

## **A Review of Legal Instruments on Equal Right to Education of Children with Disabilities in Nigeria**

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### **Introduction**

Achieving the Education For All targets and Millennium Development Goals will be impossible without improving access to and quality of education for children with disabilities. The EFA Global Monitoring Report 2007 estimates that the majority of children with disabilities in Africa do not go to school at all, and of the 72 million primary aged children worldwide that are out of school, one third have disabilities.<sup>1</sup>

Education is an empowerment tool in the development of the human personality and ultimately, of the society. Unfortunately, due to some impediments, not all children enjoy their right to education, especially among those who have disabilities. According to the EFA Global Monitoring Report 2010, children with disabilities remain one of the main groups being widely excluded from quality education and disability is recognised as one of the least visible yet most potent factors in educational marginalisation<sup>2</sup>. Bines and Lei have also submitted that disability

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<sup>1</sup> Department for International Development (DFID), UKaid. Guidance Note A DFID practice paper, p. 1.

<sup>2</sup> UNESCO (2010) Reaching the marginalized. EFA Global Monitoring Report 2010.

<http://unesdoc.unesco.org/images/0018/001866/186606E.pdf>

remains a significant factor in exclusion from schooling<sup>3</sup>. Factors that impede the equal access to education of children with disabilities are therefore a source of concern in human rights. For education to be truly successful, society, including teachers, administrators, parents, and peers, need to provide people with disabilities the opportunity and respect to use their knowledge and skills to lead independent and self directed lives.<sup>4</sup> Children with disabilities (CWDs) have been found to record lower educational achievements as they are less likely to start school than their peers without disabilities, and have lower rates of staying and being promoted in schools<sup>5</sup>. Even where (CWDs) start school, education completion gaps are found across all age groups in both low-income and high-income countries, and the pattern is more pronounced in poorer countries<sup>6</sup>. The difference between the percentage of (CWDs) and the percentage of non-disabled children attending primary school ranges 15% in Cambodia to 58% Indonesia, in secondary education in Indonesia respectively<sup>7</sup>. Even in countries with high primary school enrolment rates, such as those in Eastern Europe, many children with disabilities do not attend school<sup>8</sup>. Earlier approaches in disability discourse generally relied on a medical diagnosis, but disability is now generally

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<sup>3</sup> Bines, H, Lei P. (2011). Disability and education: The longest road to inclusion, *International Journal of Educational Development* 31 (2011) 419–424

<sup>4</sup> Human Rights. Yes! Action and Advocacy on the Rights of Persons with Disabilities, PART 2: the convention on the rights of persons with disabilities p. 167. Retrieved on 04 March 2014 at <http://www1.umn.edu/humanrts/edumat/hreduseries/TB6/pdfs/HRYes%20-%20Part%202%20-%20Chapter%2013.pdf>

<sup>5</sup> Department of International Development (DFID) UKaid, Guidance Note, A DFID practice paper. Education for children with disabilities – improving access and quality, p.2.

<sup>6</sup> *Ibid*, p.3.

<sup>7</sup> Filmer D. 2008. Disability, poverty, and schooling in developing countries: results from 14 household surveys. *The World Bank Economic Review*, 22:141-163. doi:10.1093/wber/lhm021

<sup>8</sup> World Health Organisation and World Bank, 2011. World Report on Disability, WHO, Geneva, p.7.

defined in terms of the consequence for functionality of a physical, sensory or cognitive impairment and impact on social participation, including the barriers to such participation in particular societies<sup>9</sup>. There has been a clear shift in the perception of disability and its implications from a medical model in which the person with disability was viewed as defective and needing to be fixed, to a social model in which the person has the same rights as other human beings and is the prominent concern rather than the condition of having an impairment. In the later model, the environment plays a key role in the ability of PWDs to function in and be included in the society.

The article is therefore in seven parts. After its introduction, it examines disability and its definitions, types and prevalence in the second part to provide a deeper understanding of the concept. It examines the importance of education and why it is needful for children with disabilities in the third part and proceeds in the fourth, fifth and sixth parts to examine the international, regional and Nigerian legal structure for the protection of the right to education of children with disabilities respectively. It is noted that in the enjoyment of the right to education, challenges that confront CWDs include inaccessibility, unavailability of facilities and teachers in remote areas, physical barriers to educational facilities where available, inadequate skills among teachers and administrators and inadequate attention to the Special Needs of learners with disabilities, especially when located in the mainstream education set up<sup>10</sup>. The paper examines the relevant laws that seek to protect and achieve equality in education for persons with disability at international, regional and municipal levels with the objectives first to articulate the relevant laws and secondly to review the laws for a better understanding. The article ends with some recommendations and conclusion.

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<sup>9</sup> Bines, H, Lei P. (2011). Disability and education: The longest road to inclusion, *International Journal of Educational Development* 31: 419–424, p. 420.

<sup>10</sup> DFID, op.cit., p. 3.

