CHAPTER 3

READING 'DISABILITY' INTO THE NON-DISCRIMINATION CLAUSE OF THE NIGERIAN CONSTITUTION

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Summary

World Health Organisation estimates place the number of disabled persons in Nigeria at approximately 20 per cent of the country's population. This article uses the 1999 Nigerian Constitution, as amended, as the main pivot for discussion with respect to 'disabled people'. The provisions of the Nigerian Constitution relating to non-discrimination are ambivalent with respect to disabled peoples' rights. In spite of significant strides towards constitutional amendments in Nigeria, state actors, as a matter of self-interest, have continued to overlook the alienation of disabled people from legal, socio-economic and political processes. An analysis of the provisions of the Constitution on non-discrimination reveals a contradiction in law that outwardly embraces equality but inwardly effectuates inequality in relation to disabled people. Nonetheless, it is argued that, despite the inherent contradictory constitutional provision, the possibility of reading disability into the non-discrimination clause is not entirely lost. It is contended that the law should be more inclusive and protective of the needs and aspirations of underprivileged and disadvantaged members of society.

1 Introduction

The 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution) is the supreme law of Nigerian society and has binding force on *every one* in Nigeria. Its major objective lies in promoting good governance and the welfare of *all* persons in Nigeria based on the principles of equality and justice.[1] The Constitution contains a Bill of Rights, which includes civil and political rights as fundamental rights, and socio-

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1 See the preamble to the Nigerian Constitution, emphasis mine.

economic rights, as Fundamental Objectives and Directive Principles.[2] Chapter IV, on civil and political rights, is rendered justiciable by the Constitution, while the chapter on socio-economic rights is considered non-justiciable and has been referred to as progressive rights.[3] However, it is to be noted that the right to non-discrimination falls under the Chapter IV group of rights, which is rendered justiciable and considered a basic right under Nigeria's constitutional values.[4]

Nevertheless, the right to non-discrimination as provided for in the Constitution does not exemplify the inclusive equality of all persons in Nigeria as posited under the Constitution as well as other relevant international instruments adopted by Nigeria. Nigeria admits to the imperative of rendering equality to everyone in its constitutional Preamble, but without substantially illustrating same in relation to vulnerable people, such as disabled persons. It is true that Nigeria has adopted and ratified the Convention on Rights of Persons with Disabilities (CRPD). However, its provisions regarding the right to non-discrimination subtly assumes similarity of equality needs for all persons.[5]

The normative thrust following the CRPD has been described as inclusive equality which finds foundation in securing substantive equality and human dignity for persons with disabilities in any given legal system.[6] Recently, the demand for equality and non-discrimination, especially in relation to disabled persons, has globally gained impetus. In the past few decades, some countries have experienced the emergence of equality literature and jurisprudence with inclusive interpretations which have gained wide acceptance. Unlike the Nigerian constitutional provision on non-discrimination, which is geared towards the idea of formal equality, substantive equality is pursed in these countries.

In distinguishing formal equality from substantive equality, Dupper highlights that formal equality means the legal treatment of persons in the same manner irrespective of their situation or circumstances, while substantive equality takes into account the circumstances of people and requires the law to ensure equality of outcome.[7] Ultimately, substantive equality goes beyond formal equality by appreciating that individuals in

2 The Fundamental rights are contained in Chapter IV while the Fundamental Objectives are contained in Chapter II of the Nigerian Constitution.
3 See sections 6(6)(b) and 6(6)(c) of the Nigerian Constitution.
4 See Chapter IV of the Nigerian Constitution, section 42.
5 Nigeria adopted and ratified the CRPD and its Optional Protocol on the 30 March, 2007 and 24 September, 2010 respectively. Furthermore, under the Law of Treaties, states are expected to be sincere towards treaty obligations, see article 26 of the Vienna Convention on the Law of Treaties 1969, United Nation, *Treaty Series* vol 1155 331.
6 CG Ngwena 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' (2013) 1 *African Disability Rights Yearbook* 139 141.
7 O Dupper 'Affirmative action and substantive equality: The South African experience' (2002) *South African Mercantile Law Journal* 275 277.

different situations and circumstances cannot compete favourably.[8] It endorses the notion of treating people unequally in order to bring about equality of opportunities.[9] Substantive equality, thus, may be likened to an idea of egalitarian justice which aims at securing equal human values and respect for everyone.[10] This definitely underscores the need to make accommodations within socio-economic and political environments. It further entails that judges come to the decision table adopting a purposive interpretation approach towards the law in interpreting cases brought before them. The accent is on interpretations and decisions which give 'value-based interpretive effect' to the elimination of unfair discrimination which should always be pursued in order to ensure substantive protection for individuals in society.[11] Ultimately, this value ought to incorporate the development of full human personality- it recognises human diversity and aspires to restore human worth.

Therefore, the guarantee of equality may be juxtaposed with state law, policy or administrative practices in determining whether the commitment to equality has been achieved. For some time now, Nigeria's constitutional provision on non-discrimination has sustained the idea of formal equality.[12] Consciousness about substantive equality as a means towards overcoming the denial of opportunities under Nigeria's socio-political environment is still to come. Also, the Nigerian Constitution is yet to address disability as a discrete status, especially in the context of equality and non-discrimination. The wording of section 42 supports the forgoing claims. Thus, the question raised is whether disability can be read into the non-discrimination clause of the Nigerian Constitution.

To foster discussions around the foregoing, this discourse is divided into five sections, the introduction being the first section. The second section discusses the international law framework on non-discrimination. The third section exemplifies the way in which some jurisdictions have interpreted equality provisions. The fourth section is an examination of the Nigerian situation in order to evaluate Nigeria's position *vis-á-vis* international law standards of protection against non-discrimination. The fifth section contains the conclusion.

8 C Albertyn & B Goldblatt 'Facing the challenge of transformation: The difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248.

9 CG Ngwena 'Equality for people with disabilities in the work place: An overview of the emergence of disability as a human rights issue' (2004) 29 *Journal of Juridical Science* 167 169.

10 MH Rioux 'Towards a concept of equality of well-being: Overcoming social and legal construction of equality' (1994) 7 *Canadian Journal of Law and Jurisprudence* 127.

11 G Beth 'Context and interpretation in anti-discrimination law' (2002) 26 *Melbourne University Law Review* 325 329; O Pollicino 'Legal reasoning of the court of justice in the context of the principle of equality between judicial activism and self-restraint' (2004) 5 *German Law Journal* 283 287.

