

Towards a Justiciable Right to Basic Education in Nigeria: A Commentary on the Decision of the Court on the *Legal Defence and Assistance Project (LEDAP) v Federal Ministry of Education*

P Mutu*

Online ISSN
1727-3781

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Perekeme Mutu

Affiliation

University of Pretoria,
South Africa

Email

Perekeme.mutu@gmail.com

Date Submitted

26 August 2022

Date Revised

29 January 2024

Date Accepted

29 January 2024

Date Published

30 May 2025

Editor

Prof Neels Kilian

Journal Editor

Prof Wian Erlank

How to cite this contribution

Mutu P "Towards a Justiciable Right to Basic Education in Nigeria: A Commentary on the Decision of the Court on the *Legal Defence and Assistance Project (LEDAP) v Federal Ministry of Education*" *PER* / *PELJ* 2025(28) - DOI <http://dx.doi.org/10.17159/1727-3781/2025/v28i0a14639>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2025/v28i0a14639>

Abstract

The right to basic education is a fundamental human right which is recognised globally for its vital role in the transformation of individuals and society in general. The right to basic education is enshrined in the *Nigerian Constitution*, 1999 as amended as a Directive Principle of State Policy. The right is also recognised in various international and regional instruments of which Nigeria is a signatory. However, unequal access to quality education, inadequate infrastructure and teacher shortages have continued to hamper the enjoyment of this right. The failure of the government to ensure the adequate enjoyment of this right underscores the importance to ensuring accountability of a legally enforceable right to education in Nigeria. The *Legal Defence and Assistance Project (LEDAP) v Federal Ministry of Education* case presents an opportunity for the courts to once again provide clarity on the nature of the right to basic education. This case marks a significant judicial intervention in the enforcement of the right to basic education as enshrined in the *Nigerian Constitution*, legislation and international human rights instruments. The article examines the court's interpretation of the constitutional and legislative provisions on the right to basic education, highlighting the court's rationale in affirming the justiciability of the right to basic education. Furthermore, the article examines the broader effect of the decision on the government's commitment to fulfilling its educational obligations in the Constitution and under international law, highlighting the role of the judiciary in enforcing the educational right. The paper argues that while the court's decision marks a significant step towards realising the right to basic education, there is a need for sustained advocacy and government accountability for the right to basic education to become a tangible reality for children in Nigeria.

Keywords

Right to basic education; justiciability; human rights; Nigeria.

.....

1 Introduction

The right to education is a fundamental human right which is recognised globally for its vital role in the transformation of individuals and society in general. The right to basic education is enshrined in the *Nigerian Constitution*, 1999 as amended as a Directive Principle of State Policy. The right is also recognised in various international and regional instruments of which Nigeria is a signatory.¹ However, unequal access to quality education,² inadequate infrastructure and teacher shortages have continued to hamper the enjoyment of this right. The failure of the government to ensure the adequate enjoyment of the right to basic education underscores the importance to ensuring accountability of legally enforceable rights to education in Nigeria. The *Legal Defence and Assistance Project (LEDAP) v Federal Ministry of Education*³ case presented an opportunity for the court to provide clarity on the nature of the right to basic education in the context of the ongoing quest to make the right to basic education a justiciable right in Nigeria. The article interrogates the court's interpretation of constitutional and legislative provisions, highlighting the court's rationale in affirming the justiciability of the right to basic education in Nigeria. The commentary furthermore examines the broader effect of the decision on the government's commitment to its education obligations in the *Constitution* and under international law, highlighting the role of the judiciary in enforcing the right. The commentary evaluates the challenges and opportunities the court decision presents to policymakers,

* Perekeme Mutu. BPolSci BA Hons LLB MPhil PhD. Postdoctoral Fellow, Department of Private Law, University of Pretoria, South Africa. E-mail: Perekeme.mutu@gmail.com. ORCID: <http://orcid.orcid.org/0000-0003-1175-218X>.

¹ Article 28(1)(a) of the *Convention on the Rights of the Child* (1989); Art 13 of the *International Covenant on Economic, Social and Cultural Rights* (1966); Art 11 of the *African Charter on the Rights and Welfare of the Child* (1990); Art 2 of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2003); Art 13 of the *African Youth Charter* (2006).

² The United Nations International Children's Emergency Fund (UNICEF) while defining quality education observed that there are several definitions of quality education, a fact which reflects the complexity of education. However, it noted that quality education must include learners who are healthy well-nourished and ready to participate in learning; an environment that is safe, protective and gender sensitive, and provides adequate resources and facilities; content that is supported by relevant materials for the acquisition of basic education skills in the area of literacy, numeracy and life skills; processes through which trained teachers use child-centered teaching approaches in well-managed classrooms and schools and skillful assessment to facilitate learning and reduce disparities; and outcomes that encompasses knowledge, skills and attitudes, and are linked to national goals for education and positive participation in society. UNICEF 2000 https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNICEF_Defining_Quality_Education_2000.PDF.

³ *Legal Defence and Assistance Project (LEDAP) GTE and LTD v Federal Ministry of Education* (FHC/ABJ/CS/978/15) [2018] NGFCHC 1 (17 April 2018) (hereafter *LEDAP case*).

educators, and civil society organisations (CSOs). This paper argues that while the court's decision marks a significant step towards realising the right to basic education, there is a need to capitalise on the court's decision for a sustained advocacy and government accountability for the right to basic education to become a tangible reality for children in Nigeria. The article is divided into three main sections. The first section examines the legal framework protecting the right to basic education. The second section discusses the facts of the *LEDAP* case and the decision of the court. The third section evaluates the impact of the decision of the court on access to quality basic education for every child in Nigeria. In assessing the impact of the case in realising the right to basic education, the article relies on a study commissioned by the Open Society Justice Initiative, which developed a model for measuring the impact of strategic litigation. This model measures the material impact, instrumental impact and non-material impact of the litigation.⁴

