



ISLAMIC UNIVERSITY IN UGANDA

JOURNAL OF COMPARATIVE LAW

IUIUCLJ, Vol 6 Issue 2 , 2019



**ISLAMIC UNIVERSITY
IN
UGANDA**

**COMPARATIVE LAW
JOURNAL**

IUIUCLJ

IUIUCLJ. VOL 6, ISSUE 2, 2019

COMPARATIVE LAW JOURNAL

© 2019 Islamic University in Uganda Journal of Comparative Law
(IUIUJCL. 2019)

Journal of Faculty of Law, Islamic University in Uganda, Mbale, Uganda

All rights reserved. No part of this publication may be reproduced, distributed, or transmitted in any form or by any means including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the Editorial Board of the Journal except in the case of academic research and proper acknowledgement having been made.

ISSN: 2519-951X

Published by

FACULTY OF LAW
ISLAMIC UNIVERSITY IN UGANDA
P.O. BOX 22555
MBALE, UGANDA

ABOUT THE JOURNAL

SCOPE

Islamic University in Uganda Journal of Comparative Law is the official journal of the Faculty of Law, Islamic University in Uganda. It is a peer reviewed journal providing an objective and industry focus and analysis of national and international legal, policy and ethical issues from Islamic and Classical perspectives. The Journal publishes articles that combine academic excellence with professional relevance on legal, ethical and policy issues concerning common and Islamic law.

It is devoted to the publication of faculty legal and interdisciplinary research and it publishes studies that contribute to the understanding of legal concepts from both classical and Islamic law perspectives. It is informed by a wide array of theoretical perspectives, innovative in form and content, and focused on both traditional and emerging topics. It provides in-depth analysis of legal concepts, institutions and topical and contemporary legal issues of fundamental importance.

IUIUJCL offers reference materials to practitioners, members of the academia, governmental and non-governmental organisations. The journal publishes two issues per year and welcomes articles concerned with theoretical and practical issues from classical and Islamic perspectives. All articles are subjected to double-blind review process to ensure objectivity, quality, and relevance. The journal is published in both print and electronic formats accessible from the Faculty of Law page of the University website. All correspondences are to be addressed to:

Citation: This journal may be cited as IUIUJCL Vol 6, Issue 2, 2019

Disclaimer

Statements of fact and opinion contained in the Journal of Comparative Law are those of the individual authors and contributors and are not necessarily those of the Faculty of Law of Islamic University in Uganda, the editors, or the institutions with which the authors and contributors are affiliated. Authors and contributors are responsible for the integrity and accuracy of respective material content and references. Faculty of Law of Islamic University in Uganda does make any representation, express or implied, with respect to the accuracy of the material in the Journal of Comparative Law and expressly disclaims any responsibility or liability for such material. As the Faculty of Law, Islamic University in Uganda and the editors cannot accept any legal responsibility for any errors or omissions that may be made.

The Editor-in-Chief

Islamic University in Uganda

Journal of Comparative Law

Faculty of Law Islamic University in Uganda

P.O. Box 2555 Mbale, Uganda

Email: jcl@iuiu.ac.ug Tel: +256 750 190 021

EDITORIAL BOARD**Dr Saidat Nakito****Chairperson**

The Dean, Faculty of Law
Islamic University in Uganda

Tajudeen Sanni (PhD)**Editor-in-Chief**

Senior Lecturer, Faculty of Law
Islamic University in Uganda

Assoc. Prof. Tindifa B. Samuel**Member**

Head, Common Law Department, Faculty of Law
Islamic University in Uganda

Dr. Ediriisa Kasozi**Member**

The Deputy Dean, Kampala Campus
Faculty of Law, Head, Islamic Law Department
Islamic University in Uganda

Nayiga Sauda**Member**

Deputy Dean Faculty of Law ,Kabojja Campus
Islamic University in Uganda

Phina O Amaghara-uzor**Member**

Deputy Dean Faculty of Law ,Main Campus
Islamic University in Uganda

Hon. Justice Ssekaana Musa**Member**

High Court Judge
Uganda Judiciary

Kayongo Yokub**Editorial Assistant.....**

Faculty of Law
Islamic University in Uganda

ADVISORY BOARD

Prof. Ismail S Gyagenda : Islamic University in Uganda

Prof. Dire Tlade University of Pretoria

Prof. Nukila Evanty : Jemba University, Indonesia

Dr. Abdirashid Ismail : Migration Institute, Finland

Prof. Ibrahim Kara : Faculty of Law Istanbul University

Prof. Ben Twinomugisha : Makerere University/Islamic University in Uganda

Prof Haruna Balarabe : Bayero University, Faculty of Law ,Kano,Nigeria

Associate Prof Kasim Balarabe : Faculty of Law,Jindal Global University,India

Prof Emmanuel Kazimbazi : Makerere University

Dr. Bolanle T Erinola : University of Cape Coast, Ghana

Dr. Okurut E Islamic University in Uganda/Gulu University

Dr. (Sheikh)Yasir Qadhi : Rhodes College/Islamic Seminary of America, USA

Dr. Hope Among : Gulu University

Prof. Victor Serafimor : Faculty of Law South West University Bulgaria

Dr. Yambo Olivier, : Faculty of Law Nottingham Trent University UK

Dr. Leah Ndimurwimo : Faculty of Law Nelson Mandela University South Africa

Prof. Juan Li: Central South University, China

TABLE OF CONTENTS

FRAMEWORK FOR OWNERSHIP OF PETROLEUM RESOURCES IN UGANDA: A CRITIQUE

ANGELLA CHARLES 1

LEGAL-PICTOGRAPHIC ANALYSIS OF THE PRINCIPLES AND PROCEDURES OF MEDIATION UNDER CONVENTIONAL AND ISLAMIC LAW IN NIGERIA

AYINLA LUKMAN ALABI 13

THE PROSPECTS AND TRAVAILS OF BANK LOAN REPAYMENTS: EMERGING TRENDS AND CHALLENGES IN THE NIGERIAN BANKING INDUSTRY

ADAMU IBRAHIM, ... 25

CONTEMPORARY CHANGES IN ARMED CONFLICT AND THE NEED FOR RECONSIDERATION OF INTERNATIONAL HUMANITARIAN LAW

FAHAD KIZITO & TAJUDEEN SANNI 49

A CRITIQUE OF THE REFUGEES ACT OF 2006 IN RELATION TO THE NORMS OF INTERNATIONAL REFUGEE LAW, INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

