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# THE PROLIFERATION OF LOW-COST PRIVATE SCHOOLS: A NEW CHALLENGE TO THE ENJOYMENT OF THE RIGHT TO FREE EDUCATION IN NIGERIA

Osifunke Ekundayo\*

## ABSTRACT

*During the past decades, low cost private school phenomenon has gained popularity and increased visibility in Nigeria. These private schools are competing with free public schools run by the government. They are profit oriented enterprises, and claiming to be making quality education available to millions of children who would have been out of school as a result of costs. The resulting effect of this influx is, private education flourishing as an attractive business with minimal control and supervision by the government. This has negative impact as it undermines the right to education. Capitalising on the inability of governments to cope with rising demands on public learning, private education providers are mushrooming, which is an indictment on the government for its failure to meet its obligation to provide universal free and quality primary education for all its children. It is this unfortunate reality that this paper seeks to bring to light. It then concludes that the low-cost schools are no more than profiteering ventures disguised as philanthropy. Their proliferation is an assault on the very essence of public education and education as a human right.*

## INTRODUCTION

Presently, the global setting when it comes to education is rapidly changing. One of the most notable of these changes is the recent trend towards privatisation in education in many countries. Private education appears to be the new horizon that profit making investors are rushing into. This trend is proving to have significant implications for the enjoyment of the human right to education, both in terms of quality and accessibility to education. While the State is supposed to

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\* Lecturer, Department of Private and Property Law, Faculty of Law, University of Ibadan, Email: [segunfunmi@hotmail.com](mailto:segunfunmi@hotmail.com)



provide educational services as the primary education provider, private education is seen as a parallel system offering an alternative choice for parents and students. While the significant role private educational institutions play must be acknowledged, the emphasis remains on the need to safeguard education as a public good, in keeping with State's obligations on the right to education as laid down by international human rights conventions. The State needs to discharge its responsibility as the guarantor of education as a fundamental human entitlement and as a public cause.

The right to education guarantees that everyone should enjoy a quality education, free from discrimination and exclusion. The Committee on Economic Social and Cultural Rights (CESCR) describes education as:

*'...the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.'*<sup>1</sup> Similarly, UNESCO has recognised the right as *'... a powerful tool by which economically and socially marginalised adults and children can lift themselves out of poverty and participate fully as citizens.'*<sup>2</sup>

While important progress has been made in ensuring that the right to education is enjoyed by all, today millions of children still remain deprived of educational opportunities.

As Kishore Singh, the UN Special Rapporteur on the Right to Education highlighted in his report on the Millennium Development Goals Post-2015 Framework-

*'[...] in many parts of the world inequalities in opportunities for education will be exacerbated by the growth of unregulated private*

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<sup>1</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 2017].

<sup>2</sup> <http://globalinitiative-escr.org/advocacy/privatisation-in-education-research-initiative/> [accessed 26 June 2017]

*providers of education, with wealth or economic status becoming the most important criterion to access a quality education.*<sup>3</sup>

Low cost private schools phenomenon has gained momentum and increased visibility in recent years in Sub-Saharan Africa and Asia. Low cost private schools are schools typically used by the poorest fee-paying population in an area. It should be noted though that those poorer than these groups will only be able to send their children to government schools or not educate them at all. There is the concern that influx of private institutions can lead to greater discrimination and will hinder the attainment of education for all by excluding the poor, thereby closing off their principal pathway out of poverty. This marginalised group will fail to enjoy the bulk of the positive impacts of free education. The influx breeds exclusion as those who are in these disadvantaged groups are unable to have access to private schools, thus aggravating disparities in access to education and marginalising the poor further.

Like all human rights, the right to education imposes three levels of obligation on States: The obligation to respect, protect and fulfil each of the “essential features” (availability, accessibility, acceptability, adaptability) of the right to education. The obligation to respect requires States to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States to take necessary measures to remove the barriers to education posed by third parties such as individuals or communities that are interfering with the enjoyment of the right to education. In turn, the obligation to fulfil incorporates an obligation to ensure that education is available for all children and that positive measures are taken to enable children to benefit from it. States parties to relevant human right treaties on the right to education are required to establish an accessible educational system, and refrain from actions which may prevent or limit its accessibility.<sup>4</sup>

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<sup>3</sup>Report of the Special Rapporteur on the right to education Kishore Singh: *Protecting the right to education against commercialization*, Human Rights Council 29<sup>th</sup> Session Agenda item 3 available at: [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions29/Documents/A\\_HRC\\_29\\_30\\_AEV.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions29/Documents/A_HRC_29_30_AEV.doc) [accessed 13 January 2017]

<sup>4</sup> CESCR *Gen Comment No 13*, paras 46 & 47.



It must be noted that States are not required to make all primary education free,<sup>5</sup> but shall, nevertheless, ensure that free primary education is available.<sup>6</sup> States are the providers of public primary education, but under international law, private actors also have the liberty to establish and direct educational institutions.<sup>7</sup> This means that individuals, organisations, religious institutions, companies or other bodies are free to establish schools or other educational institutions and administer and govern them according to their wishes with certain limitations. If private entities fail to comply with the State's minimum standards, then the State must intervene.<sup>8</sup> While the State is supposed to provide educational services as the primary education provider, private education is seen as a parallel system offering an alternative choice for parents and students. The fear is that with the influx of private institutions, government will relax in the upkeep of the public schools. Sadly, education is increasingly being opened up to profit-making and trade.

International human rights law defines education as human right; international trade law defines it as a service.<sup>9</sup> Subjecting education to free-market rules relieves government of the necessity to allocate to it significant parts of their budget; but the consequence is that only those who could afford to pay tuition fees could enrol.<sup>10</sup>

Rene Maheu has rightly declared that;

*'Education is no longer the privilege of an elite or the concomitant of a particular age: to an increasing extent, it is reaching out to embrace the whole of society...'*<sup>11</sup>

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<sup>5</sup> Art 29 (2) CRC recognises the liberty of individuals and bodies to establish educational institutions.

