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## A Rights-Based Approach for Right to Education in Nigeria

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### Abstract

The focal point of this paper is the application of rights-based approach (RBA) programming the right to education in Nigeria. It describes RBA in terms of the State's obligation so to respond to fulfilling the right of the child to education. This approach is most essential for realising the right to education in developing countries including Nigeria, as it identifies the state as the duty bearer and the children as the right holders. The State therefore is held accountable for the implementation of the right and children are entitled to claim the right to free primary education. The paper distinguishes RBA from 'needs-based approach' explaining that the latter is often met out of charitable intentions, whereas the rights-based approach is based on legal obligations that the state must fulfil. It has explored the important issue of education delivery in Nigeria from within human rights perspective. Also, it is aimed through this paper to deepen our understanding of the constituent elements in a RBA programming, such as indivisibility, empowerment, equality and accountability. In essence, the paper has provided an insight into some steps that need to be taken for the right to education in Nigeria to have a significant impact on both policy and practical outcomes in Nigeria.

Education is one of the most protected rights in international law. The right to education is addressed in most international human rights instruments.<sup>1</sup> Each of these documents specifies that

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<sup>1</sup> Article 26, Universal Declaration of Human Rights, (UDHR) 1948, G.A. Res 217, UNGAOR 3<sup>rd</sup> Sess. Supp. No127 at 71 UN Doc A/80 (1948), International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), 993UNTS 3 entered into force January 3 1976, Article 13; Convention on the Rights of the Child (CRC) (1989) G.A.Res44/25 UNGAOR, 44<sup>th</sup> sess, Supp No49 at 167, UN Doc/44/49 (1989), entered into force 2<sup>nd</sup> September 1990 Article 28; African Charter on the Rights and Welfare of the Child (ACRWC) (1990), OAU/Doc/CAB/LEG/24.9/49(1990) entered into force Nov 29 1999,

education, specifically primary education must be compulsory and available, free to all children. Education is a basic human right that is necessary for enjoying many other rights.<sup>2</sup> From a human rights perspective, it has been acknowledged that the right to education is essential for people to be aware of the other rights they are entitled to, to exercise them, and to be empowered to demand them.<sup>3</sup> The right to education is often referred to as a 'multiplier right' because its enjoyment enhances other rights.<sup>4</sup> For example, the enjoyment of a number of civil and political rights such as freedom of information, and the right to vote depend on a minimum level of education and literacy. As the Committee on Economic, Social and Cultural Rights states in the introductory statement of its General Comment No. 13,

... 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.<sup>5</sup>

In other words, it is the route whereby the poor can escape poverty and play a part in their communities. It also plays a vital role in safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, and protecting the environment.<sup>6</sup>

Once States ratify international human rights instruments they commit themselves through whichever government in power, to

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Article 11; and UNESCO Convention against Discrimination in Education (1960) entered into force 22<sup>nd</sup> May 1962, Article 4(a).

<sup>2</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para 1, available at <http://www.refworld.org/docid/4538838c22.html> [accessed 17 June 2014].

<sup>3</sup> CESCR *General Comment No13*, note 2, at para 1.

<sup>4</sup> Tomasevski, K. *Annual Report of the Special Rapporteur on the right to education- Katarina Tomaevski*, 11 January 2001, E/CN.4/2001/52, (Annual Report 2001), p.3. See also; Katarina Tomaevski, '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 *Hum. Rts. L. Rev.* 205.

<sup>5</sup> CESCR *General Comment No13* note 2 para. 1.

<sup>6</sup> *Ibid.*

comply with the rights embodied in the instruments.<sup>7</sup> In effect, States hold the primary responsibilities and are accountable to the right holders for the implementation of the rights. Under international human rights law, signatories to a UN Convention have three types of obligations—to respect, protect and fulfil. States are the principal duty bearers and are under obligation to fulfil, respect and protect all human rights for all individuals within their jurisdiction. The purpose of imposing international obligations on state parties to international and regional human rights instruments is to ensure that the rights and freedoms guaranteed under the instruments are translated into practical reality for those whom the said rights and freedoms are designed to protect. In the case of education, state is to ensure the realisation of the right to education. The state's obligations are expounded as follows:

**Obligation to fulfil:** This requires duty-bearer (State) to directly provide assistance or services for the realisation of the right. They are also to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realisation of the right. In relation to right to education; to fulfil the right to education state must ensure that education is available for all children and that positive measures are taken to enable children to benefit from it. Education offered must be adequate in quality and promote the realization of the child's other rights.<sup>8</sup>

**The Obligation to Respect:** This requires the duty-bearer to refrain from interfering directly or indirectly with the enjoyment of the right. To respect the right to education, State should avoid any action that would serve to prevent children from accessing education, for example, legislation that categorises certain groups of children with disabilities as uneducable.<sup>9</sup>

**The Obligation to Protect:** This requires the duty-bearer to take measures that prevent third parties from interfering with the enjoyment of the right. To protect the right to education, State

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<sup>7</sup> Article 14(2) Vienna Convention: 'The consent of a state to be bound by a treaty is expressed by ratification'

<sup>8</sup> UNESCO, *The Right to Primary Education Free of Charge: Ensuring compliance with international obligations*, Paris: UNESCO, 2008.

<sup>9</sup> S. 15 (7) CRA 2003. The provision of right of child to free, compulsory & universal primary education shall not apply to children with mental disabilities.

should take necessary measures to remove the barriers to education posed by individuals or communities. For example, cultural barriers to education or violence and abuse in the school environment.<sup>10</sup> Also, State must protect the accessibility of education by ensuring that third parties including parents and employers do not stop girls from going to school. For example, girls in certain communities are denied education because of cultural beliefs that female children are inferior to male children. And where early marriage is practiced, the girl-child is soon married off, so she is presumed not to need education. The current wave of Boko Haram sect activity in Nigeria especially in the North Eastern part of the country has stalled education of many children. Several children are out of school in all these conflict affected part of the country, and is exacerbating existing low enrolment rate in these states. The State has the duty to take measures to prevent third party interference with the enjoyment of the child's right to education.