2 Legal framework protecting the right to basic education in Nigeria

The right to basic education and other socio-economic rights are established in Chapter 2 of the *Nigerian Constitution* as fundamental goals and guiding principles of state policy. Section 18(1) of the *Nigerian Constitution* provides that the government shall direct its policies towards ensuring that there are equal and equitable opportunities for education at all levels.⁵ The section also provides that the government should strive to eradicate illiteracy and, where possible, provide free education at all levels.⁶ Interpretation of section 18(1) of the *Constitution* suggests that the government will provide free primary education only where practicable. In other words, the government has no direct or immediate obligation to provide education. The provision of such education by the government is subject to the availability of resources. Nigeria has also enacted legislation (*Compulsory, Free Universal Basic Education Act*, 2004, hereinafter the *UBE Act*; and the *Child Rights Act*, 2003, hereinafter the *CRA*) that gives legal backing to the right to basic education in the country. Both laws provide for the right to basic education for children in Nigeria and impose corresponding obligations on the government at all levels to provide this education. Section 2(1) of the *UBE Act* provides that "Every Government in Nigeria shall provide free, compulsory and universal basic education for every child of primary and junior secondary school age."⁷ Section 15(1) of

⁴ OSJI *Strategic Litigation Impacts* 43.

⁵ Section 18(1) of the *Constitution of the Federal Republic of Nigeria*, 1999 (the *Nigerian Constitution*).

⁶ Section 18(1) of the *Nigerian Constitution*.

⁷ Section 2(1) of the *Compulsory, Free Universal Basic Education Act*, 2004.

the CRA provides that "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."⁸

In addition, Nigeria has domesticated the *African Charter on Human and Peoples' Rights* (hereafter the *African Charter*).⁹ This means that the provisions of the *African Charter* are now part of the domestic laws of Nigeria.¹⁰ This position was confirmed by the Court of Appeal in the case of *IGP v ANPP*,¹¹ where the court explicitly stated that the *African Charter* is part of Nigerian law, and must be upheld by the courts.¹² By implication, Article 17 of the *African Charter*, which provides for the right to education, can be relied on as a legal basis to hold the state to account, where it fails to guarantee the right to basic education of children within its jurisdiction.

Article 17 of the *African Charter* stipulates that "every individual shall have the right to education".¹³ Onuora-Oguno observes that the right to education under the *African Charter* is provided in an unqualified term.¹⁴ The *Charter* does not distinguish between the different types of obligations imposed at the different levels of education. For instance, the *Charter* does not stipulate whether basic education should be provided for free and should be compulsory, while higher education should be made progressively available for free. However, this seeming lacuna was addressed in the 2004 *Pretoria Declaration on Economic, Social, and Cultural Rights in Africa*. The declaration provided that the content of Article 17 of the *African Charter* includes the provision of free and compulsory basic education.¹⁵ It further provides that secondary and higher education, as well as vocational training and education, should be made affordable and accessible.¹⁶

These legal instruments not only give every child in Nigeria legal entitlement to the right to basic education but also impose a corresponding obligation on the government at all levels to provide such education. However, despite

⁸ Section 15(1) of the *Child Rights Act*, 2003.

⁹ *African Charter on Human and Peoples' Rights* (1981) (the *African Charter*) through the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act* 2 of 1990.

¹⁰ Egede 2007 JAL 260. Also see Adigun 2019 J Legal Plur 320-349.

¹¹ *Inspector-General of Police v All Nigeria Peoples Party* (Court of Appeal of Nigeria, Abuja Judicial Division) appeal no CA/A/193/M/05 of 11 December 2007 (*IGP v ANPP*).

¹² *IGP v ANPP* para 7.

¹³ Article 17 of the *African Charter*.

¹⁴ Onuora-Oguno *Development and the Right to Education* 50.

¹⁵ ACHPR 2004 <https://achpr.au.int/sites/default/files/files/2021-08/achprinstrdecla Pretoriaescrights2004eng.pdf> para 8.

¹⁶ ACHPR 2004 <https://achpr.au.int/sites/default/files/files/2021-08/achprinstrdecla Pretoriaescrights2004eng.pdf> para 8.

this legal protection judicial enforcement of the right to basic education in Nigeria has remained in limbo.

Two constitutional obstacles have hampered the judicial enforcement of the right to basic education in Nigeria. The first is that the right to basic education is subject to progressive realisation. Interpretation of section 18(1) of the *Constitution* suggests that the government will provide free primary education only where practicable. The government has no direct or immediate obligation to provide such education.

The second constitutional barrier to the judicial enforcement of the right to basic education is section 6(6)(c) of the *Constitution*, which provides as follows:

The judicial powers vested in accordance with foregoing provisions of the section ... (c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.¹⁷

Section 6(6)(c) of the *Nigerian Constitution* prohibits the courts from entertaining any issue that arises from Chapter 2 of the *Constitution*. This means that there is no direct legal basis for holding the state accountable for failure to fulfil any of the rights contained in Chapter 2, including the right to basic education. Given the supremacy of the *Constitution*, questions were raised as to whether the enactment of the *UBE Act* and *CRA* can elevate the right to basic education from a non-justiciable to a justiciable status.

Over the years the courts have had the opportunity to pronounce on the nature of the right to education in Nigeria. The non-justiciability of the rights contained in Chapter 2 of the *Constitution* was confirmed in *Okojie v Attorney General of Lagos State*.¹⁸ In this case the applicant challenged the Lagos State Government's policy of abolishing private schools in the state, alleging that the policy violated the right to education guaranteed in section 16 (Chapter 2) of the 1979 *Nigerian Constitution*,¹⁹ which is *in pari materia*²⁰ with section 18 (Chapter 2) of the 1999 *Constitution*. The Court ruled that section 6 of the 1979 *Constitution*, which is equivalent to section 6 of the 1999 *Constitution* earlier referred to, was unenforceable and that the Court had no jurisdiction to rule on them.²¹

¹⁷ Section 6(6)(c) of the *Nigerian Constitution*.