<sup>6</sup> Newell, P & Hodgkin, R., *Implementation Handbook for the Convention on the Rights of the Child*, 3<sup>rd</sup> ed., (Paris: UNICEF, 2008) p. 421.

<sup>7</sup> Article 13 (4) ICESCR & Article 11(7) ACRWC.

<sup>8</sup> *Ibid* (Article 13(4) ICESCR

<sup>9</sup> Tomasevski, K. 'Globalising what: education as a human right or as a traded service?' Vol 12, No1 *Indiana Journal of Global Legal Studies*, pp1-78.

<sup>10</sup> *Ibid* at p.13.

<sup>11</sup> Maheu, Rene, (Director-General of UNESCO), '1970 International Education Year, Message' (1970 1971) *Annual Review of United Nations Affairs* pp.179-182.

Education is not a privilege of the rich and well-to-do; it is an inalienable right of every child. Provision of basic education free of costs is a core obligation of States.<sup>12</sup> Children of parents who cannot afford the costs and those without parent are victimised by being denied schooling. Moreover, many children have to work to pay for the costs of their own primary schooling. Every state in the world has signed up to at least one international treaty obliging it to making primary education free and compulsory. It is binding that the State provides education for free. According to UNESCO, millions of children are denied their human right to education, for the simple reason that their parents cannot afford to keep them in school.<sup>13</sup>

In developing countries, government public schools have not yet been able to ensure quality education. This has resulted in the rise of private schools, leaving public schools comprising of children of the lower income segment.<sup>14</sup> The view is that if parent sends a child to public (government free primary) schools that the parent is wasting the child's destiny. The poor quality of the public education system stemming from low government funding on education, especially at primary school level is increasingly forcing parent to resort to private schools in spite of their very limited income.<sup>15</sup> Talking about quality, from research conducted by Tosin Sulaiman<sup>16</sup> on low-cost private schools in Nigeria and Kenya in 2014, she discovered that low cost private schools typically have bare bones infrastructure with low cost construction in make shift buildings. Many do not have benches and/or desks in classrooms and suffer from frequent electricity outages. Despite all these, parents unfortunately still see low cost schools as better alternative to government public schools. Parents' desire is to get their children good education in order to give them a fighting chance at escaping

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<sup>12</sup>K.Singh 'Education must be protected from the forces of privatisation' (A/69/402) New York/ Geneva (27 October 2014) - Statement of the UN Special Rapporteur on the Right to Education, available in <http://www.ohchr.org/EN/issues/Education/SRE/Pages/AnnualReports.aspx> accessed 03 May 2015.

<sup>13</sup>UNESCO, *Education for All Global Monitoring Report 2010*. UNESCO and Oxford University Press..

<sup>14</sup>Tomasevski, K. *Education Denied: Costs and Remedies* Zed Books, London 2003 p.83

<sup>15</sup>*ibid* p.87

<sup>16</sup> Sulaiman, Tosin, *Dollar a day schools: Why private education is thriving in African slums*. A three part series on private education in Africa, published the Financial Times' beyondbrics blog in December 2014.



poverty. It is argued that the poor have exhibited a high willingness to pay for these services. This may be correct, but nonetheless there is a distinction between willingness and ability to pay. Eventually most of these children from poor background drop out of schooling and are not able to complete their education because it is unaffordable. There are the neediest families for whom the cost of schooling is prohibitive.

World Bank has stepped up its mission to promote the benefits of private schooling.<sup>17</sup> It is known that even the African Development Bank (ADB), the UN Economic Commission for Africa (UNECA), the African Union (AU) and the UN Development Programme are all promoting increased private sector involvement in education too.<sup>18</sup> As a result, this call has been reverberated by some African countries' governments thus culminating to mushrooming of private schools. The crux is that government should do more to strengthen public primary education as this is the only option for the poorest of the poor, who are in the majority in Sub-Saharan Africa including Nigeria.

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<sup>17</sup> Bretton Woods Project, <http://www.brettonwoodsproject.org/2014/09/education-public-good/> accessed 27<sup>th</sup> September 2017. Shanta Devarajan, chief economist of the World Bank's Middle East and North Africa Region sparked controversy by stating that 'education is a private good'. Education international in responding, accused Devarajan of having 'a poor understanding of economics.'

<sup>18</sup> Tomasevski, K. 'Not Education for All, Only Those Who Can Pay: The World Bank's Model for Financing Primary Education', 2005 (1) *Law, Social Justice & Global Development*, (An Electronic Law Journal) p.3 available [http://www.go.warwick.ac.uk/elj/lgd/2005\\_1/tomasevski/](http://www.go.warwick.ac.uk/elj/lgd/2005_1/tomasevski/) [accessed 15 April 2016]. See also Tomasevski, K, *The State of the Right to Education Worldwide Free or Fee: 2006 Global Report*, p. xix, available at [http://www.katarinatomasevski.com/images/Global\\_Report.pdf/](http://www.katarinatomasevski.com/images/Global_Report.pdf/) [accessed 17 April 2016].

## **EDUCATION SECTOR DEVELOPMENT IN NIGERIA - PUBLIC AND PRIVATE EDUCATION**

The number of children who are out- of school in Nigeria has increased from 8 million in 2007 to 10.5 million in 2017- the highest figure in the world.<sup>19</sup> Sixty-one percent of children age 6-11 (64 percent of males and 58 percent of females) attend primary school.<sup>20</sup> Number of students enrolled in public primary schools keeps declining. In 2006, 22,861,884 pupils were enrolled in all the primary schools. In 2010, 20,663,805 were enrolled.<sup>21</sup> The most common factors for such a large number of out- of- school children in the country are; poverty (resulting in the inability of the parents to meet both the direct and indirect educational costs of their children), child labour as there are needs at home including the necessity to contribute to the family's basic survival, and distance to school. The United Nations Development Programme report states that those who are less likely to attend school are usually from "poorer households".<sup>22</sup> The abysmal state of public primary education is one of several urgent developmental priorities that require the Nigerian Government's attention.