12 Sec 42 Nigerian Constitution.

2 International standards of protection regarding non-discrimination against disabled persons: Scope of the right to non-discrimination

No general definition exists of the concept of non-discrimination. However, non-discrimination remains foundational to international human rights law.[13] Under international law, the principles of equality and non-discrimination have been widely acknowledged as related concepts.[14] This means that realising the right to non-discrimination is synonymous with sustaining equality in the real sense among individuals and groups in society. The right to non-discrimination is contained in different United Nations (UN) human rights instruments.[15] These human rights instruments prohibit discrimination on numerous grounds, and often the phrase 'other status' is used to exemplify that the prohibited grounds of discrimination are not exhaustive.

Emerging from the above is the understanding that the prohibited grounds for discrimination are not a rigid category, and that disability is a prohibited ground even if it is not specifically listed in early human rights instruments. With the coming into effect of the CRPD, disability was decisively placed on the list of internationally prohibited discrimination grounds.

13 W Aseka & AS Kanter 'The Basic Education Act of 2013: Why it is one step forward and two steps back for children with disabilities in Kenya' (2014) 2 *African Disability Rights Yearbook* 33 40; A Bayefsky 'The principle of equality and non-discrimination in international law' (1990) 11 *Human Rights Law Journal* 1; EW Vierdag *The concept of discrimination in international law* (1973) 2.

14 See, eg the articulations of CCPR General Comment 18 on non-discrimination, adopted at the 37th session by the Human Rights Treaty Bodies 10 November 1989, UN Doc. HRI/GEN/1/Rev.1a 26 (1994); Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, arts 1(b) & 3(1) & (2); the CRPD, adopted 13 December 2006 UNGA/A/RES/61/106. See Bayefsky (n 13 above) 2; W McKean *Equality and non-discrimination under international law* (1983) 288.

15 Such as art 2 of the Universal Declaration of Human Rights, adopted 10 December 1945, GA Res. 217 A (III); arts 2 & 26 of the International Covenant on Civil and Political Rights, adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on 23 March 1976, in accordance with art 49; art 2(2) of the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on 3 January 1976, in accordance with art 27; art 5 of the CRPD (n 14 above); art 2 of the African Charter Human and Peoples' Rights, adopted June 27 1981 OAU DOC CAB/LEG/67/3 Rev. 5, 21 ILM. 58 (1982) entered into force 21 October 1986; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 29.

In terms of what amounts to discrimination, few international human rights instruments specifically provide what constitutes discrimination.[16] From the basic provisions in the instruments, it may be gathered that the term 'discrimination' involves any distinction, exclusion or restriction based on specified prohibited or analogous grounds, and having the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, '*on equal footing*'; of all rights and freedoms.[17] Put differently, the communication that could be derived from the provisions of the instruments regarding the meaning of discrimination indicates that to differentiate or distinguish is allowed (and in the sense of positive discrimination), provided that the differentiation made is not unfair. However, discrimination takes on an unhelpful meaning when it renders different treatment to individuals based on a specified prohibited or analogous ground which has a disparate impact.

As a follow-up to the thoughts above, the Human Rights Committee – an international human right supervisory body – observes that a breach of the principle of non-discrimination occurs where (i) equal cases are treated differently; (ii) differentiation does not have an objective and reasonable justification; and, (iii) there is no proportionality between the aim sought and the means used.[18] The Committee further emphasises that

> (t) he enjoyment of rights and freedoms *on an equal footing*, however, does not mean identical treatment in every instance.[19]

The foregoing understanding was also given effect to by Tanaka J of the International Court of Justice (ICJ) in the *South West Africa case* where he stated:

> The principle of equality before the law does not mean ... absolute equality, namely, the equal treatment of men without regard to individual, concrete circumstances, but it means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal ... to treat unequal matters differently according to their inequality is not only permitted but required.[20]

The theory of non-discrimination as articulated under international law deliberately requires the equal treatment of equals as well as the treatment

16 Eg, in art 1(1) of the Convention on the Elimination of All Forms of Racial Discrimination, adopted by UNGA Res 2106 (xx) of 21 December 1965, entered into force 1969, in accordance with art 19; art 2 Convention on the Elimination of All Forms of Discrimination Against Women, adopted by UNGA Res 34/180 of 18 December 1979, entered into force in 1981; art 2 CRPD.
17 General Comment 18 (n 14 above), para 7, my emphasis.
18 General Comment 18 para 13.
19 General Comment 18 Para 8, my emphasis.
20 ICJ Rep. 1962, 425-428.

of unequal matters or individuals differently according to their difference.[21] Identical treatment often referred to as formal equality, may demand that individuals be treated in the same way by providing that people should not be discriminated against as human beings. However, it is not useful in providing vulnerable groups tangible equality in terms of a distribution. Further steps may be required in order to bring a historically-marginalised group up to a threshold level of equality by considering their circumstances as well as socio-political barriers. For instance, treating disabled persons in the same way will not remove socio-political and economic barriers, neither will it encourage differential treatment in the provision of accommodations in order to ensure equality of opportunity and bring about equality of outcomes or substantive equality.[22]

International law also requires there to be a legitimate objective and a relational proportionality between the legitimate objective and the act or omission under review. At all times, the articulations should be understood as implying that the purpose for different treatment must be legitimate and the means chosen must be appropriate and proportionate to the intended objective.

Furthermore, under international human rights law, discrimination need not be direct or intentional for it to constitute unfair discrimination.[23] Indirect discrimination is also considered unfair as it accentuates the reality and effect of discrimination in the same way as direct discrimination.[24] 'Distinctions' imply that the act or omission does not necessarily have to be directed against the individual or group alleging discrimination, but may occur through the promotion of one or some individuals at the expense of others.

In the African region, the right to non-discrimination is also guaranteed under the African Charter on Human and Peoples' Rights (African Charter). The African Charter in article 2 also provides a non-exhaustive list of prohibited grounds of discrimination like other international human rights instruments. This can be seen in the use of the phrase 'other status'. Article 18(4) goes further by recognising disabled persons as a protected group entitled to special measures of protection in

21 See also the articulations made by Tanaka J in the South West African case. In fact, the principle of non-discrimination is largely influenced by the pronouncements made by Tanaka J in his historic dissenting opinion in *South West Africa (Second Phase),* (1966) ICJ Reports, Advisory Opinion and Orders. His articulations on non-discrimination pervade today's international law on the subject. The case concerns claims brought before the International Court of Justice by Ethiopia and Liberia against South Africa in relation to its governance of South West Africa. Tanaka J in his dissent opposed the ICJ's decision to dismiss the claims brought by Ethiopia and Liberia.