MUYUNGA ASHIRAF ZIWA 59

BODY SCARIFICATION UNDER THE CHILD RIGHT ACT AND *SHARI'AH*: BETWEEN CULTURAL WEIGHT AND CONTEMPORARY REALITY

ABDULRAHEEM TAOFEEQ ABOLAJI, Ph.D , FOLORUNSHO AHMAD
HUSSEIN, Ph.D & OLAGUNJU-IBRAHIM R.O. (P.h.D.) 77

ISLAMIC LAW CONCEPT OF WEALTH CIRCULATION AS PANACEA TO THE SCOURGE OF ECONOMIC AND FINANCIAL CRIME IN NIGERIA

OLAGUNJU-IBRAHIM, R.O (Ph.D.) 85

JUSTICIABILITY OF THE RIGHT TO EDUCATION: THE INDIAN AND NIGERIAN POSITION

FOLORUNSHO AHMAD HUSSEIN (Ph.D), ABDULRAHEEM TAOFEEQ ABOLAJI
(Ph.D) & OLAGUNJU-IBRAHIM R.O (Ph.D) 99

A CRITICAL ANALYSIS OF THE PREREQUISITES OF AN INDEPENDENT AND EFFECTIVE JUDICIARY IN UGANDA

ASIIMWE JACKLINE *	119
CRITIQUE OF THE AUTONOMOUS NATURE OF PARTY AUTONOMY IN ARBITRATION	
AYINLA L. A. & ONIYIDE. T	141
SAFEGUARDING THE RULE OF LAW AND DEMOCRATIC GAINS: LESSONS FROM SUBSAHARAN AFRICA	
ASIIMWE JACKLINE *	155
A CRITICAL ANALYSIS OF THE CONCEPT OF CONTRACTUAL RISK IN THE UPSTREAM SECTOR, VIS A VIS AN APPRAISAL OF THE KEY FEATURES INCLUDING PROVISIONS ON INDEMNITIES AND LIABILITIES IN THE UPSTREAM OIL AND GAS CONTRACTS	
SHAMSUDDEEN Y ABDULRAHMAN	171
AN EXPLORATORY OVERVIEW OF JURISDICTION ON SEA IN INTERAATIONAL LAW	
KIZITO FAHAD & TAJUDEEN SANNI	183
PARTY AUTONOMY DOCTRINE IS THE CORNERSTONE OF ARBITRAL PROVISIONAL MEASURES	
SHADAT SSEMAKULA MUTYABA MOHMEDED	201
STATES' CONCEPT EXAMINED UNDER THE ISLAMIC AND INTERNATIONAL LAWS	
A.A. OWOADE	217
SMALL CLAIMS PROCEDURE & AND AREAS FOR REFORM IN THE RULES	
KAGOYA JACKLINE	229
CASE REVIEW:KRISPUS AYENA ODONGO v. ATTORNEY GENERAL OF UGANDA:(FEBRUARY 2020)	
MUKAMA SANYU JAMIL	239

JUSTICIABILITY OF THE RIGHT TO EDUCATION: THE INDIAN AND NIGERIAN POSITION

FOOLORUNSHO AHMAD HUSSEIN¹ (Ph.D), ABDULRAHEEM TAOFEEQ ABOLAJI ²(Ph.D) & OLAGUNJU-IBRAHIM R.O³ (Ph.D)

Abstract

The problems faced by the Nigerian Education sector are enormous, which is occasioned by many factors, i.e political, economic legal and cultural. Education is seen as a right from the perspective of human right as contained in the International Instruments on Human Rights. These instruments are expected to be given efficacy by member states through domestication and implementation. But in the case of education, Nigeria as a state does not see it as such and this is as a result of the classification of rights to First, Second and Third generation rights. This article studies the effect of the generational classification on the status of education in the Nigerian Law. it finds that education is not accorded the status of Fundamental Right to be adequately protected, infringement of which redress could be sought in the court of law particularly against the government. It then concludes that the status or education is raised to a full fledge Justiciable Fundamental Human Right, education will continue to suffer neglect as it is in the successive administration in Nigeria.

Keywords: Nigeria, Human Rights, Education, Justiciability.

Introduction

Education is a phenomenon that unifies all and sundry, it is a concept that attracts all interests. Human Rights on the other hand is a fast growing concept that is all encompassing. Education is a global project which has been legally regulated. It has been perceived by some people as a right while some see it as a mere privilege based on the legal classification of Human Rights. This perception has over the time generated serious argument on the justiciability of the right to Education, advantage of which states have taken to neglect their respective education sector. This also necessitated different interpretation of constitutional provision leading to conflicting judicial pronouncement on the issue in many countries particularly in Nigeria. It is not out of place to hold that Educational Right is not adequately protected in Nigeria. Making education an enforceable Fundamental Right therefore, is a better way of protecting it. Apart from the legislative enactment for the recognition and protection of the rights, judiciary as the interpreter of the law has a vital role to play in the process of making it a justiciable one. It is against this background that this paper

¹ Lecturer I, Department of Islamic Law, Faculty of Law, University of Ilorin, Nigeria.
Email: alhamaweys01@gmail.com

² Lecturer I, Department of Islamic Law, Faculty of Law, University of Ilorin, Nigeria. Email: taofeeqbj@gmail.com

³ Lecturer I, Department of Islamic Law, Faculty of Law, University of Ilorin, Nigeria. Email: ridwanolagunju@gmail.com

examines the status of Education as a Fundamental Right to be enforced by citizens. It goes further to analyse the position of the Nigerian law and Judicial pronouncement on the justiciability of educational right as well as examining the position of Indian law in this regard. The paper concludes that the Right to education has not enjoyed the expected legal and judicial protection in Nigeria and recommends that leave could be borrowed from India to ensure adequate protection of the Right to Education under the Nigerian Law.

Coceptual Overview of Human Rights

The contextual usage human rights determines what meaning to be given to right as it means different thing to different people.⁴ Right could be what is appropriate, or people's entitlement on account of some circumstances and reasons.⁵ After it might have been given recognition and guaranteed by the government and political structure. It could be said to be a valid claim by been sanctioned by law against some people for their action or omission.⁶ In other words, human right is a right accorded to man simply because he is human being, including the rights contained in the list of rights as enshrined in the International Human Rights instruments inclusive.⁷

Human on the other hand has been defined to mean person other than animal, machine or gods.⁸ Human rights, therefore, literally connotes some basic rights accordable to individuals, consequential upon which the state has the obligation to protect and prevent its being violated.⁹ It is also said to be set of claims legally granted and guaranteed for the preservation of human dignity.¹⁰

⁴ See P. Sarojini Reddy, "Judicial Review of Fundamental Rights", (New Delhi: National Publishing House, 1976), 2. Where Reddy in examining what rights mean through work of writers quoted Hobhouse as follows, "Rights are what we may expect from others and others from us, and all genuine rights are, conditions of social welfare. Thus the rights any one may claim are partly those which are necessary for the fulfillment of the functions that society expects from him. They are conditioned by correlative to his social responsibilities." As cited in R N Gilchrist, "Principle of Political Science" (Madras 1952), 135.

⁵ See Ibidapo-Obe A. "The Human Rights Philosophy of Honourable Dr. Akinola Aguda" in *Essays on Human Rights Law in Nigeria*, (Nigeria: Concept Publication Limited, 2005), 29. See also, Franck, Thomas M., and Thomas M. Franck *Fairness in international law and institutions* (Oxford: Clarendon Press, 1995). Also Clark, Regina M. "China's Unlawful Control Over Tibet: The Tibetan People's Entitlement To Self-Determination," *Ind. Int'l & Comp. L. Rev.* 12 (2001): 293. Franck, Thomas M. "Democratic Entitlement, The," *U. Rich. L. Rev.* 29 (1994), 1. And Jones, Peter. "Human Rights, Group Rights, and Peoples' Rights," *Human Rights Quarterly* 21, no. 1 (1999), 80-107.

⁶ See William I. "The Special Right Theory within the Context of Human Rights. How not to Reconstruct Sexual Equality" in *Human Rights Review: An international human Rights Journal*, Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, Nigeria and the National Human Rights Commission of Nigeria, Vol 3, (2012), 6. See also Bondzie-Simpson, Ebow. "Critique of the African Charter on Human and People's Rights, A," *Howard LJ* 31 (1988), 643.

⁷ James Griffin, *On Human Rights*, (New York: Oxford University Press, 2008), 20.

⁸ See Oxford Advanced Learner's Dictionary 7th edition (Oxford: Oxford University Press, 2005), 729.

⁹ Ibid., 730.