## 2. Prevalence and Nature Disability

World estimates of prevalence of disability have become higher in the last decade. More than a billion people are estimated to live with some form of disability, or about 15% of the world's population (based on 2010 global population estimates) which is higher than previous World Health Organization estimates, which date from the 1970s and suggested around 10%<sup>11</sup>.

**The International Classification of Functioning, Disability and Health** (ICF) defines disability as an umbrella term for impairments, activity limitations, and participation restrictions, while according to the World Report on Disability, disability is the negative aspects of the interaction between individuals with a health condition (such as cerebral palsy, Down syndrome, depression) and personal and environmental factors (such as negative attitudes, inaccessible transportation and public buildings, and limited social supports)<sup>12</sup>. Disability has been variously defined and classified in international law, constitutional and national laws. Definitions of disability are not only found in laws, but also other fields. According to Howe, various research fields attach different meanings to the words 'disability', 'impairment' and 'handicap'<sup>13</sup>. For example, some definitions focus on social construction of disability as a dynamic and culturally determined interaction between a person's individual functioning and the social meaning and response imposed upon that function<sup>14</sup>. Here disability can be perceived as the loss or limitation of opportunities that prevents people who have impairments from taking part in the normal life of a community on an equal level with others due to physical and social barriers. Furthermore, the dominant 'medical' construction of disability emphasizes overcoming or conquering

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<sup>11</sup> World Health Organisation and World Bank, 2011. World Report on Disability, WHO, Geneva, p.7.

<sup>12</sup> World Health Organisation and World Bank, 2011. World Report on Disability, WHO, Geneva, p.7.

<sup>13</sup> Howe, J. 2000. Violence Against Women with Disabilities: An Overview of Literature. *International Rehabilitation Review*, 50(2): 40-47, p. 41.

<sup>14</sup> *Id.*

disability through medical treatment or individual fortitude<sup>15</sup>. The definition of the concept disability along with related concepts has been by the World Health Organisation. The WHO developed an International Classification of Impairments, Disabilities and Handicaps which includes the following:

'Impairment' refers to any loss or abnormality of psychological, physiological or anatomical structure or function.

'Disability' refers to any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

'Handicap' refers to a disadvantage for a given individual, resulting from impairment or a disability that limits or prevents the fulfillment of a role that is normal (depending on the age, sex, and social and cultural factors) for that individual<sup>16</sup>.

Disability refers to difficulties encountered in any or all three areas of functioning. The ICF can also be used to understand and measure the positive aspects of functioning such as body functions, activities, participation and environmental facilitation<sup>17</sup>. Disability arises from the interaction of health conditions with contextual factors - environmental and personal factors. The ICF contains a classification of environmental factors describing the world in which people with different levels of functioning must live and act. Such factors can be either facilitators or barriers. The environmental factors include: products and technology; the natural and built environment; support and relationships; attitudes; and services, systems, and policies.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, p. 40.

<sup>17</sup> The ICF adopts neutral language and does not distinguish between the type and cause of disability – for instance, between “physical” and “mental” health. “Health conditions” are diseases, injuries, and disorders, while “impairments” are specific decrements in body functions and structures, often identified as symptoms or signs of health conditions.

The Convention on the Rights of Persons with Disabilities (CRPD) (2006) does not explicitly define the word “disability”. Indeed, the Preamble to the Convention acknowledges that “disability” is an evolving concept<sup>18</sup>. The Convention does not also define the term “persons with disability”. However, the treaty states that the phrase includes persons who have long-term physical, mental, intellectual or sensory impairments that, in the face of various negative attitudes or physical obstacles, may prevent those persons from participating fully in society<sup>19</sup>.

### **2.1 Types of Disability**

Depending on the type and nature of their challenges, PWDs are confronted with different types of problems, some of which are common others are disability specific.

**Locomotor Disability:** Locomotor disability is defined as the person’s inability to execute distinctive activities associated with moving both himself and the objects, from place to place and such in ability resulting from affliction of musculoskeletal and/ or nervous system. Some common conditions giving raise to locomotor disability could be poliomyelitis, cerebral palsy, autism, amputation, injuries of spine, head, soft tissues, fractures, muscular dystrophies etc.

**Visual Disability:** Visual Disability or Blindness refers to a person’s inability to see either fully or partially. A visually disabled person is known to be suffering from visual impairment. **Low Vision or Poor Eye Sight:** A person with low vision or poor eyesight is one who continues to have the problem even after going through medically approved corrective measures. This person with poor eyesight is still in a position to continue his tasks with appropriate assisted devices.

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<sup>18</sup> Sub paragraph. (e) CRPD 2006.

<sup>19</sup> Article 1, CRPD 2006.

**Mental Illness:** Mental illness can include both mental ill health and retardation. Mental retardation is defined as a state of arrested or incomplete development of the mind, which is specially characterized by impairment of skills manifested during the development period which contribute to the overall level of intelligence, i.e., cognitive language, motor and social abilities. Mental ill health constitutes of schizophrenia, anxiety disorder and depressive disorder or any other problem, which is caused due to series of chemical changes in the brain.