22 Dupper (n 7 above) 277, see also arts 5(3) & (4) of the CRPD.

23 Dupper (n 7 above)

24 As above; gathered also from a reading of S Farrior 'Equality and non-discrimination under international law' in S Farrior (ed) *The library of essays on international human rights* (2015) 569.

line with their physical and moral needs. As is later argued, its contents hold much in relation to the right to non-discrimination of disabled persons in Nigeria if appropriately constructed.

Nigeria is an African state that has domesticated the African Charter as part of its legislation,[25] and the African Charter is further exemplified here because it is considered the major instrument upon which the African human rights system is founded.[26] Furthermore, the African Charter has been identified as providing the foundation for further elaboration of the rights of disabled persons in subsequent African regional human rights treaties.[27]

That said, it may be gathered that international human rights law upholds the substantive equality approach over and above formal equality for disabled persons in the enjoyment of all existing human rights. Particularly, the CRPD, as an international law instrument, gives concrete expression to substantive equality in its recognition of human diversity and in its subscription to the social model of disability.[28] Evidently, the cardinal objective of advancing towards the substantive equality approach under international law is to discourage as well as to offer positive opportunities for redressing direct and indirect discrimination embedded in negative socio-political considerations. Indeed, some jurisdictions have moved towards establishing the legal and juridical background for the attainment of substantive equality. In this instance, the equality jurisprudence of Canada and South Africa is considered instructive.

3 Non-discrimination and its interpretation in the selected jurisdictions

One important encouragement in exemplifying the two jurisdictions is that the South African Constitutional Court has borrowed the Supreme Court of Canada's juridical sensitivity in determining and strengthening arguments relating to the issue of discrimination. Second, South Africa belongs to the African region, like Nigeria, and is also comparable to Nigeria in terms of population, human diversity, and yet is able to provide

25 By virtue of the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 2 of 1983.

26 J Biegon 'The promotion and protection of disability rights in the African human rights system' in I Grobbelaar-Du-Plessis & T van Reenen (eds) *Aspects of disability in Africa* (2011) 53 61.

27 Especially in relation to the adoption of the African Charter on the Rights and Welfare of the Child; the African Women's Protocol; the African Children's Charter and the Draft Protocol to the African Charter on the Rights of Persons with Disabilities (n 14 above).

28 Ngwena (n 6 above) 145. For a detailed articulation of the social model, see M Oliver *Understanding disability: From theory to practice* (1996); JE Bickenbach *Physical disability and social policy* (1993).

pragmatic directions towards the realisation of equality for its diverse citizens.

3.1 Canada

The Canadian Charter provides that '[e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and *in particular* without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.[29] It further encourages affirmative action in respect of disadvantaged groups or individuals.[30] This means that the Charter contemplates not just a negative duty to desist from discrimination, but also a positive duty to provide accommodations in order to redress unfair discrimination. It broadens the list of protected grounds to include analogous grounds. There is also the acknowledgment that equality goes beyond rendering sameness of treatment. Canadian courts have followed this direction and have progressively developed conceptions of substantive equality. Thus, in the Canadian case of *Andrew v Law Society of British Columbia*,[31] it was held that

> [d]iscrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.[32]

The Supreme Court of Canada found that the grounds of discrimination enumerated in section 15(1) of the Canadian Charter were not exhaustive but covered analogous grounds, and 'may even be broader than that'. This finds justification in the use of the term 'in particular' under section 15(1). Furthermore, the Supreme Court rejected the formal equality approach of the trial court on the reasoning that a formal guarantee of equality is not intended by section 15, because it will not 'necessarily result in equality' in the application of the law.[33]

Furthermore, in the case of *Egan v Canada*,[34] the Supreme Court of Canada had to determine whether a violation of the right to non-discrimination had occurred. In 1995, *Egan v Canada* was one of three cases concerning equality and non-discrimination decided by the Canadian

29 Sec 15(1) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982. Canada also has statutory provisions prohibiting discrimination; this exists at the federal, state and provincial levels.
30 Canadian Charter (n 29 above), sec 15(2).
31 (1989) 1 S.C.R. 143; this decision of the Supreme Court was first to interpret sec 15 of the Canadian Charter.
32 As above, per Dickson, Robert George Mclntyre, William Rogers; Lamer, Antonio; Wilson Bertha & L'Heureux JJ at 174.
33 Per Dickson et al (n 32 above).
34 (1995) 2 SCR 513.

Supreme Court.[35] Although the three cases illustrate the divided opinion of the justices of the Supreme Court regarding equality claims, what is worth noting in the decisions is the recognition by a greater majority of justices that discrimination relates to any insensitive treatment based on an enumerated or analogous ground. There is also the acknowledgment that the impact of the discriminatory law or act on a claimant is a decisive factor. Therefore, it may be reasoned that the approach or test adopted by the Supreme Court to interpret the non-discrimination and equality clause is not only open-ended, but lends weight also to the impact of the discrimination in order to determine unfair discrimination. Arguably, judicial opinion appears divided with respect to the application of the foregoing judicially-articulated tests to the facts in issue.

However, the Canadian Supreme Court, in determining whether there was a violation of the right to non-discrimination in *Egan v Canada,* followed the analysis made in the *Andrew* case above. The Court per Cory J considered whether the law drew a distinction based on individual characteristics of the complainant and whether the distinction resulted in unfair discrimination. The Court pointed out that it is unfair discrimination if:

> (a) the basis of the distinction is one of the listed grounds or one that is analogous to the listed grounds; and (b) the distinction has the effects of imposing a disadvantage, obligation, or burden that is not imposed on others, or if it withholds or limits access to benefits or advantages that are available to others.[36]

The Court also emphasised that the right to non-discrimination was a commitment to recognising every individual's worth and dignity.[37] Therefore, achieving equality must involve the elimination of distinctions that perpetuate the idea that a person is 'less capable, or less worthy of recognition or value as a human being ... equally deserving of concern, respect and consideration'.[38] This, naturally, extends to reflections concerning the characteristics of the group affected by the distinction and the effect of the distinction on the group.[39] However, the Canadian Charter has a limitation clause in section 1, but the limitation becomes reasonably justifiable where 'the objective is of sufficient significance and