### The Concept of Rights-based Approach

A rights-based approach (RBA), also referred to as human rights based approach or human rights approach, has attracted enormous attention from the UN agencies, international civil society organizations (CSOs) and donors since the end of the 1990s.<sup>11</sup> RBA focuses on the inalienable human rights of each individual, as expressed in UN instruments, and on governments' obligation to fulfil, respect and protect those internationally defined human rights. In so doing, it aims to support and empower individuals and communities to claim their rights.<sup>12</sup> A rights-based approach to development is a framework that integrates the norms, principles, standards and goals of the international human rights system into the plans and processes of development. It is central to the premise of RBA that human beings have inalienable rights and a

<sup>10</sup> Committee on Economic, Social and Cultural Rights, 'General Comment No. 13: The right to education (article 13)', E/C.12/1999/10, December 1999, paras. 43, 44, 50.

<sup>11</sup> Dan Banik, *Implementing Human Rights-Based Development: Some Preliminary Evidence from Malawi, Expert Seminar: Extreme Poverty and Human Rights*, 2007, 1, available at [http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan\\_Banik.pdf](http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan_Banik.pdf) [accessed 13 July 2014].

<sup>12</sup> Tomaševski, Katarina. *Manual on Rights-Based Education: Global human rights requirements made simple*, UNESCO Bangkok, Bangkok, 2004.

deprivation can often be addressed as a denial of rights.<sup>13</sup> It removes the charity dimension of development by emphasising rights and responsibilities. It recognizes poor people not as beneficiaries, but as active rights holders and establishes corresponding duties for States and other actors against whom claims can be held. The concept of rights-holders and duty-bearers introduces an important element of accountability. One of the most fundamental dynamics of a human rights, and consequently of a RBA, is that every human being is a rights-holder and that every human right has a corresponding duty-bearer. A rights-holder; is entitled to rights, is entitled to claim rights and is entitled to hold the duty-bearer accountable. Consequently, the states are duty-bearers and have the obligation to respect, protect, and fulfil the rights of the rights-holder. The overall responsibility for meeting human rights obligations rests with the State. This responsibility includes all the organs of the state such as executives, legislators, ministries, local authorities, judges and justice authorities, police, or teachers. All these are legal duty-bearers. The state as a legal duty-bearer also has a duty to regulate the actions of moral duty-bearers – e.g. parents, and guardians in the case of children, to ensure that they respect human rights. In essence, RBA seeks to hold governments and other duty-bearers accountable and encourage rights holder to claim their rights. A rights-based approach to education is imperative.

### **Human Rights Approach vs. Needs Approach**

According to Feinberg,<sup>14</sup> a world without rights, no matter how benevolent and devoted to duty everyone in it is, such a world would be morally impoverished because no one will feel deserving of even decent treatment'.<sup>14</sup> The deprived person would lack the dignity of considering oneself equal to every other person in the society which leads to the individual's low self-esteem.<sup>15</sup> Such a person has no guarantee of even minimal decent treatment and is not empowered to seek redress for injustice suffered.<sup>16</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> Feinberg, J., 'Social Philosophy', *Prentice-Hall Foundations of Philosophy Series*, (Essex: Pearson, 1973) 58.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

A human rights approach to programming differs sharply from the basic needs approach. While the fundamental human needs are the basis of human rights there are some notable differences between needs and rights. Human rights go beyond the notion of physical needs and include a more holistic perspective of human beings in terms of their civil, political, social, economic and cultural roles.<sup>17</sup> Rights always trigger obligations and responsibilities, whereas needs do not. Rights cannot be addressed without raising the question of who has obligations in relation to these rights. This automatically raises questions about the actions and accountability of duty bearers. People are often expected to be grateful when their needs are met; this is not the case when people's rights are met. It is therefore wrong to be campaigning for 'the needy children', but rather advocate support for these group of children as equal human beings in their efforts to claim their rights and address the poverty, suffering and injustice in their lives particularly in respect of their education.<sup>18</sup> A rights-based approach, for example, is likely to give priority to severe or gross types of rights violations even if these affect only a small number of children, while needs-based approaches would offer a basis for justifying a focus on less severe types of violations that affect a larger number of children.<sup>19</sup> In applying rights-based-education, there should be focus on legal and institutional frameworks and promotion of the rule of law. The mechanism for seeking judicial redress in case of violation must conform to human rights principle and standards.

The basic needs approach does not imply the existence of a duty-bearer whereas in a RBA, there must be a duty bearer. The basic needs approach often aims to obtain additional resources to help a marginalised group obtain access to services. A human rights approach, in contrast, calls for existing community resources to be shared more equally, so that everyone has access to the same services. Another important difference between the two approaches pertains to motivation. Basic needs can, in principle, be met

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<sup>17</sup> Kirkemann Boesen Jakob and Tomas Martin, *Applying a rights-based approach an inspirational guide for civil society*, (Copenhagen: Danish Institute for Human Rights 2007) p. 4.

<sup>18</sup> UNICEF, *A Human Rights -Based Approach to Education for All: A framework for the realisation of children's rights to education and rights within education*, (Paris: UNICEF 2007) p. 10

<sup>19</sup> Ibid.



through benevolent or charitable actions. Actions based on a human rights approach are based on legal and moral obligations to carry out a duty that will permit a subject to enjoy her or his right. As noted earlier, accountability for such a duty depends partly on the duty-bearer's acceptance of responsibility. Charity negates such acceptance, as it does not take rights and responsibilities into consideration. In a rights approach, solidarity replace charity.