**Speech and Hearing Disability:** Speech and Hearing Disability is referred to a condition wherein the person is incapable of speaking and hearing any sound.

**Learning Disability:** It is a disorder, which affects the basic psychological processes of understanding or using written or spoken language. This disorder affects development of language, speech, and reading and associated communication skills needed for social interaction. Conditions such as brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia are examples of learning disabilities.

**Multiple Disabilities:** A combination of two or more disabilities as defined in clause (i) of section 2 of the Person with disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 namely Blindness/low vision Speech and Hearing impairment Loco motor disability including leprosy cured Mental retardation and Mental illness.<sup>20</sup>

The human rights model addresses power relations and rights<sup>21</sup>. The classifications into these models have been evolving and appear to represent different areas. However, there is no clear demarcation in the successive stages of the different models as social and human rights model for instance, can co-exist in some

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<sup>20</sup> Chaudhuri Leni, Disability in India Issues and Concerns, *eSS Conference Paper* May, 2006, p.3.

<sup>21</sup> Ember-10 October2001,E/CN.4/2002/Add 1,28

instances. According to Degener, “a powerful link can be forged between the “Social Construct” models of disability<sup>22</sup>. In terms of disability and handicap (sometimes used interchangeably) they have been distinguished. While the term disability summarizes a great number of different functional limitations occurring in any population in all countries of the world, handicap is the loss or limitation of opportunities to take part in the life of the life of the community on an equal level with others. Handicapped describes the encounter between the environments, emphasizing the shortcomings in the environment, which prevent persons with disabilities from participating on equal term<sup>23</sup>. It is noted in accordance with the principle of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation<sup>24</sup>.

Although there is generally agreement in the available information on low education rate of CWDs both in the global South and North, comparatively, the extent is worse in the South. Bines and Lei have observed that until recently, the impact of disability has been somewhat neglected in relation to education in the global south, but they also agree that several factors are now contributing to a change in this situation<sup>25</sup>. Despite some positive changes however, the right to education of children in Nigeria continues to face challenges related discrimination and poverty among others.

### **3. Why education of children with disabilities important**

It is important to emphasize that children with disabilities have the rights as normal children and deserve the same protection, or even more protection due to their disabilities. Although the law provides some protection, there is however no comprehensive legislation

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<sup>22</sup>Quinn G., and Degener T., *Op.cit.*

<sup>23</sup> The Standard Rules on the Equalization of Opportunities for persons with Disabilities, adopted by the UN General Assembly, Resn.48/96, December 20, 1993, Introduction, para.24.

<sup>24</sup> *Ibid*, para.25

<sup>25</sup> Bines, H, Lei P. (2011), *op.cit.*

safeguarding the rights of the disabled learner in the current South Africa legal framework<sup>26</sup>. Nigeria also currently lacks such a comprehensive legislation to date. Takamine has observed that in terms of its effects, lack of education remains the key risk factor for poverty and exclusion of all children, both of those with disabilities and those with no disabilities<sup>27</sup>. The result of lack of access to education is far reaching in the context of disability. According to the Directorate for International Development (DFID) children with disabilities in developing countries have restricted access to education with only 1 to 2% receiving an education<sup>28</sup>. In justifying the need to educate children with disabilities, DFID submits that it is a good investment, based on a World Bank paper notes that it reduces welfare costs and future dependence<sup>29</sup>. Educating CWDs reduces current dependence and frees other household members from caring responsibilities, allowing them to increase employment or other productive activities<sup>30</sup>. Additionally, it increases children's potential productivity and wealth creation which will in turn help to alleviate poverty<sup>31</sup>. It is thus important that the law should ensure that the right to education is available to all persons and especially those with disabilities.

Unfortunately, Bines and Lei have found that until recently, the impact of disability has been somewhat neglected in relation to

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<sup>26</sup>Skelton (ed.) (1998)Children and the Law, Pretoria Lawyers for Human Rights,72 as cited in Bekink B. and Bekink M., 2005. Children with disabilities and the right to education: a call for action, *STELL LR*,127.

<sup>27</sup> Takamine, Yutaka (2004): Working Paper Series on Disability Issues in East Asia: Review and Ways Forward. Paper No. 2004-1, May, p. 20. Available at: [http://siteresources.worldbank.org/DISABILITY/Resources/Regions/East-Asia-Pacific/Disability\\_Issues\\_in\\_East\\_Asia\\_Takamine.pdf](http://siteresources.worldbank.org/DISABILITY/Resources/Regions/East-Asia-Pacific/Disability_Issues_in_East_Asia_Takamine.pdf)

<sup>28</sup> DFID, 2000. Enabling Education Network, P3: Available at <http://eenet.org.uk>

<sup>29</sup> DFID, op.cit. p.3

<sup>30</sup> Ibid.