35 The other two cases are *Miron v Trudel* (1995) 2 SCR 418 and *Thibaudeau v Canada* (1995) 2 S.C.R 627.
36 Egan case (n 34 above) Paras 130-132; McLachlin, Iacobucci Sopinka and L'Heureux JJ concurred with Cory J.
37 *Egan* case (n 34 above) paras 36-37.
38 Egan case paras 38 & 56.
39 Egan case paras 58-68.

the process adopted is not arbitrary, unfair, and impairs the right as little as possible'.[40]

Significantly, *Eldridge v British Columbia (Attorney-General)*[41] provides a useful insight in relation to the duty to provide accommodations as well as the application of section 1of the Charter to section 15 claims. In Eldridge, the Canadian Supreme Court applied a reasonableness test to resource provision and distribution. The Court stated that the right to equality placed a responsibility on state actors to distribute resources to ensure that vulnerable groups have the advantage of public benefits. The Court found that government had failed to reasonably justify a denial of medical interpretation services to the appellants and had not accommodated the appellants' needs to the point of undue strain on state resources. This purposive approach emerging from Eldridge puts the focus on the inequality that needs to be remedied, thus establishing the idea of substantive equality. The idea of employing a substantive equality analysis in relation to section 15 was reaffirmed by the Supreme Court in the case of *R v Kapp*.[42]

In the Kapp case, it was held that section 15(1) should not be construed in a manner that finds an ameliorative action (like affirmative action and positive discrimination) aimed at combating disadvantage to be discriminatory and in violation of section 15.[43] Essentially, sections 15(1) and (2) were held as working together to promote substantive equality. Where state actors can show that the objective of the impugned law or Act is to ameliorate a disadvantage experienced by a group or individual, then the law or action is considered valid under section 15(2) and should not be challenged pursuant to section 15(1).[44] However there are concerns by some groups or individuals regarding claims of under-inclusiveness.[45]

3.2 South Africa

The South African Constitutional jurisprudence regarding the right to equality and non-discrimination, as articulated in section 9 of its

40 S Fredman 'Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India' Report submitted on the authority of the European Network of Legal Experts in the field of non-discrimination to the European Commission (2012) 10.
41 (1997) 3 SCR 624.
42 2008 SCC 41.
43 As above para 38.
44 Kapp (n 43 above) paras 3 & 41. See also the decision of the Supreme Court in *Alberta v Cunningham* (2011) SCC 37, para 45.
45 M Butler 'Section 15 of the Canadian Charter of Rights and Freedoms: The development of the Supreme Court of Canada's approach to equality rights under the Charter' (2013) 83 *Background Paper*; S Moreau '*R v Kapp*: New directions for section 15' (2009) 40 *Ottawa Law Review* 283.

Constitution, has been described as transformative.[46] Apart from providing a general equality guarantee, it contains specific anti-discrimination provisions and extends the list of protected grounds. Additionally, it encourages the provision of accommodations, authorises affirmative programmes, and introduces the concept of unfair discrimination.[47]

The South African Parliament has established statutory protection against discrimination which also covers broad characteristics as well.[48] As is the case in Canada, the South African Constitution contains a limitation clause in section 36 which courts have interpreted as permissible only when it is reasonably justifiable. South African courts have similarly developed conceptions of substantive equality by looking at direct discrimination, unfair discrimination, indirect discrimination and the effect of discrimination. The Constitutional Court has had to address these issues in a number of cases before it.

For instance, in *Prinsloo v Van der Linde,*[49] the Court had to examine the issue of discrimination and differentiation. The Court was of the view that differentiation based on certain justifiable factors or grounds did not amount to discrimination, except where the differentiation made was unfair. This means that differentiation may or may not bring about unfair discrimination. In this regard, the Court had to take into consideration the history of South Africa and the effects of the apartheid system. According to the Court, 'discrimination has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them'.[50] Unfair discrimination, therefore, could be ascertained from the effect legislation, policy or practice has on a claimant's self-worth as a human being.[51]

In *Harksen v Lane*,[52] the South African Constitutional Court further developed the test for determining unfair discrimination. This involves assessing:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination is on a specified ground or not;

46 M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *South African Public Law* 155; Albertyn & Goldblatt (n 8 above) 248; *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) para 74 per Krieger J.
47 Sec 9 Constitution of the Republic of South Africa, 1996.
48 See the Employment Equity Act (EEA) of 1998, which provides protection against discrimination in the work place, and the Promotion of Equality and Prevention of Unfair Discrimination Act 2000, which provides protection against unfair discrimination in the public and private sectors where the EEA is not applicable.
49 1997 6 BCLR 759 (CC).
50 *Prinsloo v Van der Linde* (n 49 above) para 31
51 *Prinsloo v Van der Linde* para 32
52 1998 (1) SA 300 (CC).

(b) the nature of the provision or power and the purpose sought to be achieved by it, if its purpose is manifestly not directed, in the first instance, at impairing the complaints in the manner indicated above, but is aimed at achieving a worthy and important societal goal;

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

The following factors, which do not constitute a closed list according to the Court, assist in determining whether discrimination has occurred in an unfair or fair manner.[53] The factors also have a cumulative effect in regard to context.[54] This means that determining unfair discrimination requires contextually a subjective-objective interpretation. In other words, it relates not only to the subjective experiences of the complainant(s), but questions will also arise as to what constitutes the reasonable man's view with respect to someone with similar characteristics and under similar circumstances.

Again, in *President of the Republic of South Africa v Hugo,*[55] the South African Constitutional Court reiterated the need to develop a concept of unfair discrimination which recognises that achieving equality is inconsistent with applying similar treatment in all circumstances. Accordingly, what is required is a careful appreciation of the *impact of the discriminatory action upon the particular people concerned.*[56]

The non-discrimination and equality jurisprudence in the two jurisdictions discussed are laudable as they motivate and exemplify considerable moral commitment towards persuasive foreign jurisprudence that can positively affect the quality of human rights protection.[57] However, it must be stated that some justices in the exemplified jurisdictions nonetheless render the application of the judicially generated international standards on non-discrimination uneven in terms of application. This can be seen from a reading of the ratio behind some of the minority decisions.[58] Each of the justices appears to take a different approach when applying the test for determining unfair discrimination.

53 *Harksen v Lane* (n 52 above) para 50.
54 As above.
55 *Hugo* (n 46 above).
56 *Hugo* para 41 (my emphasis)
57 In this instance, the Canadian and South African courts exemplified judicial dispositions.
58 Eg, In the Egan case (n 34 above), it was observed that the Court was severely divided in an attempt to determine whether the right to non-discrimination had been violated. The same scenario occurred in *Miron v Trudel* as well as in *Thibaudeau v Canada* (n 34 above).

