

ARE LOW FEES PRIVATE SCHOOLS BETTER SUBSTITUTE TO PUBLIC SCHOOLS? ANALYSIS FROM THE STANCE OF HUMAN RIGHTS BASED APPROACH (HRBA).

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‘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.’- Statement of the UN Special Rapporteur on the Right to Education February 2015. (Kishore Singh).

Abstract

The paper examines the rapid growth of private providers, which is resulting in the commercialisation of education, and examines the negative effects of such commercialisation on the norms, principles and legal frameworks underlying the right to education as established by international human rights treaties. It also highlights the repercussions of privatisation on the principles of social justice and equity, underlining the need for safeguarding education as a public good. It analyses rights-based and non-rights-based strategies in education. It is inspired by a paradox in the current developments. The paper therefore identifies the dynamics of human rights provisions, based inter alia, on international human rights law, empirical research, concluding observations from human rights bodies, UN Human Rights Council Resolutions, as well as the analytical framework developed by Abidjan Principles within the traditional framework of human rights obligations. Whilst international human rights treaties do not proscribe private actors like low fee private schools (LFPS) in delivering education, there is a profound concern that LFPS are weakening the right to education rather than strengthening it and that they crowd out public alternatives. The paper concentrates on primary education. This is because primary education has long been the

target of international aspirations, and the goal to achieve compulsory and free primary education is one of the most central targets of the three core education treaties, Convention on the Rights of the Child (CRC), International Covenant on Economic Social and Cultural Rights (ICESCR) and Convention against Discrimination in Education (CADE). Recommendations for developing effective regulatory frameworks for controlling private providers in education, in keeping with State obligations on the right to education as laid down in international human rights conventions are proposed. It is concluded that education must be available in sufficient quantity; accessible to everyone without discrimination; the form and substance of education must be quality and acceptable; and education must be adaptable to respond to the changing needs of society.

Key words: Right to education, Low-fee private school, public schools, human rights based, SDG, Abidjan Principles, and non- discrimination

1. Introduction

Education is a fundamental human right. Education is a basic human right that is necessary for enjoying many other rights.¹ It is transformative and empowering. Rene Maheu has rightly observed 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 and the entire lifespan of the individual. This means that it must be continuous and omnipresent. It must no longer be thought of as preparation for life, but as a dimension of life,

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¹ 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 2022].

distinguished by continual acquisition of knowledge and ceaseless re-examination of ideas.²

Education has much to contribute to both individual and national development and ought to be regarded by states as an investment in human capital.³ Additionally, from a human rights perspective, it has been acknowledged that the right to education is essential for people to be aware of the other rights they are entitled to, to exercise them, and to be empowered to demand them.⁴ States are the principal duty bearers and are under obligation to fulfil, respect and protect all human rights for all individuals within their jurisdiction. States have the primary responsibility to promote and ensure the right to education for all individuals in their territories and subject to their jurisdiction. 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.⁵ Providing public education is the primary responsibility of States. Education can also be provided by non-State actors, including religious institutions,⁶ non-governmental organisations (NGOs), community-based groups,⁷ trusts, enterprises and individual proprietors. The State is both guarantor and regulator of education. The provision of basic education, free of cost, is not only a core obligation of States, but also a moral imperative.

² Maheu, Rene, (Director-General of UNESCO), '1970 International Education Year, Message' (1970-1971) Annual Review of United Nations Affairs pp.179-182.

³ Van Bueren, G. *The International Law on the Right of the Child*, (Dordrecht: Martinus Nijhoff Publishers 1994) p.2325 CESCR General Comment No13, at para 1. 20 accessibility.

⁴ CESCR General Comment No13, at para 1.

⁵ *Ibid*, paras 46 &47.

⁶ The liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions is recognised in international human rights conventions. This should be subject to "such minimum educational standards as may be laid down or approved by the State" (art. 13 (3) of the International Covenant on Economic, Social and Cultural Rights). Such education is primarily not driven by profit or business considerations.

⁷ A community can build or establish schools for basic education, assuming social responsibility in education; in some cases, these are taken over by the Government later on. The primary purpose is not business through education but to supplement Government efforts. There are also educational establishments for philanthropic purposes which, again, are business-driven but aimed at promoting education as a public good.

During the past decade there has been a rapid increase in the number of private providers of education in many developing countries, with many schools and educational establishments not being registered and being funded and managed by individual proprietors or enterprises. Such providers are distinct from other non-State actors, such as religious institutions, NGOs, community-based groups and foundations. In the gap left by inadequate public-school provision, private providers especially the so-called low-fee private schools (LFPS), have mushroomed. As a result, education is being commercialised and for-profit education is flourishing as an attractive business, with scant control by public authorities. This closes off the pathway to schooling for children of parents who cannot afford the costs and defies both international human rights law and the global commitment to poverty reduction. This explosive growth of privatised education for-profit education is seen to be taking advantage of the limitations of government capacities to cope with rising demands on public education. Privatisation is making its intrusion at all levels of education, and the phenomenon of education as an attractive business is assuming alarming proportions. Additionally, in the past decades, there has been a massive growth of LFPS, which are for-profit private schools targeting low-income families. Generally, private schools are chosen owing to the lack or poor quality of public schools. Subjecting education to free-market rules relieves government of the necessity to allocate to it significant parts of their budget, and the consequence is that only those who could afford to pay tuition fees could enrol and thus, income inequalities would be continuous from one generation to the next since education is in itself a determinant of lifetime income. This rapid growth in private providers, which is resulting in the commercialisation of education, has negative effects on the norms and principles and legal frameworks underlying the right to education as established by international human rights treaties. Such privatisation has repercussions on the principles of social justice and equity, underlining the need for safeguarding education as a public good. The State remains primarily responsible for education on account of international legal obligations and cannot divest itself of its core public service functions. The Supreme Court of the United States of America stated in the landmark decision in *Brown v. Board of Education* that, "...providing public schools ranks at the very apex of the function of a State"

and “education is perhaps the most important function of State and local governments”.⁸ Yet, instead of controlling the growth of privatised, for-profit education, governments often support private providers through subsidies and tax incentives, thus divesting themselves of their primary public function. As a result, rather than supplementing government efforts, private providers are supplanting public education and commercialising education in the process.⁹ The commercialisation of education and its unfettered liberalisation, open to operators for lucrative purposes or objectives, is contrary to international human rights law. The introduction of private, for-profit education into the national education landscape has a number of serious repercussions. This can have a crippling effect on the fundamental principle of equality of opportunity in education. Privatisation often excludes marginalised groups, who are unable to pay, undermining the right of universal access to education. Privatisation leads to shrinking of public investment. Its negative effects on education must receive foremost consideration in public policies, bearing in mind that education is a social good. State responsibility for providing basic education free of charge is established in human rights law. States are the providers of public primary education, but under international law, private actors too have the liberty to establish and direct educational institutions.¹⁰ Likewise, the UNESCO Convention Against Discrimination in Education (CADE), which establishes the right to education comprehensively, provides that the State can permit the establishment or maintenance of private educational institutions,

[...] if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms

⁸ *Brown v. Board of Education* 347 U.S. 483 (more) 74 S. Ct 686; 98 L. Ed.873; 1954 U.S.