### **Benefits of Applying RBA in Programming**

***RBA focusing on the poorest and most vulnerable:*** These groups are usually the most disempowered and at greatest risk of violation or denial of their rights. In relation to education, poverty-based exclusion from qualitative education highlights the impossibility of alleviating poverty through education.<sup>20</sup> Parents who cannot pay fees are forced to keep their children out of schools even if education is compulsory. If education is accessible (i.e. available and free), children from disadvantaged or vulnerable categories will be able to benefit equally from the right to education. Right to education is pro-poor strategy. This is high-lighted by Committee on Economic Social and Cultural Rights (CESCR) when Committee described education as the 'primary vehicle' by which the economically and socially marginalised can lift themselves out of poverty. Levying charges in public primary schools is illegal in countries that are parties to International Covenant on Economic Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), African Charter on Human and Peoples' Rights (ACHPR) and African Charter on the Rights and Welfare of the Child (ACRWC), but in many countries of the developing nations including Nigeria, the law is often unknown or worse still ignored.<sup>21</sup> In applying RBA, it should be emphasised that, no child should be denied the opportunity to complete a good quality primary education because it is unaffordable. Also child labour must not stand in the way of education.

The ICESCR Committee reiterated that:

The nature of this requirement [that education is free] is unequivocal. The right is expressly formulated so as

<sup>20</sup> Tomasevski, K. *The State of the Right to Education Worldwide: Free or Fee-2006 Global Report*, [http://www.katarinatomasevski.com/images/Global\\_Report.pdf/](http://www.katarinatomasevski.com/images/Global_Report.pdf/) [accessed 17 June 2014].

<sup>21</sup> *Ibid*, p. xix.

to ensure availability of primary education without charge to the child, parents or guardians. 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 should be eliminated.<sup>22</sup>

***RBA is a participatory approach:*** This enables the input of a range of stakeholders – including parents, teachers, religious leaders, community groups and children into the investigation of the right and provides opportunities to feed back on its implementation. Children's perspectives are indispensable. Whenever possible, the views of girls and boys of different ages, in and out of school, with and without disabilities, and from different ethnic groups, geographic locations and socio-economic situations should be taken into account in respect of the quality of education they are receiving.

***RBA enables disaggregated data:*** To ensure the visibility of all groups of children in relation to enrolment, attendance, completion, attainment in education and other pertinent factors, it is crucial that data are disaggregated by sex, disability, race, ethnic or social origin, economic status, religion, language, geographic location and other status. Accurate data and monitoring of learning achievement are also critical, for planning and budgeting, as well as for evaluation and accountability. Without accurate and reliable data, no meaningful planning can be done and it will be difficult to avoid policy breakdown at the implementation stage.<sup>23</sup> The data must be reliable, sufficient and disaggregated and must be nationally coordinated. The disaggregation of data will be helpful in revealing the gaps in the realisation of educational right for children in the country. The necessity to gather reliable data is supported by Kasper in her statement that 'applying the tenets of the CRC requires disaggregation of national data by age, gender

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<sup>22</sup> CESCR *General Comment No. 11 (1999) Plans of Action for primary education (art 14)* E/C.12/1999/4. 10 May 1999 para 7.

<sup>23</sup> Hinchliffe, K. *Public Expenditures on Education in Nigeria: Issues, Estimates and Some Implications*, The World Bank, Africa Region Human Development Working Paper Series, 2002, p. 25

and ethnic background so that the vulnerable group will be identified and polices developed'.<sup>24</sup>

### **The Principles that inform a Rights-based Approach**

These principles are expounded into four concrete focus areas, which offer clear direction to RBA programming. These are first, inalienability, indivisibility universality and interdependence of human rights, second, empowerment and participation, third, equality and non-discrimination, and last, accountability. The application of these human rights principles to the development process forms the fundamental basis of an RBA.

#### ***Inalienability, Indivisibility and Interdependence of Human Rights***

As reiterated in the Vienna Declaration, '[...] all human rights are universal, indivisible and interdependent and interrelated'.<sup>25</sup> This principle entails two things. First, all human rights must be given the same attention. There is no hierarchical order whatsoever between civil and political rights, on the one hand and economic, social and cultural rights, on the other. Second, the interdependence and interrelatedness of rights entails that the protection and fulfilment of one right often depends on the protection and fulfilment of other rights. This in turn, calls for collaboration among different sectors for fruitful implementation of national programmes, strategies and policies. Another characteristic of human rights is that they are inalienable, which means that they cannot be taken away. Consequently, it is imperative to safeguard human rights against violations, abuse, or neglect. Human rights are universal and inalienable, they are the entitlement of all people everywhere in the world. An individual cannot voluntarily give them up. Nor can others take them away. Consequently, it is imperative to safeguard human rights against violations, abuse, or neglect. As stated in article 1 of the Universal Declaration of Human Rights, "All human beings are born free and equal in dignity and rights." Another characteristic of RBA is indivisibility: Human rights are indivisible. Whether civil, cultural, economic,

<sup>24</sup> Kasper, J., 'The Relevance of U.S. Ratification of the CRC for Child Health, (2010) No. 89, Volume 5 *Child Welfare* p.27.

<sup>25</sup> Vienna Declaration and Program of Action adopted by the World Conference on Human Rights on 25<sup>th</sup> June 1993, UN doc.A/CONF.157/23, para. 5.

political or social, they are all inherent to the dignity of every person.<sup>26</sup> Consequently, they all have equal status as rights and cannot be ranked in a hierarchy. Speaking in respect of the right to education, Tomasevski endorsed the principle by stating that the right to education embodies elements of economic, social and cultural rights as well as civil and political rights.<sup>27</sup> Interdependence and interrelatedness: The realization of one right often depends, wholly or in part, on the realization of others. For example, realization of the right to health may depend on realization of the rights to education and information.

