

The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities

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Summary

The article examines the right to inclusive education in Nigeria. It asserts that the essence of the right to education is that it should be provided to all and without discrimination. It posits that, under Nigerian law, children with disabilities suffer many prejudices, including seclusion and discrimination in terms of education. It argues that such practices amount to a violation of the Nigerian commitments and obligations under international law to provide education for all and without discrimination. The article calls on the Nigerian government to put in place adequate laws and policies advancing the right of children with disabilities within its territory.

1 Introduction

Diversity, integration and inclusion are the means and methods of developing a public education system that is fair.¹

Children are a particularly vulnerable group.² On account of their tender age, they are generally not in a position to effectively articulate and enforce their rights.³ Human rights challenges confronting children

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¹ CV Willie 'Brown v Board of Education: A restoration of equity in public education' in CJ Russo *et al* (eds) *Equal educational opportunities: Comparative perspectives in education law* (2005) 79.

² In terms of sec 277 of the Child's Rights Act, 2003 (Nigeria), a child means a person under the age of 18.

³ KD Beiter *The protection of the right to education by international law* (2006) 113-114.

are many and varied. They include torture, ill-treatment and appalling conditions of detention on every continent.⁴ Challenges confronting children are as severe as death sentences and the killing of thousands in armed conflicts.⁵ Millions of children are forced by poverty to live on the street, while millions more work hazardous jobs or are the victims of child trafficking and prostitution.⁶ Discriminatory attitudes and practices cause girl children to suffer gender-specific abuse, such as female genital mutilation and other forms of abuse, including rape.⁷ General Comments and a UN Fact Sheet have described labour-related challenges confronting children as 'contemporary forms of slavery'.⁸ According to the United Nations Children's Fund (UNICEF)'s estimates there are about 246 million children engaged in exploitative child labour; 140 million children who have never been to school; and 300 000 child soldiers, some as young as eight years of age.⁹ The picture is a grave one that challenges the humanity of governments, organisations and individuals.

Children with disabilities are even more vulnerable, suffering many more prejudices on account of their disabilities. According to the United Nations (UN), 10 per cent of the world's population – or 650 million people – live with one disability or another.¹⁰ Rieser states that at least 10 per cent of the world's people have a significant, long-term, physical or mental impairment which prevents them from taking part in the usual educational, social and economic activities of their communities.¹¹ This is due to barriers in societal attitudes regarding disabilities, the built environment, and the way society is organised preventing the disabled from participating on an equal level with others.¹² It is an established fact that people with disabilities and children, in particular, are especially vulnerable to exploitation, abuse, exclusion and margin-

⁴ 'Fight poverty: Children right issues' <http://www.fightpoverty.mmbrico.com/cr/issues.html> (accessed 21 September 2010).

⁵ As above.

⁶ As above.

⁷ As above.

⁸ Fact Sheet 4, Contemporary Forms of Slavery <http://www.humanrights.is/the-human-rights-rproject/humanrightscasesandmaterials/generalcomments/unfactsheets/No14contemporaryformofslave/> (accessed 21 September 2010).

⁹ UNICEF Reports.

¹⁰ <http://www.un.org/disabilities/default.asp?id=18> (accessed 21 September 2010).

¹¹ See R Rieser 'Disability equality – Confronting the oppression of the past' in M Cole (ed) *Education, equality and human rights: Issues of gender, race, sexuality, disability and social class* (2006) 118. Degener submits that more than 600 million people in the world are disabled as a consequence of mental, physical or sensory impairment, out of which two-thirds live in developing countries. See T Degener 'International disability law: A new legal subject on the rise: The interregional experts' meeting in Hong Kong, December 13-17, 1999' (2000) 18 *Berkeley Journal of International Law* 180 187; see also AM Cotter *This ability: An international legal analysis of disability discrimination* (2007) 15.

¹² Rieser (n 11 above).

alisation all over the world.¹³ They are at more risk of having their rights violated and denied.¹⁴

In the education sector, for instance, discrimination against the disabled varies from an outright denial of educational opportunities to more subtle forms of discrimination, such as isolation and segregation imposed in the forms of physical and social barriers.¹⁵ For instance, according to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), 90 per cent of children with disabilities in developing countries do not attend school.¹⁶ In this context, Bekink and Bekink submit that the effects of disability-based discrimination have been particularly severe in the field of education due to, in part, the 'relative invisibility of persons with disabilities'.¹⁷ Because of this, millions of children and adults in all parts of the world are faced with a life that is segregated and debased.¹⁸ It should be noted that the systematic way in which society discriminates against persons with disabilities amounts to oppression.¹⁹ It is oppressive to discriminate against, and exclude, people with disabilities from the mainstream of society merely on the basis of disability. For instance, a denial of access to education by placing physical barriers – such as staircases – to classrooms, or a failure to make educational materials available to all in forms that are accessible to them, is discriminatory and oppressive. It is therefore submitted that people with disabilities should be accorded the same rights and opportunities as other persons.²⁰

Given the nature of children and the prejudices they suffer, the UN has attempted to work out the particularities of the application of human rights to children. It adopted the Declaration on the Rights of the Child, 1959, and the Convention on the Rights of the Child (CRC), 1989, to cater for the interests of children. Both the Declaration and the Convention contain provisions on the rights and welfare of children. In addition to recognising the specific rights of the child such as the right to education,²¹ CRC also contains specific provisions on the rights of

¹³ B Bekink & M Bekink 'Children with disabilities and their right to education: A call for action' (2005) 1 *Stellenbosch Law Review* 125-126.