⁹ Singh, Kishore, (2015) Report of the Special Rapporteur on the right to education, Kishore Singh Protecting the right to education against commercialization. Para 55. Report is submitted pursuant to Human Rights Council resolutions 17/3, 23/4 and 26/27.

¹⁰ Article 13 (4) ICESCR, Article 29(2) CRC & Article 11(7) ACRWC

with such standards as may be laid down or approved by the competent authorities, for education of the same level.¹¹

This means that individuals, organisations, religious institutions, companies or other bodies are free to open schools or other educational institutions and administer and govern them according to their wishes but with certain limitations. If private entities fail to comply with the State's minimum standards, then the State must intervene. Such freedom in establishing educational institutions is not unfettered, it is subject to compliance with minimum standards in education, to which all private educational institutions are required to conform.¹² 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 for parents and students. The fear is that with the influx of private institutions, government will relax in the upkeep of the public schools. While the significant role private educational institutions play must be acknowledged, the emphasis remains on free and compulsory primary education provided by the state. This is particularly true within the African regional human rights framework, where privatisation of essential services is viewed as a potential threat to the full realisation of human rights.¹³ While States must permit private education, they still must ensure that private actors abide by human rights stipulations, especially considering non-discrimination and equalities. Currently, there is widespread concern about the negative effects of privatisation in education in scholarly writings, by the intellectual community and civil society organisations, and by international organisations. States remain primarily responsible for providing education on account of their international legal obligations. They should not abandon their primary responsibility for the provision of free and quality basic education, to the advantage of private

¹¹ Article 2 (c) CADE “La régulation du système éducatif: une obligation pour atteindre l'équité et améliorer la qualité”, paper prepared by the International Institute for Educational Planning of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Organization of the Francophonie and Wallonie Bruxelles, 2014.]

¹² Article 13 (4) ICESCR, Article 29(2) CRC & Article 11(7) ACRWC

¹³ *Pretoria Declaration on Economic, Social and Cultural Rights, 2004*, para 3(j) <http://www.achpr.org/instruments/pretoria-declaration/> [accessed 7 June 2022],

providers, who find the inadequacies of public education, fertile ground for making money from the provision of education and reaping uncontrolled profits. In sum, privatisation in education is a growing global trend particularly in sub-Saharan Africa (SSA). Regrettably, limited attention is paid to its impact on the right to education and the achievement of quality and accessible education for all, creating a shift in the perception of education as a public good available to all, to a private good that can be purchased, altering how education is valued by citizens and governments.

2. Definitions, Concepts, and Clarifications of Terminologies

For the purpose of clarity in this paper, it is necessary to first establish the terms ‘public education institutions’ and ‘private education institutions’ and provide some clarifications and key definitions of these terms and related terminologies.

i. Public Education Institutions

Public education systems will differ from one context to another. In this paper, public educational institutions refer to institutions defined as follows;

...[a] learning institution is public if it meets three cumulative criteria, meaning it is: First, recognised by the State as a public educational institution; second, effectively controlled and managed by a state organ or genuine representatives of the population they serve; third, not at the service of any commercial or other exploitative interest that undermines learners’ right to education.¹⁴

In order to determine the extent of states’ obligations to provide public education, it is necessary first to establish the term ‘public education’. While the relevant international instruments and bodies do not define public education, they do establish certain criteria which should generally characterise public education. Thus, the relevant international instruments refer to schools ‘established by the public authorities’, meaning that public schools should, in general, be established on the initiative of the state and not

¹⁴ Abidjan Guiding Principle 2 The Abidjan Principles: Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education. www.abidjanprinciples.org accessed 2nd May 2022

that of private actors.¹⁵ It follows from this that public schools must be funded by the state, although funding alone is not sufficient to make a school ‘public’ if the other requirements for public education stated earlier are not met. The question is asked if religious or community schools are public or private. When the facilities belong to the church or community, but the teachers are paid by the state, it is a public institution. Thus, some schools with private elements, such as the Roman Catholic schools that were run by the church but publicly funded and overseen by a public-school board, may nonetheless be considered part of the public education system.¹⁶ In other words, what constitutes public education will, in the first instance, be a matter determined by the state itself. To be effective, public education must be adequately funded.

ii. Private schools.

These are schools that depend on user fees to cover all or part of their operational and development costs.¹⁷ Private schools are predominantly managed independently of the state and are owned and/or founded independently of the state.¹⁸ However, private schools tend to settle in areas where the demand for education is good. In this paper ‘private schools’ will denote formal schools that are not public, and [that] may be founded, owned, managed and financed by actors other than the State. Private provision of education is highly diverse and “may be for-profit or charitable, fee charging or free, driven by companies and entrepreneurs or by communities and non-governmental organisations, may be supported by the State or totally independent.”¹⁹ Types of private actors in education include high-fee private

¹⁵ Art 13(3) ICESCR. See also, e.g., Art 13(4) ICESCR; CRC, Art 29; and UNESCO Convention against Discrimination in Education, Art 2(c).

¹⁶ *Arieh Hollis Waldman v Canada*, Communication No. 694/1996, HRC, CCPR/C/67/D/694/1996 (5 November 1999), para. 10.3.

¹⁷ Ashley et al., (2014), (2014) “The Role and Impact of Private Schools in Developing Countries”, in Education Rigorous Literature Review, final report, April, London, the UK: Department for International Development, p.4 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/439702/privateschools-full-report.pdf [Accessed 04.04.2022].

¹⁸ *ibid*

¹⁹ Sylvain Aubry and Zizipho Zondani, “Learning the lesson: why the EU should defend an alternative model to the privatisation of education”, in Progressive Lab for Sustainable

schools; low cost profit-making schools targeting poor households; commercial private school chains; community and faith-based schools; and charter schools.²⁰ In a draft private sector engagement strategy paper for the period 2019–2022, the Global Partnership for Education distinguishes between for-profit and not-for-profit schools. For-profit schools may be majority internationally or nationally owned network operators, or nationally owned single proprietor schools. Not-for-profit schools include schools run by non-governmental organizations (NGOs) and faith-based schools.²¹ Another way to classify private institutions is to establish whether they are commercial in nature or orientation, making the learner a consumer and education a consumer good.²² The 2016 Appeal by Francophone civil society against the commercialisation of education defined private schools as “educational institutions for which one of the primary goals (although not the only goal) is to trade education services and to protect their own interest rather than serving the public interest”. They view education as a commodity, which results in a willingness to expand their activities and their model by competing with other institutions, increasing their turnover, or growing their profits.²³ Crucially, commercial institutions are defined by their commercial interest and orientation, rather than their formal legal structure. The opening of private for-profit schools depends, therefore, on the social demand for education. Some are very expensive for the privileged classes (such as international schools), while others are more affordable and geared towards the middle classes. Deployed by socioeconomically advantaged families to avoid public schools, increasing stratification and further disenfranchising schools with families who cannot afford different options are widening.