### **Empowerment and Participation**

Under a RBA, individuals are not simply recipients of goods and services. All persons are entitled and expected to engage meaningfully in society at the community and state level. They have the right to actively, freely and meaningfully be involved in all matters affecting their lives. To that end, government institutions must be transparent and ensure access of individuals to information. Coomans points out that the right to education is an empowering right as it increases the individual's means to control his or her life and the ability to claim rights against the states.<sup>28</sup> As regards children, child's participation is an essential guiding principle of both the CRC<sup>29</sup> and ACRWC.<sup>30</sup> Children's participation is about listening to them, taking them seriously and understanding children's issues through their point of view.

<sup>26</sup> Unni Krishnan J.P. v. State of Andhra Pradesh AIR 1993 SC 2178. See also *Minister of Health and Others v Treatment Action Campaign and Others (TAC Case)* (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002) see also; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC). *Grootboom* 2001 (1) SA 46 (CC).

<sup>27</sup> Tomasevski, Katarina *Annual Report of the Special Rapporteur on the right to education- Katarina Tomaevski*, 11 January 2001, E/CN.4/2001/52, (Annual Report 2001), p.3. See also; Katarina Tomaevski, '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 *Hum. Rts. L. Rev.* 205.

<sup>28</sup> Coomans, Fons, 'In Search of the Core Content of the Right to Education', in: S. Chapman & S. Russell (eds), *Introduction to Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Antwerpen: Intersentia 2002), 217-246, p.231.

<sup>29</sup> Articles 12 and 13 of the CRC

<sup>30</sup> Articles 4 and 7 of the ACRWC

However, it does not entail that children's opinions should be automatically endorsed. It requires a process of dialogue in which children are given the opportunity to influence decisions. In such a process, adults should provide direction and guidance to children while considering the child's views in a manner consistent with the child's age and maturity. In genuine child's participation the process must be free from pressure and manipulation. In addition, it should be ensured that the most disadvantaged and marginalised children have opportunities to participate and make their voices heard. Education is an important empowering tool for children. Empowerment is the process by which people's capabilities to demand and use their human rights grow. They are empowered to claim their rights rather than simply wait for policies, legislation or the provision of services. The goal is to give people the power and capabilities to change their own lives, improve their own communities and influence their own destinies. Empowering rights holders to claim their rights requires a range of strategies, including information, advocacy, capacity-building, parent networking, peer support and technical assistance. Initiatives should be focused on building the capacities of individuals and communities to hold those responsible to account.

### *Equality and Non-Discrimination*

All individuals are equal as human beings, and by virtue of the inherent dignity of each person, are entitled to their rights without discrimination of any kind. A rights-based approach requires a particular focus on addressing discrimination and inequality. Safeguards need to be included in development instruments to protect the rights and well-being of marginalized groups. As far as possible, data need to be disaggregated – for example, by sex, religion, ethnicity, language and disability – in order to give visibility to potentially vulnerable populations. Furthermore, all development decisions, policies and initiatives, while seeking to empower local participants, are also expressly required to guard against reinforcing power imbalances.

International human rights law strongly condemns discrimination on unjustifiable grounds. The various human rights instruments guarantee the right of individuals to be free from discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin,

property, birth or other status.<sup>31</sup> The term—other status in the human rights instruments show that the grounds of discrimination are not exhaustive. Other grounds, not explicitly stated, such as age, and disability, are also prohibited. Thus, States should refrain from putting in place laws, policies and programmes that directly or indirectly exclude people. Under a RBA, 'the ground is level', no one is singled out for special favour, no distinction based on colour and no one is identified as being superior or inferior. All are equal. Rights-based education is non-discriminatory; it includes all children regardless of geography, ethnicity, economic status or disability. A related principle is that human rights must be enjoyed without discrimination based on either attributes over which a person has no choice (such as gender, age, or ethnic origin), or attributes that, if denied, would result in the infringement of other human rights (such as religion and political ideology).

For right to education, educational institutions and programmes must be accessible to all without discrimination. Education must be accessible to previously excluded and unreached children.<sup>32</sup> In addition, education provided by the state should be of the same quality for all groups in society; girls and boys should be given the same quality of education. The fundamental principles established in the UNESCO Convention against Discrimination in Education is aimed at ensuring that education becomes truly inclusive by effectively reaching the unreached especially the poor, marginalised and the vulnerable groups, children, young people and rural population denied of equal access to education.<sup>33</sup> Discrimination in education is a violation of rights and is proscribed by the UNESCO. The Dakar Framework for Action also emphasises the elimination of all forms of discrimination and prioritises the excluded, vulnerable and marginalised children.<sup>34</sup> The principles of equality and non-discrimination are embedded throughout the human rights framework and prescribe that all rights must be 'exercised without discrimination of any kind as to

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<sup>31</sup> UDHR Article 2, ICESCR Article 2(2); ACRWC in Article 3; UNESCO Convention against Discrimination in Education, 1960, Article 1(1).

<sup>32</sup> Article 2(2) and 3 ICESCR, Article 26 ICCPR, Article 2 CRC, and Limburg Principles at 35 and 37.

<sup>33</sup> Article 1 UNESCO Convention against Discrimination in Education 1960.

<sup>34</sup> Dakar Framework for Action, Education for All: Meeting our Collective Commitments. Adopted by World Education Forum. Dakar, Senegal 26-28 April 2000.

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>35</sup>

The prohibition against discrimination enshrined in Article 2(2) of the 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>36</sup> In some circumstances, separate educational systems or institutions for groups, defined by the categories in Article 2(2), are not deemed to constitute a breach of the Covenant.<sup>37</sup> According to the Article, separate institutions can be made for different sexes, religious or linguist groups without their focus on particular groups being considered discrimination.<sup>38</sup>

The principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals and irrespective of legal status.<sup>39</sup> All such discrimination are in direct contradiction with the requirements in Article 29(1)(a) of the CRC, that education be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.<sup>40</sup>

The principle of non-discrimination in education is an immediate obligation, and it plays a key role in empowering marginalised groups such as women and girls, and helps to combat wider discrimination within societies. Non-discrimination applies to all aspects of education including access to education, the content of education, teaching methods, the outcomes of learning, education staffing, as well as laws, policies and administrative practices. States have a minimum core obligation to ensure that resources are allocated in a non-discriminatory manner. Therefore, as States develop and expand educational programmes, particular segments of the population should not be passed over and States

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<sup>35</sup> UDHR Article 2, ICESCR Article 2(2); ACRWC in Article 3; UNESCO Convention against Discrimination in Education, 1960, Article 1(1).