¹⁴ Bekink & Bekink (n 13 above) 126-127.

¹⁵ 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.

¹⁶ UN Web Services Section, Department of Public Information, United Nations 2006; 'Factsheet on persons with disabilities' <http://www.un.org/disabilities/default.asp?id=18> (accessed 21 September 2010).

¹⁷ Bekink & Bekink (n 13 above) 127.

¹⁸ AM Cotter *This ability: An international legal analysis of disability discrimination* (2007) 15.

¹⁹ Rieser (n 11 above).

²⁰ Cotter (n 18 above) 15.

²¹ See arts 28 & 29 of CRC which guarantee the right of the child to education.

children with disabilities.²² Apart from the Declaration and CRC, the right to education has been given recognition in a number of important international and regional human rights instruments.²³ In the context of discrimination in education, a number of human rights instruments have equally been put in place to fortify the right of persons with disabilities.²⁴ These instruments include the Declaration on the Rights of Disabled Persons, 1975,²⁵ the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, 1993,²⁶ and, most importantly, the recent Convention on the Rights of Persons with Disabilities, 2006 (Disability Convention).²⁷ These instruments are examined in detail shortly. Particular emphasis is placed on the provisions of the Disability Convention with regards to persons with disabilities and CRC pertaining to the rights of the child generally.

This article attempts to examine the right of children with disabilities in Nigeria with a particular focus on equal educational opportunities for all. It also analyses the existing national and international human rights instruments on the rights of the child with the aim of determining whether those instruments adequately guarantee the rights of children with disabilities in terms of education. If it should find those instruments inadequate, the article will suggest ways in which the rights of this category of persons may be effectively guaranteed. The article is divided into seven parts. Following this introduction, I examine the two major concepts used in this paper. Part three examines the protection and recognition of the right to education. It dwells on international and national instruments in which the right to education is protected. Part four is devoted to examining the protection of children with disabilities, while part five examines the exclusion of children with disabilities from education. Part six dwells on disabilities and inclusive education in Nigeria. It also assesses all the relevant laws and policies on disabilities in that country. The conclusion makes recommendations on how to ensure inclusive education in Nigeria.

The terms 'disability' and 'inclusive education' feature prominently in the article and it is necessary at the outset to place these terms in proper perspective. In the article, disability is defined in relation to persons with

²² Art 23(3) of CRC obligates state parties to the Convention to ensure that the disabled child has effective access to education and training.

²³ See art 10 of the Convention on the Elimination of Discrimination Against Women (CEDAW) 1979; arts 23, 28 & 29 of CRC; art 17 of the African Charter on Human and Peoples' Rights; art 11 of the African Charter on the Rights and Welfare of the Child; 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; the European Convention 1953; the American Declaration of the Rights and Duties of Man 1948, amongst others.

²⁴ See, generally, D Hodgson *The human right to education* (1998) 155-168.

²⁵ UN General Assembly Resolution 3447 (XXX) of 9 December 1975.

²⁶ UN General Assembly Resolution A/RES/48/96 of 20 December 1993.

²⁷ UN General Assembly Resolution A/RES/61/106 of 24 January 2007.

disabilities (PWDs). The Disability Convention states that PWDs include 'those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on equal basis with others'.²⁸ The Disability Convention's definition shifted the emphasis/reason for disability from the individual to their 'interaction with various barriers which may hinder' her or him. Older models of disability have defined the concept from the medical perspective and have therefore typically defined the term in a stereotypic manner as 'the inability [of a person] to perform expected social role because of chronic medical pathology'.²⁹ In such a context, persons with disabilities are, therefore, referred to as a 'group of people who are experiencing a significant level of physical, sensory or mental incapacity which affects their daily life in some way'.³⁰ Such a model of disability has been overtaken by more recent perspectives, which view the experience of disability in terms of factors outside 'the disabled person', emphasising 'the environment which is disabling'. The Standard Rules on the Equalisation of Opportunities for Disabled People is based on the older perspective on disability.³¹ It states: 'People may be disabled by physical, intellectual or sensory impairment, medical condition or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.'³²

This definition clearly omits environmental factors involved in people's experience of disability. However, the Disability Convention defines disability in its Preamble in a manner that radically changes the emphasis from the individual to the environment. It states:³³

[r]ecognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

The term 'disabled' as used in the article covers people with physical impairments, sensory impairments; chronic illness or health issues; all degrees of learning difficulties, including specific learning difficulties such as dyslexia and speech and language impairments; and impairment based on emotional and behavioural difficulties.³⁴ It should be

²⁸ Art 1 Disability Convention.

²⁹ PK Longmore 'Disability policy and politics: Considering consumer influences' (2000) 11 *Journal of Disability Policy Studies* 36; PK Longmore 'Disability policy and politics: Considering consumer influences' in P Blanck (ed) *Disability rights* (2005) 53.

³⁰ T Shakespeare 'What is a disabled person?' in M Jones & LAB Marks (eds) *Disability, divers-ability and legal change* (1999) 26.

³¹ See Standard Rules on the Equalisation of Opportunities for Disabled People, annexed to General Assembly Resolution A/RES/48/96 (1993) para 17.