Nevertheless, drawing from the South African and Canadian jurisprudence, the concept of non-discrimination puts a high premium on extended analogous grounds of discrimination, the provision of accommodations, substantive treatment and human dignity as basic decisive factors. Therefore, it would not be wrong to say that international law standards on non-discrimination share certain connections with comparative law.[59] Broadened analogous grounds analyses usually help to query the distinction made in order to ascertain its effects on a claimant's dignity. In this way, eliciting impact serves equality by insisting on the substantive treatment of individuals who are not similarly situated. Substantive equality recognises individual differences and has been noted to take into account the circumstances of disabled persons in addition to the demand for disabled persons' full equality under the law and in human affairs.[60] These standards accord with the social model of disability, which requires the socio-political environment to take practical action in order to eliminate barriers that perpetuate marginalisation and inequality for disabled people.

Using the normative equality values gathered from international law, as well as the Canadian and South African jurisprudence, the next section appraises Nigerian non-discrimination law with a view to ascertaining Nigeria's response *vis-á-vis* international law standards of protection on non-discrimination. The main argument is on the possibility of reading disability into the non-discrimination clause of the Nigerian Constitution.

4 The Right to non-discrimination under Nigerian law

4.1 Constitutional disposition

Section 42(1) of the Nigerian Constitution provides:

> A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion, shall not by reason only that he is such a person:
>
> (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of

59 Art 38(1) (c) of the ICJ Statute considers the general principles of law recognised by civilised nations as one of the sources of international law. By the same token, the decisions on human rights by foreign courts are one of the sources of international human rights law. See J Dugard *International law: A South African perspective* (2005) 38; C Botha *Statutory interpretation: An introduction for students* (1998) 42.

60 I Grobbelaar-Du Plessis & S van Eck 'Protection of disabled employees in South Africa: An analysis of the Constitution and labour legislation' in Grobbelaar-Du Plessis & Van Reenen (n 26) 231 240; *Andrew v Law Society of British Columbia* (n 31 above) para 65 (subtitled 'the concept of equality').

other communities, ethnic groups, place of origin, sex, religious, or political opinion are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, either groups, place of origin, sex, religion, or political opinions.

From the foregoing constitutional provision, there is no doubt that the wording of section 42(1) clearly prohibits 'direct discrimination', 'differential treatment' and 'positive or compensatory action'. Although section 42 (1) does not directly discriminate by expressly excluding groups, its effect indirectly discriminates by requiring the same practice, condition or rule to everyone regardless of difference. This appearance of neutrality is considered deceptive in that it concentrates on differentiation that can be identified based on the mere manifestation or form of a measure, that is, characteristics that are expressly based on protected grounds of discrimination.[61] In this manner, such an approach disregards the effect of adverse discrimination and unfair advantage on vulnerable persons, including disabled persons and legal requirements for legitimate differentiation. The underlying idea is to render consistent treatment to all human law subjects (in other words, formal equality).

It is also obvious that disability is not a prohibited ground of discrimination under section 42 (1), and a fixed category approach is adopted in respect of grounds upon which discrimination is prohibited.[62] The implication is that grounds can be added only legislatively and not judicially. It could also mean that applications for violations of the right to non-discrimination brought pursuant to non-listed grounds will not be entertained or may not be subjected to a stricter level of scrutiny.[63]

Section 42, as articulated, does not indicate a commitment towards providing equality of opportunity in order to ensure substantive equality as demanded under international law standards. It also does not reflect a consideration of the difference of humanity. Vulnerable persons such as disabled persons, ought to be regarded in the 'scheme of things' and treated equally as humans and differently in the scheme of distribution.[64] Equality

61 C Tobler *Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (2005) 23.

62 In the Nigerian case of *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt.290) 708 CA the Court of Appeal held, among others, that an action for discrimination can only succeed under sec 39 of the Nigerian 1979, now sec 42 of the present Constitution, where the discrimination complained against is listed as a prohibited ground, and where the ground complained of is also not applicable to other Nigerians. The protected characteristics include ethnic group, place of origin, sex, religion, political opinion or circumstances of birth.

63 Drawn from a reading of the ratio in *Uzoukwu v Ezeonu II* (n 62 above); see also NO Ogbu *Human Rights Law and Practice in Nigeria* (2013) 378.

64 I follow Finnis's thoughts here regarding the idea of basic goods of human flourishing. See J Finnis *Natural law and natural rights* (2011).

here should go beyond identical treatment of formal equality to consider substantive equality. This implies that simple differentiation between persons or groups of persons based on factors such as disability, race or sex does not necessarily amount to unfair discrimination once it is aimed at achieving a legitimate purpose.[65]

In principle, simple differentiation endorses the suggestion that bringing about non-discrimination may entail treating people differently and not necessarily in the same way in order to address their different situations and the barriers they face.[66] Dworkin, in fact, made an interesting point when he said that the cardinal objective regarding the right to non-discrimination lay in discouraging as well as offering positive opportunity for redressing unfair discrimination embedded in the socio-political system.[67]

The insight exemplified in this section suggests the failure of section 42 to give equal protection to disabled persons as vulnerable members of the Nigerian society. In spite of all efforts by the Constitution to reflect the neutral and impartial character of the law in relation to non-discrimination, a presumption of equality as formal equality readily manifests. Thus, the possibility of reading disability within the strict provision of section 42 of the Nigerian Constitution remains fluid. Nevertheless, it is envisaged that all hope is not lost. We must then ask the question: Do other options exist under Nigerian law for the determination of the right to non-discrimination of disabled persons? Or, to what extent can it be argued that the right to non-discrimination of disabled persons is protected and procurable under Nigerian law?

The relevant point that needs to be highlighted is that Nigeria is signatory to major international human rights treaties that extol the fundamentals of non-discrimination.[68] Nigeria has also signed and ratified

65 Grobbelaar-Du Plessis & Van Eck (n 60 above) 244-246.

66 As highlighted in the South African case of *MEC for Education: KwaZulu-Natal & Others* v *Pillay* 2008 (2) BCLR 99 (CC) para 103 as well as *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (1) BCLR 39 (CC) para 132; See also Ngwena (n 6 above) 157.