<sup>36</sup> Article 2(2) and 3 ICESCR, Article 26 ICCPR, Article 2 CRC and The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), UN Doc E/CN.4/1987/17, at 35 and 37.

<sup>37</sup> CESCR, *General Comment no13, The Right to Education* para 33.

<sup>38</sup> Article 2(2) and 3 ICESCR, Article 26 ICCPR, Article 2 CRC and Limburg Principles at 35 and 37.

<sup>39</sup> CESCR *General Comment No 13* para 3.

<sup>40</sup> CRC *Committee General Comment No. 1 The Aims of Education*, para 10.

must not direct marginalised groups to an inferior standard of education.

Van Bueren has noted that the right to education on the basis of equal opportunity is so fundamental to the child's right to education that the drafters of the CRC made all other aspects of the right to education dependent upon it.<sup>41</sup> Verheyde has also pointed out that the principle of equality implies that special attention should be given to specific groups which are particularly vulnerable to discrimination in education and which consequently require special policies.<sup>42</sup> This was also upheld by the Committee of Experts of the ACRWC in its decision on the complaints brought before it by the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent against the government of Kenya in 2011.<sup>43</sup> The Committee's recommendation was that the Government of Kenya should adopt a short-, medium- and long-term plan, including legislation, administrative and other measures to ensure the fulfilment of the right to education of these children.

Gender equality has been a focal point at several international summits and conferences since the 1990s,<sup>44</sup> and the elimination of gender disparity in primary and secondary education was one of

<sup>41</sup> Van Bueren, G. *The International Law on the Right of the Child*, (Dordrecht: Martinus Nijhoff Publishers 1994), pp. 245-248.

<sup>42</sup> Verheyde, M., *Commentary on the UN Convention on the Right to Education Article 28, The Right to Education*, (Leiden: Martinus Nijhoff, 2006), p.40.

<sup>43</sup> 002/09 *IHRDA and Open Society Justice Initiative on behalf of children of Nubian descent v. Kenya*. 22 March 2011.

A complaint was brought before the Committee of Expert of the African Charter on the Rights and Welfare of the Child (ACRWC) alleging violation of Article 3 of the ACRWC that the children of Nubian descent were treated differently from other children in Kenya. It was also alleged that the children of Nubian descent had less access to educational facilities for the fulfilment of their right to free and compulsory primary education than comparable communities who were not composed of children of Nubian descent, which is a violation of Article 11(3) ACRWC. They claimed that there is de facto inequality in their access to available educational services and resources.

<sup>44</sup> The 1990 World Conference on Education for All (Jomtien), Article 3(3) of the World Declaration on Education for All; the 1995 World Conference on Women (Platform for Action, Beijing (UN Doc. A/CONF.177/20/Rev.1,1996), paras 263 and 279); the 1990 World Summit for Children (Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990, para 10); and the 2000 World Education Forum (Dakar) (Articles 7(ii) and (v) and 8(vi) of the Dakar Framework for Action.



the Millennium Development Goals aimed to be achieved by 2015.<sup>45</sup> Article 11(3) (e) of the ACRWC obliges State Parties to take special measures to ensure equal access of girls to education. The Charter also highlights the entitlements of girls who become pregnant before completing their education and should 'have an opportunity to continue with their education on the basis of their individual ability'.<sup>46</sup>

State Parties are supposed to implement immediate measures both to prevent discrimination arising and to eliminate discrimination where it has already occurred.<sup>47</sup> The measures are clearly set out: repeal any statutory, administrative instruction or practice which involves discrimination.<sup>48</sup> This includes prohibiting any form of assistance provided by public authorities to educational institutions which restrict or express preference solely on the ground that pupils belong to a particular group<sup>49</sup> and granting equal access to education to children who are residents and foreign nationals.<sup>50</sup>

The leading Nigerian case on discrimination to education is *Badejo v. Federal Minister for Education & 2 others*,<sup>51</sup> where the court denied access to judicial remedies and the enforcement of this right, based on a technical interpretation of the law. Plaintiff had alleged that she was denied being called for interview for admission into a public funded secondary education institution because of the policy of quota system which discriminated against her because of her state of origin, whereas, pupils from some other states who scored lower marks were called for the interview. The court held that the interview complained of had already been completed about 15 months earlier and the matter had been overtaken by events. The court also held that the interest of the State to the sustenance of the educational system prevailed over the rights of the applicant to educational system. This decision is criticised because, recognising that state parties have a negative

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<sup>45</sup> UN Millennium Developments Goals, <http://www.un.org/millenniumgoals> [accessed on 3rd January 2015].

<sup>46</sup> Article 11 (6) ACRWC.

<sup>47</sup> Art 3 UNESCO Convention Against Discrimination in Education.

<sup>48</sup> Art 3(a) and (b) UNESCO Convention Against Discrimination in Education.

<sup>49</sup> Art 3(c) UNESCO note 37

<sup>50</sup> Art 3(d) UNESCO note 37

<sup>51</sup> *Badejo v. Federal Minister for Education & 2 others*, (1996) Part 464, 8NWLR p. 15.

duty not to act in such a manner as to discriminate against any person. Where two children of different ethnic origin have same /equal scores in entrance examination, they are entitled to the same methods of admission, failure of which the children may lose their trust in the state not to discriminate against them. It is submitted, with respect, that it was wrong for the court to have let the interest of the State to the sustenance of the educational system prevail over plaintiff's right to equality under the educational system.