<sup>31</sup> Ibid. For instance, a CIRJE study on Nepal estimates that rate of returns of investment to education among persons with disabilities varies between 19 and 32 per cent.

education in the global south. But several factors are now contributing to a change in this situation<sup>32</sup>.

- First, progress on general enrolment is enabling more attention to be given to children who are harder to reach, many of whom are disabled.
- Second, there is increasing awareness that universal primary education will only be achieved if the participation in schooling of such children is secured.
- Third, there is more recognition of the rights of people with disabilities, including the right of children with disabilities to education, due to advocacy at both national and international levels.
- Fourth, there have been associated changes in attitudes towards people with disabilities and their capabilities. Finally, an increasing emphasis on rights and inclusion in relation to disability in northern countries is having some influence on approaches to development, including in relation to education.<sup>33</sup>

Education has been defined as the “efficient production of human capital” in the view of Economists. Its purpose is to structure “the supply of qualified people over a long period of time to make it more in line with economic demands”. Such definitions have been criticized as being the basis for denial of the right to education for PWDs. Investment on the education of PWDs must be seen as a public investment to ensure equality of all human members of society, rather than as a prolific venture only.

Education has multiple positive roles in society. According to DFID for instance, it can reduce discrimination against children with disabilities and tackle poverty<sup>34</sup>. Education, particularly inclusive education, is able to reduce discrimination through

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<sup>32</sup> Bines, H, Lei P. (2011). Disability and education: The longest road to inclusion, *International Journal of Educational Development* 31: 419–424, p. 419.

<sup>33</sup> *Ibid.*

<sup>34</sup> DFID UKaid Guidance Note, A DFID practice paper. Education for children with disabilities – improving access and quality, p.3.

enabling children with and without disabilities to grow up together. Education gives children with disabilities skills to allow them to become positive role models and join the employment market, thereby helping to prevent poverty<sup>35</sup>.

#### **4. Legal and policy structure on the equal right to education of children with disabilities**

##### **4.1 Universal Declaration on Human Rights (UNDHR)**

In terms of the development of the right to education, the first international document to make express reference to the right to education was the Universal Declaration on Human Rights (UNDHR), which provides for free and compulsory education and higher education that is to be equally accessible<sup>36</sup>. The UN Declaration on the Rights of Disabled Persons also provided for the right to education by specifying that disabled persons have the right inter-alia, to education, social rehabilitation, vocational training and other services which capabilities and skills to the maximum and will hasten the process of their social integration or re-integration<sup>37</sup>. It is however important to note that the said declarations do not have legal binding force as they are merely resolutions of the UN General Assembly, which do not require ratification by state parties. The legal import of the declarations is therefore grossly inadequate to secure the needed commitment to their provisions by member states.

##### **4.2 The International Covenant on Economic, Social and Cultural Rights (ICESCR)**

It contains provisions also for equal rights to education. It provides inter- alia, that “State Parties to the covenant recognize the right of everyone to education and recognize inter- alia, that to achieve the full realization of this right, primary education shall be compulsory

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<sup>35</sup> Ibid.

<sup>36</sup> UNDHR 1948 Article 26.

<sup>37</sup> Declaration on the Rights of the Disabled Persons, Principle 6.

and freely available to all<sup>38</sup>. Other provisions for the right to education on equal basis include the United Nations World Declaration for All 1990<sup>39</sup>, which guarantees the right to education and development of a person's full capacity.

### **4.3 The Standard Rules on the Equalization of Opportunities for persons with Disabilities:**

The General Assembly of the UN further endorsed the provision of equal rights to education when it has adopted the Standard Rules on the Equalization of Opportunities for persons with Disabilities<sup>40</sup>. Although the UN Standard Rules are not legally binding, they express principles of full participation and equality for people with disabilities. They also set international Standards for National planning and have provided for guidance for some countries in Africa in developing policies<sup>41</sup>. The standard Rules which were adopted in the 48th session of the United Nations General Assembly, December 1993, should be considered as a guideline for strict implementation to achieve good access for PWDs. Though it is a "soft law" in the sense that it is not enforceable per se as a legislative enactment would be, it sets out ideals or standards for the rights of PWDs to be realized. To achieve development, access to education is the key as development is a factor of education. This does not only physical access to schools but also reservation of seats, access to reading material on Braille, appliances like hearing aids should be made available to all disabled children<sup>42</sup>. Other instruments of the UN Agencies will now be examined briefly.

#### **4.3.1 Convention 142 concerning vocational guidance and vocational training in the development of human resources**

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<sup>38</sup> UNICESCR 19966. E/2001/64 General Comment.5.

<sup>39</sup> Article 1

<sup>40</sup> 1994

<sup>41</sup> Skleton(ed.)op cit.(note 15 above) 72 South Africa for instance, has been guide in formulating national Policies, by the Standard Rules.