67 D Dworkin *Taking rights seriously* (1977) 227.

68 Universal Declaration of Human Rights (UDHR) arts 2 and 7, adopted 10 December 1945 GA Res. 217 A (III); International Covenant on Economic Social and Cultural Rights (ICESCR) art 2, adopted 16 December 1966 by UN General Assembly Resolution 2200A (XXI) and entered into force on 3 January 1976 in accordance with art 27, signed and ratified by Nigeria on 29 July 1993; International Covenant on Civil and Political Rights (ICCPR) arts 3 and 26, adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on 23 March 1976, in accordance with art 49; see also arts 7 and 10, signed and ratified by Nigeria on 29 July 1993; African Charter on Human and Peoples' Right (African Charter) adopted 27 June 1981, OAU DOC CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982) entered into force 21 October 1986, see arts 2 and 3, adopted and ratified by Nigeria on 31 August 1982 and 22 June 1998 respectively.

the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol.[69] More pertinent is the fact that Nigeria has incorporated the African Charter by virtue of its Constitution which stipulates that – 'no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'.[70] This was made possible via the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 2 of 1983.[71] Nigeria operates the dualist system of law, and international treaties have the force of law under Nigeria's legal system only when these have been ratified and domesticated by the Nigerian legislature.

The implication is that the African Charter Act is domestic legislation in Nigeria, and this has been judicially noticed in a number of Nigerian Court of Appeal and Supreme Court decisions.[72] Specifically, the Nigerian Supreme Court in *General Sani Abacha & Others v Chief Gani Fawehinmi* [73] held:

> Where a treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into municipal law by the African Charter on Human Peoples' Right (Ratification and Enforcement) Act Cap 10 Laws of the Federation, it becomes binding and our courts must give effect to it like all other laws falling within the judicial power of the courts. By Cap 10 the ACHPR is now part of the laws of Nigeria and like other laws the Courts must uphold it. The ACHPR gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the ACHPR are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution

At this point, it is useful to gain an overview of the normative framework underpinning the African Charter Act and the likelihood of the potential for promoting and protecting the equality rights of disabled persons in Nigeria.

69 On 30 March, 2007 and 24 September, 2010 respectively.
70 See the enactment in sec 12 of the Nigerian Constitution.
71 The Act came into effect on 17 March 1983, but is now contained in Cap A9, Laws of the Federation of Nigeria, 2004.
72 See *Ogugu v The State* (1994) 9 NWLR (Pt. 366)1. Prior to the decision in the Ogugu case, in the High Court in 1990 in *Mohammed Garuba & Others v Lagos State Attorney-General & Others,* (the African Charter, as local legislation, was applied by the Judge to reach its decision. Likewise, in the case of *The Registered Trustees of the Constitutional Rights Project v The President of the Federal Republic of Nigeria & Others* (1994) 9 NWLR (Pt. 366).
73 *General Sani Abacha & Others v Chief Gani Fawehinmi* (2000) SC 45/1997 *per* Ogundare JSC.

4.2 Legislative disposition: African Charter Act

Apart from the African Charter Act, there is no other identifiable law that specifically addresses disability discrimination in Nigeria. As such, the African Charter Act provides in article 2:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3:

> (1) Every individual shall be equal before the law
> (2) Every individual shall be entitled to equal protection of the law

Article 18(4):

> The aged and *the disabled* shall also have the right to special measures of protection in keeping with their physical and moral needs[74]

A central theme emerging from the African Charter Act, and specifically reflected from a joint reading of articles 2, 3 and 18(4), is the reality of possible opening that could be explored in securing the equality aspirations of disabled people in Nigeria. It is true that article 2 does not specifically list disability as a protected ground of discrimination. However, this challenge can be overcome by the existence of the terms 'other status' in section 2 as derived from international jurisprudence on non-discrimination. This has been observed as allowing judges room to extend the list of enumerated grounds of protection.[75]

However, it is considered that the guarantee of formal equality with respect to rights contained in the African Charter Act under article 2 and 3 may not ensure the concrete enjoyment of rights set out in the legislative instrument for vulnerable and marginalised groups. Marginalisation and vulnerability suppose that vulnerable minorities require greater protection and treatment.[76] Ensuring the empowerment of vulnerable groups such as children, racial minorities and disabled persons, demands negative and positive obligations which require states not only to discourage unlawful

74 My emphasis.
75 Biegon (n 26 above) 53;This was also stated in the decision of the African Commission in the case of *Purohit & Anothers v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 4.
76 DP Zongwe 'Equality has no mother but sisters: The preference for comparative law over international law in equality jurisprudence in Namibia' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 123 144.

discrimination, but to take positive actions in order to enhance opportunities for the enjoyment of the guaranteed rights.[77]

The African Charter instructively appreciates this reality as it provides for the right to 'special measures of protection for vulnerable groups, such as women, children, the aged and disabled' in society.[78] Additionally, it is expected that the 'special measures' shall objectively respond to the 'physical and moral needs' of disabled persons.[79] This, in some manner, signals a deference towards the social model of disability which denounces the conception of disability as the problem of the individual and equality as identical treatment.[80] This ultimately accentuates the duty of states to accommodate diversity by providing needed individualised support and services.[81]

Unarguably, a combined reading of articles 2, 3 and18 (4) of the African Charter Act provides a legal opening for securing the equality rights of disabled people in Nigeria. To this end, the legislation, through its peculiar provisions, substantively advocates the recognition and protection of the equality rights of disabled persons. It presents an important source of inspiration for human rights activists, disabled people's organisations as well as civil society, and provides a common domestic avenue that can be invoked not only by disabled people but also by human rights defenders. It is, therefore, imperative that the Nigerian judiciary enhances the enforcement and protection of substantive equality in the enjoyment of rights of disabled persons.

Unlike some jurisdictions, Nigerian courts are yet to develop normative equality jurisprudence for all peoples, including disabled persons. Distinct from the Canadian and South African case law on equality, where the idea of substantive equality is pursued, equality interpretation by Nigerian courts reveals a strict reliance on section 42 of the Constitution which extols the formal equality approach.[82] Further confirmation of equality for disabled persons as formal equality is to be found in the case of *Simeon Ilemona Akubo v Diamond Bank.*[83] This will be evaluated in the next section in order to determine the extent to which Nigerian courts have followed the normative currency embedded in the African Charter Act in the interpretation of equality rights for disabled persons.

77 See General Comment 18 (n 14 above) para 10; Biegon (n 26 above) 62.
78 As set out in art 18(4) of the African Charter.
79 As above.
80 Ngwena (n 6 above) 145.
81 Art 5 CRPD.
82 See the discussion in sections 4.1 and 4.2 above.
83 Suit ID/763M/2010, decided in the High Court of Lagos State of Nigeria.