³² As above.

³³ Para (e), Preamble to the Disability Convention.

³⁴ Rieser (n 11 above) 158.

noted that, while disabilities and ill-health are not necessarily the same, nonetheless, many children who are disabled have health problems which impact on their education.³⁵

Inclusive education, on the other hand, refers to the practice of including every learner, irrespective of talent, disability, socio-economic background or cultural origin, in supportive mainstream schools and classrooms, and meeting all his or her particular needs.³⁶ It is a system of education that is responsive to the diverse needs of learners.³⁷ The term is used to describe educational policies and practices that support the right of learners with disabilities to belong and learn in mainstream schools.³⁸ One of the fundamental elements of the right to education is that it be provided in a non-discriminatory manner to all.³⁹ CRC, therefore, explicitly imposes obligations on states to take measures that ensure that disabled children have effective access to and receive education.⁴⁰ In this regard, the CRC Committee recommends the establishment of special education programmes for children with disabilities and, where feasible, integrate them into mainstream schools.⁴¹ Given the focus of the article, the next section examines the legal guarantees and importance of education generally.

2 The protection and recognition of the right to education

The right to education has been given recognition in a number of important international human rights instruments. The levels of such recognition will be discussed in two sections, namely, instruments at

³⁵ See L Lundy 'Schoolchildren and health: The role of international human rights law' in N Harris & P Meredith (eds) *Children, education and health (International perspectives on law and policy)* (2005) 11.

³⁶ See J Stainback & L Stainback *Inclusion: A guide for educators* (2002) 3.

³⁷ S Naicker *Curriculum 2005: A space for all – An introduction to inclusive education* (1999) 53.

³⁸ P Engelbrecht & L Green *Promoting learner development* (2001) 6.

³⁹ See art 28(1) of CRC.

⁴⁰ See art 23(3) of CRC which recognises the special needs of the disabled child and ensures 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'.

⁴¹ See, amongst others, CRC Committee, Concluding Observations: Azerbaijan (UN Doc CRC/C/66, 1997) para 296; CRC Committee, Concluding Observations: 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 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.

the international and national levels. At the international level, the UN has generally adopted instruments while, at the regional level, instruments have notably also been adopted in the European, American and African contexts.⁴² In this article, the term 'instrument' includes treaties, which, as international agreements, legally bind state parties thereto, as well as 'soft law' documents, such as resolutions, declarations and standard rules.

2.1 Instruments at the international level

At the international level, the right to education was first given recognition in a series of treaties concluded after World War I under the auspices of the League of Nations. However, with the formation of the UN, a good number of instruments protecting the right to education have further been adopted. These instruments include the Universal Declaration of Human Rights (Universal Declaration), 1948; the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; the International Covenant on Civil and Political Rights (ICCPR), 1966; the UNESCO Convention Against Discrimination in Education, 1960; the 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 (African Charter), 1981; and the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter).⁴³

The Universal Declaration, for instance, provides for the right to education, emphasising that education must be free, at least at the elementary and fundamental stages.⁴⁴ In terms of this provision, everyone has the right to education. Elementary and fundamental education must be free and compulsory. While elementary education refers to formal schooling for children of primary school age, fundamental education means education which is offered outside the regular primary education system for children, youth and adults, who did not have the opportunity to undergo or complete primary education.⁴⁵ Similarly,

⁴² Beiter (n 3 above) 85.

⁴³ Nigeria has ratified some of these conventions. It ratified ICESCR and ICCPR on 29 July 1993; the African Charter on 22 June 1983; the African Children's Charter on 23 July 2001; CEDAW on 23 April 1984; ICERD on 16 October 1967; CRC on 19 April 1991. See, generally, EA Taiwo 'The implementation of the right to education in South Africa and Nigeria' seminar presented at the Faculty of Law, University of Ibadan, Nigeria, 15 February 2010 1-2.

⁴⁴ See art 26 which provides for the right of everyone to education.

⁴⁵ Beiter (n 3 above) 90.

article 13(1) of ICESCR guarantees the right to education in the following terms:⁴⁶

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.

It provides further that primary education shall be compulsory and available free to all; 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; 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; and 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.⁴⁷

In the same vein, CRC also contains a comprehensive set of legally-enforceable commitments concerning the right to education.⁴⁸ CRC reaffirms the right of every child to free and compulsory primary schooling, and states further that higher levels of education must be made accessible to all on the basis of capacity and without discrimination of any kind. More fundamental is the provision of article 23 of CRC, which obliges state parties to ensure that the disabled child has effective access to education and training.⁴⁹

⁴⁶ The provision proceeds to set out the aims of education. It repeats a similar provision as contained in art 26(2) of the Universal Declaration with some modifications.

⁴⁷ Arts 13(2)(a)-(d).

⁴⁸ See arts 28, 29, 30 & 31 of CRC. Art 28(1), eg, states: '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 ...' See also D Fottrell (ed) *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* (2000) 1.