¹⁰ See Mark Goodale, "Locating Rights: Envisioning Law between the Global and the Local" in G. Mark, S E Merry (ed.), *The Practice of Human Rights: Tracking Law between the Global and the Local*, (United Kingdom: Cambridge University Press, 2007), 6. Mark in the introductory part of the work of Alison Brysk in her edited volume *Globalization and Human Rights*, where the latter expressed the legal approach to human rights as "a set of universal claim to safeguard human dignity from illegal coercion, typically enacted by state agents. These norms are codified in a widely endorsed set of international undertakings: the "International Bill of Human Rights" (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Social and Economic Rights); phenomenon-specific on treaties on war crimes (Geneva Conventions), genocide and torture; and

Classification of Human Rights

Due to different approaches of different region based on the differences in their cultures which have influenced their perception of what constitutes human rights differently, human rights have been classified into three different categories known in the history as the first-generation, second-generation and third-generation.¹¹ The first-generation human rights is said to have been promoted by the west, the second-generation human rights was found to be the idea of the Communist states, and lastly the third-generation human rights as the title connotes emanates from the struggle by the third world countries.¹² The categorisation of human rights into three generational rights¹³ began with the implementation of individual negative claim, to freedom from state, to positive claims and to entitlement to state resources.¹⁴

The first generational rights by its nature seems to be procedural. It is a rule that determines the application of substantive claims to material goods. It is a class of rights that sees property rights as fundamental, individual and even absolute.¹⁵ It is consequently seen as a negative civil and political rights, i.e freedom from rather than freedom to.¹⁶ The second generational rights were seen not as mere negative civil and political rights but as affirmative, substantive and social claims to the state resources. It was as a result of class struggle and thus as collective rights.¹⁷ While the third generational rights came to the limelight in the post Second World War, it is a class of rights seen also as collective such as the second generation rights.¹⁸ In addition to its

protections for vulnerable groups such as the UN Convention on Rights of the Child and the Convention on the Elimination of Discrimination against Women."

¹¹ See Abdul Haseeb Ansari, Umar A. Oseni, "Human Rights: Genesis and Perspectives" in Abdul Ghafur Hamid @ Khin Maung Sein (ed), *Human Rights Law, International, Malaysian and Islamic Perspectives* (Malaysia: Sweet & Maxwell Asia, 2012), 10-11.

¹² Leonard, 9. On the third-generation human rights reference was substantially made to several paragraphs of part 1 and 2 of the Vienna Declaration 1993.

¹³ See Louis B. Sohn "The New International Law: Protection of The Rights of Individuals Rather Than State", *American University Law Review* Vol. 13, (1982) 1. where he traced the concept of three classification of human rights to Karel Vasak in his work, *A Thirty Year Struggle* (UNESCO: Courier, 1977), 30. K. Vasak was a legal adviser to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), he was also the former director of the UNESCO Division of Human Rights and Peace. In his work he propounded that, Liberty is first generation rights (Civil and Political rights), that Equality is second generation rights (Economic, social and cultural rights) while Fraternity is third generation rights (solidarity for economic development, disaster relief assistance, good and peace environment rights for developing nations).

¹⁴ Raheem Kolawole Salman, "The Effectiveness of Nigerian National Human Rights Commission," (Ph.D Thesis, International Islamic University Malaysia, 2011), 35. where he cited John King Gamble, Teresa A. Mailey, Jared S. Hawk, Erin E. McCurdy, "Human Rights Treaties: A Suggested Typology, An Historical Perspective" *Buffalo Human Rights Law Review*, Vol. 7 (2001) at 33 where they explained what is referred to as collective human rights.

¹⁵ See Underkuffler-Freund, Laura S. "Property: A special right." *Notre Dame L. Rev.* 71 (1996): 1033-1093, Shelton, Dinah. "Human rights, environmental rights, and the right to environment." *Stan. j. Int'l L.* 28 (1991): 103. See also Sohn, Louis B. "New International Law: Protection of the Rights of Individuals Rather Than States, The." *Am. UL Rev.* 32 (1982): 1. Underkuffler, Laura S. "On Property: An Essay." *Yale Law Journal* (1990): 127-148 and Waldron, Jeremy. *Liberal Rights: Collected Papers 1981-1991*. (London: Cambridge University Press, 1993).

¹⁶ Ibid., 36 where he referred to Eric Engle, "Universal Human Rights: A Generational History" *Annual Survey of International and Comparative Law* 12, (2006), 219, 17.

¹⁷ Ibid., 37, on the authority of Claire Moore Dickerson, "Human Rights: The Emerging Norm of Corporate Social Responsibility" *Tu. Law Review* 76, (2002)1431 at 1445 and Louis B. Sohn, "The New International Law: Protection of The Rights of Individuals Rather Than States", *American University Law Review* Vol. 13, (1982), 33.

¹⁸ See Alston, Philip. "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" *Netherlands International Law Review* 29, no. 03 (1982): 307-322. Dickerson,

features, it is a class of rights that is dynamically complementary to the first two categories of rights.¹⁹

In the light of the above, the right to education and other subsidiary freedoms attached to it such as freedom of education and academic freedom form part of the contemporary human rights law and it is considered as a cultural right though related to other human rights.²⁰ The liberal and socialist concepts of human rights were both concerned about education as human rights. It was the socialist concept that eventually shifted the obligation of providing education to the state and at the international level, right to education has been given recognition in various human rights instruments.²¹

Indivisibility and Interdependence of Human Rights

Discussion on indivisibility and interdependence of human right was an agenda during the Tehran International Conference on human rights in 1968 where it was unanimously agreed and proclaimed as follows:

*Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.*²²

This is the platform upon which arguments for or against the equal treatment and immediate implementation of all human rights were based at the Vienna World Conference on Human Rights in 1993 vis-a-vis the different categories of rights as contained in the major two International Covenants.²³ It was affirmed at the Vienna as follow:

All human rights are universal, indivisible and interrelated. The International Community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic

Clair Moore "Human Rights: The Emerging Norm of Corporate Social Responsibility" *Tul. L. Rev.* 76 (2001): 1431.
Marks, Stephen P. "Emerging human rights: a new generation for the 1980s" *Rutgers L. Rev.* 33 (1980): 435.
Udombana, Nsongurua J. "The third world and the right to development: Agenda for the next millennium." *Human Rights Quarterly* 22, no. 3 (2000): 753-787 and Galenkamp, Marlies. "Collective Rights: Much Ado about Nothing-A Review Essay" *Neth. Q. Hum. Rts.* 9 (1991), 291.

¹⁹ Ibid.

²⁰ See Manfred Nowak, "The Right to Education", in Asbjorn Eide, Catarina Krause and Allan Rosas (ed.) *Economic, Social and Cultural Rights* (Netherlands: Martinus Nijhoff Publishers, 1995), 189.

²¹ Ibid., 192.

²² See paragraph 13 of the Proclamation of Teheran, Final Act of The International Conference on Human Rights, (United Nations Publications, Tehran, 1968). Available at <http://www1.umn.edu>. (Accessed on 12 December, 2014). Serious arguments on the priority of one right above the other began in 1966 when the ICESCR and ICCPR were adopted to the effect that participating member states maintained two divergent opinions on which to be given preference among the contents of the two instruments but despite the uncompromising divisions, human rights experts have consistently opined that all human rights are equally important and intimately linked.

²³ See the International Covenants on Economic, social and Cultural Rights and the International Covenants on Civil and Political Rights.

*and cultural systems, to promote and protect all human rights and fundamental freedoms.*²⁴

It was at this conference that the principle of indivisibility and interdependence was conclusively accepted and resolution was passed that all rights are universal, indivisible, interdependent and interrelated.²⁵ Hence all rights should be treated globally in a fair and equal manner, on the same footing and with the same emphasis.²⁶

In the conceptual discussion on the universality, indivisibility and interdependence of human rights, it has been analytically observed that universality connotes that the rights are all valid and applicable everywhere,²⁷ in all societies, cultures and all part of the world.²⁸ The right must be enjoyed by all and sundry without discrimination of any kind, be it racial, gender, religious or status.²⁹ The indivisibility should be understood as it is in the content and context of the Vienna Declaration, that is, the state should ensure all rights are comprehensively guaranteed and protected and not part of them.³⁰ Interdependence however, is the synergy for the individual between the protections of two different rights.³¹ For example, full enjoyment of the right to freedom of expression is hinged on the right to be educated.³²

It is also noteworthy that the unionism between all the rights as expressed in the above referred Human Rights Instruments and the efforts of human rights specialists in articulating the need to observe the adopted principles of universality, indivisibility and interdependence remains in jeopardy.³³ The reason is that despite the fact that implementation of one's political right could hardly be achieved without the enjoyment of right to education first, so is the right to vote a pre-requisite for the right

²⁴ See part 1-5 of the Vienna Declaration and programme Action adopted by the World Conference on Human Rights on 25 June, 1993. Available at www.ohchr.org. (Accessed on 12 December, 2014).