In 1974, the Federal Government of Nigeria announced that it would be responsible for all primary education as from 1976, that attendance in primary schools would be compulsory by 1979.<sup>23</sup> Consequently, the Federal Military Government launched a nationwide program of universal primary education in 1976. Formal enrolment in primary schools leapt from 6.2 million students in

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<sup>19</sup>UNESCO Institute for Statistics (UIS), available at: [http://data.uis.unesco.org/?ReportId=184&IF\\_Language=eng](http://data.uis.unesco.org/?ReportId=184&IF_Language=eng) [accessed 17 June 2017]. See also <http://www.soschildrensvillages.org.uk/news/archive/2012/07/too-many-children-out-of-school-in-nigeria-and-across-the-world>, [accessed 14 August 2017].see also <http://www.unicef.org>Nigeria>education/> [accessed 14 August 2017].

<sup>20</sup> National Population Commission (Nigeria) and Research Triangle Institute (RTI) International, *Nigeria Demographic and Health Survey (DHS) EdData Profile 1990, 2003, and 2008: Education Data for Decision Making*, (Washington DC: National Population Commission and RTI International 2011) pp. xx and 55.

<sup>21</sup> Federal Republic of Nigeria, *Fifth Periodic Report 2011-2014 on the implementation of the African Charter on Human and Peoples' Rights* available at [www.staterreport5\\_Nigeria\\_2013\\_eng1](http://www.staterreport5_Nigeria_2013_eng1) [accessed 14 July 2016]

<sup>22</sup> UNDP *The Millennium Development Goals Report 2014: 2* available at: <http://www.un.org/millenniumgoals/pdf/mdg2014> [accessed 17 June 2016]

<sup>23</sup> *Ibid*



1975 to 8.1 million students in 1976 and continued to grow rapidly until 14.7 million students were formally enrolled in 1983.<sup>24</sup> There was a surge in enrolment because it was free. This evidenced economic factor as a significant obstacle to education.

The mid-1980 can be seen in Nigeria as the beginning of lost years due to debt and structural adjustments that had brought earlier progress in education to retrogression. Structural Adjustment Programme (SAP) was introduced in Nigeria in 1986, as prescribed by International Monetary Fund (IMF) and the World Bank to stimulate recovery of the ailing Nigerian economy as a pre-condition for obtaining loan facilities because of the worsening economic conditions.<sup>25</sup> As a result, there was a decline in enrolments and in the quality of education. This was, in part, attributed to the effects of financial austerity measures imposed along with the SAP by IMF and the World Bank.<sup>26</sup> The reduction in public spending on education, which hiked the costs of education was a major source of the effect of stabilisation and adjustment on the demand for education.<sup>27</sup> This is regrettable because, while the State is held primarily responsible for ensuring free education, international financial institutions such as the World Bank or the IMF can constrain the ability and willingness of the government to guarantee this human right.<sup>28</sup> The governments of most countries in Sub-Saharan Africa frequently claim that they are unable, not unwilling to make education free for all children; that they are restrained by the structural adjustment programmes, fiscal austerity and economic recession.<sup>29</sup> In the 1980s and 90s, Nigeria and other developing countries made significant cuts to their public

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<sup>24</sup> Ayo, Dele et al, 'The Experience in Nigeria with decentralisation approaches to local delivery of primary education and primary health services', *Decentralisation: Finance & Management Project Report* (Burlington: VT: Associates in Rural Development, 1992), pp. 30-31.

<sup>25</sup> Moja, Teboho, *Nigeria Education Sector Analysis: An Analytical Synthesis of Performance and Main Issues* (Washington D.C.: World Bank 2000), p 6.

<sup>26</sup> Reimers, F., & Tiburcio, L, *50 Years of Education; Educational Strategies for small Island States*, (Paris: UNESCO Publication, 1993), p.186.

<sup>27</sup> World Bank, *Structural Adjustment and Living Conditions in Developing Countries*, (Washington DC: Population and Human Resources Department, Welfare and Resources Department Division, 1989).

<sup>28</sup> Tomasevski, 'Globalizing What: Education as a Human Right or as a Traded Service', (2005), 12 *Indiana Journal of Global Legal Studies*, 1-79 at p. 6

<sup>29</sup> Mustapha, A.R., 'Structural Adjustment and Agrarian Change in Nigeria' in: Olukoshi, A.O. (ed.) *The Politics of Structural Adjustment in Nigeria*, (London: Currey 1993) 115.

education and health spending. In addition, international financial institutions, including the World Bank promoted user fees and increased private sector service delivery.<sup>30</sup>

In 1999, the Nigerian government introduced Universal Basic Education (UBE), widely heralded as a huge success in boosting enrolment figures and ensuring access to basic education for children in Nigeria. The Universal Basic Education (UBE) came as a replacement for 1976 Universal Primary Education (UPE) scheme.<sup>31</sup> The launch of UBE in 1999 was aimed at providing free universal basic education for all, to enable all citizens to acquire appropriate levels of literacy, numeracy, communicative, manipulative and life skills. The primary target of the UBE educational policy was to ensure that every Nigerian child acquire a minimum of 9 years basic education.<sup>32</sup> The enrolment explosions triggered by announcements of free education at every implementation of Universal Primary Education (UPE) initiative have revealed the formidable barrier fees, charges and other financial contributions are to children from poor households, who are in the vast majority in Nigeria. However, the 'invasion' of private schools since Nigeria liberalised the education sector has threatened to undo any progress made by UBE in the past two decades.