¹⁸ *Okojie v Attorney General of Lagos State* 1981 2 NCLR 350 (*Okojie case*).

¹⁹ *Okojie case* para 350.

²⁰ *In pari materia* is a Latin term use to describe general laws that were enacted at different times but pertain to the same subject or object. For more on this, see LexisNexis 2024 <https://www.lexisnexis.co.uk/legal/glossary/in-pari-materia>.

²¹ *Okojie case* para 350.

However, recent developments in education law jurisprudence in Nigeria seem to suggest a shift towards a justiciable right to basic education in Nigeria. This is evident from the views of academic scholars²² and most importantly recent pronouncements from the courts on the justiciability of the right to basic education in the case of *Republic of Nigeria v Registered Trustees of the Social Economic Rights Action Project*,²³ and the *LEDAP* case. The next section of this article will discuss these cases in detail in the context of the shift toward a justiciable right to basic education.

3 A shift toward a justiciable right to basic education in Nigeria

As noted earlier, over the years the justiciability of the right to basic education in Nigeria has been in limbo. However, recent jurisprudence and the views of scholars seem to suggest a gradual shift towards the recognition of basic education as a fundamental right that is justiciable. This is evident in the case of the *Republic of Nigeria v Registered Trustees of the Social Economic Rights Action Project* (SERAP).

The applicant in this case instituted a case against the Nigerian Government at the Economic Community of West African States (ECOWAS) regional court for the lack of adequate implementation of the *UBE Act*. Relying substantially on the *African Charter*, SERAP, among others, sought a declaration that every child in Nigeria is entitled to free and compulsory basic education by virtue of Article 17 of the *African Charter*, section 15 of the *CRA* and section 2 of the *UBE Act*.²⁴ SERAP also requested an order directing the defendant to make adequate provision for compulsory and free education for every child.

In response to the application the Nigerian Government raised the issue of the jurisdiction of the ECOWAS regional court to entertain the application. The government argued that the Court lacked jurisdiction to entertain the action filed by SERAP on the ground that the *UBE Act* and the *CRA*, on which the applicant relied, were domestic laws of Nigeria and as such are not subject to the jurisdiction of the regional court, and are not treaties of ECOWAS.²⁵ Most importantly as it relates to this article, the Government argued that the educational objectives of the Nigerian government under

²² See Akinbola 2010 *AHRLJ* 467. Also see Taiwo and Govindjee 2012 *Obiter* 119; Nwauzi and Geoge-Ibikiri 2018 *African Journal of Law and Criminology* 18.

²³ *Registered Trustees of the Social Economic Rights Action Project (SERAP) v Nigeria* Ruling, Suit No ECW/CCJ/APP/08/09 and RUL No ECW/CCJ/APP/07/10 (ECOWAS) 10 December 2010) (*SERAP* case).

²⁴ *SERAP* case para 2.

²⁵ *SERAP* case para 2.

the 1999 *Constitution* were not justiciable or enforceable through the courts.²⁶

However, the ECOWAS Court in its ruling dismissed all the objections raised by the Nigerian government. The court stated that although SERAP factually based its claim on the *UBE Act* and the *CRA*, it alleged a violation of the right to education in Article 17 of the *African Charter* and not a breach of the right to education contained in the Nigerian *Constitution*.²⁷ In terms of jurisdiction the Court asserted that it is a well-established principle of law that jurisdiction is a creature of signature. The Court noted that under Article 9(4) of the *Supplementary Protocol* the Court has jurisdiction to adjudicate on an application concerning a violation of human rights that occurs in any member state. SERAP's claim concerned the denial of the right to education for the people of Nigeria as protected by the *African Charter*, to which Nigeria is a signatory. The Court reiterated that it had jurisdiction over human rights enshrined in the African Charter, and the fact that these rights were domesticated in the Nigerian municipal laws did not exclude the jurisdiction of the Court.²⁸ The Court further noted that the rights protected by the *African Charter* are justiciable before the Court. Consequently, it surmised that since SERAP's application was in pursuance of a right protected by the *African Charter*, the objection of the government that the right to education is not justiciable as it is a directive principle of state policy cannot hold.²⁹ The ECOWAS Court unequivocally held that the Nigerian Government has a legal obligation to provide free and compulsory quality basic education to every Nigerian child.

The outcome of this case was groundbreaking as it concerns the justiciability of the right to basic education. This view was also shared by Femi Falana who was the solicitor for SERAP. According to Falana, this was the first time that a regional court in Africa recognised citizens' legal right to education in Nigeria and sent out a clear message to ECOWAS member states and all African governments that the denial of the right to education to millions of African children would not be accepted.³⁰ Falana observed that the outcome of this case has re-defined human rights jurisprudence in Africa forever.³¹ The jurisprudential shift towards a justiciable right in Nigeria also received a substantial boost in the *LEDAP* case.

²⁶ SERAP case para 3.

²⁷ SERAP case para 11.

²⁸ SERAP case para 14.

²⁹ SERAP case para 20.

³⁰ Reliefweb 2009 <https://reliefweb.int/report/nigeria/ecowas-court%C2%A0says-nigerians-have-legal-right-education#>.

³¹ Reliefweb 2009 <https://reliefweb.int/report/nigeria/ecowas-court%C2%A0says-nigerians-have-legal-right-education#>.