⁴⁹ The article provides recognition for the right of (1) the mentally and physically disabled child to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community; and (2) the disabled child to special care and encouragement 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. See also principle 6 of the UN GA Declaration on the Rights of Disabled Persons adopted on 9 December 1975, which provides for the right to 'medical, psychological and functional treatment, including prosthetic and orthetic

2.2 Instruments at the African regional level

The right to education is recognised also in regional human rights instruments. Article 17(1) of the African Charter, for instance, states that ‘every individual shall have a right to education’. Similarly, article 11 of the African Children’s Charter provides for every child’s right to education.⁵⁰ The Children’s Charter sets out the purposes and the duties of state parties with regard to achieving the full realisation of the child’s right to education. It states that education of the child shall be directed towards the promotion and development of the child’s personality, talents and mental and physical abilities to their full potential.⁵¹ State parties are also obliged to take special measures in respect of female, gifted and disadvantaged children.⁵² It is submitted that Nigeria, having ratified ICESCR⁵³ and the African Charter,⁵⁴ has obligations under international human rights law to provide education for its citizens.⁵⁵

Article 13 of the African Children’s Charter deals with handicapped children, while article 20 deals with parental responsibilities. Article 13(2) states:

State 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 state 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’. These are all fundamental provisions on the protection of the child’s right to education on the

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 principle 2 of the Declaration on the Rights of Mentally-Retarded Persons, adopted by the UNGA Resolution 2856 (XXVI) of 20 December 1971, which also provides for the right of the mentally-retarded person 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.

⁵⁰ It has similar provisions to arts 28 & 29 of CRC.

⁵¹ Art 11 African Children’s Charter.

⁵² Art 11(3)(e) African Children’s Charter.

⁵³ Ratified on 29 October 1993.

⁵⁴ See Ratification and Enforcement Act of 17 March 1983.

⁵⁵ See generally Taiwo (n 43 above) 9.

African continent. Apart from the African system, other regional human rights instruments also guarantee the right to education.⁵⁶

To strengthen the effective implementation of the right to education as provided for in the various African regional instruments, the African Union (AU) has put in place mechanisms for monitoring the rights of the child in the region. These monitoring mechanisms include the African Commission on Human and Peoples' Rights (African Commission), the African Committee of Experts on the Rights and Welfare of the Child and the African Court on Human and Peoples' Rights (African Court).⁵⁷ The African Commission was established by the African Charter and the Charter obliges all state parties to accept supervision and monitoring of all rights enshrined in the Charter. This includes the monitoring of the right to education as provided for in the African Charter.⁵⁸ It is notable that all 53 member states of the AU are parties to the African Charter, including Nigeria. The African Court 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.⁵⁹ The African Committee of Experts on the Rights and Welfare of the Child on its part was established by the African Children's Charter. The African Children's Charter empowers the Committee of Experts to consider individual communications.⁶⁰ There is no record yet of any complaint examined by the Committee.⁶¹

2.3 Instruments at the Nigerian national level

In Nigeria, the right to education is provided for in the form of directive policy. The Constitution states that government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.⁶² The section states further that government shall strive to eradicate illiteracy and shall, as when practicable, provide free education at all levels.⁶³ In furtherance of these constitutional mandates, the government re-launched the Universal Basic Education (UBE) Programme in 2000.⁶⁴ Similarly, the Child's Rights Act (CRA),

⁵⁶ See, however, art 2 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), 1952, which states that no person shall be denied the right to education; 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 also guarantees the right to education.

⁵⁷ <http://www.crin.org/resources/infoDetail.asp?ID=18055&flag=report> (accessed 21 September 2010).

⁵⁸ As above.

⁵⁹ The Protocol to the African Charter entered into force in 2006.

⁶⁰ See art 44 of the African Children's Charter.

⁶¹ As above.

⁶² Sec 18(1) Nigerian Constitution 1999.

⁶³ Sec 18(3) Nigerian Constitution 1999.

⁶⁴ The UBE was backed in 2004 by the UBE Act.

2003, provides for the right to education. In terms of this Act, every child has the right to free, compulsory and universal basic education, which shall be the duty of the government to provide.⁶⁵ It is important to mention that the Fundamental Objectives and Directive Principles of State Policy, according to section 6(6)(c) of the Constitution, are non-justiciable.⁶⁶ For instance, in the much-cited case of *Uzoukwu v Ezeonu II*,⁶⁷ the Nigerian Court of Appeal said:⁶⁸

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 under the Fundamental Objectives and Directive Principles of State Policy under Chapter 2 of the Constitution.

It is my contention that, with the enactment of the Child's Rights Act in 2003, the right to education was raised from a non-justiciable entitlement to a new legal imperative. The Child's Rights Act and the Universal Basic Education Act have brought into Nigerian socio-economic rights jurisprudence a new dispensation which equates the right to education in the country with international standards. This recognition thus paved the way for the recognition of children (both able and disabled), as bearers of a right which may be enforced against parents, other individuals and the state.⁶⁹ This position is supported by the recent judgment of the Economic Community of West African States (ECOWAS) Court which affirmed the right of every Nigerian to education.⁷⁰ The Nigerian court demonstrated this change in *Adebisi*

⁶⁵ See sec 15(1) of the Act.

⁶⁶ Sec 6(6)(c) of the Constitution provides: 'The judicial powers vested in accordance with the forgoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.'

⁶⁷ [1991] 6 NWLR (pt 200) 708 761-762.

⁶⁸ See also D Olowu 'Human rights and the avoidance of domestic implementation: The phenomenon of non-justiciable constitutional guarantees' (2006) 69 *Saskatchewan Law Review* 39 41.