Children with disabilities are often discriminated against within the Nigerian educational context. This could be due to the inadequate numbers of institutions that have special facilities and programmes for children with disabilities. In most cases, these children are not integrated into the state educational systems because of their disabilities. To enable children with disabilities to fulfil their potential, provision must be made for them through the provision of special teaching and learning materials. States are directed to recognise 'the special need' of children with disabilities including a duty placed on States Parties to the CRC to ensure that children with disabilities have effective access to education and training.<sup>52</sup> Such education should, according to UNESCO, be suited to the individual needs of children, regardless of the degree of disability or special need.<sup>53</sup> Education must be accessible to all, especially the most vulnerable groups, in law and without discrimination.

In Nigeria, even though the Constitution incorporates a provision of non-discrimination,<sup>54</sup> the Committee of the CRC, in its combined third and fourth reports' concluding observations on Nigeria in 2010,<sup>55</sup> raised concerns that *de facto* discrimination against children was still prevalent in Nigeria and is widely tolerated in the State party. Of particular concern was vis-à-vis the girl child, children with disabilities, street children and children of minority groups. The Committee requested the State party to provide more information in its next periodic report on measures taken to give practical effect to the principle of non-discrimination in relation to these groups.

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<sup>52</sup> Art 23(2) CRC

<sup>53</sup> Art10 UNESCO note 37

<sup>54</sup> Section 42 (2) 1999 Constitution of Nigeria.

<sup>55</sup> Committee on the Rights of the Child Concluding observation: *Nigeria CRC/C/NGA/CO/3-4*, para. 28

### **Accountability**

States are the primary duty-bearers for the protection and promotion of human rights. Under a RBA approach, States should be accountable in the event of their failure to live up to their human rights obligations. Human rights law has devised a framework within which individuals can seek remedies where their rights are infringed before appropriate judicial or quasi-judicial organs according to the rules and procedures determined by law. Apart from legal redress, accountability requires effective monitoring system and transparency of actions. In the context of right to education, transparency entails a host of obligations on States, such as ensuring the availability of information pertinent to the implementation of free primary education. The budgetary allocation and disbursement of funds for educational programme should be made available to all. Ferguson argues that to talk in terms of rights is in itself a – ‘vehicle’ for increasing the accountability of government organisations to their citizens and consequently increasing the likelihood that policy measures will be implemented in practice.<sup>56</sup> While the State is the principal duty-bearer with respect to the human rights of the people living within its jurisdiction, the international community also has a responsibility to help realize universal human rights.<sup>57</sup> Thus, monitoring and accountability procedures must not only extend to States, but also to global actors-such as the donor community, intergovernmental organizations, and international NGOs, all whose actions bear upon the enjoyment of human rights in any country.<sup>58</sup> Uvin argues, ‘the very move from charity to claims brings about a focus on mechanisms of accountability’.<sup>59</sup>

RBA seeks to raise levels of accountability in the development process by identifying ‘rights holders’ and corresponding ‘duty bearers’ and to enhance the capacities of those duty bearers to meet

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<sup>56</sup> Ferguson, C. *Global Social Policy Principles: Human Rights and Social Justice*, (London: DFID, 1999), p. 23.

<sup>57</sup> Article 4 CRC provides that ‘all measures for realising economic, social and cultural rights must be taken to the maximum extent of available resources of State Parties and ‘where needed within the framework of international cooperation.’

<sup>58</sup> UNOHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, available at [www.unhcr.ch/development/povertyfinal.html](http://www.unhcr.ch/development/povertyfinal.html), 2002, paragraphs 23 & 230. 15

<sup>59</sup> Uvin, P., *Human Rights and Development*, (Bloomfield: Kumarian, 2004), p. 131.

their obligations. These include both positive obligations to protect, promote and fulfil human rights, as well as negative obligations to abstain from rights violations. In addition to governments, a wide range of other actors should also carry responsibilities for the realisation of human rights, including individuals, local organizations and authorities, the private sector, the media, donors, development partners and international institutions. The international community also carries obligations to provide effective cooperation in response to the shortages of resources and capacities in developing countries.<sup>60</sup> A rights-based approach requires the development of laws, administrative procedures, and practices and mechanisms to ensure the fulfilment of entitlements, as well as opportunities to address denials and violations. It also calls for the translation of universal standards into locally determined benchmarks for measuring progress and enhancing accountability.

As relates to education in Nigeria, data on total government spending on education is sporadic, and data on government spending on primary education is difficult to find. There is no credible estimate of the total amount of public expenditure which is spent by the Federal, state and local governments on education and, subsequently, the sources, levels, trends and distributions across the various educational levels are not available for analysis.<sup>61</sup> The missing information includes figures for real expenditures, public expenditures, absolute or relative to national income, and the distribution of expenditures across the various educational levels either nationwide or in individual states.<sup>62</sup> At the same time, the level of monitoring of state government expenditure is inadequate and there is no single location at which the annual budget books or audits is held, let alone collated and analysed.<sup>63</sup> This clearly shows lack of accountability. Without reliable data, it will not be possible to understand the nature of the problem and

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<sup>60</sup> CESCR Committee, *General Comment No3, The Nature of States Obligation* (Article 2 para 1 on the Covenant, (1990), UN Doc E/1991/23. para. 14. See also, Articles 2, 23 and 15(4) of the ICESCR.

<sup>61</sup> *Sofolahan, J. 'National Policy Review Issues'* in: R. Akpofure (ed) *The State of Education in Nigeria*. (Abuja: UNESCO Abuja Office 1998) pp. 3-9.