4.3 Judicial disposition

Decisions of superior courts (Supreme Court and Court of Appeal) with respect to the right to non-discrimination of disabled persons are yet to be seen. A deficit in case law in Nigeria on the right to non-discrimination of disabled persons has also been reported. However, there are two identifiable unreported Nigerian High Court decisions relating to disability and the right to non-discrimination.[84]

In *Simeon Ilemona Akubo v First City Monument Bank PLC* [85] the judge found that the claimant had been discriminated against on account of disability when he was denied access to the banking hall. The trial judge in his reasoning 'drew support from foreign jurisprudence'. The Court acknowledged the reasoning in the English case of *David Allen v Royal Bank of Scotland* [86] which was decided by the Supreme Court of Judicature, Court of Appeal Division based on the English Disability Discrimination Act (DDA) of 1995. In reaching its decision, the High Court judge did not rely on section 42 of the Nigerian Constitution, but instead relied on section 18 of the African Charter Act which he construed as being philosophically comparable to the provisions of the English Disability Discrimination Act. The provisions of the DDA stipulate when an action of a provider of services will be discriminatory and particularly impose an obligation on a service provider to provide accommodations for disabled persons. The Court's approach demonstrates a salutary convergence with normative values 'animating' equality under international law.

By contrast, the trial judge in *Simeon Ilemona Akubo v Diamond Bank* [87] refused to follow the reasoning of his learned brother when confronted by similar facts. The Court strictly relied on section 42, despite the fact that the claimant brought his application pursuant to article 42 of the Constitution and the African Charter. The Court argued that Nigeria had no corresponding legislation like the DDA and that the DDA 'is not in anyway, form, purport or intent identical to the Constitution or the African Charter'. With respect, this superficial interpretation of the equality rights of disabled persons under the African Charter is restrictive. The interpretation adopted by the Court in respect of the African Charter Act also failed to give the Act the legitimacy it needs to consistently bring renewed hope to disabled persons in Nigeria. The Court drawing mainly from section 42 of the Constitution, insisted that Diamond Bank was not under any compulsion to provide accommodation to the claimant beyond giving him

84 *Simeon Ilemona Akubo v First City Monument Bank*; Suit ID/824M/09 and *Simeon Ilemona Akubo v Diamond Bank PLC* (n 83 above), decided in the High court of Lagos State of Nigeria.
85 (n 84 above).
86 (2009) EWCA Civ.1213.
87 (n 83 above).

> banking services and a reasonable opportunity to use its facilities; it was for the applicant to do all that is reasonably within his own abilities to meet reasonable procedural regulations of the bank which will allow him enjoy the facilities. I shall therefore say for the umpteenth time, that the problem was with the metal devices (crutches). I am not aware that he tried to access the bank using wooden or plastic crutches and could not gain access....Whereas, the action of the respondent's staff could be labelled as lacking initiative, untactful or even insensitive, but I am very doubtful that it can be reasonably be regarded as one offending the applicant's right to human dignity or discrimination.

Accepting the judge's interpretation and reasoning is considered inimical to the normative equality values embedded in the African Charter Act for the attainment of equality rights of disabled persons. Indeed, the facts of the case disclose unfair discrimination as the applicant was denied access to the banking hall on account of his metal crutches. There is evidence that the respondent bank required him to leave his walking crutches outside and could not provide an alternative mobility aid or any other assistive device for the applicant even after the claimant had asked for an alternative.

The Court's view 'that it was for the applicant to do all that is reasonably within his own abilities to meet reasonable procedural regulations of the bank' cannot be conceded. To do so is a denial of the duty to provide accommodation and a good example of absolving the social environment from altering existing social arrangements in order to accommodate disabled people.[88] It will also entail putting the burden of disability on the claimant, as has been expressed under the medical model of disability.[89] This must be part of what Ngwena referred to as 'individualising disability' which serves to worsen the status quo.[90]

The trial judge also failed to consider the position of the claimant as a member of a vulnerable group and the effect of the respondent's action which the Court had clearly described as being insensitive and untactful.[91] It will be recalled that the denial of access into the banking hall necessitated

88 As considered by Ngwena in his analysis of the duty to accommodate difference; see Ngwena (n 6 above) 144; see also art 1(b) of the Draft Protocol to the African Charter on Persons with Disabilities in Africa 2014 (n 14 above).

89 Oliver (n 28 above)30; Bickenbach (n 28 above) 65

90 Ngwena (n 6 above) 144.

91 The effect or impact of discrimination on a complainant is usually focused on in determining the extent of discrimination. Drawing from the jurisprudence of other jurisdictions, such as those of Canada and South Africa, courts in these jurisdictions have exemplified that the position of the complainant in society as well as the nature and purpose are usually taken into consideration. In addition, the extent to which the provision had affected the rights or interests of the claimant is also implicated. Apparently, the list does not constitute a closed list, neither is any of the factors determined in isolation, but is usually determined in the context of other existing factors. See *Andrew v Law and Society of British Columbia* (n 31 above); and the decision in *Harksen v Lane & Others* 1998 (1) SA 300 (CC); Ngwena (n 6 above); Grobbelaar-Du Plessis & Van Eck (n 60 above) 242.

the use by the claimant of third parties to transact business in the bank while he remained outside. Without a doubt, this affected the claimant psychologically, and also amounted to an invasion of his privacy and confidentiality, as argued by his counsel. There was also evidence that the claimant suffered mental torture as a result of the alleged hostile action of the respondent's agents. The Court further erred by stating that the claimant had not been treated differently from others. This reflects a formal equality approach to disability which is not compatible with international law standards on non-discrimination.