Development: from Vision to Action, Conny Reuter and Ernst Stetter, eds. (Brussels, Foundation for

²⁰ David Archer, “Rights-based responses to non-state education provision: a tentative typology and some critical reflections” (Action Aid, 2016).

²¹ Report of the Special Rapporteur on the right to education (2019) *Right to education: the implementation of the right to education and Sustainable Development Goal 4 in the context of the growth of private actors in education*, A/HRC/41/37 Human Rights Council

²² Education, Privatization and Social Justice: Case Studies from Africa, South Asia and South East Asia, Ian Macpherson, Susan Robertson and Geoffrey Walford, eds., ch. 1, (Oxford, Symposium Books Limited, 2014).

²³ Available at <http://nevendezpasleducation.org/wp-content/uploads/2017/07/Appeal-eng.-against-commercialisation.pdf> accessed 12 June 2022

Private schools target three strata of the society: first, the very privileged social classes with quality private institutions. Second, the middle classes with less successful, but more affordable schools. Third, so-called low-cost schools, intended for more disadvantaged populations. Also, religious schools are created to meet a social demand, which favours religious education (Christian or Muslim). These private schools can have a wide variety of forms, the focus here is low-fee private schools (LFPS).

Low-fee Private Schools (LFPS) are defined as private schools that target the relatively poor through comparatively low user fees, that have private owners and/or are founded independently of the state. LFPS can be both transnational companies, such as Bridge International Academies (BIA), or they can be single proprietor schools, often founded by local entrepreneurs. They are independently funded through comparatively lower tuition fees (relative to elite or higher-fee private schools), financially sustained through direct payments from poorer or relatively disadvantaged households (though not necessarily the poorest or most disadvantaged), and independently managed and owned by a single owner or team.²⁴ LFPS can take a variety of forms, and may be operated by individuals, community and self-help groups or large commercial enterprises.²⁵ The LFPS are therefore often small in size, housed in rented, semi-permanent buildings and rely on parental contributions or the owner's private finances. Tuition fees at these establishments typically cost between \$3 and \$5 per month, though other school-related expenditures may raise the total cost to over \$10 in some cases. These schools therefore serve children from somewhat poor (but not the poorest) households in informal settlements and are now increasingly recognised as legitimate service providers of education, despite over 60 per cent of them remaining

²⁴ Srivastava, P. (2006). Private schooling and mental models about girls' schooling in India. *Compare: A Journal of Comparative and International Education*, 36(4), 497–514.

²⁵ Srivastava, P., & Read, R. (2019). Philanthropic and impact investors: Private sector engagement, hybridity and the problem of definition. In N. Y. Ridge, & A. Terway (Eds.), *Philanthropy in Education: Diverse Perspectives and Global Trends* (pp. 15–36). NORRAG Series on International Education and Development. Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing

unregistered and unregulated.²⁶ Talking about quality, according to research conducted by Tosin Sulaiman on low-cost private schools in Nigeria and Kenya in 2014,²⁷ 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. Also, studies in Kenya have alleged that schools operated by for-profit provider Bridge International Academies often have poor-quality infrastructure to the extent that it constitutes a violation of health and safety standards.²⁸ When the Ministry of Education in Uganda reportedly resolved to shut Bridge schools in the country, one reason provided was that poor hygiene and sanitation put the life and safety of the schoolchildren in danger.²⁹ 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 poverty. 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. In essence, the gap left by inadequate public-school provision, private providers, such as the so-called LFPS, have mushroomed. The right to education demands commercial private educators such as for-profit LFPS to only exist as an additional option to free, publicly funded education. Yet, if LFPS are viewed as the result of a bottom-up led initiative to improve access to and quality of education, the

²⁶ Allavida Kenya. (2012). Access to and Quality Basic Education in Kibera, Nairobi. Retrieved from: http://www.uwezo.net/wp-content/uploads/2013/01/KE_COMM_Networks_AllavidaReport.pdf

²⁷ Sulaiman, Tosin., (2014) 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' beyondbricks blog in December 2014.

²⁸ Report of the Special Rapporteur on the Right to Education, Kishore Singh, 10 June 2015 http://www.ohcr.org/EN/HRBodies/HRC/RegularSessions29Documents/A_HRC_29_30_AEV.doc accessed 22 March 2022.

²⁹ Global Initiative for Economic, Social and Cultural Rights, "Uganda to close the largest chain of commercial private schools over non-respect of basic education standards" (2016), available at www.gi-escr.org/latest-news/groundbreaking-news-uganda-to-close-the-largest-chain-of-commercial-private-schools-over-non-respect-of-basic-education-standards/ see also <http://www.theguardian.com/global-development/2016/nov...ers-closure-low-cost-bridge-international-academies-uganda> accessed 22 March 2022.

question of their role in the right to education is quite complex. Studies from countries like Nigeria, Ghana and Kenya found that despite the low fees of LFPSs, they remain unaffordable to the poorest households.³⁰ 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.

There is also the need to distinguish between public and private education because at times the difference is not always distinct, due to differences in national education systems and understandings of ‘private’ and ‘public’ education in various countries. Coupled with the fact that there are different elements involved in delivering education services, some of which may be private and some of which may be public.³¹ In particular, comments by the treaty bodies, the Special Rapporteur and others indicate that schools which operate primarily to make a profit for private actors cannot be considered as public.³² Article 13(4) of ICESCR, for example, which protects the right to establish private schools, provides for the liberty of individuals and bodies to ‘direct’ educational institutions.³³ It follows from these provisions that the State must ‘direct’ the operation of public schools, but can only intervene in the operation of private schools in limited circumstances. As a result, for a school to be classified as part of the public education system, the State (or

³⁰ Rolleston, C., and Adefeso-Olateju, M. (2014) “De facto Privatisation of Basic Education in Africa: a market response to government failure?” in Macpherson, I., Robertson, S., and Walford, G. (eds.) *Education, Privatisation and Social Justice: Case studies from Africa, South Asia and South East Asia*, Oxford, the UK: Symposium Books.

³¹ Fons Coomans and Antenor Hallo de Wolf, (2005) ‘Privatization of Education and the Right to Education’, in K. de Feyter and F.G. Isa (eds.), *Privatisation and Human Rights in the Age of Globalisation*, 229, 243–250 Intersentia; see also Igor Kitaev, *Private Education in Sub-Saharan Africa: A Re-Examination of Theories and Concepts Related to Its Development and Finance* (UNESCO, 1999), 41.

³² UN General Assembly, Report of the Special Rapporteur on the Right to Education, Kishore Singh, A/HRC/29/30 (10 June 2015), para. 68.

³³ Article 29(2) of the CRC is in identical terms. The UNESCO Convention against Discrimination in Education refers to the ‘maintenance’ of separate educational institutions (art. 2(b)–(c)).

local authorities) must have the ability to exercise substantial control over the operation of the school, such that the way in which the school operates is ultimately determined by the State, or by publicly appointed school boards, and not by private actors.