²⁵ Winston, Morton Emanuel. *Indivisibility and interdependence of human rights*. University of Nebraska-Lincoln, 1999

²⁶ Pierre Sane, "Introduction" in Yvonne Donders and Vladimir Volodin, (ed.), *Human Rights in Education, Science and Culture Legal Developments and Challenges* (UNESCO: Ashgate, 2008), 1.

²⁷ Asbjorn Eide, "Interdependence and Indivisibility of Human Rights" in Yvonne Donders and Vladimir Volodin, (ed.), *Human Rights in Education, Science and Culture Legal Developments and Challenges* (UNESCO: Ashgate, 2008), 11.

²⁸ See Ansari, 13.

²⁹ Ibid., 12.

³⁰ Hamm, Brigitte I. "A Human Rights Approach to Development." *Human Rights Quarterly* 23, no. 4 (2001): 1005-1031 and Donnelly, Jack, *Universal Human Rights in Theory and Practice*, (Cornell University Press, 2013).

³¹ Scott, Craig, "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights," *Osgoode Hall LJ* 27 (1989): 769. Donnelly, Jack, "International Human Rights: a Regime Analysis," *International Organisation* 40, no. 03 (1986): 599-642. Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2013 and Winston, Morton Emanuel, *Indivisibility and Interdependence of Human Rights*, (Lincoln: University of Nebraska-Lincoln, 1999).

³² Ibid., 13.

³³ Otto, Dianne. "Rethinking the Universality of Human Rights Law." *Colum. Hum. Rts. L. Rev.* 29 (1997), 1. Mubangizi, John C., "Towards a new Approach to the Classification of Human Rights with Specific Reference to the African Context," *African Human Rights Law Journal*, 4, no. 1 (2004), 93. Popovic, Neil AF. "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment." *Colum. Hum. Rts. L. Rev.* 27 (1995): 487.

to ensure adoption of good policy. As multidimensional as some human right such as right to education which could assume the status of both social, cultural right and civil right as well, the right to freedom of expression which is civil and political right could also be a cultural right. States are still hiding under the legal classification of human right to give preference to one above the other in terms of implementation.

Education as a Guaranteed Fundamental Human Right

Education as human right is as old as the human right concept itself, the latter which has been said to be as old as human creation. It has been discussed in the earlier part of this chapter that evolution of human right comes with the evolution of man and so is the evolution of right to education.³⁴ Education plays a pivotal role and it is a precondition in the exercise of human rights. Right to education including other educational freedoms form the integral part of the contemporary human rights law.³⁵ Right to education has been described as an essential right in the mist of other rights. The level of individual's education determines his ability to exercise other rights, be it civil and political rights or economic, social and cultural rights.³⁶ Right to education is an important means of promoting human rights.

In the past specifically before the age of enlightenment, the European Educational System was a function of the parents and the church. Not until when the German Constitution of 1949 incorporated some education related rights with a view to putting education issues as a matter of public concern. This development affirmed education as a function of the state, providing and protecting the right of the poor to education.³⁷

The emergence of the UDHR, the adoption of ICESCR and other instruments gave a substantial boost and some stability to the recognition and campaign for right to education.³⁸ The legal basis and features of right to education is rooted in the UDHR.³⁹ Article 13(1) and Article 26(2) is replica in stipulating the central theme of right to education in the following language:

The State Parties to the present Covenant recognises the right of everyone to education. They agree that education shall be directed to the full development

³⁴ See Al-Baqarah: 31-33.

³⁵ Manfred, 32 at 189, see also Nik Ahmad Kamal Nik Mahmod, "The Right to Work and the Right to Education" in Abdul Ghafur Hamid @ Khin Maung Sein (ed), *Human Rights Law, International, Malaysian and Islamic Perspectives* (Malaysia: Sweet & Maxwell Asia, 2012), 165.

³⁶ Ibid.

³⁷ Ibid.

³⁸ See Nik Ahmad Kamal Nik Mahmod, "The Right to Work and the Right to Education" in Abdul Ghafur Hamid @ Khin Maung Sein (ed), *Human Rights Law, International, Malaysian and Islamic Perspectives* (Malaysia: Sweet & Maxwell Asia, 2012), 165. Where on right to education, he made reference to provisions of human rights instruments like UDHR, ICESCR, UNESCO 1960 Convention against Discrimination in Education, 1952 European Convention on Human Rights. Reference was also made to some national constitutions such as the Belgian Constitution, the India Constitution and the Constitution of the Netherland.

³⁹ See Article 26 of the UDHR.

*of the human personality and the sense of its dignity, and shall strengthen the human rights and fundamental freedoms. They further agree that education shall enable all person to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and racial, ethnic or religious groups and further the activities of the United Nations for the maintenance of peace.*⁴⁰

Content and Scope of Right to Education

The content of right to education otherwise called the basis and the scheme is as stated above is enshrined in various human rights instruments. This is to the effect that recognition of right to education is recognition of the educational objectives in the life of every individual⁴¹ and the development of the society at large.⁴² The scope of right to education is not unconnected among other things with its nature as a prerequisite for the exercise of many other rights. The universality, indivisibility and interdependence nature of human rights also depicts the scope of right to education as a right applicable everywhere, in all societies, to all cultures and enjoyable by all and sundry without discrimination of any form.⁴³

The provisions of Article 13 of the ICESCR and Article 26 of the UDHR read together stipulates three key elements which summarised the scope of right to education as: the recognition of a right to education; a guarantee of parental rights in matters of education; and a reference to the aims of education.⁴⁴ According to the provision of ICESCR, right to education is universal; it places obligations upon the state and sets out steps to be taken for the full realisation of the right to education.⁴⁵

Features of Right to Education

The duty placed on the states to guarantee and protect educational rights of the citizens in the relevant human rights instruments relating to right to education by specific use of the phrases "Recognise and Respect"⁴⁶ progressive in nature for the realisation of the right. It is progressive in nature because it emphasizes the obligation to realize the right to primary, secondary and higher education. With particular reference to the provisions that made primary and secondary educations free and

⁴⁰ See Article 13(1) of the ICESCR and Article 26(2) of the UDHR.

⁴¹ See Umar A. Oseni, Yusri Mohamad, "Islamic Human Right versus International Human Rights Instruments" in Abdul Ghafur Hamid @ Khin Maung Sein (ed), *Human Rights Law, International, Malaysian and Islamic Perspectives* (Malaysia: Sweet & Maxwell Asia, 2012), 345.

⁴² See Nik, 170.

⁴³ Asbjorn, 38.

⁴⁴ See Fons Cooman, "Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization" in Yvonne Donders and Vladimir Volodin, (ed.), *Human Rights in Education, Science and culture legal Developments and Challenges* (UNESCO: Ashgate, 2008), 186.