4 The facts of the case: *Legal Defence and Assistance Project v Federal Ministry of Education*

Spurred on by the uncertainty hampering the realisation of the right to basic education in Nigeria, LEDAP filed a complaint in the Abuja Federal High Court in 2015 seeking a declaratory order on the status of the right to basic education in Nigeria. LEDAP called for a declaration that the constitutional provisions on the right to free and compulsory primary education up to junior secondary education for all Nigerian citizens under section 18(3)(a) of the *Constitution of the Federal Republic of Nigeria*, 1999 are enforceable under the *UBE Act*.³²

LEDAP also sought a declaratory order requesting that federal and state governments have a constitutional obligation to provide financial and institutional resources to ensure free, compulsory and universal primary and secondary education for every child in Nigeria.³³ LEDAP also sought a declaration that the failure to introduce free, compulsory and universal primary education and free junior secondary education constituted a violation of the Constitution by the government. Finally, it sought an order compelling the first defendant (the Federal Minister of Education) to immediately withdraw all tuition fees and other payments from primary and junior secondary school students in Nigeria under section 2(1) of the *UBE Act*.³⁴

The relief sought by LEDAP was based on the following grounds: first, the provisions of Chapter 2 of the *Nigerian Constitution* are not enforceable because of section 6(6)(c) of the Constitution, which prohibits the court from entertaining any matter arising from Chapter 2 of the *Constitution*. However, once legislation is enacted to give legal effect to any provisions of Chapter 2, in accordance with item 60 of the exclusive legislative list,³⁵ the rights contained in such provisions become enforceable.³⁶ Second, by enacting the *UBE Act*, the National Assembly has given legal effect to the right to basic education contained in section 18(3)(a) of the *Constitution*, which requires the government to provide free and compulsory basic education. By reason of section 2(1) of the *UBE Act* the government is under a legal obligation to provide every child in Nigeria with free and compulsory basic education.

³² LEDAP case para 1.

³³ LEDAP case para 4.

³⁴ LEDAP case para 5.

³⁵ Item 60 of the exclusive legislative list empowers the legislature to make laws that will give expression to any of the provisions in chapter 2 of the *Nigerian Constitution*.

³⁶ Item 60(a) of the exclusive legislative list in the *Nigerian Constitution* empowers the National Assembly to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution.

LEDAP argued that the government had failed to fulfil this legal obligation, as millions of children in Nigeria were without access to basic education. Consequently, it asked the Court to use its powers to compel the government to comply with the above legal obligation and to report back to the court within a specific period on the measures taken to comply with the legal obligation. The government neither appeared in court nor submitted any observations on the applicant's case and the applicant's case was therefore unchallenged.

4.1 The decision of the Court

In delivering its verdict the Court was guided by the principles set forth in the case of the *Attorney General of Ondo State v Attorney General of the Federation*.³⁷ The Court ruled on the basis of the principles applied by the Supreme Court in this case, in which the Supreme Court ruled that none of the provisions of Chapter 2 of the *Constitution* can be enforced by the court unless the National Assembly enacts laws that give expression to any of the provisions.³⁸ Guided by this principle, the Federal High Court ruled that there is no doubt that the National Assembly had enacted the *UBE Act* to give legal backing to section 18 of the *Nigerian Constitution*. The Court, therefore, concluded that for this reason, the right to basic education is enforceable in Nigeria. The failure of the government at all levels to take appropriate action to exercise this right constituted a violation of the right.

Scholars and commentators have also expressed their views and confirmed the enforceability of the right to basic education in Nigeria. According to Akinbola, the passage of the *UBE Act* and the *CRA* made the right to basic education enforceable.³⁹ Similarly, Nwauzi and Geoge-Ibikiri stated that enactment of the *UBE Act* and the incorporation of the *African Charter* into the Nigerian legal system has transformed the right to basic education into an enforceable right.⁴⁰ Both legal documents not only guarantee the right to free and compulsory primary education for every child but also confer the legal obligation on the government at all levels to ensure the provision of free and compulsory quality basic education for every child.

It is safe to argue that regardless of the government's stance and the inconsistencies that have emanated from the courts, the only logical conclusion that can be drawn from the foregoing discussion is that the right to basic education is actionable. The right confers a legal entitlement to

³⁷ *Attorney General of Ondo State v Attorney General of the Federation* 1983 JELR 46418 (SC) para 38.

³⁸ *LEDAP* case para 13.

³⁹ Akinbola 2010 *AHRLJ* 467. Also see Taiwo and Govindjee 2012 *Obiter* 119.

⁴⁰ Nwauzi and Geoge-Ibikiri 2018 *African Journal of Law and Criminology* 18.

every child and confers on the government at all levels, a legal obligation to provide every Nigerian child with a quality basic education.

4.2 Evaluating the impact of the decision on access to quality basic education for children in Nigeria

Evidence regarding the impact of litigation or decision of the court is mixed and sometimes difficult to ascertain. Some cases are easy to evaluate and the positive impacts are easily ascertained, while others are more difficult as the issues are multifaceted. That said, a study commissioned by the Open Society Justice Initiative (OSJI) developed a model that can be used to assess the impact of strategic litigation. This model encompasses three categories of impact assessment, which are material impact, instrumental impact and non-material impact.⁴¹ This model can also be deployed to assess the impact of the *LEDAP* case, as the case falls within the category of strategic litigation. Strategic litigation is a legal action "consciously designed, selected and pursued in order to achieve impacts beyond the case involved."⁴² McClymount and Golup describe strategic litigation as the use of the courts to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged, women, the poor, and ethnic-religious minorities.⁴³ *LEDAP* embarked on this litigation to bring about systemic change in the basic education sector in Nigeria that would promote the enjoyment of the right to basic education for every child in the country. The impact or benefit of the *LEDAP* case goes beyond the applicants. As such, the case falls within the definition or description of strategic litigation. Therefore, the OSJI impact assessment model can be used to assess the impact of the *LEDAP* case.

The material impact assessment looks at the concrete, discernible benefits which result from the litigation that can substantially improve the enjoyment of the rights of the affected communities.⁴⁴ In this instance the expectation is that the outcome of the *LEDAP* case will result in substantial improvement in the enjoyment of the right to education of children in Nigeria. Unfortunately, given the facts on the ground that has not been the case. The *LEDAP* judgment was delivered in 2017, and since then there has not been a tangible improvement in the educational plight of millions of Nigerian children. This is evident in the African Committee of Experts on the Rights and Welfare of the Child's 2019 concluding observation report, which raised concern about the plight of basic education in Nigeria.⁴⁵ The Committee

⁴¹ OSJI *Strategic Litigation Impacts* 43.