2.1 Arguments for and against LFPS

The right to education entails some essential features that States must strive to achieve: Education must be available in sufficient quantity; accessible to everyone without discrimination; the form and substance of education must be acceptable; and education must be adaptable so as to respond to the changing needs of society.³⁴ According to international human rights law, parents are also awarded the liberty to choose private education in conformity with their own convictions, but this option should exist only as an addition to free schooling guaranteed by the state.³⁵ When private actors are involved in the provision of education, the state is required to adopt and enforce effective regulatory measures to ensure that the right to education is safeguarded.³⁶ With regards to the privatisation of education, the monitoring committees of ICESCR and CRC have warned that whilst it is not prohibited, it must be subject to strict regulations in conformity with the states' obligations in line with the conventions.³⁷ The Committee on Economic, Social and Cultural Rights (CESCR) is especially concerned that private provision of public goods, such as education, may render these goods unaffordable for many, or with decreased quality as more attention is paid to profit.³⁸ The Special Rapporteur on the Right to Education has been a vocal critic of the privatisation of education, which he believes undermines the right to education.³⁹ Allowing the emergence of fee-charging schools in areas where public school services are inadequate or non-existent may therefore effectively be a violation of international human rights if it results in some

³⁴ CESCR, (1999), para. 6.

³⁵ ICESCR, arts. 13.3, 13.4; CADE, art. 2(b).

³⁶ Abidjan Principles, (2019), Principle 4; CESCR, 2017, para. 21; CRC, 2013, para. 28.

³⁷ CESCR, 2017, para. 21; see also, Committee on the Rights of the Child, 2013, para. 33.

³⁸ CESCR, 2017, para. 22.

³⁹ UN Human Rights Council (2015) a Report of the Special Rapporteur on the Right to Education – Protecting the right to education against commercialization, paras. 40-46 10 June, A/HRC/29/30, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/120/82/PDF/G> accessed 4 April 2022.

children being financially barred from attending school. The Special Rapporteur on the Right to Education suggests that states unable to fund adequate public-school provision should meet the education demand through not-for-profit, NGO, community and religious schools, or contractual arrangements between regions and private schools.⁴⁰ The role of for-profit private education is only meant to constitute an option in addition to free education. Firmly based in international human rights law, many human rights advocates and UN representatives argue that the growth of LFPS is threatening the right to education and should therefore be firmly regulated and contained.

2.1.1 Arguments against LFPS

Firstly, studies from countries like Nigeria, Ghana and Kenya found that despite the low fees of LFPS, they remain unaffordable to the poorest households.⁴¹ This financial barrier is also contributing towards discrimination against girls and children with disabilities, as these are often not prioritised for private schools if parents must choose. Rather than improving access to education LFPS are indirectly contributing to existing educational divides. Rolleston and Adefeso Olateju argue that even if LFPS have emerged as a result of a bottom-up demand for education opportunities in the context of a failing public sector, they still contribute to inequality and inequity when the poorest and most marginalised are not be able to pay their fees.⁴²

Secondly, LFPS, and Bridge International Academies (BIA) in particular, have frequently been accused of breaching national laws and regulations. For example, in Uganda, the country's High Court upheld a decision to close sixty-three BIA schools for failure to comply with the basic requirements and minimum standards for schools. In Uganda, it was welcomed by many as a

⁴⁰ Ibid, UN Human Rights Council, (2015) a, para. 66.

⁴¹ Härmä, J. (2013) "Access or quality? Why do families living in slums choose low-cost private schools in Lagos, Nigeria?", in *Oxford Review of Education*, vol. 39(4), pp. 548-566, available at: <https://www.tandfonline.com/doi/abs/10.1080/03054985.2013.825984>

⁴² Rolleston, C., and Adefeso-Olateju, M. (2014) "De facto Privatisation of Basic Education in Africa: a market response to government failure?" in Macpherson, I., Robertson, S., and Walford, G. (eds.) *Education, Privatisation and Social Justice: Case studies from Africa, South Asia and South East Asia*, Oxford, the UK: Symposium Books.

step forward in addressing the quality of education through enforcement of standards.⁴³ Barely a month after the High Court of Kampala, Uganda, allowed the Ugandan Government to close all schools run by Bridge International Academies (BIA) in the country, the High Court of Kenya in Busia County followed suit, for BIA failing to meet education standards.⁴⁴ 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. BIA is one of the low- cost private institutions. This should serve as a warning to BIA in Nigeria because Nigeria is one of the African countries where BIA chain is established. There is the concern that BIA cannot come to African countries and charge fees for education from children of very poor background in our communities and not respect the laws on education standards of the country. In Nigeria most of the LFPS are often not registered with public authorities, therefore they are not monitored, and no data can be generated to evaluate their performance.

Thirdly, it has been argued that LFPS are frequently a non-choice for parents who have become involuntarily excluded from a state system not able to provide school access in slum areas.⁴⁵ A study from Lagos, Nigeria, found that because of the massive increase in private schools, the government is no longer feeling pressured to improve the inadequate public school system.⁴⁶ Additionally, Watkins argued that when parents from relatively privileged backgrounds withdraw their children from public schools, the pressure upon the government to improve public education diminishes.⁴⁷ The result is a “vicious circle of under-investment in state-education”.⁴⁸ For poor households, the non-choice to go to private schools is expensive, and may come at the expense of their movement out of poverty, as they are not able to

⁴³ <http://www.iser-uganda.org/index.php/publications/reports/248-privatisation-discrimination-and-right-to-education-in-uganda.htm> accessed 21 March 2022

⁴⁴ <http://www.right-to-education.org/news/kenyan-court-uphold...-bridge-international-academies-schools-over-failure-respect> accessed 21 March 2022.

⁴⁵ Oketch, M., Mutisya, M., Ngware, M., and Ezech, A. C. (2010), “Why are there proportionately more poor pupils enrolled in non-state schools in urban Kenya in spite of FPE policy?” *International Journal of Educational Development*, vol. 30, pp. 23-34.

⁴⁶ Härmä, (2013), *supra*, 549-550.

⁴⁷ Watkins, K. (2004) “Private Education and ‘Education for All’ – Or How Not to Construct an Evidence-Based Argument: A Reply to Tooley”, *Economic Affairs*, vol. 24(4), 11.

⁴⁸ *ibid*

invest in small business or other livelihood opportunities.⁴⁹ The argument of school choice situations in poorer countries has shown that parents are often pushed into choosing a private option out of desperation and wanting the best for their children. But this is not a desirable option and is only eroding the system overall. The poorest are left behind in over-crowded and increasingly ghettoised government schools. This type of unplanned school choice may be construed as benefiting government education systems by lessening the burden on them and with the poor, left behind. This concern has been upheld by the UN Educational, Scientific and Cultural Organization (UNESCO), which has argued that transferring responsibility to communities, parents and private providers is not a substitute for fixing public-sector education systems, and further [f]or the poorest groups, public investment and provision constitute the only viable route to an education that meets basic quality standards.⁵⁰

Fourthly, the effect of LFPS, and increased privatisation in general, is that education is no longer considered a public or societal good grounded in values of justice and equal opportunity, but becomes an individualised private good.⁵¹ A similar argument has been presented by the Special Rapporteur on the Right to Education, who argued that the UN's mission of social justice is being undermined by the proliferation of private education.⁵² The private sector generally pursues its business interests and is motivated by profit, whereas community and civil society organisations and foundations are often devoted to social services in a philanthropic spirit and should be distinguished from the for profit private actors.