⁴⁵ See paragraph 2 of Article 13 of the ICESCR and Article 2(1) of the same instrument which states that, "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

⁴⁶ Article 13(1-3) of the ICESCR.

compulsory, these foundation stages which are the main focus of this research.⁴⁷ It is a strong legal obligation which corresponds with the tone of Article 14 of the ICESCR which also particularises implementation of free and compulsory primary education for states which have not achieved it as a goal. The state parties have no justification whether on hard economic circumstances to deny the citizen the right to the implementation of free and compulsory primary education.⁴⁸

In the light of the legal instruments on right to education and the obligations vested therein on states, essential features of right to education has been codified as the "4-A" meaning; Availability, Accessibility, Acceptability and Adaptability.⁴⁹ This feature is also used as a device to measure the level of compliance and implementation by states.⁵⁰ Education as a right of every child and by virtue of this its nature, it places an obligation on the government while the latter takes the greater portion and as the prime duty bearer in the provision of education and ensuring the protection of the child right to education. Going by the features of the right to education, the government must ensure that education is made available by providing the required and proper infrastructures, adequate educational/instructional materials, provision of recreational centers, proper training and retraining of staff and general appropriate funding of the education sector.⁵¹

Accessibility is another important feature of right to education, whereas the government is duty bound to make education accessible to children without any form of bias. The duty to ensure that schools are made closer to the children, provision of good road and necessary transportation form part of the measures to make education accessible to the people.⁵²

In addition to the above is adaptability of education. The government through its educational policy should protect the children's right to education and to achieve the fourth feature which is acceptability, ensuring that, the curriculum of learning must adapt to the culture and background of the people for the purpose of acceptability by

⁴⁷ See Article 13(1 and 2) (a and b) of the ICESCR.

⁴⁸ See Fons, 176.

⁴⁹ Katarina Tomasevski, "Has the Right to Education a Future Within the United Nations?" A Behind-the Scene Account by the Special Rapporteur on the Right to Education 1998-2004," *Human Right Law Review* 5, (2005), 205-237.

⁵⁰ Fons 176, at 189, where he also referred to the UN special rapporteur on the right to education in her preliminary report (Tomasevski 1999, Chapter II) Also Tomasevski (2003b, 51-2), Beeckman (2004).

⁵¹ See Ministry of Education, The Development of Education National Report of Malaysia (Malaysia: Ministry of Education, 2004), at 43, see also, Caliver, Ambrose. *Availability of Education to Negroes in Rural Communities*. No. 12. (US Government Printing Office, 1936)

⁵² Hackett, Stephanie, and Bambang Parmanto. "A Longitudinal Evaluation of Accessibility: Higher Education Web Sites." *Internet Research* 15, no. 3 (2005): 281-294. See also Woolfson, Richard C., Michael Harker, Dorothy Lowe, Mary Shields, and Hilary Mackintosh. "Consulting with children and young people who have disabilities: views of accessibility to education." *British Journal of Special Education* 34, no. 1 (2007): 40-49. Rosati, Furio Camillo. "Child Labor in Morocco: A Case for Increased Accessibility to Education." (2001) Flowers, Claudia P., Marty Bray, and Robert F. Algozzine. "Accessibility of Special Education Program Home Pages." *Journal of Special Education Technology* 14, no. 2 (1999): 21-26.

the people.⁵³ upholding these features of right to education therefore, for the purpose of protecting the child's right to education, the government must take positive steps in addressing the educational needs and a serious commitment in the implementation of the policy that will bear the aforementioned features.

Justiciability of Human Rights

Justiciability of an issue means legal claim in respect of such issue to be determined by a court, tribunal or any other quasi-judicial body vested with the authority to adjudicate. This has to do with the qualification of such claim and issues arising there from to be attended to by judicial panel for the appropriate judicial pronouncement be it an order, remedy or declaration. Justiciability of human rights therefore is the status of these rights (subjective right in particular) in the area of potential and actual justiciability in national legislations,⁵⁴ international instruments and within the ambit of case law.⁵⁵

Ordinarily, ratification of an international treaty places legal obligation on states to ensure that its system absorbs such treaty by way of domestication. This creates a subjective right capable of being invoked by an individual in a court of law.⁵⁶ But problems arises when issue of dispute be it violation or restriction of any of these rights occur which calls for judicial remedy and redress. Universality nature of human rights is expected to be a yardstick for justiciability, however the dichotomy in the justiciability of some of these rights by some states is as a result of the classification of human rights via the two major International Conventions.⁵⁷ This is why some authors are of the view that some rights especially those within the economic and social rights are not justiciable because of their nature as they can neither be invoked in court nor applied by court.⁵⁸

Justiciability of human rights may be attainable as a result of the legal provisions in the positive law of a particular country where the domestic legislation serves as the first important point of call for the realisation of those rights. The constitutional

⁵³ Agarwal, Pawan. *Higher Education in India: The Need for Change*. No. id: 576 2006, Mort, Paul R., and Francis Griffith Cornell, *Adaptability of Public School Systems*. Teachers college, Columbia university, 1938, Allen, Michael, Joan Sargeant, Karen Mann, Michael Fleming, and John Premi. "Videoconferencing for Practice-based Small-group Continuing Medical Education: Feasibility, Acceptability, Effectiveness, and Cost." *Journal of Continuing Education in the Health Professions* 23, no. 1 (2003): 38-47.

⁵⁴ See Farid Sufian Shuaib, "Fundamental Liberties under the Federal Constitution: A Critical Analysis" in Abdul Ghafur Hamid @ Khin Maung Sein (ed), *Human Rights Law, International, Malaysian and Islamic Perspectives* (Malaysia: Sweet & Maxwell Asia, 2012), 308.

⁵⁵ Frans Viljoen, "The Justiciability of Socio-economic and Cultural Rights: Experience and Problems" in Yvonne Donders and Vladimir Volodin, (ed.), *Human Rights in Education, Science and Culture Legal Developments and Challenges* (UNESCO: Ashgate, 2008), 53-55.

⁵⁶ Martin Scheinin, "Economic and Social Rights as Legal Rights" in Asbjorn Eide, Catarina Krause and Allan Rosas (ed.) *Economic, Social and Cultural Rights* (Netherlands: Martinus Nijhoff Publishers, 1995) at 41.

⁵⁷ ICCPR, ICESCR. The categorization of human rights in these instruments seems to be the platform for the abuse of universality of human rights by giving priority to a category of human right above the other.

⁵⁸ Martin., 71

inclusion in relation to justiciability comes in two faces; the bill of rights or chapter on fundamental rights which contains subjective rights is justiciable in principle;⁵⁹ the other leg of it is the directive principles of state policy (DPSPs) containing objective legal norms to be converted to subjective is not justiciable as it serves as guide to the authority.⁶⁰ Hence in practice, justiciability of a right is premised on the qualification of such right for judicial scrutiny. However, as earlier stated, problems of justiciability being encountered by some rights are either as a result of non-inclusion of such rights in the constitution, or their inclusion in the above mentioned non-justiciable DPSP.⁶¹ Also, the inherent differences between socio-economic right, civil and cultural rights, is greatly a contributory factor to non-justiciability of some rights.⁶²

The Nigerian Position

The judiciary on the other hand as a mechanism of guide, in the light of the existing laws has the duty to facilitate the enforceability of the undertakings in the constitution.⁶³ Also as an institution with multifarious functions which includes; sustenance of constitutional governance, human rights protection, safeguard and preservation of the value of the constitution, determination of the intent of the lawmakers and interpretation of the constitution and laws generally is its famous function.⁶⁴ Manifestation of individual and institutional misconduct is noticeable through the power of courts while nullifying and declaring such misconducts either ultra vires, unconstitutional and a nullity.⁶⁵

The provision of section 13 of the Constitution also connotes that the judiciary as an organ of government is empowered by the Constitution to perform its above enumerated functions by "observing, and applying" the provisions of the said chapter and give legal effect to it by addressing and adjudicating on any legal issue arising there from.⁶⁶ However, in the case of judiciary and its power to attend to and address issues bothering on chapter II of the constitution which is basically the Fundamental

⁵⁹ See Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 as amended.

⁶⁰ See Jadesola O. Akande, *Introduction to the Constitution of the Federal Republic of Nigeria 1999*. (Lagos: MII Publisher, 2000), 53 where the author referred to the judicial pronouncement in the case of Archbishop Anthony Olubunmi Okogie (Trustee of Roman Catholic School) & Others v. Attorney General of Lagos State (1981) 1 NCLR 281. Where it was held that the directive principle of State policy in Chapter II of the Constitution have to conform to and run subsidiary to the fundamental rights and that Chapter II is subject to legislative powers conferred on the State. Also see Chapter II of the constitution of the Federal Republic of Nigeria 1999 as amended.