Earlier, before the decisions in *Simeon Ilemona Akubo v Diamond bank* and *Simeon Ilemona Akubo v First City Monument Bank PLC,*[92] Nigerian courts, in determining equality and non-discrimination under section 42 of the Constitution, generally had not deviated from distinctions explicitly based on prohibited grounds of discrimination. Within this framework, the spotlight is often on equal treatment. Persuasive foreign jurisprudence on non-discrimination is usually not taken into account. For instance, in the case of *Uzoukwu v Ezeonu,*[93] the Nigerian Court of Appeal held, among other things, that the right to non-discrimination presupposed, first, that the discrimination complained against must have been based on law; second, the discrimination must be seen as an act of government or its agencies; third, that the discrimination complained against does not apply to other Nigerians. Finally, a violation of section 42 can only be invoked where the discrimination falls within the protected grounds; it cannot be invoked if, in addition to protected grounds, there are other reasons why a person is discriminated against.[94]

Arguably, section 42, as construed, failed to appreciate that vulnerable persons like disabled persons are different from other non-vulnerable Nigerians. Using non-vulnerable Nigerians as comparators for vulnerable Nigerians is to condemn, for instance, disabled persons to perpetual marginalisation and discrimination. As a consequence of the emphasis on equal treatment, discrimination not based on law and strict reliance on specifically provided grounds of discrimination cannot influence positive socio-cultural attitudes towards disabled persons. Indeed, negative social and cultural attitudes have been implicated as part of what accentuates discrimination against disabled persons.[95]

However, six years after the decision in *Uzoukwu v Ezeonu,* the Nigerian Court of Appeal in *Mojekwu v Mojekwu*[96] cited international law

92 See n 83 & 84 above.
93 (n 62 above).
94 *Uzoukwu v Ezeonu* paras 777-780.
95 As articulated under the medical model of disability. See also the World Health Organisation definition of disability in WHO International classification of functioning, disability and health assembly (2001); see also NB Miller *Everybody's different: Understanding and changing our reactions to disabilities* (1999) 34
96 (1997) 7 NWLR (part 512) 283 (CA).

to support its finding of discrimination, and held that the '*oli-ekpe*' custom, which allows the son of the brother of the deceased person to inherit the assets of the dead to the exclusion of the deceased's female children, cannot be allowed under section 42, as well as the repugnancy doctrine.[97] This, indeed, indicates a deference towards international law standards relevant to advancing the right to non-discrimination. Unfortunately, the decision in Mojekwu was later on appeal criticised by the Supreme Court when presented with similar facts and issues for determination. The Supreme Court disagreed with the Court of Appeal's condemnation of the '*oli-epke*' custom as well as other customs that discriminate against women, by holding that the Court of Appeal ought to have granted a fair hearing to the people whose customs these may be.

The Supreme Court did not overturn the judgment of the Court of Appeal, as it held that the Court of Appeal was correct to have decided the case based on the '*kola tenancy*', which governed the devolution of the property in dispute. However, the Supreme Court's averments concerning customs that discriminate against women raise considerable concern as to whether the most superior court in Nigeria would fulfil the non-discriminatory rights guaranteed women under international law and domestic law.

Another problem in *Festus Odafe & Others v Attorney-General of the Federation and Others*[98] was the failure by the Federal High Court to extend the list of protected grounds. Arguably, a strict application of section 42 of the Nigerian Constitution aligns with 'the fixed-category approach'. However, this contrasts with international legal standards that usually specify a list of grounds of discrimination, but stipulate that the list is not exhaustive by making reference to terms like 'other status', 'such as' and 'in particular'.[99] The articulation of what amounts to discrimination is often left to the courts to determine. This approach has been adopted in international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (Universal Declaration) as well as in some domestic jurisdictions.[100] In the case of *Festus Odafe,* the Court's construction of section 42 as not explicitly forbidding discrimination on the grounds of health or disease status failed not only to reflect international standards of protection regarding the right to non-discrimination, but also demonstrates a failure to adopt a purposive interpretation of section 42.

A purposive interpretation should have seen the Court pursue an interpretation of section 42 that would give a wide effect to ethical considerations in the elimination of discrimination. The major purpose

97 The Court considered some provisions of CEDAW.
98 (2004) AHRLR 205 (NgHC 2004).
99 S Fredman *Discrimination law* (2011) ch 3.
100 Like the Canadian and South African examples.

and objective of anti-discriminatory provisions is to offer remedial answers taking into account factual differences. Reasonably, the denial of treatment to an HIV-positive patient jeopardises the right to life and further impacts the individual's human dignity. Thus, a court of justice has a legal and moral duty to fill the vacuum left by the legislative arm.[101]

In light of these judicial interpretations, one may argue that Nigeria is yet to build a dependable jurisprudence with regard to section 42. There seems to be a common understanding among Nigerian judges that existing legal and other institutional structures are tolerable apart from periodic occurrences which might cause direct discrimination. Obviously, the idea is to settle individual differences using existing structures, regardless of its effect. Consequently, individuals, including disabled persons who are unable to compete within existing social structures experience unfair discrimination. Such an approach encourages formal equality rather than substantive equality.

Restrictive interpretations of equality before the law, in concrete terms are an aspect of formal justice which is further epitomised in the statue of the Greek goddess of justice commonly used as insignia in Nigerian courts and law schools.[102] The Greek goddess assuming equality usually has her eyes covered, while carrying a sword in one hand and scales in the other hand. Philosophically, this constitutes an elusive notion of equality as the scales link to absolute measurement for everyone, and the blindfolded eyes which suggest an intentional denial of vision, prevent the acknowledgment or consideration of different situations and circumstances relative to individuals in society. Such a presumption of equality of status breeds inequality in the distribution of socio-economic goods and services. Adjusting the blindfold will sometimes enable the goddess (courts) to counterbalance the scale of justice when the need arises, in order to remedy historical marginalisation and domination of vulnerable groups such as disabled persons.

5 Concluding remarks

Drawing from the discussion, it is concluded that the existing constitutional framework on the right to non-discrimination in Nigeria can further the right to non-discrimination of disabled persons. Although no explicit reference to disabled persons is made in the Nigerian Constitution, the provisions of the African Charter Act, which has been given effect to by the Constitution, may be used to enforce and protect the substantive

101 Pollicino (n 11 above) 288.

102 USF Nnabue *Understanding jurisprudence and legal theory* (2009) 300; A Oyebode 'Equality before the law in Nigeria: Myth or reality' http://www.nigeriavillagesquare.com/articles/equality-before-the-law-in-nigeria-myth-or-reality.html (accessed 28 March 2016).

equality rights of disabled persons in Nigeria. What remains is the utilisation through litigation of this opportunity by disabled persons and persons acting on their behalf.[103]

Nevertheless, there are indications that Nigerian courts can build on this rather peculiar framework, by rendering non-restrictive equality interpretations that are likely to result in the development of a body of equality jurisprudence relevant to disabled persons and comparable to normative international standards and admirable foreign case law.

103 Especially when the new Rules of Court made by the Chief Justice of Nigeria in 2009, pursuant to sec 46(3) of the Constitution, allow public interest litigation; see Fundamental Rights (Enforcement Procedure) Rules 2009, with effect from 1 December 2009.