<sup>42</sup> Chaudhuri Leni, Disability in India Issues and Concerns, *eSS Conference Paper* May, 2006, p. 33.

This Convention was adopted by the ILO in 1975 and came into force in 1977. Under this Convention a ratifying country agrees to establish and develop open, flexible and complementary systems of general, technical and vocational education, educational and vocational guidance and vocational training, whether these activities take place within the formal education system or outside it<sup>43</sup>.

#### **4.3.2 The United Nations Educational, Scientific and Cultural Organisation (UNESCO)**

The primary concern of UNESCO is the promotion and protection of cultural rights. According to its Constitution,<sup>44</sup> the purpose of UNESCO is:

To contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.

#### **4.3.3 Convention against discrimination in education**

This Convention was adopted in 1960 by the General Conference of UNESCO and came into force in 1962. It has been ratified by the UK and other leading countries. The Convention reformulates the UNDHR statement that ‘discrimination in education is a violation of the right of every person to education’ and declares that:

discrimination in education includes depriving any person or group of persons of access to education of any type or at any level... or limiting any person or group of persons to education of an inferior standard...

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<sup>43</sup> Article 2.

<sup>44</sup> Article 1.

or inflicting on any person or group of persons conditions which are incompatible with the dignity of man<sup>45</sup>.

This convention is specific on its subject matter, education therefore is one of the early instruments that brought the right to education of PWDs to the fore as a subject of human right rather than charity.

#### **4.3.4 The Convention on the Rights of Persons with Disabilities (CRPD) 2006**

The CRPD is an instrument purposely targeted at the protection of the rights of the right of people with disabilities, including children. It strengthens the shift from institutional care by recognising the right of PWDs, to live in the community, backed up with the necessary support and community based services to make that possible. The CRPD thus embraces a rights-based, social model conceptualization of disability, and in so doing signifies a major shift from previous international instruments and a progressive development of human rights law that has major implications for education stakeholders.

Thus the CRPD has introduced a profound shift in emphasis. For instance, it frowns at institutionalising children with disabilities which involves removing them from public view and effectively rendering them invisible. That was an approach which identified the child as a 'problem' to be got rid of. The philosophy underpinning the CRPD encourages the removal of the social, physical, cultural, attitudinal and economic barriers that impede the realisation of rights not the removal of the child. Article 14 of the CRPD introduces a requirement on Governments to ensure that people with disabilities, including children, are entitled to enjoy the right to liberty on the same basis as others.<sup>46</sup>

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<sup>45</sup> Article 1.

<sup>46</sup> The CRC stresses that children should never be removed from their parents against their will, unless it is necessary for the best interests of the child, for example, where the parents are subjecting the child to physical abuse or are neglecting him or her. In addition, removal from their family is a matter of

In terms of its educational guarantee, article 24 CRPD on education provides as follow:

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

- (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- (c) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

- (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
- (c) Reasonable accommodation of the individual's requirements is provided;
- (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

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extreme concern to children, and should never be undertaken without consulting them and taking their views seriously, in accordance with their age and maturity.

(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

- (a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
- (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
- (c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

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

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an

equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

It is important that both the Convention on the Rights of the Child (CRC) and the CRPD require that the best interest of the child is always the paramount consideration. In terms of implementation of the right to education, the school system has to decide to provide education for PWDs, and therefore require modifications of both curricula and infrastructure. Governments have to choose to cater for the needs of their citizens who have disabilities, (even if at an increased cost).

## **5. African Regional Instruments relevant to right to education of PWDs**

### **5.1 African Charter on Human and Peoples' Rights, 1981<sup>47</sup>**

The ACHPR, also known as the Banjul Charter, was adopted by the Organisation of African Unity in 1981 and entered into force on 21 October, 1986<sup>48</sup>. The Charter recognises the basic civil and political rights as well as economic, social and cultural rights<sup>49</sup>. It also recognises other rights such as the rights to development, self-determination and a satisfactory environment<sup>50</sup>. The Charter further recognises the duties of the individual towards the family,

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<sup>47</sup> An increasing source of influence on the international scene is the phenomenon of the regional network, either within or across continents (for example the European Union and the Council of Europe, that seek to agree on a set of norms that it will strive to uphold within the region, although there is no basis in law for enforcing these norms. One such example is the Organisation of American States (OAS), whose General Assembly adopted in June 1999 the Inter-American Convention on the Elimination of All Forms of Discrimination against people with disabilities.

<sup>48</sup> See OAU Doc. CAB/LEG/67/3/Rev.5, 21 ILM 58 (1982). The Organisation of African Unity (OAU) has been re-christened as African Union (AU).

<sup>49</sup> See arts 3-14 on civil and political rights and articles 15-18, on economic, social and cultural rights.