⁶⁹ See secs 15(1) & (2) of the Child Rights Act which oblige the government of Nigeria, parents and guardians to ensure that their children and wards attend schools up to, at least, junior secondary school.

⁷⁰ *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit ECW/CCJ/App/0808) delivered on 27 October 2009. The court held at para 19: 'It is trite law that this court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and article 17 thereof guarantees the right to education. It is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this court. Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.' See also *Attorney-General, Ondo State v Attorney-General, Federation of Nigeria* [2002] 9 NWLR (pt 772) 222.

Olafisoye v Federal Republic of Nigeria, where the Supreme Court held that the non-justiciability of section 6(6)(c) of the Constitution is not sacrosanct, as the section provides a headway by the use of the words 'except as otherwise provided by the Constitution'.⁷¹

Having discussed those instruments that recognise the right to education, the next section discusses specifically the protection and guarantees of the right of persons with disabilities.

3 The protection of children with disabilities

A number of international instruments and national laws address the right to education as it accrues to disabled persons. It is observed that in many countries of the world, the issue of disability as a subject of law has commonly been included in social security and welfare legislation, health law or guardianship law.⁷² Thus, disabled persons have been depicted not as subjects of legal rights, but as objects of welfare, health and charity programmes.⁷³ The underlying policy has been to segregate and exclude people with disabilities from mainstream society, sometimes accommodating them in special schools, sheltered workshops, special housing and transportation.⁷⁴ It is observed that the idea of excluding people with disabilities from the mainstream is born out of the erroneous belief that disabled persons are incapable of coping with society at large and most life activities.⁷⁵ The inability of people with disabilities to operate in the same way as people without disabilities within the societal framework has led to this assumption. However, had the framework of society been cast on the basis of a universal design of equality, then everyone would have been able to cope with society and most life activities.

In modern times, attempts to open employment, education, housing and goods and services to persons regardless of their disabilities have changed the understanding of disability from a medical to a social category.⁷⁶ A key element of this new concept is the recognition that the exclusion and segregation of people with disabilities do not logically follow from their impairments, but rather from political choices based on false assumptions about disability.⁷⁷ With the paradigm shift from the medical to the social model of disability, disability was reclassified as a human rights issue. This has led to attempts to provide equal opportunities for disabled people and to combat their segregation,

⁷¹ [2004] 4 NWLR (pt 864) 580 659.

⁷² *Degener* (n 11 above) 180.

⁷³ As above.

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ As above.

⁷⁷ As above.

institutionalisation and exclusion as typical forms of disability-based discrimination.⁷⁸ This shift of paradigm constitutes a major milestone on the path towards the recognition of the human rights of disabled people.

Breakthroughs in this regard are the recognition of the equality principle as well as freedom from discrimination in most national constitutions and other domestic and international human rights instruments. Protection has been provided for people with disabilities in a number of international instruments. In 1971, the UN General Assembly adopted a Resolution entitled Declaration on the Rights of Mentally-Retarded Persons.⁷⁹ Significantly, this Resolution provides that disabled persons enjoy the same human rights as other human beings.⁸⁰ It itemises rights that are of special importance to persons with disabilities, including education, training and rehabilitation. Also, in 1975 the UN General Assembly adopted the Declaration on the Rights of Disabled Persons.⁸¹ This Declaration states that persons with disabilities have the same civil and political rights as other human beings.⁸² It provides further that such persons are entitled to 'measures designed to enable them to become as self-reliant as possible'.⁸³ The Declaration identifies a number of economic and social rights that are of obvious importance for the development of capacities and social integration.⁸⁴ It contains many fundamental provisions on the right of disabled persons.⁸⁵

In 2006, the UN adopted the Disability Convention.⁸⁶ Article 24 of the Disability Convention makes provision for the right to education for persons with disabilities and this includes children with disabilities. The Disability Convention provides that state parties recognise the right of persons with disabilities to education and in order to realise this right, without discrimination and on the basis of equality of opportunity, governments should ensure an inclusive education system at all levels.⁸⁷ This provision is directed to the full development of

⁷⁸ Degener (n 11 above) 181.

⁷⁹ General Assembly Resolution 2856 (XXVI) of 20 December 1971.

⁸⁰ Art 1.

⁸¹ General Assembly Resolution 3447 (XXX) of 9 December 1975.

⁸² Para 4.

⁸³ Para 5.

⁸⁴ Para 6.

⁸⁵ Para 8, which requires that their special needs be taken into consideration at all stages of economic and social planning; para 10 on the right to protection against exploitation and treatment of an abusive or degrading nature; and para 12 which states the right of an organisation of persons with disabilities to be 'usefully consulted in all matters regarding the rights of disabled persons'. See also the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities adopted by the United Nations General Assembly by Resolution 48/96 of 20 December 1993.

⁸⁶ Adopted on 13 December 2006.