⁴⁹ Härmä, (2013), *supra*

⁵⁰ UNESCO (2009) "Overcoming Inequality: Why Governance Matters", EFA Global Monitoring Report, Oxford, UK: Oxford University Press, 131-132.

⁵¹ Macpherson, I. (2014) "Interrogating the Private-School 'Promise' of Low-Fee Private Schools", in Robertson, S., and Walford, G. (eds.) *Education, Privatisation and Social Justice: Case studies from Africa, South Asia and South East Asia*, Oxford, the UK: Symposium Books.

⁵² UN Human Rights Council (2015) a Report of the Special Rapporteur on the Right to Education – Protecting the right to education against commercialisation, 10 June, A/HRC/29/30, para. 60, available at: <https://documents-dds-ny.un.org/doc/UNDOC/> accessed 21 February 2022.

2.1.2 Argument for Privatisation

Walford and Dixon proponents of LFPS have argued in favour of LFPS, they stated that aid to public education risks being inhibited by corruption, lack of transparency, poor monitoring and entrenched teacher unions not considering the best interest of the pupils.⁵³ Dixon further suggested that aid agencies should listen to the poor themselves, who are in the best position to determine where aid allocations should go.⁵⁴ According to her, they have already “voted with their feet” in favour of private schools as demonstrated by evidence of private school enrolment.⁵⁵ It is argued that LFPS increase de facto access to and quality of universal primary education, and should therefore be supported. Additionally, this is supported by Tooley, the co-founder and chairman of chains of LFPS in Ghana and India,⁵⁶ who has asserted that ‘cross the developing world, poor parents are making their preferences clear’. They want schools that are accountable to them, where teachers turn up and teach. They want private schools. It is time the development experts caught up with them”.⁵⁷

Heyneman and Stern argued that human rights cannot imply that education must be delivered by the state when there is evidence of state inadequacy in delivering this service.⁵⁸ They further contend that if private schools are doing a better job at delivering quality education to the poor, it would be contrary to human rights to monopolise its delivery to the state.⁵⁹ It is argued

⁵³ Walford, G. (2015) “The Globalisation of Low-Fee Private Schools”, in Zajda, J. (ed.) *Second International Handbook on Globalisation, Education and Policy Research*, Dordrecht, the Netherlands: Springer. 318. See, Dixon, P. (2013) *International Aid and Private Schools for the Poor: Smiles, Miracles and Markets*, Cheltenham, the UK: Edward Elgar Publishing Limited, 202.

⁵⁴ Dixon, P. (2013) *International Aid and Private Schools for the Poor: Smiles, Miracles and Markets*, Cheltenham, the UK: Edward Elgar Publishing Limited, 149

⁵⁵ *ibid.*

⁵⁶ Tooley, J., Dixon, P., and Stanfield, J. (2008) “Impact of Free Primary Education in Kenya: A Case Study of Private Schools in Kibera”, *Educational Management Administration & Leadership*, vol. 36(4), pp. 449-469.

⁵⁷ Tooley, J. (2004) “Private Education and ‘Education for All’”, in *Economic Affairs*, vol. 24(4), pp. 4-7.

⁵⁸ Heyneman, S. P. and Stern, J. M. B. (2014) “Low cost private schools for the poor: What public policy is appropriate?” *International Journal of Educational Development*, vol. 35, p. 13.

⁵⁹ *ibid*

that in many cases, the real cost difference between LFPSs and public schools are found to be low because of the “hidden costs” of supposedly free public schools. Although tuition fees in public schools have been abolished in countries like Ghana, Nigeria and Kenya, there are indirect costs associated with purchasing textbooks, uniforms, transport and food.⁶⁰ Many children in Nigeria are already excluded from education due to “hidden costs” of public schools – these children will not be able to pay the fees of LFPSs. Two of the central reasons identified by USAID for the low education quality of Nigeria public schools’ education are teacher absenteeism and high teacher-pupil ratios.⁶¹ It is argued that LFPSs are able to ensure low levels of teacher absenteeism because teachers are made directly accountable to parents, children and the school leadership. The commercial nature of LFPS also allow them to employ more teachers and cap the number of students at a sustainable number. The DfID funded report refuted the claim that private schools were as affordable to users as state schools.⁶² Private operators of private education are advocating for support, and they feel that they deserve international attention. In sum, a person’s financial status profoundly affects his or her education, and that children of the poor often have none, least of all free of charge. A large proportion of children of the haves attend private schools and the difference in the impact that the cost of education has on the finances of the rich and poor family is significant. Poverty- based exclusion from education highlights the impossibility of alleviating poverty through education for all those who are too poor to afford its cost. This is the resultant effect of treating education as a traded service and not as a human right. As long as LFPS charge fees, they will never be able to reach the most marginalised.

From human rights perspective, the state is considered the most central actor when it comes to education. This is grounded in two pillars: That education

⁶⁰ Rolleston, C., and Adefeso-Olateju, M. (2014) “De facto Privatisation of Basic Education in Africa: a market response to government failure?” in Macpherson, I., Robertson, S., and Walford, G. (eds.) *Education, Privatisation and Social Justice: Case studies from Africa, South Asia and South East Asia*, Oxford, the UK: Symposium Books,p.29

⁶¹ Referenced in World Bank, (2015)

⁶² DfID (2018) *Education Policy*, policy paper, 6 March, available at: <https://www.gov.uk/government/publications/dfid-education-policy-2018-get-children-learning/dfid-education-policy> accessed 30.01.2022.

is a human right, and that education is fundamental to development. As a human right, education is first and foremost the responsibility of governments.⁶³ It is important that the government has the primary responsibility for education. When commercial education actors enter the education sector, they will assert great influence over domestic education authorities that results in an overall weakening of the public education system. LFPS are not system strengthening, rather they adversely impact the education systems in the countries concerned, especially because of reports that they “crowd out” public alternatives.⁶⁴ In sum, even though the support of LFPS may improve the education sector in a short-term perspective, the long-term impact is that the public education system is undermined instead of strengthened.

3. International legal framework for the right to education

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)⁶⁵ 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)⁶⁶ and Article 28 of the Convention on the Rights of the Child (CRC),⁶⁷ which both guarantee the right of everyone to compulsory and free primary education.⁶⁸ 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’,⁶⁹ the African Charter on the

⁶³ Kishore Singh (2015) Report of the Special Rapporteur on the right to education; Protecting the right to education against commercialization, A/HRC/29/30

⁶⁴ Heyneman, S. P. and Stern, J. M. B. (2014) *supra*

⁶⁵ Universal Declarations of Human Rights. G.A. Res 217, UNGAOR 3rd Sess.Supp. No 127 at 71 UN Doc A/80 (1948).