⁴² Nolan and Skelton 2022 *HR L Rev* 3.

⁴³ Hershkoff and McCutcheon "Public Interest Litigation" 283.

⁴⁴ Hershkoff and McCutcheon "Public Interest Litigation" 283.

⁴⁵ AU 2019 <https://www.acerwc.africa/sites/default/files/2022-09/Nigeria%202-3rd-periodic%20Concluding%20observation.pdf>.

observed that there is a low rate of child enrolment and generally poor quality of infrastructure in schools, which affects the quality of education in schools in the country.⁴⁶ The Committee also decried the security situation in some parts of the country, which affects access to education of children in the country. The challenges affecting the basic education sector were also highlighted in a 2023 report by UNICEF, which indicated that 26% of primary school-age children are out of school, while at the junior secondary school level, 25% of school-going children are out of school, and at the senior secondary level, the number of out of school children increased to 34%.⁴⁷ Given these facts, it can be concluded that the outcome of the *LEDAP* case has not resulted in concrete benefits that will advance the enjoyment of the right to basic education of millions of Nigerian children.

The second type of assessment used by the OSJI model to evaluate the impact of strategic litigation is the instrumental impact, which measures the changes in policy, law, jurisprudence and institutions that can have the greatest impact on the largest number of people.⁴⁸ Far-reaching changes most often require enabling policies, jurisprudence, institutions and legislation that will translate the benefits of a judicial decision to those who are directly or indirectly involved in the litigation.⁴⁹ Although the *LEDAP* case has not resulted in notable policy changes or institutional or legislative development that will enhance the enjoyment of the right to basic education, it has, however, resulted in jurisprudential development concerning the right to basic education. The Court's pronouncement establishes the right to basic education as an enforceable right. Nigeria practices the judicial precedence system where lower courts are expected to adhere to the principles established by higher courts.⁵⁰ This is a practice known in the legal lexicon as the principle of *stare decisis*.⁵¹ In the context of this case, the judgment was delivered by a federal higher court; this means that if taken on appeal, a higher court could invalidate this judgment.

That said, until a higher court decides to the contrary, the right to basic education is enforceable in Nigeria. This view was also affirmed by Akingbehin, who noted that until the "apex judicial authority" in the country

⁴⁶ AU 2019 <https://www.acerwc.africa/sites/default/files/2022-09/Nigeria%202-3rd-periodic%20Concluding%20observation.pdf>.

⁴⁷ UNICEF 2023 <https://www.unicef.org/nigeria/media/9211/file/Nigeria%20Education%20Fact%20Sheets>.

⁴⁸ OSJI *Strategic Litigation Impacts* 13. Also see Redress 2022 https://redress.org/wp-content/uploads/2022/12/Practice-Note_Evaluation-of-Strategic-Impact_EN_WEB-1.pdf.

⁴⁹ OSJI *Strategic Litigation Impacts* 13. Also see Redress 2022 https://redress.org/wp-content/uploads/2022/12/Practice-Note_Evaluation-of-Strategic-Impact_EN_WEB-1.pdf.

⁵⁰ Umana 2024 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4759289.

⁵¹ Umana 2024 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4759289.

provides otherwise, based on this court's decision the right to basic education is enforceable in Nigeria.⁵² The significance of the Court's pronouncement is that it provides a solid legal basis for holding the state accountable for failing to meet its constitutional obligation to ensure access to quality basic education. The essential element of a right is that it confers legal entitlements on the holder and also imposes legal obligations on the state to respect, protect and fulfill such a right. It entitles the right holder to take legal action and seek legal remedies in the event of non-compliance with the obligations.⁵³ While explaining the importance of rights recognised either in a constitution or in statutes, Epp argues that such recognition gives lawyers and CSOs the bargaining power and influence that enable them to enforce and expand the protection of individual rights in practice.⁵⁴

Before this court's decision, CSOs and individuals in Nigeria did not have this bargaining power or leverage, because the justiciable status of the right to basic education was uncertain. It was not clear whether the right confers a legal entitlement on the right holder and a corresponding obligation on the government to provide such education. The decision of the court in this case has to a large extent cleared this uncertainty. This will provide CSOs and individuals with the necessary legal tools or bite to hold the government to account when it fails to fulfill its constitutional and statutory obligation of ensuring access to quality basic education for children within their jurisdiction.

The OSJI impact assessment model also identifies non-material impacts as one of the areas to consider when assessing the impact of strategic litigation. Non-material impacts are described as impacts that are indirect and difficult to quantify.⁵⁵ A non-material impact could be measured in terms of changes in the complainant's sense of empowerment, the behaviour of policymakers and teachers, the direction of public discourse, and the demonstrative power of the rule of law in action.⁵⁶ Non-material impacts are hardly the primary goal of litigation and never the legal remedy. However, their significance in the context of strategic litigation cannot be overstated. In the instance of the *LEDAP* case, while the outcome may have given the complainant a sense of empowerment and raised some level of public awareness and discourse on the justiciability of the right to basic education, not much in terms of non-material impact has been felt. This is because, as

⁵² Akingbehin 2021 *Acta Universitatis Danubius Juridica* 78.

⁵³ *Report of the Special Rapporteur on the Right to Education, Kishore Singh: Justiciability of the Right to Education* UN Doc A/HRC/23/35 (2013) para 9. Also see International Commission of Jurists *Courts and the Legal Enforcement of Economic, Social and Cultural Rights* 6.

⁵⁴ Epp *The Rights Revolution* 9.

⁵⁵ Epp *The Rights Revolution* 9.

