

TOWARDS AN ENHANCEMENT OF THE LEGAL REGIME FOR ACCESS TO PRIMARY EDUCATION IN NIGERIA *¹

Abstract

There is growing unease over Nigeria's continued inability to achieve the goal of education for all notwithstanding the recognition of the value of education in the country. As a direct consequence of the feeling, spirited efforts have been and are still being made to address the issue. The belief has always been and has remained so, that education is critical to the transformation of the society and indeed its liberation. Political, economic and social-cultural impediments, however, continued to militate against the achievement of the objective of education for all. Addressing these impediments require a robust legal framework that would ensure consistency of policy and responsibility in the management of the educational system. This paper examines the legal framework in place for Nigeria's educational system using the doctrinal research methodology. It identifies the inefficacy of the present legal framework in providing an enabling environment for the achievement of Nigeria's education goals due largely to the absence of a country-wide normative framework. It also makes a case for a national legislation which will put more responsibility on the federal arm of government to ensure a more efficient educational system. The study recommends that the right to education for the child should be elevated to the status of constitutional right. Federal government's responsibility for primary education should be enhanced. Education Reform Bill should be reviewed and represented to the legislature.

Keywords: Access to Primary Education, Legal Regime, Enhancement, Nigeria

1. Introduction

The foundation of Nigeria's education pyramid is primary education. The strength of the pyramid squarely depends on the foundation. The starting point for achieving the nation's education goals must of necessity be founded on the strength of its foundation. To achieve this, primary education must be available and accessible to all children. The requirements for making education available and accessible are many and varied. However, a critical starting point is to have the necessary legal framework that can ground a solid foundation upon which the education system can be built. The absence of an efficient and effective legal framework, no doubt, leaves the system susceptible to changes at will. Legal foundations have always provided a standard system of organisation. This is complimented by the availability of various method of enforcement for its violation. Present day legal framework for education may be gleaned from constitutional provisions as well as federal and various state laws. There are also a number of international and regional instruments that have provided some normative principles upon which education is founded and organised. Despite all the normative prescriptions, large gaps remain both in terms of its reach and enforceability thereby creating loopholes for failures particularly in the provision of access to education. At the international and regional levels, the scheme adopted to ensure access to education is to view education as a right. Such an approach renders governments and public officials liable to sanctions where they fail in the fulfilment of the obligations thereby imposed. Sadly, the enforceability of these international and regional instruments leaves much to be desired in terms of its efficacy.

At the national level, the right to education is yet to acquire a constitutional status. Provisions in various federal and state laws have failed to provide an effective basis for the insistence on a right to education.

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The truth of the matter is that much depends on the federal government if the country is to achieve its educational goals. It is therefore, necessary to reconsider the legal framework with a view to enhancing federal responsibility at least, at the base of the education pyramid.

2. Legislative Framework on Education

2.1 Municipal Framework

Constitution of the Federal Republic of Nigeria 1999 (as amended)

The Constitution of the Federal Republic of Nigeria 1999 established a Federal Republic of Nigeria. The classic description of a federal system presupposes the existence of a central government with varying degrees of autonomous units.² This kind of arrangement ensures a division of powers between the federal authority and the autonomous federating units.³ Therefore, the federal unit has its sphere of authority and the component units also have their spheres of authority. In a federal constitution, powers and responsibilities of the components units are classified into exclusive, concurrent and residual legislative lists, as is the case in Nigeria.⁴ The arrangement is such as to assign those functions which can be more efficiently performed by the federal government than lower levels of government to the federal unit (i.e. be placed in the exclusive legislative list). These include national defence, external relations (including borrowing and external trade), banking, currency, nuclear energy, etc. while those functions which benefit are more local than national, but with the possibility of spillover effects, are placed in the concurrent list. Such functions include industrial, commercial or agricultural development, post primary institutions, health care, etc. Finally, functions which are purely local in character, in the sense that the benefits accrue, in the main, to limited geographic areas within the country, are usually assigned to local authorities. Such functions would include the establishment and maintenance of markets, car parks and public conveniences, refuse disposal, primary education and the construction and maintenance of local roads and streets.⁵ As a result of this constitutional arrangement, the Federal government is constrained in active participation in those areas that do not *stricto sensu* fall within its jurisdiction. This is the tragedy that confronts primary education. During the successive periods of military rule, the strict application of the federal principle gave way to a more or less military hierarchy basis. And at one point primary schools came under direct control of the federal government.⁶

There is need to strike a balance between a complete disregard of the federal principle and giving primary education its priority place as a direct concern of the federal government. The scheme that can be adopted may be to have statutory provisions that oblige the federal government in respect of the funding, management and supervision of primary schools.

