer countries are called upon to help in solving poorer nations’ educational problems.<sup>31</sup> Richer States are expected to transfer financial and technical resources and their know-how in an effort to reduce the gap between educational facilities in industrialised and developing countries.<sup>32</sup> In this respect, the Limburg Principles state that international co-operation and assistance pursuant to the UN Charter and the ICESCR must accord priority to the realisation of human rights, whether civil and political rights or economic, social and cultural rights.<sup>33</sup> In terms of these Principles, States parties are expected to co-operate with each other, irrespective of differences in their political, economic and social systems and in particular, to promote the economic growth of developing countries.<sup>34</sup> The expected international aid and cooperation should, therefore, be geared towards strengthening the educational system and policies in the developing countries.

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<sup>29</sup> Emphasis added.

<sup>30</sup> Emphasis added. See also, art 2(1) of the ICESCR; art 28(3) & (4) of the CRC; CRC Committee General Comment 5 paras 63-64; Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 13: the Right to Education (E/C.12/1999/10 of 8 December 1999) para 60.

<sup>31</sup> Beiter *The Protection of the Right to Education by International Law* (2006) 43.

<sup>32</sup> 43.

<sup>33</sup> Para 29 of the Limburg Principles.

<sup>34</sup> Para 31 of the Limburg Principles.

#### **4 General Conclusion**

The study has presented the right to education as a right which is given a wide recognition in a number of important international human rights instruments. The provisions of international and regional human rights instruments have also been examined to assess the adequacy of a framework that applies to South Africa and Nigeria's obligations relating to the right to education. As the study reveals, the right to education is well-established as it is widely ratified as a legally binding human right. It is as an empowerment right and its realisation is fundamental to the enjoyment of all other human rights. The thesis argues that the right to education in international law imposes obligations on all nations to make primary, secondary and higher education available, accessible, acceptable and adaptable. It posits that by having ratified international agreements in which the right to education is protected, both South Africa and Nigeria assume obligations under international law, enjoining them to realise the right to education and to respect freedoms in education. Despite these obligations and international commitments to provide education for all, there is a significant gap between what is stipulated and the practical realities in both countries.

The thesis further argues that a State party, which deliberately retards or halts the progressive realisation of the right to education, violates that right. As the study reveals, the problem in South Africa and Nigeria is, however, not the case of a deliberate failure to realise the right to education. In fact, several laws and policies have been put in place to advance the realisation of this right in both countries. But the problem is that the implementation of these laws and policies are unsatisfactory. There are also the problems of inadequate planning, poor implementation of educational policies as well as lack of adequate resources and commitments to back up those policies. Nonetheless, it is submitted that this amounts to a breach of the "obligation to fulfil" imposed on the State parties in terms of article 2(1) of the ICESCR. Solving these problems and making the right to education realisable in South Africa and Nigeria call for a renewal of governmental commitments and investment of appropriate human and financial resources, as well as international co-operation to achieve the right to education for all in practice.

However, the study does not pretend to address all the problems in the education sectors of the two countries. As pointed out in chapter one, the study has some limitations. It only examined the topic from the human rights and legal perspectives. As explained earlier, since

many issues dealing with the implementation of the right to education in the world over are not only legal issues, but also include policy, financial and pedagogical issues which are obviously beyond the scope of this study. Further research from the perspectives of those disciplines might be necessary as well to complement this study in order to give a holistic solution to the problem of education in both countries. Another limitation encountered in this study is lack of adequate academic literature in Nigeria clearly explaining what the right to education is and what constitutes a violation of this right. Also, Nigeria is a country with a weak data-collection system and, as such, it could not offer all the necessary data which the study required. This limitation, however, did not pose a serious problem given the availability of abundant resources on the subject in South Africa as well as under the various international human rights instruments to which Nigeria is a signatory. This problem is also less significant in view of the aim of this study, which is to obtain some guidelines on the South African constitutional jurisprudence on the right to education to address Nigerian problems on the subject.

It is hoped that the outcome and results of this research will raise the awareness of the policy-makers in South Africa and Nigeria and equip them with ample knowledge that will be helpful in improving relevant policies conducive to the realisation of the right to education in both countries. It is expected that the research findings will also sensitise and mobilise non-governmental organisations and human rights bodies to advance on the right to education in the two countries. Given its comparative content, it is hoped that the thesis will be helpful to human rights researchers across Africa, particularly, researchers on the right to education.

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