<sup>50</sup> See arts 19-24, on peoples' rights. See also, Dugard "International Human Rights" in Van Wyk, D. Dugard, J. de Villiers, B. & Davis, D. op.cit., pp. 188.

society, and State<sup>51</sup>. The supervision of the ACHPR is entrusted to the African Commission on Human and Peoples “Rights and the African Court on Human and Peoples” Rights<sup>52</sup>. The ACHPR says little on the right to education as it devotes only article 17(1) to the right to education. The article provides that every individual shall have the right to education and that every individual may freely take part in the cultural life of his community. It states further that the promotion of the morals and traditional values recognised by the community shall be the duty of the State.

The Charter spells out the basic obligation of the States parties in its article 1 by providing that the States “shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. This obligation is complemented by article 62 which requires the States parties to report biennially “on the legislative or other measures” they have adopted to give effect to the rights the Charter guarantees. In terms of the provisions of article 25, the Charter imposes a “duty” on the States parties “to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the...Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.” It is submitted that this provision, if acted upon with imagination by the African Commission on Human and Peoples“ Rights and by non-governmental human rights organisations, could prove helpful in developing a useful programme of human rights education in Africa<sup>53</sup>.

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<sup>51</sup> See arts 27-29. See also, Van Wyk, Dugard, de Villiers & Davis, D., *op.cit.*, pp. 189.

<sup>52</sup> The Commission is established by art 30 of the ACHPR and article 45 sets out the functions of the Commission. The Court on the other hand was established by the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples’ Rights (1998) OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III), entered into force on 25 January 2004.

<sup>53</sup> See Buergenthal, T., *op.cit.*, p. 239.

## **5.2 African Charter on the Rights and Welfare of the Child, 1990**

The ACRWC which was adopted by the erstwhile Organisation of Africa Unity in 1990 has extensive provisions on the right to education<sup>54</sup>. Article 11 guarantees the right to education and further sets out the purpose of education and the duties of States parties with regard to achieving the full realisation of the child's right to education. The article provides:

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
  - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
  - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples; rights and international human rights declarations and conventions;
  - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
  - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups;
  - (e) the preservation of national independence and territorial integrity;
  - (f) the promotion and achievement of African Unity and Solidarity;
  - (g) the development of respect for the environmental and natural resources;
  - (h) the promotion of the child's understanding of primary health care.

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<sup>54</sup> See OAU Doc. CAB/LEG/24.9/49 (1990). This Charter entered into force on 29 November 1999.

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
  - (a) provide free and compulsory basic education;
  - (b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all;
  - (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;
  - (d) take measures to encourage regular attendance at schools and the reduction of the drop-out rates;
  - (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children schools, other than those established by public authorities, which conform to such minimum standards as may be approved by the State, and to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child.
5. States parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.
6. States parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.
7. No part of this Article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this Article and the requirement that the education given in such

institutions shall conform to such minimum standards as may be laid down by the State.

The Charter can be referred to as an African counterpart of the Convention on the Rights of the Child. It has similar provisions with articles 28 and 29 of the CRC. In addition to reiterating the aims of education as stated in the CRC, the Charter introduces three new educational aims. They are: the preservation of national independence and territorial integrity;<sup>55</sup> the promotion of African unity and solidarity,<sup>56</sup> and the promotion of a child's understanding of primary health care<sup>57</sup>. The Charter, unlike the CRC, does not make provision for vocational education. Also, article 11(6) of the ACRWC is new. It requires States parties to take all appropriate measures to ensure that children who become pregnant before completing their education have an opportunity to continue with their education on the basis of their individual ability. This provision is necessary in view of the pattern in most African schools which categorises pregnancy as a disciplinary offence, which usually leads to the expulsion of the pregnant girl from school. This sometimes usually has the devastating effect of precluding the girl from continuing her education<sup>58</sup>. It is submitted that if this occurs to a girl with disability, the effect is doubled by virtue of gender and disability.

Apart from article 11, other provisions protecting the right to education include articles 13 and 20 of the Charter. Article 13 deals with handicapped children while article 20 deals with parental responsibilities. Article 13(2) provides that "States parties...shall ensure that the disabled child has effective access to training...in a manner conducive to the child's achieving the fullest possible social integration, individual development and his cultural and moral development." Article 20(2)(a) provides that States parties have the obligation "in accordance with their means and national conditions to take all appropriate measures", "to assist

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<sup>55</sup> Art 11(2)(e).

<sup>56</sup> Art 11(2)(f).

<sup>57</sup> Art 11(2)(h)

<sup>58</sup> Beiter, K.D., *op.cit.*, p. 219.

parents...and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.” The foregoing are fundamental provisions on the protection of the child’s right to education and more importantly, the child with disability, at the African continent. The Charter has been criticized on the basis that the sole implementing organ of the African Charter is the African Commission on Human and People’s Rights, which has few powers and has been ‘hesitant in exercising or creatively implementing and developing them’<sup>59</sup>. It is however notable that this position has changed with the establishment of the African Court of Human Rights which has a base in Abuja, the Federal Capital Territory of Nigeria. The efficiency of the court is expected to be enhanced by this development.