⁵⁶ OSJI *Strategic Litigation Impacts* 48.

pointed out earlier in the discussion of the state of basic education in Nigeria, there is no evidence on the ground to suggest that the government or other stakeholders responsible for delivering basic education have changed their behaviour or policy to enhance access to quality basic education to benefit children on account of the court decision.

Despite the lack of concrete and substantial benefit flowing from the outcome of the case, the judicial pronouncement of the enforceability of the right to basic education has given legal backing to the right to basic education, which if deployed strategically has the potential to address some of the challenges affecting the basic education sector. This has been the case in some jurisdictions where the right to basic education is established as an enforceable right. For example in South Africa, where the right to basic education is constitutionally enforceable,⁵⁷ the courts have consistently sought to mobilise the government to meet its constitutional obligation. Where there have been shortages of textbooks in schools, CSOs have engaged the courts to ensure that the government is pressured to supply the textbooks needed for adequate learning.⁵⁸ Where learners live far away from schools and have to walk kilometres to and back from schools daily, CSOs have intervened by using the law as an instrument to ensure that the government provides such learners with transport as part of its obligation to provide basic education.⁵⁹ Where dilapidated mud schools became a threat to conducive learning for children in those schools, the court was engaged to hold the government to account and ensure that the mud schools were replaced.⁶⁰ Where there has been a lack of adequate teachers, the courts have been engaged to put pressure on the government to ensure that adequate teachers are provided in schools.⁶¹ When the government suspended its school feeding programme that formed part of its obligation towards fulfilling the right to basic education due to the school shutdown resulting from the Covid-19 pandemic, the court was engaged to compel the government to resume the school feeding programme.⁶² As such, the action was viewed as a violation of the right to basic education of the affected

⁵⁷ Section 29(1)(a) of the *Constitution of the Republic South Africa*, 1996.

⁵⁸ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP). Also see *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA).

⁵⁹ *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG). The case dealt with the question of whether the right to basic education includes the state providing transport for students who live far away from their school, and the failure of government to provide such transport.

⁶⁰ *Centre for Child Law v Government of the Eastern Cape Province* (Eastern Cape High Court, Bhisho) (unreported) case number 504/10 of 2010. Also see Skelton 2014 *International Journal of Educational Development* 59-63.

⁶¹ *Centre for Child Law v Minister of Basic Education* 2013 3 SA 183 (ECG); also see *Linkside v Ministers of Basic Education* (3844/2013) [2015] ZAECHC 36 (26 January 2015).

⁶² *Equal Education v Minister of Basic Education* 2021 1 SA 198 (GP).

learners. The list is endless. These court actions were made possible because the justiciability of the right to basic education in South Africa is unequivocally clear.⁶³

The benefit of this to the South African basic education system is obvious. In terms of school enrolment, available data indicate that South Africa has almost achieved universal primary education, with over 98 per cent of South African children attending school.⁶⁴ This is in contrast to the situation in Nigeria, where the country accounts for the highest number of out-of-school children in the world; with an estimated 10.5 million out of school in the country.⁶⁵ The lack of consequences for the government when it fails to fulfill its constitutional obligation on the right to basic education has fostered the impunity and laxity with which the government acts.

The gradual deterioration of the standard of public education at all levels in Nigeria has caused parents to lose confidence in the public education system.⁶⁶ This situation has led to the flourishing of private schools at all levels. Parents anxious to provide their children with the best possible education are choosing alternatives, which in most cases are private schools, regardless of the cost.⁶⁷ This explains the high growth in the number of private schools with severe social impacts on the country. Education plays an important role in the daily life of Nigerians; the difference between an individual's success and failure, poverty and wealth, opportunity and the overall quality of life depends on the quality of education the individual receives as a child.⁶⁸ Children from poor households who cannot afford private schools have no choice but to contend with the poor educational quality of the public education system.

The court's ruling on the enforceability of the right to basic education could help stem the gradual deterioration of Nigeria's public education system, because the enforceability of the right means that a violation of this right has legal consequences. If the government is consistently taken to court and faced with a litany of litigation for not fulfilling its obligation towards the right to basic education, as is being done in South Africa, this will compel the government to start taking its obligation to provide basic education more seriously.

⁶³ For more discussion on how the instruments of the law have been engaged to ensure the government is put under pressure to fulfill its obligation to provide basic education see Veriava *Realising the Right to Basic Education*. Also see McConnachie and Brener "Litigating the Right to Basic Education" 281-302.

⁶⁴ Modisaotsile 2012 *African Institute of South Africa Policy Brief 2*.

⁶⁵ UNICEF 2012 <http://www.uis.UNESCO.org/Library/Documents/out-of-school-children-nigeria-country-study-2012-en.pdf> 11.

⁶⁶ Adebayo 2009 *International Journal of Education Science 2*.

⁶⁷ Adebayo 2009 *International Journal of Education Science 2*.

⁶⁸ Adebayo 2009 *International Journal of Education Science 2*.

India also offers significant comparative legal insight for Nigeria. India had a constitution similar to Nigeria's, in which socio-economic rights were considered the guiding principles of state policy and were not enforceable. However, the case of *Mohini Jain v State of Karnataka*⁶⁹ should inspire the judiciary in Nigeria. In 1989 the Karnataka government issued a notice that allowed private medical schools in the state to charge exorbitant tuition fees to students not included in the "government's seat quota".⁷⁰ Mohini Jain, an aspiring medical student, petitioned the Supreme Court against the notice.⁷¹ The Court raised the important question of whether the *Indian Constitution* guarantees Indian citizens the right to education.