Section 19. (1) of the Constitution of the Federal Republic of Nigeria 1999 provides:

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

² See *Younger v. Harris*, 401 U.S. 37, 91S. Ct. 746, 27 L. Ed. 2d 669 [1971] Also see Merriam-Webster's Dictionary of Law, © 1996 Merriam-Webster, Inc. which describes federalism as the distribution of power in a federation between the central authority and the constituent units (as states) involving esp. the allocation of significant lawmaking powers to those constituent units. See also Ayuwa, I.A and Dakas, C.J.D, Federal Republic of Nigeria, <http://www.federalism.ch/files/categories/IntensivkursII/nigeriag1.pdf> visited 26/11/2010

³ This is set out in the schedule to the Constitution of the Federal Republic of Nigeria

⁴ See Sec 4 Second Schedule of the Constitution of the Federal Republic of Nigeria

⁵ Akindele S.T and Olaopa, Fiscal federalism and local Government finance in Nigeria, 2002 <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN008121.pdf> visited 26/11/2010

⁶ For instance, Decree No. 3 1991 promulgated by the General Babangida administration reinstated the National Primary Commission

- (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 .
- (4) government shall promote the learning of indigenous language.

The above cited section is part of chapter II which specifies the fundamental objectives and directive principles of state policy. The justiciability of the chapter has attracted various observations. In *Olagbegi v A.G (Ondo State)*,⁷ citing section 6(6)(c), the court took the position that it ousted its power to question any action thereby. The argument is that to give effect to any principle contained therein, there should have been passed an Act or Law by the appropriate legislature.⁸ Thus, where, the fundamental objectives provisions are violated, it seems that the only course open for redress is for the electorate to vote out the government that allows such violation or the legislature to pass a law that can be enforced in that regard. This is irrespective of the fact that organs of government and all persons exercising executive powers have as a duty and responsibility the need to conform to and observe and apply the fundamental objectives.⁹ There is nothing in the Constitution upon which an action can be maintained in defence of a denial of the enjoyment of a right to education. A constitutional provision to the effect that a child has a right to education is of utmost importance in order for such a right to be guaranteed and justiciable. The mere provision as part of the fundamental objectives of state fails to provide the necessary legal teeth for an effective rights regime bearing in mind the non-justiciability of such provisions. As Donnelly¹⁰ rightly observed, it is impossible to have rights protected without a special force, which can justify the claims to such rights.

Child Rights Act 2003

The Child Rights Act 2003¹¹ (CRA) is described in its long title as ‘an Act that sets out the rights and responsibilities of a child in Nigeria and provides for a system of child justice administration and the care and supervision of a child amongst other things’. Yet, it has received differing levels of acceptance and implementation among the various states.¹² The adoption of the federal system is *inter alia* largely designed to cater for the diversity of cultures within the country. No wonder therefore, there are differences. The Act has gone an extra mile to make provisions that could provide a basis for a better life and opportunities for the Nigerian child. In respect of education, section 15(1) of the Act provides; ‘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’. While subsection (2) requires every parent or guardian to ensure that his child or ward attends and completes his- a) primary school education; and b) junior secondary education. Subsection (6) criminalises failure to comply with the provisions of

⁷ *Olagbegi v. A.G (Ondo State)* (1983) 2 FNR 6. But in *UnniKrisann JP V. State of AP* AIR 1993 2178 SC the Indian Supreme Court held that the fundamental rights and the directive principles are supplementary and complimentary to and accordingly rendered the right to education which is in the directive principles justiciable.