⁶¹ Ibid

⁶² Tomas Englund, Ann Quennersted and Ninni Wahlstrom, "Education as a Human and a Citizenship Right- Parents' Right, Children's Rights, or...? The Necessity of Historical Contextualization," *Journal of Human Rights*, (2009, 8), 133-138

⁶³ See Tim Dare, "The Role of Law and the Role of Lawyers" in Tom Campbell, Jeffrey Goldsworthy, *Judicial Power, Democracy and Legal Positivism*, (USA: Ashgate, 2002), 372.

⁶⁴ See H. Kwasi Prempeh, "Marbury in Africa: Judicial Review and Challenge of Constitutionalism in Contemporary Africa" 80 *Tulane Law Review*, (2006), 25 at 5 and 6. See also Chapter V, part I and II and chapter VII, part I, II, III and IV of CFRN 1999.

⁶⁵ See David S. Law, "A Theory of Judicial Power and Judicial Review" 97 *Georgetown Law Journal* (2009), 13

⁶⁶ See section 13 of the Constitution of the Federal Republic of Nigeria 1999.

Objectives and Directive of Principle of State Policy. Section 6 (6) (c) of the same constitution ousted the jurisdiction of the Nigerian court and precluded it from exercising its jurisdiction on issue or question of act or omission by either an authority or person in relation to the Fundamental Objectives and Directive of Principles of State Policy provided for under Chapter II of the Constitution.⁶⁷

This is a noticeable conflict between the provision of section 13 and section 6 (6) (c) of the constitution. It consequently excludes the jurisdiction of the courts on issues bothering on contravention of Chapter II of the constitution by the government. This is to the effect that the duty imposed on all organs of government, authorities and persons in section 13 is limited to the extent that the provisions are not justiciable by the judiciary. The Executive arm may therefore not comply with the provisions in Chapter II unless and until specific laws have been enacted by the legislative arm for the enforcement of same.⁶⁸ The legislative/judicial challenges faced by the nation's education have made it practically impossible for the citizens to challenge the government when it fails to give effect to its required obligations contained in chapter II of the Constitution. This is due to either the fact that people are ignorant of the government's duty or those who are not ignorant are handicapped by the Constitutional limitation.⁶⁹ Apart from the constitution, other legislations that provide for the provision of free basic education, such as the Child Rights Act 2003, the Universal Basic Education Law and the Teaching Service Commission Law are leaneature of the international instruments which obligated every member state, which Nigeria is one, to provide free basic education.⁷⁰ Therefore, on the face value of the constitution, particularly under chapter II of the Constitution, it is obvious that the law mandated the government to provide free basic education by the use of the word "shall" in section 18.⁷¹

From this perspective, the law is clear as to what is expected of the government in the provision of free basic education.⁷² For instance, the Child Rights Act in its proviso under section 15(1) considered education as right of every Nigerian child, it further places a corresponding duty on the government to provide education for the Nigerian children via the fulfilment of the features of right to education (availability, accessibility, acceptability and adaptability).⁷³ By so doing, the Act has placed a statutory obligation upon the government to provide education for the children.

⁶⁷ See section 6 (6) (c) of the Constitution of the Federal Republic of Nigeria 1999.

⁶⁸ Akande. J.O, *Introduction to the Constitution of the Federal Republic of Nigeria 1999*, (Lagos: MIJL Publisher, 2000) 69.

⁶⁹ Imam-Tamim, Interview by Author, Ilorin, Kwara State, 10 November 2014.

⁷⁰ See Fawehinmi G, *People's Right to Free Education (At All Levels)*, (Lagos: John West Publications Ltd., 1974),1.

⁷¹ Imam-Tamim, Interview by Author, Ilorin, Kwara State, 10 November 2014.

⁷² Section 18 (1-3) of the Constitution of the Federal Republic of Nigeria 1999, also See section 15 (1) of the Child Rights Act, 2003.

⁷³ Taofeeq Abolaji Reheem, Interview by Author, Ilorin, Kwara State, 3 September, 2015.

The law is however silent on what happens in form of remedy whenever the government fails to comply and discharge this duty, unlike the way the same Act provides for punitive measure for parents who fails to discharge their own duties as decreed by the Act in the process of educating their children. Other laws earlier referred to in this paper relating to education such as the Education Act and the Universal Basic Education Act do also compel the government to provide education, particularly at the basic level as they also considered education as right of children. The statutes also serve as regulatory laws for proper and efficient administration of the educational system and implementation of policy. The effect of these laws is that out of the cardinal duties of government that is responsible to the people, education is one and important. This is because, if the government provided, security, health and other social amenities, without proper education, those amenities will not be properly sustained and this is the machinery for the preparation of the next generation leaders.⁷⁴ There is always a problem as earlier stated that there is no legal or judicial remedy if the government fails to fulfil these obligations as the government can neither be challenged nor compelled by any authority including the court of law to fulfil same.⁷⁵ It suffices to say that the law on provision of education in Nigeria is inadequate, this is because, if chapter II of the Constitution cannot be enforced, how much more can other laws be enforced, these are laws which ordinarily derive their legitimacy from the Constitution itself.⁷⁶

The import of this is that, if the Universal Basic Education Act, Education Act and others see education as children's right and the Child Rights Act further to place obligation on the government in this regard by saying government at all levels must provide free basic education⁷⁷ and the Constitution says if the governments fail to provide same it goes to no issue.⁷⁸ This simply means there is conflict between the provision of the Constitution and other laws and definitely the Constitution prevails as the mother of all other laws, and on the principle of supremacy of the Constitution.⁷⁹ The mentality of the Nigerian courts in this regard is that, any issue regarded as right which does not fall within the provision of Chapter IV of the Nigerian Constitution is not justiciable, this is why the court is approbating and reprobating in its position on the justiciability of Chapter II of the Constitution, where the issue of education belong.

⁷⁴ Muhammad Ameen Umar. Interview by Author, Abuja, Nigeria, 12 October, 2015.

⁷⁵ See *Uzoukwu v Ezeonu II* (1991) 6 NWLR (pt 200), 708 at 761-762

⁷⁶ See section 1(3) of the constitution which provides for the supremacy of the constitution and any law in Nigeria that contains any provision(s) that are at variance with the provision of the constitution will be null and void subject to their inconsistency with the constitutional provision.

⁷⁷ See section 15 (1) of the Child Rights Act.

⁷⁸ See section 13 read along with section 6 (6) (c) of the CFRN 1999

⁷⁹ See section 1 (3) of the CFRN 1999

Several efforts have been made to raise legal issues on the legal status of Chapter II of the Constitution and its justiciability before the Nigerian courts. Examples are found in some cases taken to court bothering on issues of education where Nigerian courts declined jurisdiction on the ground of non-justiciability of items contained in chapter II of the constitution.⁸⁰ The principle of law upon which the courts based most of the decisions and the attitude of declining jurisdiction is "ouster clause" as contained in section 6(6)(c) of the Constitution. The enforceability of educational right and other issues in chapter II of the Constitution has been jeopardised in Nigeria, it has therefore been argued that non-justiciability of provisions in chapter II is inimical to educational development in Nigeria.⁸¹

However, the struggle for the justiciability of educational right in Nigeria has gained international recognition, what looks like a favourable improvement in this regard happened in the case of *SERAP vs Federal Republic of Nigeria and Universal Basic Education Commission*.⁸² This case was file before the ECOWAS court for the recognition and enforcement of the citizen's right to education. The Federal Government raised preliminary objections regarding the jurisdiction of the court to entertain such matter but was overruled. The Federal Government through the Universal Basic Education Commission later argued in the substantive matter that, education is a mere directive policy of the government and not a legal right entitled to by the citizens. While the plaintiff argued per contrast, it was held at the end of the proceedings by the court that since Nigeria is one of the signatories to the international conventions (ICCPR, UDHR, ICESCR). It has become a commitment on Nigeria as a state member to fulfil the obligations therein and is duty bound to implement the articles contained in the covenants. The court therefore decided that the right to education contained in chapter II of the Nigerian Constitution can be enforced before the court of law. Consequently, the learned counsel to the plaintiff remarked after the judgment saying;