Low-cost private schools have seized upon the inadequacies of the public education system in recent years and targeted especially low-income families with fallacious promises of better teaching and increased learning outcomes to persuade parents to send their children to these private schools, many of whom struggle to make ends meet in order to do so. A person's financial status profoundly affects his or her access to, and quality of education. In Nigeria, a large proportion of children from wealthy families attend private schools to

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<sup>30</sup> Action Aid International, *Contradicting Commitments How the Achievement of Education for All is Being Undermined by the International Monetary Fund*, (2005) p.16 available at; [http://www.actionaid.org/sites/files/actionaid/aaconf\\_contradictions\\_final2.pdf](http://www.actionaid.org/sites/files/actionaid/aaconf_contradictions_final2.pdf) accessed 13 March 2017

<sup>31</sup>In November 1999, the Federal Government under the leadership of President Olusegun Obasanjo launched the Universal Basic Education (UBE) Scheme for the nation. This was re-launching of a similar programme to UPE

<sup>32</sup>Etuk, G.R., Ering, S.O. and U.E. Ajake,, 'Nigeria's Universal Basic Education (U.B.E.) Policy: A Sociological Analysis', (2012) 7 ( 2) July *American International Journal of Contemporary Research*, pp.179 – 183 at 180.



secure access to quality education, which most poor families cannot afford. Poverty-based exclusion from qualitative education highlights the impossibility of alleviating poverty through education.<sup>33</sup> Parents who cannot pay fees may be forced to keep their children out of schools even if education is compulsory. If education is accessible (available and free), children from disadvantaged or vulnerable categories will be able to benefit equally from the right to education.

In public schools, educational infrastructure and facilities worsened for lack of funding.<sup>34</sup> Poor supervision and ineffective management of schools also led to further deterioration in the quality of education.<sup>35</sup> The classrooms were overcrowded and in some instances schools operated with teacher-pupil ratios of 1:76, whereas, the National Policy on Education prescribed that the teacher-pupil ratio should be 1:40. The quality of public education suffered in consequence, with the justification that public funding was scarce. The morale amongst teachers was low due to the poor basic conditions of service such as the work environment, low and late salaries.<sup>36</sup> There was a significant decrease in completion rate as students were forced to drop out. The importance attached to quality education is expressed in the Recommendation Concerning Status of Teachers (1966) which provides that '*as an educational objective, no State should be satisfied with mere quantity, but should seek also to improve quality*'.<sup>37</sup> Where the public education system is functioning in line with internationally expected standards, as it should be, the private schools would struggle to entice families to opt for such fee-paying schools over a free alternative of the same quality. Unfortunately this is by no means the case in Nigeria presently.<sup>38</sup>

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<sup>33</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>34</sup> World Bank 2004 *Books, building and learning outcomes: An impact evaluation of World Bank support to basic education in Ghana*. Washington DC: Operations Evaluation Department (OED), World Bank.

<sup>35</sup> Kadingdj, Stanislaus 'Policy initiatives for change and innovation in basic education programmes in Ghana' (2004) Vol 4: 2 *Educate* p.6.

<sup>36</sup> Federal Ministry of Education, *Education Sector Report 2003*, p.34.

<sup>37</sup> Article 10 (g) *Recommendation concerning the Status of Teachers* (adopted by the Special Intergovernmental Conference on the Status of Teachers, Paris, 5 October 1966 available at [unesco.org](http://unesco.org)

<sup>38</sup> Moja, Teboho, *Nigeria Education Sector Analysis: An Analytical Synthesis of Performance and Main Issues* (Abuja: World Bank Publication 2000).

Private schools often charge fees that are out of reach for most Nigerians and even low-fee private schools ask for money for school and examination materials and school uniforms as a way of making up for the low tuition paid by students. All these fees prevent poorest families from enrolling and even those who enroll are doing so with significant sacrifice at the expense of other needs such as health and sufficient nutrition. In most cases, such children end up dropping out of school due to inability by the parents to cope with the cost.

In Nigeria, low cost private primary schools also called budget private primary schools, have emerged lately. They charge tuition fees equivalent to one dollar (US\$1) -a day or less. Their proprietors are claiming that they can make available primary education which is cheap and affordable. There are doubts over the quality of these schools as most are unapproved by the government, and given the low fees, they cannot afford to have qualified teachers; so, there are doubts that they provide an objectively good quality education. These schools are run by lone entrepreneurs. These schools could be in tin shack; most are unapproved.<sup>39</sup> In addition, most privately run schools are not properly regulated or monitored; several are not registered, with several untrained teachers, substandard infrastructure, and teaching with curricula which are below standard.<sup>40</sup> Moreover, most have not been evaluated with regulatory supervision and monitoring framework. This is at variance with the country's obligation under the international human rights laws to provide free and quality primary education for all children. Kishore Singh, the UN Special Rapporteur on the Right to Education pointed out that such schools should not be allowed, in order to safeguard the noble cause of free primary education.<sup>41</sup> It should be noted that these schools, which are claimed to be affordable to the poor, have not decreased the number of out-of-school children in Nigeria. An increased budget to improve quality of public primary schools will improve the situation of public primary schools in the country.

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<sup>39</sup>Sulaiman, Tosin, note 14

<sup>40</sup>Tooley, J., Dixon, P., and Olaniyan, O. 'Private and public schooling on low-income areas of Lagos State Nigeria: A census and comparative survey, *International Journal of Educational Research* 43 (2005), 125-146 at 130.

<sup>41</sup>Singh, Kishore, *Report of the Special Rapporteur on the right to education 2013*, A/HRC/23/35, 10 May 2013. Available at [www.ohchr.org/Documents/HRBodies/HRCouncil](http://www.ohchr.org/Documents/HRBodies/HRCouncil), [accessed 14 October 2014].