<sup>62</sup> *Ibid.*

<sup>63</sup> Hinchliffe, Keith, 'Public Expenditure on Education in Nigeria: Issues, Estimates and some Implications', Africa Region Human Development Working Paper Series, Human Development Sector Africa Region, (The World Bank 2002.

respond accordingly. To achieve universal free and compulsory education for all children, accurate information collection systems need to be implemented; when the data has been collected, a suitable plan can be proposed.<sup>64</sup>

***Obstacles to Complying with Responsibilities may derive from:  
Legal Barriers***

The Nigerian Constitution provides that the government shall *when practicable* provide free compulsory and universal basic education,<sup>65</sup> which is a far cry from the State's obligation under relevant international human rights instruments it has ratified. This 'practicable' clause changes the right to education declared in the constitution into merely an aspiration or declaratory statement. Whereas, Nigeria has an obligation under article 14 of the ICESCR, which requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation within a reasonable number of years. Likewise, Committee on CRC require State parties to develop a national plan of action to promote and monitor realisation of the aims of education listed in Article 29 (1) of the CRC.<sup>66</sup> In spite of these obligations, Nigeria has neither drafted nor implemented a plan of action for free and compulsory primary education as is required.<sup>67</sup> The power of the courts in enforcing the right to education is also removed by the constitution.<sup>68</sup>

Constitutional provisions concerning socio-economic and environmental rights, such as right to education, health and adequate standard of living are consigned to Chapter II of the constitution entitled "Fundamental Objectives and Directive Principles of State Policy",<sup>69</sup> which are non-justiciable.<sup>70</sup> Issues or

<sup>64</sup> Duncan Wilson In & Angela Melchiorre, *Analysing education budgets through the lens of human rights: a two-step process*, RTE Framework for budget analysis, <http://r2e.gn.apc.org/sites/r2e.gn.apc.org/files/RTE%20framework%20for%20budget%20analysis.pdf> accessed on 14 July 2014.

<sup>65</sup> Section 18(3), 1999 Constitution of the Federal Republic of Nigeria.

<sup>66</sup> CRC *General Comment No1 Aims of Education* para 23.

<sup>67</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding observations: Nigeria)*.

<sup>68</sup> Section 6 (6) (c), 1999 Constitution of the Federal Republic of Nigeria.

<sup>69</sup> Section 18, 1999 Constitution of the Federal Republic of Nigeria.

<sup>70</sup> Section 6(6), 1999 Constitution of the Federal Republic of Nigeria.

questions as to whether any law is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II cannot be challenged in court.<sup>71</sup> The result is that there is the absence of an effective enforcement procedure for these rights, which constitutes a serious legal barrier against the enjoyment of the right to education in Nigeria. Furthermore, the Nigerian Constitution which is the 'grund norm' does not expressly provide for a right to education in its substantive sections. In essence, there is a lack of consistency on the right to education between the Nigerian constitution and the international human rights laws to which the country is bound through its ratification. Generally, under international human rights law, socio-economic rights in regard to basic needs such as education, health and shelter continue to be perceived as discretionary and distinct administrative initiatives that fall into the realm of social policy rather than enforceable law.

### ***Lack of Resources***

It is often argued that free education is unsustainable for most developing countries due to lack of adequate resources. Bray has argued in that regard that financing primary education fully by the state is unaffordable because government cannot afford to provide the necessary funding needed to deliver adequate education service.<sup>72</sup> He gave examples of countries like Nigeria, Ghana and Kenya that had made attempts to abolish school fees in the 1960s and 70s, but found these policies to be unsustainable.<sup>73</sup> Some African governments have argued that insufficient resources exist for realising economic, social and cultural rights and that realisation of these rights is aspirational and a complaints procedure to enforce them will force unrealistic choices on states. It is hereby submitted that no state that is seriously committed to education for its children will be thwarted in the realisation of this goal by an argument about lack of resources. Where a state party is lacking in financial resources, it is required to work out a detailed

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<sup>71</sup> Ibid.

<sup>72</sup> Bray, M. 'School fees- Philosophical and operational issues', In: M. Bray & K. Lillis (eds), *Community financing education; issues & Policy Implication in Less Developed countries*, (Oxford: Pergamon Press, 1988), 55-74 at 60.

<sup>73</sup> Ibid.

plan and the international community has a clear obligation to assist.<sup>74</sup>

Both ICESCR and CRC state that signatory governments are required to "undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."<sup>75</sup> Many governments cannot currently demonstrate that their efforts represent the maximum extent of their available human, economic and organisational resources. It is important to stress that human rights, as presently set forth in international instruments, represent minimum international standards. Resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of socio economic and cultural rights. Hence, human rights conventions encourage the prevalence of standards that are higher than those enshrined in the conventions. As a result the realisation of human rights is an ongoing challenge, in that attained goals must not merely be sustained but progressively made more ambitious. States must adopt a detailed plan of action for progressive realisation of securing free primary education in their jurisdiction within two years of becoming a state party to the ICESCR.<sup>76</sup> After the two years, minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.<sup>77</sup> In all cases, however, full realization of the rights depends on the availability of adequate financial and material resources. Nonetheless, as established by the Limburg Principles 2528,<sup>78</sup> and confirmed by the developing jurisprudence of the ICESCR Committee, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights including the right to education.<sup>79</sup> State should maneuver to better allocation of its resources for the implementation of

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<sup>74</sup> CESCR General Comment 11, para 9.

<sup>75</sup> Art 14 ICESCR & Art 4CRC.

<sup>76</sup> Article 14 ICESCR, State is obliged to work out and adopt a detailed plan of action within two years. A state cannot escape the obligation to adopt a plan of action.

<sup>77</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (1998) 20 *Human Rights Quarterly* pp. 691-704, para 9.

<sup>78</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), UN Doc E/CN.4/1987/17, Principle no 56.