⁸ *Ademola v Jakande* (1981) 1 NCLR 262

⁹ *Amadi V. Governor of River State* (1983) 4 NCLR 651

¹⁰ J Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca and London: Cornell University Press, 1999, p9

¹¹ Cap C52 Laws of the Federation of Nigeria.2004

¹² The President had to embark on a tour of states to urge them to adopt the law. All Africa.com, 2006, Nigeria : President Obasanjo seeks nationwide Adoption of CRA, 30th May, 2006, <http://allafrica.com/stories/20605300495.html>

subsection (2) and imposes a penalty of a fine and/or imprisonment.¹³ Undoubtedly, the Act does not occupy the exalted position of constitutional status and is of limited application in scope. It seems that the combined effect of the decisions cited above on the fundamental objectives establishes the right. Hence persons within the areas where the Act is applicable or the state's legislature has adopted the Act, can claim an enforceable right therefrom. Providing for a right to education by the Act is a welcome development. Yet one finds the efficacy of the Act doubtful. Attempt to ensure compliance through criminalising its violation fails to achieve the objective. The problem remains, that where government fails to make adequate provision of schools for a parent to send his child the responsibility reverts to government that would have enforced the provisions. It is obvious, therefore, that criminalising the failure to comply with the provisions of the Act may not produce the anticipated impact.

Compulsory Free Universal Basic Education Act 2004

The Universal Basic Education (UBE) programme was launched to achieve the following objectives;

- i. Developing in the citizenry a strong consciousness for education and a strong commitment to the promotion
- ii. The provision of free UBE for every Nigerian child of school going age.
- iii. Reducing drastically the incidence of drop out from the formal school system through improved relevance, quality and efficiency.
- iv. Catering for the learning needs of young persons who for one reason or the other have had to interrupt their schooling through appropriate forms of complimentary approaches to the provision and promotion of basic education.
- v. Ensuring the acquisition of the appropriate level of literacy, numeracy, manipulative communicative and life skills as well as the ethical moral and civic values needed for laying a solid foundation for life.

Section 2(1) of the Act provides that every government in Nigeria shall provide free, compulsory and universal basic education for every child of primary and junior secondary school age. While Section 2(2) provides that every parent shall ensure that his child or ward attends and completes; (a) primary school education, (b) junior secondary education, by endeavouring to send the child to primary and junior secondary school.

It is interesting to note that the Act prescribes punishment for parents who contravene Section 2(2).¹⁴ The penalty provided for by the Act is a fine of N2000, or imprisonment for a month or both in the case of a first time offender, and for subsequent conviction a fine of N5000 or imprisonment for a term of two months or both. Section 3 of the Act provides that the services provided in public primary and junior schools shall be free of charge. The efficacy of such a sanction does not seem potent. Poverty is one of the reasons why some parents are unable to send their children to school. Therefore, there must be in place a scheme that will guarantee that poverty does not form a basis for failure by a parent. Most states have passed watered down version of the legislation.¹⁵ But it needs to be observed that the states passed the law hurriedly so as to enable them access the funds meant for that objective. One may

¹³ The whole Section 15 is explicit that the child has a right to education.

¹⁴ Just as Dr Gidado Tahir then Executive Secretary of the UBE Commission asserted that "one major difference between the UBE and the UPE is that this one is compulsory, any child who is between the ages of 6 and 15 must be in school" Dr Gidado Tahir's Interview captioned 'parents risk sanction for not taking child to school.' People's Daily Online, http://english.peopledaily.com.cn/200604/03/eng20060403_255471.html visited 30th October 2008

¹⁵ For instance the version passed by the Borno State House of Assembly has 'the right to education' only as a side note in the Law.

compare this scenario with what is happening to the Child Rights Act, which also requires similar action to be effective in the states. Generally the states appear reluctant to adopt the policy.