Contrary to assertions that the introduction of private actors in the education sector will enable improvement in the quality of education, studies carried out have revealed that private institutions have also been found to be contributing to the poor quality of education in some countries.<sup>42</sup> So, the argument that school fees may be necessary to ensure the quality of primary education is a fallacy. In fact, imposing fees may lead to the further exclusion of socially and economically marginalised groups; in particular, children from poor families who are unable to pay the fees and remain deprived of education. These costs perpetuate the vicious cycle of poverty, widening the gap between the haves and the have-nots. This will result in increased disparities in educational standards between rich and poor. All children should have free access to quality education within an equitable system.

Kishore Singh UN Special Rapporteur on the right to education says:

*'For-profit education should not be allowed in order to safeguard the noble cause of free primary education as this is the only option for the poorest of the poor'.<sup>43</sup>*

Having to pay for education blocks the pathway out of poverty for those who need it the most. Unfortunately, those who need this education the most are often denied access to it. Tomasevski, too, pointed out the responsibility of the State to actively provide primary education that, if left to the free market, would be at a price, and thus would further exclude the poor.<sup>44</sup> In sum, the admission policy in all private schools is based on the ability to pay, and on the socio-economic background of parents.

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<sup>42</sup> Tooley and others *supra*, note 40. See also; Initiative for Social and Economic Rights, 'Privatisation, Discrimination and the Right to Education in Uganda' *Alternative Report submitted by the Initiative for Social and Economic Rights and the Global Initiative for Social and Economic Rights* 2015 see [http://www.iser-uganda.org/images/stories/Downloads/ISER\\_GIESCR\\_report\\_to\\_UNCESCR.pdf](http://www.iser-uganda.org/images/stories/Downloads/ISER_GIESCR_report_to_UNCESCR.pdf) accessed October 3 2015. see also <https://amp.theguardian.com/global-development/2017/may/...schools-africa-bridge-international-academies-kenya-lawsuit> see also <http://www.theguardian.com/global-development/2016/nov...ers-closure-low-cost-bridge-international-academies-uganda>

<sup>43</sup> Report of the Special Rapporteur on the Right to Education, Kishore Singh, 10 June 2015 accessed October 3 2016 [http://www.ohcr.org/EN/HRBodies/HRC/RegularSessions29Documents/A\\_HRC\\_29\\_30\\_AEV.doc](http://www.ohcr.org/EN/HRBodies/HRC/RegularSessions29Documents/A_HRC_29_30_AEV.doc)

<sup>44</sup> <http://www.katarinatomasevski.com/> accessed 13<sup>th</sup> March 2016.

## LEGAL FRAMEWORK ON RIGHT TO QUALITY FREE EDUCATION

### International legal guarantees

The right to free education has a solid basis in international laws on human rights. Article 26 of the Universal Declaration of Human Rights (UDHR)<sup>45</sup> clearly provides that every child is entitled to receive free and compulsory primary education in all States. Later, the right to education was rearticulated at the universal level in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>46</sup> and Article 28 of the Convention on the Rights of the Child (CRC),<sup>47</sup> which both guarantee the right of everyone to compulsory and free primary education.<sup>48</sup>

At the regional level, the right to education has been recognised in several binding instruments. In Africa, the right to education is guaranteed in the African Charter on Human and Peoples' Rights (ACHPR). While the Charter is simply providing that *'every individual shall have the right to education'*,<sup>49</sup> the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>50</sup> reiterates the requirement in CRC to provide free and compulsory primary education.

The Committee on Economic Social and Cultural Rights (CESCR) endorses the position taken by the United Nations Children's Fund (UNICEF) and stated that *'primary education is the most important component of basic education'*.<sup>51</sup> Convention against Discrimination in Education<sup>52</sup>, 1960, reiterated in Article 4 the indispensability of compulsory and free education at the primary level, and insisted on the importance of the obligation for all to attend schools. It should

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<sup>45</sup> Universal Declaration of Human Rights. G.A. Res 217, UNGAOR 3<sup>rd</sup> Sess.Supp. No 127 at 71 UN Doc A/80 (1948).

<sup>46</sup> ICESCR G.A. Res 2200A (XXI), 21U.N.GAOR Supp.(No 16) at 49. Un Doc A/6316 (1966) 993 U.N.T.S.3, entered into force Jan 3 1976.

<sup>47</sup> CRC G.A. Res. 44/25, annex, 44.U.N.GAOR Supp (No49) at 167, UN Doc.A/44/49 (1989) entered into force Sep 2 1990.

<sup>48</sup> See also CESCR Gen Comment No 13: The Right to Education, para. 51, States Parties are obliged to prioritise the provision of free and compulsory primary education.

<sup>49</sup> Article 17 (1) ACHPR

<sup>50</sup> Article 11 ACRWC

<sup>51</sup> CESCR, *General Comment No. 13*, at para 9.

<sup>52</sup> Convention against Discrimination in Education 429 U.N.T.S.93 entered into force Mya 22 1962.



be noted that Article 13(3) of the ICESCR protects the liberty of parents and legal guardians to choose their children's schools, other than those established by the public authorities. This means that, it is assumed that there is available a system of public schools already, which private schools should provide an alternative to; but there is the proviso that the schools should conform to the minimum educational standards as may be laid down or approved by the State.<sup>53</sup> Similarly, the UNESCO Convention against Discrimination in Education provides that the establishment or maintenance of private educational institutions does not constitute discrimination when it is to provide educational facilities in addition to those provided by the public authorities.<sup>54</sup> Also, at the regional level, the African Charter on Right and Welfare of the Child (ACRWC) requires States 'to respect the liberty of parents and guardians to establish and choose for their children schools, other than those established by the public authorities.'<sup>55</sup> All these various instruments clearly emphasise the supremacy of public schools.