## **6 National Instruments for the protection of the right to education of PWDs**

### **6.1 Constitution of the Federal Republic of Nigeria (CFRN) 1999**

Education is not only a right of every child as advocated for by the United Nations (UN), it is also a constitutional enactment in Nigeria<sup>60</sup>. Although the CFRN 1999 guarantees a group of rights which are collectively tagged “Fundamental Rights”, not all children in Nigeria enjoy equal right to education and particularly, CWDs often suffer exclusion from education. The rights include the right to life, dignity of the human person, personal liberty, fair hearing, private and family life, freedom of thought, conscience and religion, expression and the press, peaceful assembly and association, freedom of movement, freedom from discrimination, and right to acquire and own immovable property anywhere in Nigeria<sup>61</sup>. Of particular relevance is section 42 which guarantees

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<sup>59</sup> Steiner, H. and Alston, P. 1996. *International Human Rights in Context: Law, Politics, Morals*. Oxford: Clarendon, p. 689.

<sup>60</sup> Section 18, CFRN 1999.

<sup>61</sup> Sections 333 – 43 of the CFRN 1999 (as amended).

the right to freedom from discrimination. Lack of access results in exclusion and exclusion implies discrimination against the excluded. The constitutional provision on education is contained in section 18 in the second chapter of the CFRN 1999. This provision is one of those collectively labeled as “Fundamental Objectives and Directive Principles of State Policy”. There are quite a lot of debates on the enforceability of rights in chapter II of the CFRN, 1999. It is notable that section 18(1) states that: Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. This is a policy commitment and if matched with the provision of section 6(6) of the same constitution, it appears that no one can sue for the enforcement of the right to education on the basis of section 18 CFRN 1999. Section 6(6)(c) of the 1999 Nigerian Constitution provides that the judicial powers vested (by the Constitution) on the courts “shall not extend ... to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution.” However, it must be mentioned here that if it is interpreted along side with other legislative instruments and especially the African Charter (Domestication) Act, 2004, then it is possible for the courts to exercise jurisdiction in the enforcement of the right to education in Nigeria<sup>62</sup>.

**6.2 The Nigerians with Disability Decree (NWDD) 1993** also provides for accessibility to all public facilities for all persons with disabilities (PWDs). Fields covered in the Decree include its general principles, Declaration of policy, Interpretation, Rights and privileges of persons with disability, Education, Vocational rehabilitation and employment, Housing, Accessibility, Transportation, Supportive social services, Sports and recreation, Telecommunications, Voting access and Legal services<sup>63</sup>. Sections

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<sup>62</sup> See Attorney-General, Ondo State v Attorney-General, Federation of Nigeria (2002) 9 SCM 1 at pp. 97-98.

<sup>63</sup> Section 1 – 14 NDD 1993, respectively.

5 and 8 of the NWDD which deal with the rights to education and accessibility respectively are closely related as the provision of access is not only important but invaluable in ensuring equal right to education. As disclosed in the first section of the Decree, its intentions or objectives are clearly set out and are well intentioned as follow:

*The purpose of this Decree is to provide a clear and comprehensive legal protection and security for Nigerians with disability as well as establish standard for enforcement of the rights and privileges guaranteed under this decrees and other laws applicable to the disabled in the Federal Republic of Nigeria*<sup>64</sup>

Although the Nigerians with Disability Decree of 1993 talks about making all public buildings and places of importance accessible to the PWDs, the government is far from achieving it as at 2012. The reason for this is that the NWDD of 1993 was not subsequently included in the Laws of the Federation of Nigeria (LFN) 2004. Its legal status has therefore been uncertain and its provisions have been unenforced<sup>65</sup>. When the government eventually decides to implement the policy on education in favour of PWDs, it is recommended that it should set a dead line and immediately work upon the physical accessibility part to educational facilities both physical and virtual, in order to realize the ideals of the NWDD. The meaning and scope of virtual access in the context of disability expands the concept of access from physical access to include other things like information, communication, media, entertainment, sports and culture.

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<sup>64</sup> Section 1 of the NDD 1993.

<sup>65</sup> See Olanrewaju A. A. 2011. Comparative Analysis of Disability Rights, in Epiphany Azinge and Chinyere Ani (eds.) *The Rights of Persons with Disabilities*, Nigerian Institute of Advanced Legal Studies, pp.177-219, 188. See also Awah Animi, 2011. Legislating for the Disabled in Epiphany Azinge and Chinyere Ani (eds.) *The Rights of Persons with Disabilities*, Nigerian Institute of Advanced Legal Studies, pp.143-176, 161.

### 6.3 The Child's Rights Act 2003

The Child Rights Act (CRA), 2003 was enacted by the National Assembly to provide and protect the rights of a Nigerian child and other related matters. It provides for comprehensive rights of the child in a binding and fundamental way such as the United Nations CRC.