Education Reform Bill

It is interesting that there was and still is an Education Reform Bill before the National Assembly. The preliminary description of the Bill was for an Act to give effect to the reforms in the education sector in Nigeria; enacting enabling legislations establishing certain bodies; amending, repealing, and consolidating the provisions of other existing education related legislations to achieve the purpose of the education sector reforms, and connected purposes. The objective of the Bill was to give effect to the revolutionary reforms sought to be introduced by the then President Obasanjo government.¹⁶ Tragically, the Bill ended with the end of President Obasanjo's tenure. Some of its milestone provisions are however, worthy of consideration. These include policy formulation on education should take into account United Nations programmes on education, the Millennium Development Goals (MDGs)¹⁷ and the National Economic Empowerment and Development Strategy (NEEDS). It is also provided that the Educational Objectives under section 18 of the 1999 Constitution of the Federal Republic of Nigeria and the views of stakeholder and the Nigerian public should also be taken into consideration. This is important because the Bill squarely places the key strategies that support a right to education for a child as the fundamental considerations in formulating any education policy. Then also it takes cognisance of the fundamental objectives, which also supports a rights regime. The Bill takes due cognisance of the Child Rights Act 2003 and prescribes that Section 15 thereof shall apply. The Bill is a normative framework for the realisation of the Education reforms of the President Obasanjo's tenure. Subsequently, however, Dr Igwe Aja – Nwachukwu who succeeded Mrs Oby Ezekwesili, as Minister of Education, had no difficulty abandoning the objectives of the reforms sought to be introduced then.¹⁸

2.2 International Instruments

A survey of international instruments will reveal that, education has been a recurring theme in those circles since 1948. The approach had been to make education as a right and hold states obligated in its provision. Subsequent developments, however, seemed to have compromised the position in that it veered towards adopting a twin set of rights. Despite the continued perception of education as a socio-economic right, there abounds good authority to the effect that the ESCR was part of the indivisible rights adopted by the UN in the UDHR.¹⁹

Universal Declaration of Human Rights

The founding document of international human rights law is the Universal Declaration of Human Rights (UDHR), unanimously ratified by the UN General Assembly in 1948.²⁰ The objective of the law was to provide protection to all human beings regardless of whom they were and where they lived.²¹ The UDHR established the fundamental vision and principles of the new human rights regime by recognising the interdependence and indivisibility of all human rights.²² Accordingly, people were

¹⁶ The Development of Education National Report, By The Federal Ministry of Education for the Forty-Eight Session of the International Conference on Education(ICE) Theme: Inclusive Education: The Way of the Future Geneva, Switzerland 25-28 November, 2008

¹⁷ United Nations, 2007, The Millennium Development Goals Report 2007, New York Print

¹⁸ See Oyekanmi, R.L., Education reform agenda for fine-tuning © 2003 - 2007 @ Guardian Newspapers Limited (All Rights Reserved).

¹⁹ See S Leckie, "Another Step Towards Indivisibility: Violations of Economic, Social and Cultural Rights" in *Human Rights Quarterly*, Vol. 20, No. 1, 1998

²⁰ Universal Declaration of Human Rights, G.A.Res.217A of 10 December 1948, UN Doc. A/810 (1948)

²¹ See L Hekin, *The Age of Rights* (New York: Columbia University Press 1990)

²² It is obvious that the UDHR did not differentiate component parts of human rights.

guaranteed civil and political freedom; through the human rights to life, physical integrity, free speech and belief, and due process of law as well as economic and social wellbeing through the human rights to an adequate standard of living, housing, work, education, food and health.²³

International Covenant on Economic, Social, and Cultural Rights

One of the two binding instruments adopted by the UN was the International Covenant on Economic, Social, and Cultural Rights (ICESCR).²⁴ The right to education fell under this Covenant which from adoption appeared non-justiciable.²⁵

Convention on the Rights of the Child

The Convention on the Rights of the Child²⁶ was an important landmark for the children of the world. It reiterates the principle that children are not only entitled to the same human rights as adults, but also entitled to special rights which take account of their youthfulness and vulnerability. It provided a strong normative framework for the right to education for the child.²⁷ The international instruments intended to make education a right particularly at the primary level. The international community did not stop at that. Several subsequent international events²⁸ went on to emphasise its commitment to education culminating finally into the Millennium Development Goals which substantially bordered on education.²⁹ Most of the goals thus target the improvement of the child and specifically provides in goal number 2 achieving universal primary education.

2. 3 African Regional Instruments

In order to cater for regional variations, regions around the world were encouraged to also provide for themselves specific provisions that would take into account their individual peculiarities. It was through the African Charter on Human and People's Rights that this was sought to be achieved. This was followed by African Charter on the Rights and Welfare of the Child. While maintaining the international approach, the African regional instruments recognised its unique circumstances.