This is the first time an International court has recognised citizen's legal right to education, and sends a clear message to ECOWAS member states, including Nigeria and indeed all African governments, that the denial of this human right to millions of African citizens will not be tolerated.⁸³

⁸⁰ See G.N. Okeke, C. Okeke, "The Justiciability of the Non-Justiciable Constitutional policy of Governance in Nigeria," *IOSR Journal of Humanities and Social Sciences (IOSR-JHSS)* Vol. 7, issue 6 (2013), 1. Also the case of *Uzoukwu v Ezeonu II* (1991) 6 NWLR (pt 200) 708 at 761-762. See also G.N. Okeke, "Fundamental Objectives and Directives Principles of State policy: A Viable Anti-Corruption Tool in Nigeria," unpublished.

⁸¹ See Imam-Tamim M.K, "Challenges of Sustainable Development in Nigeria: Legal Perspectives," in Egbewole W.O, Etudaiye M.A, Olugbenga A.O, *Law and Sustainable Development in Africa*, (Ilorin: Al-Fattah Publications Ltd, 2012), 116.

⁸² ECW/CCJ/APP/08/08 delivered on 27th October 2009.

⁸³ See Imam-Tamim M.K, "Challenges of Sustainable Development in Nigeria: Legal Perspectives," in Egbewole W.O, Etudaiye M.A, Olugbenga A.O, *Law and Sustainable Development in Africa*, (Ilorin: Al-Fattah Publications Ltd, 2012), 116.

Ordinarily, this ought to be a relief but the relative question is whether the ECOWAS court's judgment will be binding on Nigeria or how would effect be given to such judgment. Obviously, the judgment is yet to have any positive effect in Nigeria in any manner, this is because the government has deliberately refused to give recognition to the said judgment, this as a result of the government's position on the matter from inception by challenging the court's jurisdiction but it is the hope of Nigerians that a government will come that would be responsive and responsible towards enforcing the said judgment.⁸⁴ It is noteworthy that the regional court was firm and resolute in its decision recognising education as right in Nigeria but no such courageous and emphatic decision has emanated from the Nigerian courts in the interest of Nigerians right to education.

The decision of the court in *Uzoukwu v Ezeonu II*⁸⁵ show the reasoning of the court on the right to education as a mere privilege, this further indicates that if the so called right to education which the court says is accruable to persons is infringed upon or violated either by any individual of government, no redress could be sought in the court of law by means of fundamental rights enforcement. The legal implication of the position of the court in the above case is that the court classifies rights into ordinary and fundamental, and shows the sharp contrast between the two.

Also the position of the court in *Federal Republic of Nigeria v Anache*⁸⁶ and *Olafisoye v Federal Republic of Nigeria*⁸⁷ is to the effect that there is likelihood of justiciability of Chapter II as the same is not foreclosed but that has not been achieved. Similarly in *Attorney-General, ondo State v Attorney-General of Nigeria*⁸⁸ Furthermore, the court in *Anthony Olubunmi Okogie v Attorney-General of Lagos State*⁸⁹ expanded the interpretation of section 39 of the Constitution of the Federal Republic of Nigeria which bothers on freedom of expression to incorporate right to establish and operate schools and that abolition of private primary school is violation of the right to freedom of expression.

The Supreme Court of Nigeria in *Adewole v Alhaji Jakande and Others*,⁹⁰ Particularly in *Abacha v Fawehimi*⁹¹ made reference to the jurisprudence of India for the purpose of ensuring that items contained in Chapter II of the Nigerian Constitution which is replicated from that of the Indian constitution do not remain dead letter, but the effort is to no avail. In a related manner, the case of *Badejo v Federal Ministry of Education*

⁸⁴ Imam-Tamim, Interview by Author, Ilorin, Kwara State, 10 November 2014.

⁸⁵ (1991) 6 NWLR (pt 200) 708 at 761-762.

⁸⁶ (2004) 14 WRN.

⁸⁷ (2005) 51 WRN 52.

⁸⁸ (2001) 9 SCM 1 at 97-98, or (2002) FWLR (Part 111) 1972 at 2144 see also *AG Lagos State v AG Federation* (2003).

⁸⁹ (1981) 1 NCLR 105.

⁹⁰ (1981) 1 NCLR 262, also Dr. Basil Ukeagbu v Attorney-General of Imo State (1983) NSCC 160.

⁹¹ (2000) 6 NWLR (pt 600) 228.

& Ors⁹² would have strengthened and established a favourable jurisprudential legacy from the Nigerian court's pronouncement on the recognition and protection of right to education in Nigeria but the brilliant position of the Appeal Court was truncated by the apex court where it failed to firmly uphold the position of the Court of Appeal and declare education as fundamental right of the Nigerian citizens.

The Indian Position

The jurisprudence of the Indian Courts on the Directive Principles is that, despite the express and unambiguous Constitutional provisions that they are not enforceable, the courts have successfully made socio-economic rights enforceable by establishing that right to life which is constitutionally enforceable is meaningless without enforcing the socio-economic rights.

Article 37 of the Constitution of India provides that the provisions contained in this part:

shall not be enforceable by any court, but the Principles therein laid down are never the less fundamental in the governance of the Country and it shall be the duty of the State to apply these principles in making laws.

On the other hand, section 13 of the CFRN provides:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive and judicial powers, to conform, observe and apply the provisions of this Chapter of the Constitution.

The jurisprudence of the above two provisions vis-à-vis the attitude of the courts in the respective countries is that, although, the Indian Constitution declared the provisions not enforceable by any court, but the courts by extensive interpretation made it justiciable. While the CFRN empowers the court and other authorities to conform, observe and apply. The courts in India have been more active and enthusiastic in enforcing socio-economic rights where the Directive Principles are merely being used as guide in law making. But the Nigerian Courts have generally been hesitant in enforcing the same rights despite the constitutional directive.

Corroborating the above position is the decision of the Indian Supreme Court in the case of *Francis Coralie v Union Territory of India*⁹³ where it was held that the right to life includes the protection of:

Every limb or faculty through which life is enjoyed, namely, the bare necessities of life such as adequate nutrition, clothing and shelter, and

⁹² (1996) LPELR- SC. 196 or (1996) NWLR (pt. 464) 15.

⁹³ (1981)1 SCC 608, at 618-619.

facilities for reading writing and expressing oneself in diverse forms, freely moving about....

In *Shanti Star Builders v. Narayan Totam*⁹⁴ it was also held that the right to life would take within its sweep the right to food and a reasonable accommodation to live in. Also justifying how the right to shelter is a part of the right to life, the court had this to say in *Olga Tellis v Bombay Municipal Corporation*:⁹⁵

*The sweep of the right to life conferred by Article 21 is wide and far reaching... An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life, that which alone makes it possible to live, leave aside what makes life livable must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life... So unimpeachable is the evidence of nexus between life and the means of livelihood.*⁹⁶

In addition to the above authorities, in India, right to education has been used to better explain the relationship between the directive principles which are not justiciable and the fundamental rights which are justiciable. The Supreme Court of India held *inter alia* in the case of *Mohini Jain v State of Karnakata*⁹⁷ otherwise called, the Capitation fees case that, charging of capitation fees in professional colleges is illegal and unconstitutional, on the ground that 'the right to education flows directly from the right to life' because 'the right to life and the dignity of an individual cannot be assured unless it is accompanied by the right to education' as the Fundamental Right guaranteed under Part III of the Constitution of India, including the right to freedom of speech and expression... cannot be appreciated and fully enjoyed unless a citizen is educated. The Supreme Court had this to say:

The directive principles which are fundamental in the governance of the country cannot be isolated from the Fundamental Rights guaranteed under Part III. These Principles have to be read into the Fundamental Rights. both are supplementary to each other... Without making right to education under

⁹⁴ (1990) 1 SCC 520.