⁸⁷ Art 24(1).

potential and human dignity and strengthening a respect for human rights; fundamental freedoms and human rights; human diversity; the development by children with disabilities to their fullest potential; and enabling children with disabilities to participate effectively in a free society.⁸⁸

The right to education without discrimination is guaranteed at all levels in the Disability Convention. While this provision covers all persons with disabilities, the Disability Convention recognises the special need of children for qualitative education and the need to prepare children for productive adult lives. The Convention specifically provides that governments must ensure that children with disabilities are not excluded from the education system, or from primary or secondary education on account of their disability. State parties are also obliged to ensure access, inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live. States are also to ensure the provision of reasonable accommodation, that disabled people receive the support measures they need to facilitate their effective education, and provide them with individualised support measures in environments that maximise academic and social development, consistent with the goal of full inclusion.⁸⁹ It is in recognition of the importance of having teachers who have been trained specially and equipped for teaching children with disabilities that the Disability Convention provides thus:⁹⁰

In order to help ensure the realisation of this right, state parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

It is commendable that the Disability Convention specifically provides for the use of experts who have disabilities themselves for meeting the manpower needs of teaching persons with disabilities. This will serve several advantages, including providing inspiration and mentorship for children with disabilities as well as providing employment opportunities for trained people with disabilities. It is regrettable to note that Nigeria is yet to ratify the Disability Convention. It is submitted that these provisions should be ratified and domesticated to make them applicable in Nigeria.

⁸⁸ Arts 24(1)(a)-(c).

⁸⁹ Arts 24(2)(a)-(e).

⁹⁰ Art 24(4).

4 Exclusion of children with disabilities from education

Given the importance of education in any society, it would be a great disservice to exclude a segment of society from this benefit. The importance of education cannot be over emphasised. According to Addison:⁹¹

Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home [it is] 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.

In the same vein, Devenish submits:⁹²

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 gives to them dignity and self-confidence and is a basic right, on which the materialisation of many other rights depends.

Education is described as an empowerment right with a multiplying effect in the sense that the enjoyment of a number of other rights, such as freedom of information and the right to vote, depends on a minimum level of education.⁹³ Education enables the individual to think critically about life. It enables him or her to examine seriously possible courses of action and to make rational choices based on such examination.⁹⁴ It is observed that today education is perhaps the most important function of state and the various levels of government.⁹⁵ Education is of cardinal importance for meaningful human existence; it enables a person to fully participate and function in society.⁹⁶ It allows individuals to develop whole and mature personalities, and it empowers them to fulfil a role in the community that is enriching for themselves and is beneficial for the community.⁹⁷ Bekker asserts that the right to vote, freedom of expression, freedom of information, freedom

⁹¹ J Addison, as quoted by O Ikejiani *Nigerian education* (1964) 19.

⁹² GE Devenish 'Aspects of the right to education in the Constitution' (1998) 2 *De Jure* 224-225; see also M Verheyde *Article 28: The right to education* (2006) 7; Bekink & Bekink (n 13 above) 125; Beiter (n 3 above) 28.

⁹³ See Taiwo (n 43 above) 12, citing F Coomans 'Content and scope of the right to education as a human right and obstacles to its realisation' in Y Donders & V Volodin (eds) *Human rights in education, science and culture: Legal developments and challenges* (2007) 183 185.

⁹⁴ See Taiwo (n 43 above) 12; Beiter (n 3 above) 29.

⁹⁵ *Brown v Board of Education of Topeka* 347 US 438 (1954).

⁹⁶ Taiwo (n 43 above) 12.

⁹⁷ See Devenish (n 92 above) 225; Taiwo (n 43 above) 12.

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.⁹⁸

Children with disabilities are recognised among the categories of children that are likely to be excluded from education.⁹⁹ According to Tomasevski, the following categories of children have been identified as particularly likely to be excluded from education: abandoned children; asylum-seeking children; beggars; child labourers; child mothers; child prostitutes; children born out of wedlock; delinquent children; *disabled children*;¹⁰⁰ displaced children; domestic servants; drug-using children; imprisoned children; homeless children; girls; HIV-infected children; married children; mentally-ill children; migrant children; minority children; nomadic children; orphans; pregnant girls; refugee children; *sans-papier* children (children without identity papers); sexually-exploited children; stateless children; street children; trafficked children; war-affected children; and working children.¹⁰¹ She submits that this calls for both national and international attention.¹⁰²

The Committee on Economic, Social and Cultural Rights (ESCR Committee) asserts as follows in its General Comment 5:¹⁰³

The Covenant [ICESCR] does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognises that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognised in the Covenants. In addition, in so far as special treatment is necessary, States Parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability.

However, one of the fundamental elements of the right to education is that it should be provided in a non-discriminatory manner to all.¹⁰⁴ There are a number of ways in which discrimination may occur in education. It may occur at the point of admission to an institution or once the student is enrolled. Such discrimination may be direct or indirect. While a failure to provide the necessary access for students with disabilities, or refusing to admit students with disabilities to a particular school, are direct and more obvious acts of discrimination, there are other subtle

⁹⁸ See G Bekker *Compilation of essential documents on the right to education (Part 1)* http://www.chr.up.ac.za/centre_projects/socio/compilation2part1.html (accessed 6 February 2010).

⁹⁹ See K Tomasevski *The right to education* Report of the Special Rapporteur submitted pursuant to Commission on Human Rights Resolution 2002/23, E/CN.4/2003/9.

¹⁰⁰ My emphasis.

¹⁰¹ Tomasevski (n 99 above).

¹⁰² As above.

¹⁰³ ESCR Committee in its General Comment 5: Persons with Disabilities (1994) (UN Doc HRI/GEN/1/Rev 7, 2004) para 6.