In sum, the State is both guarantor and regulator of education; the provision of primary education which is free is an obligation which must be imperative on the State. This was also affirmed in the decision of the Supreme Court of the United States of America, in the historic judgment – *Brown v. Board of Education*<sup>56</sup> where it was held that; 'providing public schools ranks at the apex of the function of a State' and 'education is perhaps the most important function of State and local governments'. Parental support for these private schools appears to stem from the government's failure to fulfil its international obligations to provide a quality public education. The "mushrooming" of private schools in Nigeria, far from demonstrating an increase in choice for parents as to where to send their children to school, on the contrary, is a condemnation of the government's letdown to provide universal and free basic education for its children.

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<sup>53</sup> CESCR, *General Comment No. 13*, para.29.

<sup>54</sup> Art 2 UNESCO Convention against Discrimination in Education, 1960

<sup>55</sup> Art 11 (4) ACRWC

<sup>56</sup> *Brown v. Board of Education.*, 347 US 483 (1954),

## RIGHT TO EDUCATION AND THE PRINCIPLE OF NON-DISCRIMINATION

According to the CESCR, the State has an obligation to ensure that privatised education 'does not lead to extreme disparities of educational opportunity for some groups in society'.<sup>57</sup> Similarly, the Committee on the Rights of the Child has recently noted that States must ensure that the provision of essential services by private actors 'does not threaten children's access to services on the basis of discriminatory criteria'.<sup>58</sup> States Parties' obligations with respect to non-discrimination are immediate as opposed to being subject to progressive realisation and require States to pay particular attention to vulnerable or marginalized groups. Rights-based education is non-discriminatory; it includes all children regardless of geography, ethnicity, economic status or disability. UNESCO Convention recognises right of parents to choose their children's institutions other than those maintained by public authorities<sup>59</sup>. However, the Convention stipulates that such institutions must conform to minimum laid down standards and must not be aimed at securing exclusion of a group.<sup>60</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>61</sup> Van Bueren points out 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>62</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>63</sup>

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<sup>57</sup>CESCR Gen Comment No 13, para.30

<sup>58</sup> CRC Gen Comment No 16, para.34.

<sup>59</sup>Article 2(b) UNESCO Convention against Discrimination in Education 1960

<sup>60</sup>Article 7 UNESCO Convention against Discrimination in Education 1960

<sup>61</sup> CESCR *General Comment No 13*, note 22, para 3.

<sup>62</sup>Van Bueren, G, *The International Law on the Right of the Child*, (Dordrecht:Martinus Nijhoff Publishers 1994) pp245-248.

<sup>63</sup> Verheyde, M., *Commentary on the UN Convention on the Right to Education Article 28, The Right to Education*, (Leiden: Martinus Nijhoff Publishers, 2006), p.40.



Nigeria's domestic laws also guarantee the right to education and crosscutting rights such as equality and non-discrimination. The Constitution of the Federal Republic of Nigeria further affirms that the country's foreign policy shall be based on the principles of respect for international law and treaty obligations.<sup>64</sup> Therefore, violations of the rights guaranteed under regional and international instruments to which Nigeria is a party are violations of Nigeria's own Constitution. Nigerian constitution guarantees the right for all persons to be equal before and under the law in all spheres of political, economic, social and religion and not be discriminated against on the ground of social or economic standing.<sup>65</sup>

The Courts do not prevent private individuals from providing education at all levels of education.<sup>66</sup> There has not been considerable body of jurisprudence on the protection and regulation of the rights of pupils in primary education. In the case, *Archbishop Anthony Okogie & others v. The Attorney General of Lagos State*<sup>67</sup> the courts were asked on the question of access to education. The court's decisions were primarily involved in protecting the interests and profits of the education providers, (the school proprietors), rather than claims of students or their parents. The court held that running of primary and secondary schools if undertaken by private organisations, groups or individuals could be an economic activity; so plaintiffs are allowed to carry on their chosen activities. It is correct that on the establishment of private schools, Article 29(2) of the CRC preserves the rights of individuals and groups to order their own education provision subject to the aims of Article 29(2) which provides thus;

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

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<sup>64</sup>S.19, 1999 Constitution of the Federal Republic of Nigeria, as amended.

<sup>65</sup>S.42 (1)&(2) 1999 Constitution of the Federal Republic of Nigeria amended

<sup>66</sup> *Adewole & Others v. Alhaji Jakande & Others* (1981) 1 NCLR 262 at 279; see also *Archbishop Okogie & Others v. Attorney General of Lagos State* (1981) 2 NCLR 350.

<sup>67</sup>*Archbishop Okogie & Ors v. A.G. Lagos State* (1981), 2 NCLR p.350.

From the decision of the court in *Okogie's case*, consequently the jurisprudence has broadened access to education available to those with means. It is inferred that a person's financial status profoundly affects his or her education, because it shows that the court will protect the access of children of the rich to private education, wherein lies the hope of children from poor families who are the majority in relying on the court to protect their right to free education? What Nigerian court achieved here is recognition of a right to economic activity extending the supply of education to those who can pay the price charged by the providers.

### CHILD'S RIGHTS ACT (CRA 2003)

To fulfil Nigeria's obligation under the CRC and ACRWC to domesticate these treaties, the state enacted the Child's Rights Act (CRA) 2003. Section 15 of the CRA provides for the right to free and compulsory primary education as follows;

*Every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government in Nigeria to provide such education [...] every parent or guardian shall ensure that his child or ward attend and completes his primary school education and junior secondary education.*<sup>68</sup>

This section stipulates that primary and junior secondary education should be provided free by the government to the children. However, the constitutional provision on education in section 18 of the Constitution<sup>69</sup> undermines Section 15 of the CRA in authority; therefore Section 15 of the CRA cannot be effectively implemented or enforced judicially. Section 18 of the Constitution of Nigeria makes the realisation of the right to education non-committing through the use of the expression, "as when practicable". This allows the government no specific time frame for the provision of free compulsory universal primary education as no definite time is given to achieve the objectives. This promise has still not yet been met. With such wording in the Constitution, there is a constitutional silence about the substantive commitment of the government in providing free, compulsory primary education to the children in the nearest future in Nigeria.