The court found that human dignity must not be violated under any circumstances and that the state has an obligation to respect and protect the dignity of its citizens.⁷² The court further stated that the individual can be assured of his dignity only if his personality is developed, and that can be achieved only through the education of the person.⁷³ Although the right to education is not guaranteed as a fundamental right, article 21, which guarantees the right to life coupled with the right to individual dignity, cannot be guaranteed if it is not accompanied by the right to education. Therefore, every Indian citizen has the constitutional right to education, and exorbitant fees would make education unaffordable for the poor.⁷⁴ The outcome of this case emphasises the interdependence of all human rights, and together with the similar outcome of *Unni Krishna v Andhra Pradesh State*⁷⁵ led to a constitutional reform which now recognises the right to basic education as a fundamental, justiciable right.⁷⁶

Nigerian courts can learn lessons from the Indian experience, knowing that the era in which rights were divided into different categories is coming to an end. The importance of education requires a concerted effort by the government at all levels, with the judiciary acting as a watchdog for the other arms of the state, to ensure the law is used to transform Nigeria's education system.

5 Conclusion

The enactment of the *UBE Act* and the *CRA*, as well as the Federal High Court rulings in the *LEDAP* case and the ECOWAS Court ruling, show that

⁶⁹ *Mohini Jain v State of Karnataka* 1992 AIR 1858 (*Mohini case*).

⁷⁰ These are seats reserved by the government of India for members of communities that are recognised by the *Constitution of India*, 2019 as requiring support to overcome historical discrimination and other groups designated by the government.

⁷¹ *Mohini case* 7.

⁷² *Mohini case* 9.

⁷³ *Mohini case* 9.

⁷⁴ *Mohini case* 11.

⁷⁵ *Unni Krishna v State of Andhra Pradesh* 1993 AIR 217.

⁷⁶ Section 21A of the *Constitution of India*, 2019.

there is a significant move towards establishing the right to basic education as a fundamental or enforceable right in Nigeria. However, given the conflicting judgments that have emanated from the court over the years on the justiciable nature of the right, the court's verdict in the *LEDAP* case alone cannot end the justiciability debate. This is even more marked as the decision was made by a Federal High Court, which means that there is the possibility of a higher court deciding otherwise on appeal. As such, the celebration of this judgment must be tempered with caution. This uncertainty will persist until there is a ruling from the court of finality that will set a precedent on the justiciable nature of the right to basic education. However, while we await such a verdict, based on the court verdict in the *LEDAP* case, it is argued that the right to basic education is an enforceable right in Nigeria and the government should be held accountable if it fails to fulfill its obligation towards the right. CSOs must capitalise on the legal backing given to the right by this court ruling, to put sustained pressure on the government through the legal system and other forms of advocacy to ensure that the basic education sector receives the desired attention, and children in Nigeria have access to quality basic education.

Bibliography

Literature

Adebayo 2009 *International Journal of Education Science*

Adebayo F "Preference for Private Secondary School in Nigeria" 2009 *International Journal of Education Science* 1-6

Adigun 2019 *J Legal Plur*

Adigun M "The Implementation of the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child in Nigeria: The Creation of Irresponsible Parents and Dutiful Children" 2019 *J Legal Plur* 320-349

Akinbola 2010 *AHRLJ*

Akinbola BR "The Right to Inclusive Education in Nigeria: Meeting the Needs and Challenges of Children with Disabilities" 2010 *AHRLJ* 457-477

Akingbehin 2021 *Acta Universitatis Danubius Juridica*

Akingbehin EO "The Justiciability of the Right to Free Basic Education Conundrum in Nigeria, South Africa and India: From Obstacle to Miracle" 2021 *Acta Universitatis Danubius Juridica* 60-85

Egede 2007 *JAL*

Egede E "Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria" 2007 *JAL* 249-284

Epp *The Rights Revolution*

Epp CR *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press Chicago 1998)

Hershkoff and McCutcheon "Public Interest Litigation"

Hershkoff H and McCutcheon A "Public Interest Litigation: An International Perspective" in McClymount M and Golup S (eds) *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World* (Ford Foundation New York 2000) 283-296

International Commission of Jurists *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*

International Commission of Jurists *Courts and the Legal Enforcement of Economic, Social and Cultural Rights* (International Commission of Jurists Geneva 2008)

McConnachie and Brener "Litigating the Right to Basic Education"

McConnachie C and Brener S "Litigating the Right to Basic Education" in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (Juta Cape Town 2018) 281-302

Modisaotsile 2012 *African Institute of South Africa Policy Brief*

Modisaotsile BM "The Falling Standard of Basic Education in South Africa" March 2012 *African Institute of South Africa Policy Brief* 1-7

Nolan and Skelton 2022 *HR L Rev*

Nolan A and Skelton A "Turning the Rights Lens Inwards: The Case or Child Rights-Consistent Strategic Litigation Practice" 2022 *HR L Rev* 1-20

Nwauzi and Geoge-Ibikiri 2018 *African Journal of Law and Criminology*

Nwauzi LO and Geoge-Ibikiri S "The Right to Education in Nigeria: An Appraisal" 2018 *African Journal of Law and Criminology* 12-21

Onuora-Oguno *Development and the Right to Education*

Onuora-Oguno AC *Development and the Right to Education in Africa* (Palgrave Macmillan Cham 2019)

OSJI *Strategic Litigation Impacts*

Open Society Justice Initiative *Strategic Litigation Impacts: Insights from Global Experience* (Open Society Foundations New York 2018)

Skelton 2014 *International Journal of Educational Development*

Skelton A "Leveraging Funds for School Infrastructure: The South African 'Mud Schools' Case Study" 2014 *International Journal of Educational Development* 59-63

Taiwo and Govindjee 2012 *Obiter*

Taiwo EA and Govindjee A "The Implementation of the Right to Education in South Africa and Nigeria (Part 1)" 2012 *Obiter* 93-120

Veriava *Realising the Right to Basic Education*

Veriava F *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (Juta Cape Town 2019)

Case law

India

Mohini Jain v State of Karnataka 1992 AIR 1858

Unni Krishna v State of Andhra Pradesh 1993 AIR 217

Nigeria

Attorney General of Ondo State v Attorney General of the Federation 1983 JELR 46418 (SC)

Inspector-General of Police v All Nigeria Peoples Party (Court of Appeal of Nigeria, Abuja Judicial Division) appeal no CA/A/193/M/05 of 11 December 2007