African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights was unanimously adopted at an OAU meeting of African heads of state and governments held in Kenya on 27 June 1981.³⁰ The right to education is an integral part of the rights, duties and freedoms enshrined in the Charter. Article 17 of the Charter provides: 1) Every individual shall have the right to education. 2) Every individual may freely take part in the cultural life of his community. 3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State. As a signatory to the Charter, Nigeria is obligated to ensure compliance to its provisions. The express provision as to the right to education

²³ The Preamble of the UDHR @ <http://www.un.org/Overview/rights.htm> accessed 30 October 2008

²⁴ Adopted and opened for signature and accession by General Assembly Resolution 220A (XXI) of 16th December 1966

²⁵ See Art 13 ICESCR International Covenant on Economic, Social and Cultural Rights: http://www.unhcr.ch/html/menu3/b/a_ceschr.htm

²⁶ The Convention on the Rights of the Child entered into force as international law on 2 September 1990,

²⁷ See Art. 19 of the Convention also Balton, D.A., *The Convention on the Rights of the Child: Prospects for International Enforcement*, The Johns Hopkins University Press, 1990

²⁸ Education For All

²⁹ The Millennium Development Goals are: 1. Eradicate extreme poverty and hunger 2. Achieve universal primary education 3. Promote gender equality and empower women 4. Reduce child mortality 5. Improve maternal health 6. Combat HIV/AIDS, malaria and other diseases 7. Ensure environmental sustainability 8. Develop a global partnership for development @ www.un.org/millenniumgoals.

³⁰ Umozurike, U.O, 'The African Charter and National Laws' in Nweze, C.C, and Nwankwo O. eds. *Current Themes in the Domestication of Human Rights Norms*, Fourth Dimension Publishers, 2003

cannot thus be lightly disregarded. The domestication of the Charter has further emphasize the obligation.

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

Article 11 of the Charter³¹ provides for the educational rights of the child comprehensively. Article 17 provides that everyone has the right to education and to participate freely in the cultural life of their community. It is also the duty of the state to educate people about their rights under the Charter.³² In *SERAP vs Federal Republic of Nigeria and Universal Basic Education Commission* the plaintiffs alleged the violation of the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and the right of peoples to economic and social development guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights. The Court said that the right to education can be enforced before the Court and dismissed all objections brought by the Federal Government (FG), through the Universal Basic Education Commission (UBEC), that education is 'a mere directive policy of the government and not a legal entitlement of the citizens.' There must be a continuous advocacy to promote this milestone decision by civil society so as to ensure sustenance of the gain.

3. Conclusion and Recommendations

It is only when education is available and accessible that education can serve as an instrument of liberation. The consequences of having children excluded from education are better imagined. Despite the enormous advantages of education, the educational system remains with a weak physical and institutional base. It needs to start from a position of strength if some measure of success is to be achieved. This requires an elevation of the right to education to a constitutional status. It is on this that all other efforts at addressing the crises in the educational system can be hinged. True, it can be said that there exist provisions in the laws which provide for child's right to education, constitutionally grounded right stands on a higher pedestal and would be of country wide application. It must, however, be pointed out that even if the right is set out in the fundamental human rights chapter of the constitution, it does not translate into education for all. More is required; the civil society must be in the forefront to keep advocating for this right all structures that will guarantee the right must also take firm root in the nation's body politic. Furthermore, the federal government must assume more responsibility in the affairs of primary education. There should be a direct monitoring by the federal government along the line of the US No Child Left Behind (NCLB) Act whereby the states and local schools are placed under key standards and accountability elements such that management of a school is placed under supervision and sanctioned for failings but rewarded for successes. This would involve developing education and other policies and legislation. Public education systems should be expanded to accommodate the numbers of children who still do not have access to school. alternative approaches e.g. nomadic education and uniting formal and informal education systems as is being pursued by the present administration is an encouraging development. This requires an appropriate legislation. Finally the Education Reform Bill should be dusted and reviewed for representation to the National Assembly for consideration.

³¹ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999. <http://www.africaunion.org/en/docs/> accessed 10th June 2010

³² the Charter has been domesticated and has even been pronounced upon by the ECOWAS court of justice in *SERAP vs Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 27th October 2009