<sup>68</sup> S. 15 of the CRA.

<sup>69</sup> S.18 (3) Government shall strive to eradicate illiteracy; and to this end, government shall as when practicable provide- (a) Free, compulsory and universal primary education... (Emphasis mine).



The element 'shall as when practicable' is criticised for being too vague. This poses a challenge under international law, because the state can argue for a variety of time frames when this is brought up in international litigation as was reflected in the case of *SERAP v. Federal Republic of Nigeria*.<sup>70</sup> Therefore, the State needs to specify guidelines on what constitutes 'when practicable' or give specific deadline such as 1, 5, or 10 years' time.<sup>71</sup> Afterwards, government shall develop a plan to progressively realise the attainment of this right, failure of which will amount to a violation. This was noted by the CRC Committee in its 2010 Concluding Observation on Nigeria.<sup>72</sup> The CRC Committee has urged Nigeria, taking into account its General Comment No. 1 of 2001 on the aims of education, to ensure that the right to free and compulsory education is incorporated into the Constitution within the context of the constitutional review.<sup>73</sup>

Presently, the right to free and compulsory primary education is guaranteed only in the CRA and not protected in the Constitution of Nigeria. The Committee of the CRC also urged the government to ensure primary education is provided non-discriminatorily for all children and emphasised the abolishing of fees.<sup>74</sup> In sum, while private education should and must be allowed, it should not lead to the creation of extreme disparities or discrimination of any sort, or be a factor of segregation or division in societies in general and education in particular. Also, the State must retain the responsibility to offer free and quality public education for all children.

### DEMAND FOR QUALITY IN EDUCATIONAL INSTITUTIONS

Under international laws, private actors have the liberty to establish and direct educational institutions.<sup>75</sup> It is not an absolute right but carries certain restrictions. Whenever there is failure on the part of the private bodies to comply with the State's minimum standards, then the State would intervene. In Nigeria, the

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<sup>70</sup> *SERAP v. Federal Republic of Nigeria & UBEC*, Judgement, ECW/CCJ/APP/

<sup>71</sup> Article 38, 1992 Constitution of Ghana

<sup>72</sup> Consideration of Reports Submitted by States Parties under Article 44 of the Convention Concluding observations: Nigeria by Committee on the Rights of the Child; 25 May-11 June 2010, CRC/C/NGA/CO/3-4, para 8

<sup>73</sup> *Ibid*, para 72(a)

<sup>74</sup> *Ibid*.

<sup>75</sup> ICECR Article 13 (4); African Charter on the Rights and Welfare of the Child, Article 11(7).

government acknowledged that as part of improving quality in educational institutions, a minimum standard must be set.

The *Educational National Minimum Standards and Establishment of Institutions Act No 16 of 1985*, together with the 1999 Constitution<sup>76</sup> empowers the Minister of Education to ensure that minimum standards are set, maintained and constantly improved in all schools of the federation. This responsibility, aimed at ensuring uniformity of standards is delegated to the Federal Inspectorate Service (FIS) Department and other bodies by the Minister of Education and carried out through inspection and monitoring of educational provisions in schools and colleges. The Act also imposed penalties for any contravention of its provisions.

The decline in quality of education in Nigeria has been a major concern due to rapid increase in students' numbers without comparable expansion in resources, staff and facilities. The enactment of the Act is one of the government initiatives to reform the education system. The Act provides that the responsibility for the establishment and maintenance of minimum standards in primary schools is vested in the Minister of Education.<sup>77</sup> In reality, many low cost private schools operate in conditions so poor that they do not stand a chance of government registration. As a result, several are unregistered. Such schools never engage with the government for fear of closure over lack of compliance.

Sadly, there are inadequate school inspection services in the country. Gaps remain in terms of quality control, and protecting families from exploitation by private schools' providers. Nigeria has an obligation to set standards in conformity with the CRC and closely monitor the schools. Failure to do so amounts to a violation of the Convention.<sup>78</sup> Any institution that falls below the standard should invite attention for improvement and where needed closure.

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<sup>76</sup>Second Schedule, Part I, Item 60(e) 1999 Constitution of Nigeria.

<sup>77</sup> Section 1 Educational (National Minimum Standards and Establishment of Institutions) Act (No.16 of 1985) Vol 5 (2004) LFN.

<sup>78</sup> Art 29(2) CRC



## **BRIDGE INTERNATIONAL ACADEMIES- ONE OF THE LOW- COST PRIVATE INSTITUTIONS**

Bridge International Academies (BIA) is a for-profit company that runs a chain of private nursery and primary schools offering fee-paying, standardized, technology-driven education in countries in Africa and Asia. Their model relies on technology and data, including internet enabled tablets and smartphones, to automate education delivery. Bridge schools are a burgeoning low-fee private education sector. In Uganda, research shows<sup>79</sup> that as private actors BIA have stepped into Uganda's education sphere, the government has stepped back from its obligation to provide quality public schools. This shift risks eroding the gains in access to education for vulnerable children that were made when the government of Uganda abolished tuition for primary education. In another recent development, the Ugandan High Court upheld a decision to close sixty three Bridge International Academies (BIA) schools for failure to comply with the basic requirements and minimum standards for schools.<sup>80</sup> This was welcomed by many as a step forward in addressing the quality of education through enforcement of standards.<sup>81</sup> Barely a month after the decision of the High Court of Kampala Uganda,, the Ugandan Government closed all schools run by Bridge International Academies (BIA) in the country. Shortly after, similarly the High Court of Kenya in Busia County gave a similar decision, to close schools run by BIA in the county for failing to meet education standards.<sup>82</sup> This judgment, which is similar to the one in Uganda, is a strong affirmation that BIA schools do not conform to minimum education standards in African region. This should serve as a warning to Nigeria because Nigeria is one of the African countries where BIA chain is established. Therefore, there is the concern that BIA cannot come to African countries and charge fees for education from children from very poor background in our communities and not respect the laws on education standards of our country.