⁶⁶ 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.

⁶⁷ 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.

⁶⁸ 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.

⁶⁹ Article 17 (1) ACHPR

Rights and Welfare of the Child (ACRWC) reiterates the requirement in CRC to provide free and compulsory primary education.⁷⁰

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'.⁷¹ Convention against Discrimination in Education 1960,⁷² 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 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.⁷³ 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.⁷⁴ 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.'⁷⁵ All these various instruments clearly emphasise the supremacy of public schools. In sum, the provision of primary education which is free is an obligation which must be imperative on the State. The State is primarily responsible for respecting, fulfilling and protecting the right to education. The liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions and the liberty of

⁷⁰ Article 11 ACRWC

⁷¹ CESCR, *General Comment No. 13*, at para 9.

⁷² Convention against Discrimination in Education 429 U.N.T.S.93 entered into force May 22 1962.

⁷³ CESCR, *General Comment No. 13*, para.29.

⁷⁴ Art 2 UNESCO Convention against Discrimination in Education, 1960

⁷⁵ Art 11 (4) ACRWC

individuals and bodies to establish and direct educational institutions provided for in article 13 (3) and (4) of the International Covenant on Economic, Social and Cultural Rights is not unconstrained. Such freedom in education is subject to compliance with minimum standards in education, to which all private educational institutions are required to conform.⁷⁶ The failure to ensure that private educational institutions conform to the minimum educational standards required in articles 13 (3) and (4) constitutes a violation of the right to education.⁷⁷ The UNESCO Convention against Discrimination in Education contains similar provisions. It provides that the objective of the establishment or maintenance of private educational institutions should not be to secure the exclusion of any group, but “to provide educational facilities in addition to those provided by the public authorities” and that “the education provided conforms with such standards as may be laid down or approved by the competent authorities, for education of the same level”. Education is not a privilege of the rich and well-to-do, it is an inalienable right of every person. The provision of basic education, free of cost, is not only a core obligation of States, but also a moral imperative. The Special Rapporteur considers it essential, when looking at privatization in education, to bear in mind State obligations in respect of the right to education: States must ensure promote, respect and fulfil the right to education.⁷⁸ State responsibility for providing basic education free of charge is established in human rights law. According to the interpretation of the Committee on Economic, Social and Cultural Rights, under article 13 of the Covenant, States are regarded as having principal responsibility for the direct provision of education in most circumstances; States parties to the Covenant recommend, for example, that the “development of a system of schools at all levels shall be actively pursued”.⁷⁹ States have an “unequivocal obligation” to provide primary education free of charge to all, with a detailed plan of

⁷⁶ Committee on Economic, Social and Cultural Rights, general comment No. 13 (1999) on the right to education, para. 54.

⁷⁷ *Ibid*, para. 59.

⁷⁸ The obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide (Committee on Economic, Social and Cultural Rights, general comment No. 13, paras. 46 and 47).

⁷⁹ *Ibid*, para. 48 citing art. 13 (2) (e).

action to progressively improve provision, under article 14 of the Covenant.⁸⁰ The Committee has stressed that, under article 13, States are regarded as having principal responsibility for the direct provision of education in most circumstances.⁸¹ According to a report by the United Nations Children's Fund (UNICEF), "only the State ... can pull together all the components into a coherent but flexible education system".⁸² Any State in which a significant number of individuals are deprived of the most basic form of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.⁸³ The State remains primarily responsible for education on account of international legal obligations and cannot divest itself of its core public service functions.

4. The situation for primary education in Nigeria.

The primary goal of Nigeria's educational development is accordingly to catalyse socioeconomic development, industrial growth. The government recognises that if the education system is not able to provide the young generation with education, the country's economic future is threatened. On paper, the country has an ambitious education policy, but implementation is lacking. The number of children who are out- of school in Nigeria has increased from 10.5 million in 2017 to 11 million in 2022 - the highest figure in the world.⁸⁴ According to the World Bank, Nigeria has more than 11 million out-of-school (OOS) between the ages of 6 and 15. This represents 1 in 12 OOS children globally and will require a combination of interventions. Sixty-one percent of children age 6-11 (64 percent of males and 36 percent of females) attend primary school.⁸⁵ Number of students enrolled in public

⁸⁰ Committee on Economic, Social and Cultural Rights, general comment No. 13, para. 9.

⁸¹ *Ibid.*, para. 48.

⁸² UNICEF, *The State of the World's Children — Education* (New York, 1999), p. 63

⁸³ *ibid*

⁸⁴ This was disclosed by the World Bank in a document titled 'Nigeria Development update (May 2022) The Continuing Urgency of Business Unusual.' available at: <https://www.vanguardngr.com> accessed 10 June 2022.

⁸⁵ National Population Commission (Nigeria) and Research Triangle Institute (RTI) International, *Nigeria Demographic and Health Survey (DHS) EdData Profile 1990, 2003, 2008 and 2017: Education Data for Decision Making*, (Washington DC: National Population Commission and RTI International 2021).

primary schools keeps declining. In 2006, 22,861,884 pupils were enrolled in all the primary schools. In 2010, 20,663,805 were enrolled.⁸⁶ 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".⁸⁷ The abysmal state of public primary education is one of several urgent developmental priorities that require the Nigerian Government's attention.

4.1 Historical Background

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 1979.⁸⁸ 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 1975 to 8.1 million students in 1976 and continued to grow rapidly until 14.7 million students were formally enrolled in 1983.⁸⁹ 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

⁸⁶ Federal Republic of Nigeria, *Fifth Periodic Report 2011-2014 on the implementation of the African Charter on Human and Peoples' Rights* available at www.statereport5_Nigeria_2013_eng1 [accessed 14 July 2021]

⁸⁷ UNDP *The Millennium Development Goals Report 2014: 2* available at: <http://www.un.org/millenniumgoals/pdf/mdg2014> [accessed 17 June 2015]

⁸⁸ *ibid*

⁸⁹ 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.

World Bank to stimulate recovery of the ailing Nigerian economy as a precondition for obtaining loan facilities because of the worsening economic conditions.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ The governments of most countries in Sub-Sahara 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.⁹⁴ In the 1980s and 90s, Nigeria and other developing countries made significant cuts to their public education and health spending. In addition, international financial institutions, including the World Bank promoted user fees and increased private sector service delivery.⁹⁵

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

⁹⁰ Moja, Teboho, *Nigeria Education Sector Analysis: An Analytical Synthesis of Performance and Main Issues* (Washington D.C.: World Bank 2000), p 6.

⁹¹ Reimers, F., & Tiburcio, L, *50 Years of Education; Educational Strategies for small Island States*, (Paris: UNESCO Publication, 1993), p.186.