⁹⁵ (1985) 3 SCC 545

⁹⁷ (1992) AIR SC 1858.

Article 41 of the Constitution a reality, the Fundamental Rights under Chapter III shall remain out of reach of a large majority which is illiterate.

The jurisprudence of Indian treatment of the Directive Principle and justiciability of the socio-economic rights is worthy of emulation. The courts have been pragmatic in conscripting other basic rights including the right to education to form part of the right to life through various judicial pronouncement. Consequently, by legislation, the Directive Principle are not enforceable but by judicial pronouncement they are justiciable like other fundamental rights. The above referred judicial pronouncement made right to education a *sine qua non* the enjoyment of other rights in the constitution.

In South Africa on the other hand, the socio-economic rights are justiciable in law and right to education is an enforceable right. This is so because, the Bill of rights as incorporated into the South African Constitution comprise both the socio-economic and political rights without identifying one as Fundamental rights and the other as Directive Principles.

The jurisprudential development of justiciability of Directive Principle by the Indian court as discussed earlier in chapter four is a good example for the development of the Nigerian courts. This is because, the approbating and reprobating attitude of the 1999 constitution and the Nigerian courts regarding Chapter II is a key to irresponsible governance.⁹⁸ The Nigerian Judiciary is therefore expected to rise up to the occasion like their counterpart in other jurisdictions like India and Ghana. For instance, the Ghana Judiciary has moved a step ahead in developing their jurisprudence for the justiciability of Directive Principles where the Supreme Court of Ghana held as follows in *Ghana lotto operators Association v National Lotteries Authority*⁹⁹ that, all the provisions in the Constitution were justiciable because it contained the most important rule on political governance save such provisions as are expressly excluded in the Constitution. Those principles were held to be justiciable even though the original intention of the drafting committee was that they would be justiciable because such intention did not appear in the Constitution of Ghana.

It has been asserted that any government committed to its primary function of ensuring the welfare and security of its citizens must embrace ESCR.¹⁰⁰ Other African Countries should therefore draw inference from Ghana experience to abolish the artificial distinction between

⁹⁸ See Okeke G.N, Okeke, C "The Justiciability of Non-Justiciable Constitutional Policy of Governance in Nigeria", IOSR, *Journal of Humanities and Social science (IOSR-JHSS)*, Vol. 7, Issue 6, (2013), 09-14, 13.

⁹⁹ (2007-8) 2 SCGLR.

¹⁰⁰ See Stanley Ibe, "Expanding the Space for Economic, Social and Cultural Rights in Nigeria" *ESR Review Vol. 15 No.2*, (2014), 6

Constitutional Rights and increase horizontal accountability of governmental branches.¹⁰¹ To this extent therefore, the judiciary in Nigeria has the duty to ensure good governance. This position is established in the case of *Danish v Speaker House of Assembly of Benue State*¹⁰² where the court held that even though the rights contained in Chapter II are not justiciable, they contain guidelines as to what the court should do when confronted with the problem of interpretation of the constitution. The above position is paramount because to secure the proper protection of human rights, it is very important to address the attached constraints that arise as much from poverty, poor health and lack of education as a result of tyrannical rules and intolerance.¹⁰³ In the case of developing African Nations where interrupted administrative system prevails, which precluded the course of securing Socioeconomic justice, a measure that will imbibe the propagation of rights that will account for fundamental law of reason is necessary. Notwithstanding the distinction draw by the Nigerian and Ghana court between the principle of law and principle of policy, where the former is deemed justiciable while the latter is not, The Ghana position is that, justiciability can be accomplished if the Directive Principles can be read as part of or linked to a justiciable fundamental right. The Nigerian position is different, this can as well be achieved and such achievement depends on, explicit legislative Act and/or judicial pronouncement.¹⁰⁴ Although Socioeconomic right may be better protected and enforced if the Directive Principles of State Policy were directly enforced like other fundamental rights without necessarily subjecting their justiciability and enforcement to other rights. The justiciability of the Directive Principles should not be measured by a scale that will make the Socio-economic rights propagated by the Directive principles subordinate to or separate from other rights, but a system that will treat all rights as different manifestation of the same right necessary for legal sanctity.¹⁰⁵

¹⁰¹ Abdi J I, Kwadwo A A, "Justiciability of Directive Principles of State Policy in Africa: The Experience of Ethiopia and Ghana" *Ethiopia Journal of Human Rights Vol. 1* (2013)

¹⁰² (1983) NCLR 625

¹⁰³ See Sandra, 84

¹⁰⁴ See Raheem Kolawole Salman, "The Effectiveness of Nigerian National Human Rights Commission," (Ph D thesis, International Islamic University Malaysia, 2011), 290. Where the author observed that the National Human Rights Commission whose primary assignment is the protection of Human Rights against violation of any kind lacks the express powers to protect and promote socio-economic rights where the right to education belongs in the Nigerian law. He furthered that this position is demonstrated by the position taken by the commission that these rights are non-justiciable until otherwise pronounced by the court. The author concluded that the commission has not been able to protect and promote rights of substantial Nigerians whose mostly violated rights are socio-economic rights and that failure to take issues of socio-economic rights seriously is a great minus to the activities, performance and achievements of the commission. It is noteworthy on the above ground that the failure of the commission in this regard has serious advert effect on the protection and promotion of right to education and provision of primary and secondary education in Nigeria.

¹⁰⁵ See Atudiwe P A, "Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria", *Harvard Human right Journal Vol. 27*, 105. See also Solomon T E, "The Future of Economic, Social and Cultural Rights Litigation in Nigeria" *Review of Nigerian Law and Practice, Vol 1* (2), (2007). Emeka P A, "Litigating right to Healthy Environment in Nigeria: An Examination of The Impacts of the Fundamental Rights (Enforcement Procedure) Rules, 2009, In Ensuring Access to Justice for Victim of Environmental Degradation" *Law Environment and Development Journal* 6:3, (2010), 320. See Stanley Ibe "Beyond justiciability: Realising the Promise of Socio-economic Rights in Nigeria" *African Human Rights Law journal*, (2007), 7. See Ainul Jaria M, Sambo A O, Ansari, Abdulkadir A B., "Sustaining Development Through Socio-Economic Rights: Prospect

Conclusion

In the foregoing paragraphs, it has been shown that Nigerian Education sector is not given the expected attention, due to the fact that the law is not sufficient for the recognition and protection of the educational right of the citizens. The constitution recognizes education as a privilege and not a right and that is why it remains a non-justiciable course before the Nigerian courts. The government is taking advantage of its non enforceable nature to undermine the right of Nigerians to quality education. Efforts made by some individuals by instituting cases in court to persuade the courts for judicial declaration failed and this consequently makes it impossible to hold the government responsible for its failure to put the education sector in its deserved position for the benefit of Nigerian. To save the nation's education sector is to make the right to education an enforceable right. This could be achieved through a constitutional amendment to incorporate education into the Bill of Rights in Chapter IV or by a jurisprudential pronouncement of court like that of India

and Challenges in African Countries" *Journal of Applied Sciences research*, 7, (13) 2366-2376 (2011). See Edwin E., "Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria" *Journal of African Law* Vol.51, (2) (2007), 249-284, 251. Oyedele O.S., Ogunleye T.A., "Creating Old Peoples Friendly Society: Promoting Economic, Social and Cultural Rights of Old People in Nigeria" *I NUJS L. Rev.* (2008), 607. and *Journal of the National Human Rights Commission* Vol. 4 (2005).