¹⁰⁴ Art 28(1) CRC.

ways in which discriminatory treatment may occur. A person may be discriminated against by way of his or her behaviour if that behaviour could be imputed to a disability.¹⁰⁵

Indirect discrimination does not relate to the different treatments of people with disabilities *per se*, but occurs where a person is unfairly excluded from equal participation in society as a result of the imposition of a requirement or condition with which a disproportionate number of people with disabilities will be unable to comply.¹⁰⁶ Disabled people have always suffered from stigma, prejudice and exclusion from society. The able-bodied norm is pervasive and exclusive: from public transport and pavements to working arrangements, to leisure and social facilities. People with disabilities and the concept of disability rights have long been ignored by both developed and developing countries.¹⁰⁷ The reason cannot be divorced from the fact that this group constitutes a minority within the society and that their age-long neglect has relegated them to the background as a voiceless section of society. Disability has only recently gained recognition as a legitimate subject of anti-discriminatory legislation.¹⁰⁸

5 Disabilities and inclusive education in Nigeria

Nigeria recognises the education of children with disabilities as special education. In terms of the Education (Minimum Standards and Establishment of Institutions) Act,¹⁰⁹ special education means:¹¹⁰

Education either in the normal schools or in special institutions established (a) for children and adults who have learning difficulties because of certain

¹⁰⁵ See Australian cases of *Welsh v Commissioner, Soil Conservation Service of NSW* (1991) EOC 92-330; *L v Minister for Education* (1996) EOC 92-787.

¹⁰⁶ LA Basser & M Jones 'Fostering inclusive societal values through law' (2002) 10 *The International Journal of Children's Rights* 390.

¹⁰⁷ As above.

¹⁰⁸ It was only in 1995 that the Discrimination Act finally reached the statute books in Britain. The Act requires that disabled people be afforded genuine equality. The Act established a National Disability Council which was replaced by Disability Rights Commission in April 2000. The Act has been criticised as being dependent on individual enforcement rather than proactive or preventive action, and because of its limited impact. The Act covers only areas, namely employment, the provisions of goods, facilities and services, premises, education, and transport. Discrimination outside of the specified area is not outlawed. Even within these fields there are significant exceptions. See S Fredman *Discrimination law* (2002) 58-59 83. See the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which came into being on 20 December 1993; the Vocational Rehabilitation and Employment (Disabled Persons) Recommendation (No 159) and Rehabilitation and Employment (Disabled Persons) Recommendation (No 186). The Nigerians With Disabilities Decree came into force in 1993, followed by the Disability Discrimination Act of 2001. The Americans with Disabilities Act is also as recent as 1990.

¹⁰⁹ Cap E3, Laws of the Federation of Nigeria (LFN) 2004.

¹¹⁰ See sec 25 of the Education Act, Cap E3, LFN 2004.

handicaps such as blindness, partial sightedness, deafness, hardness of hearing, mental retardation or other physical or mental handicap including social mal-adjustment 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.

The Nigerian government has formulated policies aimed at giving children with disabilities adequate education.¹¹¹ These policies are expressed in the 2004 National Policy on Education. The Policy provides that the education of children with special needs must be free at all levels.¹¹² Also, government is obliged to provide all the necessary facilities to ensure easy access to education for children with disabilities.¹¹³ To this end, government must provide inclusive education or ensure the integration of special classes and units into ordinary/public schools; provide regular census and monitoring of 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 personnel to develop capacity building and to keep abreast of the latest teaching techniques for the various categories of disabilities.¹¹⁴

The Policy states further that the teacher/pupil ratio in special schools must be one to ten,¹¹⁵ and that the architectural design of school buildings must be disability-friendly so that the barriers to free access should be removed. Buildings should take into account the special needs of the handicapped, for example, ramps instead of steps, wider doors for wheel-chairs, and lower toilets should be provided.¹¹⁶ It states that the federal government, state and local governments should jointly fund special education programmes.¹¹⁷ The practical experience in Nigeria, however, shows that persons with disabilities are often neglected and discriminated against in terms of education, health, and social facilities. The few disabled and handicap schools in the country are in a state of neglect and are not adequately funded. Health and social activities do not take special care of their needs. The policies expressed in the

¹¹¹ In terms of the National Policy on Education 2004, the term 'disabled' refers to people with impairments, physical or sensory, and who because of this impairment/disability cannot cope with regular school/class organisation and methods without formal special educational training. In this category are the 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 multiply handicapped. See paras 94(i)(a)-(h) of the National Policy on Education 2004.

¹¹² Para 96(b) of the National Policy on Education 2004.

¹¹³ Para 96(c) of the National Policy on Education 2004.

¹¹⁴ Paras 96(c)(i)-(v) of the National Policy on Education 2004.

¹¹⁵ Para 96(c)(vi) of the National Policy on Education 2004.

¹¹⁶ Para 97 of the National Policy on Education 2004.

¹¹⁷ Para 96(d) of the National Policy on Education 2004.

National Policy Act aim at addressing these inadequacies. Though the policies sound good, they would need absolute commitment on the part of government to turn them into reality.

As mentioned above, Nigeria recognises that the education of children with disabilities constitutes special education. One of the greatest challenges is finding ways to reconcile this guarantee with the experience of children with disabilities.¹¹⁸

Despite the basic protection put in place with regard to education for children in terms of the Child's Rights Act, the Universal Basic Education Act and the National Policy on Education, specific concerns have been expressed about the education of disabled children in Nigeria.