Section 15 of the Act provides for the right to education in the following words:

- (1) Every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government in Nigeria to provide such education.
- (2) Every parent or guardian shall ensure that his child or ward attends and completes his: (a) primary school education; and (b) junior secondary education.
- (3) Every parent, guardian or person who has the care and custody of a child who has completed his basic education, shall endeavour to send the child to a senior secondary school, except as provided for in subsection (4) of this section.
- (4) Where a child to whom subsection (3) of this section applies is not sent to senior secondary school, the child shall be encouraged to learn an appropriate trade and the employer of the child shall provide the necessaries for learning the trade.
- (5) A female child who become pregnant, before completing her education shall be given the opportunity, after delivery, to continue with the education, on the basis of her individual ability.
- (6) Where a parent, guardian or person who has care and custody of a child, fails in the duty imposed on him under subsection (2) of this sections, commits an offence and is liable-
  - i. on first conviction to be reprimanded and ordered to undertake community service;
  - ii. on second conviction to a fine of two thousand naira or imprisonment for a term not exceeding one month or to both such fine and imprisonment; and

- iii. on any subsequent conviction to a fine not exceeding five thousand naira or imprisonment for a term not exceeding two months or to both such fine and imprisonment.
- (7) The provisions of this section shall not apply to children with mental disability.

The Act further provides that every person, authority, body or institution that has the responsibility for ensuring the care of a child in need of special protection measures shall endeavour, within the available resources, to provide the child with such assistance and facilities which are necessary for his education, training, preparation for employment, rehabilitation, and recreational opportunities in a manner conducive to his achieving the fullest possible social integration and individual development and his cultural and moral development<sup>66</sup>.

**6.4 The Compulsory, Free, Universal Basic Education and other Related Matters (UBE) Act 2004** The right of every child to education in Nigeria, has been enacted in other legislations in addition to the constitutional provision<sup>67</sup> on education and provision for funding has been made. A key legislation in this wise, is the UBE Act 2004. To ensure the realization of the goal of the (UBE) Act 2004,<sup>68</sup> two percent 2% of the consolidated revenue of the country has been set aside for implementation. However, notwithstanding these efforts, it has been noted that enrolment ratios at the primary school level in Nigeria is quite low, confirming the submission of DFID about almost all the less developed countries<sup>69</sup>. Nigeria is one of such countries that have records of low enrolment in spite of constitutional and legislative provisions of the right to education. In respect of children with disabilities, several factors have been identified as impediments to the

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<sup>66</sup> See s 16(2) of the Act.

<sup>67</sup> Section 18, Chapter II of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN).

<sup>68</sup> See Federal Republic of Nigeria, Official Gazette, 91(66), Govt. Notice No.142,Lagos, 2004.

<sup>69</sup> DFID, Op.cit., pp. 9-15.

achievement of equal right to education for all as provided by the UBE Act 2004, including discrimination, poverty and lack of accessibility to physical educational structures and materials as well as the curricula.

### **6.5 The Convention on the Rights of Persons with Disabilities CRPD in Nigeria's Legal Structure**

Nigeria like many other countries, has declared support for disability rights on Friday, September, 24, 2010 by signing both the Convention on the rights of Persons with Disabilities (CRPD) and its Optional Protocol, thus becoming the 94th ratifier of the Convention and 58th ratifier of the Optional protocol. Some examples of the human rights that the CRPD<sup>70</sup>.

Nigeria has an obligation under international law as a party to the Convention, to establish mechanisms to effectively respect, protect, promote and enforce or implement measures for the realization of the various rights contained in the Convention, haven signed and ratified it. Till the time of concluding this research, Nigeria is yet to domesticate the CRPD 2006. This suggests that steps of signing and ratifying the CRPD earlier on in 2010 by Nigeria, was only an indication of sympathy and that the presence of children with disabilities as street beggars is one of the consequences of the failure or refusal of the country to legislate to make Nigerians with disabilities enjoy the right to education (as a right rather than charity), as provided in article 24 of the CRPD.

## **7. Conclusion and Recommendations**

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<sup>70</sup> The CRPD 2006 protects rights including but not limited to:

The right to be protected from abuse, violence, and torture;

The right to live in the community, with one's family, without being institutionalized against one's will;

The right to have access to education, transportation, and other public services;

The right to access information and communication, including via sign language or Braille;

The right to education;

The right to employment and a decent standard of living; and

The right to access social justice.

The article has examined disability generally in terms of its nature, types and prevalence, as well as the different models that have emerged one after the other. It has also examined discrimination in education as a result of disability. The paper examined the legal instruments that protect the right to education at the international, regional, and national levels. It concludes with the submission that although there are laws across all the levels, implantation of educational policies and the enforcement of such laws are imperative for the protection of the rights of PWDs generally and particularly, the right to education for children with disabilities. It therefore recommends that the CRPD 2006 which Nigeria has ratified, should be domesticated without further delay and it should be fully enforced to ensure the education of children with disabilities in Nigeria.