⁹² World Bank, *Structural Adjustment and Living Conditions in Developing Countries*, (Washington DC: Population and Human Resources Department, Welfare and Resources Department Division, 1989).

⁹³ 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

⁹⁴ 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.

⁹⁵ 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 accessed 13 March 2022

Education (UPE) scheme.⁹⁶ 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.⁹⁷ 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 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.⁹⁸ 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.

⁹⁶ 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

⁹⁷ 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.

⁹⁸ Tomasevski, K. *The State of the Right to Education Worldwide: Free or Fee-2006 Global Report*, http://www.katarinatomasevski.com/images/Global_Report.pdf/ [accessed 17 June 2014].

In public schools, educational infrastructure and facilities worsened for lack of funding.⁹⁹ Poor supervision and ineffective management of schools also led to further deterioration in the quality of education.¹⁰⁰ 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.¹⁰¹ 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'.¹⁰² 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.¹⁰³

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

⁹⁹ 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.

¹⁰⁰ Kadingdj, Stanislaus 'Policy initiatives for change and innovation in basic education programmes in Ghana' (2004) Vol 4: 2 *Educate* p.6.

¹⁰¹ Federal Ministry of Education, *Education Sector Report 2003*, p.34.

¹⁰² 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)

¹⁰³ Moja, Teboho, *Nigeria Education Sector Analysis: An Analytical Synthesis of Performance and Main Issues* (Abuja: World Bank Publication 2000).

end up dropping out of school due to inability by the parents to cope with the cost.

In Nigeria, LFPS 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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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.

Constitution of Nigeria, which is the grundnorm, states that 'the government shall when practicable, provide free, compulsory and universal primary education'.¹⁰⁷ This was noted by the CRC Committee in its 2010 Concluding

¹⁰⁴ Sulaiman, Tosin, *supra*

¹⁰⁵ 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.

¹⁰⁶ 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, [accessed 14 October 2021].

¹⁰⁷ Section 18, 1999 Constitution of the Federal Republic of Nigeria (with amendments)

Observation on Nigeria.¹⁰⁸ 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.¹⁰⁹ Presently, the right to free and compulsory primary education is not protected in the Constitution of Nigeria, and the country is a party to both ICESCR and CRC.¹¹⁰ The education sector in Nigeria still faces great challenges, especially related to high drop-out rates and the low level of education quality.

5. Non-discrimination in education

Discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited in international human rights conventions, including the International Covenant on Economic, Social and Cultural Rights (art. 2 (2)). Private education providers do not respect the prohibited grounds of discrimination and violate fundamental principles of non-discrimination in human rights law: social origin, economic condition, birth or property are the preponderant factors in allowing access to private schools. It is the obligation of States to ensure the right to education without discrimination or exclusion. Privatisation widens disparities in access to education. Private providers disregard the fundamental principle of equality of opportunity in education common to almost all international human rights treaties (A/HRC/17/29 and Corr.1). Inequalities in opportunities for education will be exacerbated by the growth of unregulated private providers of education, with economic condition, wealth or property becoming the most important criterion in access to education. States have obligations to ensure that the liberty of providing education set out in article 13 (4) of the International Covenant on Economic, Social and Cultural Rights does not lead to extreme disparities of educational

¹⁰⁸ Concluding observations: Nigeria CRC/C/NGA/CO/3-4, para 8

¹⁰⁹ Ibid para 72

¹¹⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), 993 UNTS 3 entered into force January 3 1976, the right to education is recognised in articles 13 and 14 of the Covenant. Nigeria ratified the Covenant on 29 July 1993 without any reservation. Nigeria ratified the UN CRC on 19th April 1991.

opportunity for some groups in society.¹¹¹ Pursuant to Human Rights Council resolution 17/3, states should give full effect to the right to education by, inter alia, promoting equality of opportunity in education in accordance with their human rights obligations.

6. Sustainable Development Goal (SDG) 4 and the right to education

As part of the 2030 Agenda for Sustainable Development, the Education 2030 Agenda, contributes to moving forward the full realisation of the right to education, as millions are still denied the right to education and the worst forms of discrimination still affect marginalised people and communities.¹¹² In addition to Sustainable Development Goal 4, which seeks to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all, States adopted the Education 2030 Framework for Action, which details its implementation.¹¹³ The Special Rapporteur recalls the importance of implementing Sustainable Development Goal 4 in accordance with human rights, which is not only a State obligation but also essential to tackle educational inequalities effectively, guarantee both access and quality education and ensure accountability. The Human Rights Council, in resolution 38/9, linked the obligations of States related to the right to education with their political commitments under the 2030 Agenda for Sustainable Development and more precisely with Sustainable Development Goal 4.¹¹⁴ The General Assembly itself has emphasised that the 2030 Agenda for Sustainable Development is to be implemented in a manner consistent with the rights and obligations of States under international law.¹¹⁵ Numerous stakeholders have also adopted this approach, in particular the human rights treaty bodies (for example, CRC/C/COD/CO/3-5 and CEDAW/C/NER/CO/3-4), as well as the United Nations Educational, Scientific and Cultural Organization (UNESCO), which recognised the

¹¹¹ Committee on Economic, Social and Cultural Rights, general comment No. 13 on the right to education, para. 30.

¹¹² Report of the Special Rapporteur on the right to education(2019) Right to education: the implementation of the right to education and Sustainable Development Goal 4 in the context of the growth of private actors in education A/HRC/41/37, 10 April 2019.

¹¹³ Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4 (2015).

¹¹⁴ Paras. 2 (a) and (e), 3 and 8.

¹¹⁵ General Assembly resolution 70/1, para. 18.

Convention against Discrimination in Education as the cornerstone of Sustainable Development Goal 4 and education-related targets across the other Sustainable Development Goals.¹¹⁶ An essential condition for meeting Sustainable Development Goal 4 targets is for States to allocate the maximum of their available resources to ensuring free, quality, public education for all, as required by international human rights law.

7. Abidjan Principles

These are guiding principles on the human rights obligations of States to provide public education and to regulate private involvement in education (referred to as the “Abidjan Principles”). It signifies a landmark development for the right to education, with implications for education policies and delivery. In the context of new and increasingly complex governance arrangements and processes in education and with the growing involvement of various private actors and interests in the provision, management, and funding of education in particular, the Abidjan Principles offer a reference point and a much-needed tool to address the organization of education systems. The Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education – or the Abidjan Principles – consolidate and reassert the existing obligations of States to guarantee the right to education, as set out under human rights law and standards. Specifically, they aim to unpack and clarify the normative content of the right to education in the context of the involvement of private actors in education. In recent years, courts and human rights mechanisms have increasingly referred to – and expressed concern about – the challenges and implications of growing private sector involvement in education and have highlighted the obligations of States to protect education systems against commercialization. These include, among others, UN and regional human rights treaty bodies and UN Human Rights Council resolutions. Together these have contributed to providing clarity on how the right to education applies to particular situations and complex dynamics that affect its implementation, through General Comments, concluding observations, resolutions, and reports (GI-ESCR, 2017). The Abidjan Principles bring this vast body of human rights law together and offer reference points or guidance

¹¹⁶ UNESCO, Global Education Monitoring Report 2017/18, p. 47.