The Standard Rules on the Equalisation of Opportunities for Disabled People, which is also applicable in Nigeria, state that '[s]tates should recognise the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings'.¹¹⁹ The UN Special Rapporteur on Disability on the Operation of the Standard Rules has, however, highlighted the fact that many states have no legislation dealing with special educational needs; and in some other countries, schooling for children with special educational needs is still provided predominantly in segregated environments.¹²⁰ Nigeria still has a great deal of segregation in its educational framework as special schools and 'homes for the disabled', such as Cheschire Home and Ile-alaanu Home. Schools for the blind and deaf are common features in the country. The CRC Committee has also drawn attention to instances where disabled children have no access to education or where they are simply institutionalised.¹²¹ In the same vein, ICESCR states that, in order to implement a genuinely inclusive approach to the right of children with disabilities to access to education in regular schools,¹²²

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.

¹¹⁸ See sec 25 of the Education Act Cap E3, LFN 2004.

¹¹⁹ Rule 6.

¹²⁰ See Final Report of the Special Rapporteur of the Commission for Social Development *Monitoring the implementation of the standard rules on the equalisation of opportunities for persons with disabilities* (Geneva: United Nations, 2003) A/52/56 annex.

¹²¹ See, eg, its report on the Solomon Islands: United Nations Committee on the Rights of the Child, *Concluding observations: Solomon Islands* (2003) CRC/C 15/Add 208 para 38(c).

¹²² See CESCR Committee, General Comment 5: Persons with Disabilities (1994) (UN Doc HRI/GEN/1/Rev 7, 2004).

It is submitted that children with disabilities are entitled to education that maximises their potential.¹²³ As earlier canvassed, article 23(3) of CRC imposes obligations on states to take measures that ensure that disabled children have effective access to and receive education.¹²⁴ The CRC Committee recommends the establishment of special education programmes for children with disabilities and, where feasible, to integrate them into mainstream schools.¹²⁵ In this regard it is submitted that the phrase 'in a manner conducive to the child's achieving the fullest possible social integration' in article 23(3) of CRC suggests a preference for an inclusive education.¹²⁶ An inclusive education requires that teachers and schools have to adapt to learners with divergent abilities and needs.¹²⁷

It is surprising that the Nigerian government is yet to develop a clear-cut policy on inclusive education for persons with disabilities. This category of persons are still neglected and discriminated against in terms of education, health, employment and social facilities. The few disabled and handicap schools in the country are in a state of neglect and not properly kept or adequately funded. It is submitted that disabled and handicapped persons have special needs and that they should be granted the benefit of equality notwithstanding their special needs. It is submitted that the Nigerian experience falls far below international standards that advocate equal educational opportunities for all without discrimination. Children with disabilities should be cared for economically, medically and educationally. As such, programmes which focus on the rehabilitation and reintegration of people with disabilities into full social participation and long-term benefit to themselves and for society in general are advocated. To ensure universal basic education for all and without discrimination, there should be a better commitment at the various levels of government on the education of children with disabilities.

¹²³ M Verheyde *A commentary on the United Nations Convention on the Rights of the Child: Article 28: The right to education* (2006) 44.

¹²⁴ Art 23(3) of CRC states: 'Recognising 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.'

¹²⁵ n 41 above.

¹²⁶ K Tomasevski *Right to education primer 3: Human rights obligations: Making education available, accessible, acceptable and adaptable* (2001) 32; see also Rule 6 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted on 20 December 1993 (UN Doc A/RES/48/96).

¹²⁷ ESCR Committee General Comment 5: Persons with Disabilities 32 para 35.

6 Recommendations and conclusion

The following are suggestions in light of the foregoing. First, it is recommended that the provisions on the rights of children with disabilities, as contained in the various international human rights instruments, should be domesticated and implemented in the country. For instance, Rules 6(1), (7) and (8) of the Standard Rules on the Equalisation of Opportunities for Disabled People recommend special education as an exception where the general school system is inadequate to meet the needs of people with disabilities. In Nigeria, however, children with disabilities have been systematically segregated and accommodated only in special schools separate from their peers who have no disabilities. In other words, secluded education should be discouraged while inclusive education should be implemented in Nigeria without further delay.

Secondly, the right to education is included in the Nigerian Constitution only as part of the Fundamental Objectives and Directive Principles of State Policy. Constitutional reform elevating this right to the status of a fundamental right is therefore imperative. Also in this regard, all the relevant laws and policies on the rights of persons with disabilities should be harmonised and adequately implemented. Thirdly, it is recommended that a specific human rights commission be established to cater for the rights of children with disabilities. In the alternative, an arm of the existing National Human Rights Commission should be given these functions.

To make the right to education meaningful, inclusive and universal, the government cannot afford to ignore the rights of children with disabilities. One of the fundamental elements of the right to education is that it be provided in a non-discriminatory manner to all. Lack of adequate attention to education and welfare of people with disabilities constitutes discrimination in terms of the provisions of CRC. The inevitable conclusion from the discussion in this article is that the protection of the right to education for children with disabilities in Nigeria is inadequate. Policies that can give meaning to the rights of this category of persons call for implementation. This will require a strong commitment on the part of government at every level.