<sup>79</sup> Maastricht Guidelines, note 77, para10.

education rights. As regards right to education, both the CRC (article 4) and the ICESCR (articles 2 and 13) require that States undertake all appropriate legislative, administrative and other measures to the maximum extent of available resources for the implementation of education rights. Documentation and monitoring violations of the minimum core obligations of the state should be carried out by the relevant actors, NGOs and international organisations. The obligation to ensure minimum content of the right to education of the child is an obligation of immediate nature.<sup>80</sup> The requirement to take measure within a reasonable time thus applies to measures that go beyond the minimum core content of the right to education.<sup>81</sup>

### *The State's Willingness or Political Commitment*

Political will and stronger national leadership are needed for the effective and successful implementation of right to free and compulsory primary education in Nigeria. As seen in the case of Kenya, following the presidential declaration providing free education, President Kibaki personally promoted the campaign for the right to education. At the policy level, a state commitment to realising every child's right to education is necessary and it is recommended that the state should demonstrate this through the establishment of a sustainable financial framework for achieving that. Policy commitments related to free primary education must be time-bound, action-oriented and include mid-term performance indicators. The Government needs to explore alternative and innovative ways of increasing the resources available to sustain the free and compulsory primary education programme. The Government should implement laws to protect children from culture and beliefs that are prejudicial to education. They should commit to preserving the dignity of children and engage the public to accept their responsibility to protect them.

### *Lack of Transparency and Corruption*

Realising the right to education in Nigeria has been hampered by the problems of corruption and lack of accountability. It was revealed that corruption is making the implementation of Universal

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<sup>80</sup> Coomans, Fons, Identifying Violations of the Right to Education, [http://www.right-to-education.org/sites/right-to-education.org/files/resource/attachments/Coomans\\_Identifying\\_Violations\\_Right\\_to\\_Education\\_2007.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource/attachments/Coomans_Identifying_Violations_Right_to_Education_2007.pdf)

<sup>81</sup> Ibid.



Basic Education (UBE) untenable to a large extent.<sup>82</sup> In 2006, an NGO, Socio-Economic Rights and Accountability Project (SERAP) received information from whistle-blowers alleging massive corruption by Universal Basic Education Commission (UBEC). SERAP undertook initial investigations in 2006, and submitted a petition to Nigeria's Independent Corrupt Practices Commission (ICPC) in January 2007 to undertake a formal investigation.<sup>83</sup> The ICPC investigation concluded in October 2007 that ₦3.3 billion (US\$21 million) had been lost in 2005 and 2006 to the illegal and unauthorised utilization of funds. SERAP estimated that, as a direct consequence, over five million Nigerian children lack access to primary education.<sup>84</sup> ICPC also discovered that most of the projects carried out by UBEC and various state universal basic education boards violated due process rules, while the jobs done were substandard. Most classroom blocks built under the scheme were already in bad shape, with either collapsed ceilings or poor flooring. A general appraisal showed little or no value for money paid for most of the contracts. The ICPC recommended review of the processes and procedures of the UBEC.<sup>85</sup>

The findings of the ICPC report gave SERAP the impetus to file a right to education case before the Economic Community of West African States (ECOWAS) court in Abuja, arguing that the corruption in the UBEC amounted to a denial of the right to free, high-quality and compulsory education for Nigerian children as provided for by Article 17 of the ACHPR. The Community Court of Justice (CCJ) of the Economic Community of West African States (ECOWAS) noted that there was *prima facie* evidence of embezzlement of funds on the basis of the reports of the ICPC. It stated that, while steps should be taken to recover funds and/or prosecute the suspects, the Nigerian government should provide

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<sup>82</sup> Samer Al-Samarrai, Funding fix is good news for Nigerian children, posted on World Education Blog on 5 May 2010 <http://efareport.wordpress.com/2010/05/05/funding-fix-is-good-news-for-Nigerian-children> accessed on 24 January 2013.

<sup>83</sup> The Nation, 'Government officials divert N3b UBE funds in 20 states', 5 March 2008, available at [http://www.thenationonlineng.net/archive2/tblnews\\_Detail.php?id=46398/](http://www.thenationonlineng.net/archive2/tblnews_Detail.php?id=46398/) [accessed 6 January 2013].

<sup>84</sup> Ibid.

<sup>85</sup> Adetokunbo Mumuni & Gareth Sweeney, 'Public interest litigation for the right to education: The SERAP v. Nigeria case', in: *Global Corruption Report: Education Transparency International, 2013* p. 307.

the funds necessary to cover the shortfall in order to avoid denying any of its people the right to education. The court also asked the government to ensure that the right to education was not undermined by corruption.<sup>86</sup> Sadly the court's judgment is yet to be enforced. Despite public outrage, corruption persists in Nigeria because public officials have no fear of being held accountable for their actions.<sup>87</sup> As a result of unchecked magnitude of corruption in the country, international donors exercise caution in giving aids towards educational development to the country directly.

### Conclusion

The rights within education underline the intrinsic link of the rights-based approach to just and equitable socio-economic development. The rights-based approach involves a variety of administrative procedures and institutions to ensure that human rights are implemented. This is why RBA requires states to address urgently the problems affecting the implementation and enforcement of the right to education. Respect, protection and fulfilment of the right to education require a strong commitment on the part of the government. In Nigeria, most individuals are ignorant of the law and so are not aware of their basic right to free education, much more the fundamental principles of the right to education. There is need to let the populace know how to assert and defend the right to education.

The right to education must be perceived as a necessary doorway through which children can access other cardinal rights, as it is the foundation stone of a rights-based means of their achieving their rightful places in the world both as children and as adults. It is not only right to education but also rights in education. Taking a human rights-based approach requires an important commitment by the government towards meeting obligations which are lacking enforcement and continue to be violated in the implementation of the right to education, so that, for example, the poorest of the poor and those who suffer various discriminations, are reached.

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<sup>86</sup> SERAP V Federal Government of Nigeria & UBEC, ECW/CCJ/APP/0808, available at; <http://www.escri-net.org/docs/i/1143047>

<sup>87</sup> Hope, K.R., Sr., *From Crisis to Renewal: Development Policy and Management in Africa*, (Leiden: Brill 2002), p. 104.