Legal Defence and Assistance Project (LEDAP) GTE and LTD v Federal Ministry of Education (FHC/ABJ/CS/978/15) [2018] NGFCHC 1 (17 April 2018)

Okojie v Attorney General of Lagos State 1981 2 NCLR 350

Registered Trustees of the Social Economic Rights Action Project (SERAP) v Nigeria Ruling, Suit No ECW/CCJ/APP/08/09 and RUL No ECW/CCJ/APP/07/10 (ECOWAS) of 10 December 2010)

South Africa

Centre for Child Law v Government of the Eastern Cape Province (Eastern Cape High Court, Bhisho) (unreported) case number 504/10 of 2010

Centre for Child Law v Minister of Basic Education 2013 3 SA 183 (ECG)

Equal Education v Minister of Basic Education 2021 1 SA 198 (GP)

Linkside v Ministers of Basic Education (3844/2013) [2015] ZAECGHC 36 (26 January 2015)

Minister of Basic Education v Basic Education for All 2016 4 SA 63 (SCA)

Section 27 v Minister of Education 2013 2 SA 40 (GNP)

Tripartite Steering Committee v Minister of Basic Education 2015 5 SA 107 (ECG)

Legislation**India**

Constitution of India, 2019

Nigeria

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2 of 1990

Child Rights Act, 2003

Compulsory, Free Universal Basic Education Act, 2004

Constitution of the Federal Republic of Nigeria, 1979

Constitution of the Federal Republic of Nigeria, 1999 (as amended)

Universal Basic Education Act, 2004

South Africa

Constitution of the Republic of South Africa, 1996

International instruments

African Charter on Human and Peoples' Rights (1981)

African Charter on the Rights and Welfare of the Child (1990)

African Youth Charter (2006)

Convention on the Rights of the Child (1989)

International Covenant on Economic, Social and Cultural Rights (1966)

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003)

Supplementary Protocol a/sp.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol a/p.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English version of the said Protocol (2005)

Report of the Special Rapporteur on the Right to Education, Kishore Singh: Justiciability of the Right to Education UN Doc A/HRC/23/35 (2013)

Internet sources

ACHPR 2004 <https://achpr.au.int/sites/default/files/files/2021-08/achprinstrdeclapretoriaesrights2004eng.pdf>

African Commission on Human and Peoples' Rights 2004 *Pretoria Declaration on Economic, Social and Cultural Rights in Africa*

<https://achpr.au.int/sites/default/files/files/2021-08/achprinstrdeclapretoriaescrights2004eng.pdf> accessed 22 February 2022

AU 2019 <https://www.acerwc.africa/sites/default/files/2022-09/Nigeria%202-3rd-periodic%20Concluding%20observation.pdf>
African Union 2019 *Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of Child to the Government of Federal Republic of Nigeria on Its Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child*
<https://www.acerwc.africa/sites/default/files/2022-09/Nigeria%202-3rd-periodic%20Concluding%20observation.pdf> accessed 28 of October 2024

LexisNexis 2024 <https://www.lexisnexis.co.uk/legal/glossary/in-pari-materia>
LexisNexis 2024 *In Pari Materia Definition* <https://www.lexisnexis.co.uk/legal/glossary/in-pari-materia> accessed 23 September 2024

Redress 2022 https://redress.org/wp-content/uploads/2022/12/Practice-Note_Evaluation-of-Strategic-Impact_EN_WEB-1.pdf

Redress 2022 *Evaluating the Impact of Strategic Litigation Against Torture: Practice Note 9* https://redress.org/wp-content/uploads/2022/12/Practice-Note_Evaluation-of-Strategic-Impact_EN_WEB-1.pdf accessed 15 April 2024

Reliefweb 2009 <https://reliefweb.int/report/nigeria/ecowas-court%C2%A0says-nigerians-have-legal-right-education#>

Reliefweb 2009 *ECOWAS Court Says Nigerians Have a Legal Right to Education* <https://reliefweb.int/report/nigeria/ecowas-court%C2%A0says-nigerians-have-legal-right-education#> accessed 18 May 2020

Umana 2024 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4759289

Umana V 2024 *Judicial Precedent and Hierarchy of Courts in Nigeria (Presentation Slides)* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4759289 accessed 7 July 2024

UNICEF 2012 <http://www.uis.UNESCO.org/Library/Documents/out-of-school-children-nigeria-country-study-2012-en.pdf>

United Nations International Children's Emergency Fund 2012 *Global Initiative on Out-of-School Children* <http://www.uis.UNESCO.org/Library/Documents/out-of-school-children-nigeria-country-study-2012-en.pdf> accessed 1 August 2022

UNICEF 2000 https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNICEF_Defining_Quality_Education_2000.PDF

United Nations International Children's Emergency Fund 2000 *Defining Quality Education* https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNICEF_Defining_Quality_Education_2000.PDF accessed 5 June 2024

UNICEF 2023 <https://www.unicef.org/nigeria/media/9211/file/Nigeria%20Education%20Fact%20Sheets>

United Nations International Children's Emergency Fund 2023 *Nigeria Education Facts Sheets: Analyses for Learning and Equity Using MICS Data* <https://www.unicef.org/nigeria/media/9211/file/Nigeria%20Education%20Fact%20Sheets.pdf> accessed 4 June 2024

List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AHRLJ	African Human Rights Journal
AU	African Union
CRA	Child Rights Act, 2003
CSOs	civil society organisations
ECOWAS	Economic Community of West African States
HR L Rev	Human Rights Law Review
JAL	Journal of African Law
J Legal Plur	Journal of Legal Pluralism and Unofficial Law
LEDAP	Legal Defence and Assistance Project
OSJI	Open Society Justice Initiative
SERAP	Social Economic Rights Action Project
UBE Act	Compulsory, Free Universal Basic Education Act, 2004
UNICEF	United Nations International Children's Emergency Fund