– set out in 97 principles – on how the right to education should be realized in the context of the challenges posed by changing contextual realities in education, including the growth of private provision. In particular, the Abidjan Principles offer a way to navigate potential tensions between different dimensions of the right to education protected under the human rights framework at the heart of the current policy debates on education privatization. One of these is a tension that may exist between States’ obligations to ensure the provision of free quality education for all without discrimination and segregation and the liberty of parents to choose or establish a private school separate from the State – which are both recognized under human rights law. As the UN Special Rapporteur on the right to education* (2019: para. 35), Dr Boly Barry, puts it, the Abidjan Principles “constitute a significant new tool” to guide States in the implementation of the right to education. Communities, education providers, multilateral organizations, human rights bodies and courts, and other stakeholders can also use them to advocate for the reform of laws, policies and practices, to claim rights, and to hold States to account.¹¹⁷

8. Summary

Governments in many cases have failed to keep pace with need, particularly in slums. In Lagos, authorities have no incentive to provide schools in areas that they wish to clear to make way for up-market development. Also, as all relatively affluent people and virtually all civil servants have abandoned the government school system, government schools receive reduced scrutiny on issues of quality and access. In Abuja, Nigeria’s still relatively new capital, the Abuja Master Plan has been ignored in many cases, with plots of land specifically designated for government schools being granted to private schools and individuals for their own use instead.¹¹⁸ In both Lagos and Abuja, along with many other similar contexts, government school capacity

¹¹⁷ Sylvain Aubry, Mireille de Koning, and Frank Adamson,(2021) ‘Developing human rights guiding principles on State obligations regarding private education’ in; Realising the Abidjan Principles on the right to education:human rights, public education and the role of private actors in education, eds, Frank Adamson, Sylvain Aubry, Mireille de Koning and Delphine Dorsi,- Norrag Series on International Education and Development. Downloaded from Elgar Online on 06/15/2021

¹¹⁸ Härmä, (2019) supra

is vastly over-stretched. Additionally, they are too far from home for many families to access. Children face barriers to accessing public institutions. A key factor that contributes to the increase in private schools is the scarcity of government schools. In Nigeria, this, coupled with public schools situated at the periphery of low-income settlements, limits accessibility especially for younger children. Conversely, LFPS schools are situated much closer to the children's home. In such circumstances, it is certainly the case that the option of a low-fee private school is wanted; however, it must be viewed for what it is, essentially school choice out of desperation – a coerced choice, rather than the positive exercise of a human right. It is popularly suggested that the actual and perceived decline in the quality of public education is the main driver of the growth of private schools within the region. Public/government schools the classrooms were overcrowded. Whereas in LFPS the number of pupils in each class are smaller.

Weak Regulations and weak Enforcement by the government: Where private education is regulated, it is scarcely enforced due to lack of capacity, corruption or general inefficiency¹¹⁹ In Nigeria, the closure of non-compliant LFPS is rare and appears to have only intensified whenever disaster strikes in such schools. Some time ago, when several children lost their lives in the collapse of a school building in Ibadan (The Nation, 2017). Similarly, numerous LFPS continue to operate despite failing to meet minimum standards. There have also been challenges with enforcement due to lack of State capacity.¹²⁰ Stronger calls for compliance have recently been made accompanied by threats of closure should non-compliance persist. It is unclear however, whether the government has taken concrete action in this regard. Government should put in place an elaborate framework of regulations that are prescriptive, prohibitory and punitive, in order to control private providers.

Quality: As private schools, and in particular LFPS increase, we should consider that LFPS are often limited in the quality of their offering given their modest resources Income from tuition fees in LFPS is regularly insufficient

¹¹⁹ *ibid*

¹²⁰ Härmä, J., & Pikhholz, L. (2017). *Low Fee Private Schools in Low-income Districts of Kampala, Uganda*. Chicago: CapitalPlus Exchange Corporation

for meeting expenses or needs, as a substantial number of parents are unable to consistently pay fees.¹²¹ High mobility and teacher attrition are also common, which is understandable given that teachers working in LFPS often earn only 20–30 per cent of what government staff earn, or less. All these factors have significant implications for the quality of education offered. Despite this, parents from low-income communities are still “opting” to take their children to private over public schools in Nigeria, which means more and more children are exposed to sub-standard education. Commercial education targeting low-income communities also has limits to the quality of education that is offered due in part to the primary focus being on exploiting market opportunity.

Widening Stratification and Inequality occurs - while the increase in LFPS is recognised for expanding the availability of schools, they are usually out of reach of the poorest children. Inequity is further reinforced by selection criteria which is not on merit but on affordability. As a result children from poor background are blocked even if they perform better. And scholarships are not given in LFPS.

9. Recommendations

The increase in private actors and its resultant impact is, absent from policy discourse despite the growing evidence. Nigeria remains receptive to private participation in the education sector. Nigerian government and education stakeholders in the country are to further interrogate the evidence in this regard. The data vacuum on private schools must be addressed across all the states, especially where low-cost private schools are concerned. There is the need for better monitoring by the states, and private actor accountability. This should be done through adoption and enforcement of effective regulatory measures, to ensure the realisation of the right to education where private actors are involved in the provision of education. In sum, Government must regularly monitor compliance of public and private institutions with the right

¹²¹ Edwards, D. B., Klees, S. J., & Wildish, J. L. (2015). Dynamics of Low-Fee Private Schools in Kenya: Governmental Legitimation, School-Community Dependence, and Resource Uncertainty. Retrieved from: http://download.ei-ie.org/Docs/WebDepot/2015_Kenya_Low-FeeSchools_final.pdf accessed 23 March 2022.

to education and ensure all public policies and practices related to this right comply with human rights principles.

Government must prioritise the funding and provision of free, quality, public education, and may only fund eligible private educational institutions, whether directly or indirectly, including through tax deductions, of land concessions, international assistance and cooperation, or other forms of indirect support, if they comply with applicable human rights law and standards and strictly observe all substantive, procedural, and operational requirements. International assistance and cooperation, where provided, must reinforce the building of free, quality, public education systems, and refrain from supporting, directly or indirectly, private educational institutions in a manner that is inconsistent with human rights.

10. Conclusion

Education benefits both the individual and the society and must be preserved as a public good; social interest in education must be protected against its commercialization. The corrosive impact of privatisation on the right to education must receive foremost consideration in education laws and public policies. The commercialisation of education should have no place in a country's education system. Guided by principles of social justice and equity, as well as human rights law, regulating private providers is essential to mitigate the potentially deleterious and negative effects on students, education systems and societies. Governments should not encourage low-fee private schools and should restore education as their essential public service function. The provision of basic education free of cost is not only a core obligation of the State, but also a moral imperative. The State must discharge its responsibility as guarantor and regulator of education as a fundamental human right of every child.