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<sup>79</sup><http://www.iser-uganda.org/index.php/publications/reports/248-privatisationdiscrimination-and-right-to-education-in-uganda.html>

<sup>80</sup><https://www.devex.com/news/opinion-why-uganda-sthreat-to-shut-down-bridge-international-academies-schools-matters-89154>

<sup>81</sup>*ibid*

<sup>82</sup><http://www.right-to-education.org/news/kenyan-court-uphold...-bridge-international-academies-schools-over-failure-respect>

<sup>82</sup> World Education Forum 2000.

Most of the low fee private schools including unlicensed schools, employ untrained teachers, have substandard infrastructure, poor sanitation and subpar curricula. Unqualified teachers in these schools drag down standards for teachers across the board and are detrimental to the teaching profession. These flaws are damaging to the Nigerian school system at large. This means that the State has a duty to regulate and monitor private education providers to ensure that they conform to human rights standards.

### **NEED TO PROVIDE FREE PRIMARY EDUCATION OF GOOD QUALITY**

Free primary education is, thus, not only about access but also about content. The need to provide primary education of good quality was stressed at the World Education Forum,<sup>83</sup> and this is of critical importance in the context of Education for All (EFA). The education offered must be adequate in quality, relevant to the child and promote the realisation of the child's other rights. Abolishing costs allows a large number of children to attend school but is not a sufficient measure for them to remain within the education system. Governments must take complementary measures in order to ensure, for instance, teachers' recruitment and professional training, provisions for textbooks, school maintenance (furnishing, equipment) and development expenditure for quality education.

The obligation to provide primary education free of charge is inextricably linked with the obligation to ensure quality education, as established by the Convention against Discrimination in Education.<sup>84</sup> The term "education" in the Convention is defined as including "...access to education, the *standard and quality of education*, and the conditions under which it is given."<sup>85</sup> Further, the Convention lays down the obligation for the States Parties *[t]o ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent...*<sup>86</sup> The importance attached to quality education is also

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<sup>83</sup> World Education Forum 2000.

<sup>84</sup> Convention against Discrimination in Education 429 U.N.T.S 93, entered into force May 22, 1962.

<sup>85</sup> Article 1(2) Convention against Discrimination in Education. (emphasis added).

<sup>86</sup> Article 4(b) Convention against Discrimination in Education.



expressed in the Recommendation concerning the Status of Teachers,<sup>87</sup> which provides that “as an educational objective, no State should be satisfied with mere quantity, but should seek also to *“improve quality”*”.<sup>88</sup>

Poor standards of education in public schools and the phenomenal expansion of private educational institutions in many developing countries raise the fundamental question of preserving quality education – both in public and private schools. Nigeria is not currently fulfilling its international obligations on the guarantee of a good quality education. However, Tomasevski remarked that the wealth or the poverty of any country does not prevent its government from being held to account for human rights violations.<sup>89</sup>

The argument that paying school fees may be necessary to ensure the quality of public primary education is unacceptable: it is the obligation of States to ensure that the quality of education does not suffer from its free-of-charge character. In fact, imposing fees may lead to the further exclusion of socially and culturally marginalized groups, in particular children from poor families who are unable to pay the fees and remain deprived of education. Private education is thus often not a choice but the only acceptable option for parents, contradicting the international understanding that private education ought only to provide an alternative to public schools, allowing parents the exercise of free choice as to where to educate their children. A fee paying school as the only option for children from poor background exploits the desperation of these families, who are often willing to make significant sacrifices to send their children to school.

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<sup>87</sup> Recommendation concerning the Status of Teachers Adopted on 5 October 1966 by the Special Intergovernmental Conference on the Status of Teachers convened by UNESCO, in cooperation with the ILO.

<sup>88</sup> Article 10(g) Recommendation concerning the Status of Teachers.

<sup>89</sup> Tomasevski, K. *Education Denied: Costs and Remedies*, Zed Books London 2003p.32

## CONCLUSION

A very large number of children in Nigeria still encounter impediments in their efforts to have access to schooling due to cost despite the emphatic reiteration of various children and human rights laws that no child should be deprived of basic education. Education is a basic human right which is why private schools should be resisted. Privatisation of education has a devastating impact and aggravates inequality. Education is not a privilege of the rich and well to do; it is the inalienable right of every child. To sum it all up, in the words of Tomasevski,

*[...] The right to education has been replaced by access to education, government's obligations to ensure free education has been replaced by investment, conditioned by adequate rates of returns.<sup>90</sup>*

Therefore, the conceptualisation of the right to free and compulsory primary education has shifted.

The influx of private schools implies that States are no longer themselves providing education to the general public, and instead allow this role to be filled by non-State entities and private institutions. However, under the international human rights framework, States are the duty-bearer when it comes to respecting, protecting and fulfilling the right to education, and they must ensure that there is no retrogression when it comes to the advancement and enjoyment of this right. Besides, privatisation questions and weakens the role of the State in one of the most essential social services, affecting issues from democratic participation to accountability and also impacting many other human rights. The provision of basic education free of cost is not only a core obligation of State, it is also a moral imperative.

Privatisation cripples the notion of education as a universal human right, and by assisting marginalisation and exclusion it runs contrary to the fundamental principles of human rights. It creates social inequality. Private schools promote market economy values rather than the humanist approach to education

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<sup>90</sup> *Ibid* p. 93.



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accessibility. Government should restore education as an essential public service; learning must be protected from the forces of privatisation. It is hoped that Nigeria will build on these analyses, stop promoting privatisation in education and regulate education private providers in accordance with human rights law. If the government fulfils its international obligation to provide quality and free public education, there would be no need for private education on the scale it is currently seen in Nigeria.

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