



PERSPECTIVES ON DISABILITY:

**A Resource For Theological
and Religious Studies
in Africa**

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Human Rights of People with Disability: Some Legal and Ethical Considerations

Akinbola, B. R. and Moronkola, O. A.

Abstract

All human beings have the rights to life and dignity as persons, but with disabilities (PWDS), often experience human rights violations and exclusion from the mainstream of society. Exclusion and segregation against persons with disabilities occurs in forms of obvious discrimination such as the denial of educational opportunities. It can also occur in more subtle forms such as segregation and isolation resulting from the imposition of physical and social barriers. Effects of disability-based discrimination have been particularly severe in fields such as education, employment, housing, transport, cultural life and access to public places and services. Terms like distinction, exclusion, restriction, preference, or denial of reasonable accommodation on the basis of disability, are words that describe the treatment of PWDS, which negatively affect and impact on the recognition, enjoyment or exercise of the rights of persons with disabilities. Law, therefore, as a system of social engineering, has a lot of potentials to address these social trends which directly negate the human rights of PWDS in all areas of life.

This paper examines the relevant legal issues for the realisation of the rights of PWDS including legislative provisions and policies, human rights protection and promotion and the place of affirmative action. The methodology used in this paper is the in-depth content analysis of primary sources in form of relevant legal instruments and other secondary sources in the form of relevant textbooks, journal articles, electronic materials and others. First, various forms of rights violations or denials leading to abuses are

discussed and documented. The paper also shows that disability affects people irrespective of race, colour, gender, political or religious inclinations and that PWDS are generally vulnerable to being discriminated against and excluded from the mainstream of society. The paper concludes that the law, if well enacted and enforced, is capable not only of redressing discrimination against PWDS, but by affirmative action, it can create a level playing ground by mandating certain steps which will engender the protection and promotion of the rights of PWDS in Nigeria.

Introduction

Persons With Disabilities (PWDS) are among the most marginalised groups in human societies. They are vulnerable or predisposed to human rights encroachments by reason of the disability as well as inaccessibility of the built environment and programs. However, their rights as human beings are now receiving more legal and policy attention globally. This paper reviews some ethical and legal issues in relation to disability.

Disability is not an uncommon phenomenon in human societies from time immemorial, whereas law has existed from the time of creation when God set boundaries for mankind by forbidding man from eating or touching the fruit from the tree in the middle of the Garden of Eden in the Holy Bible as recorded in Genesis chapter 1 verses 9b, 16 and 17 (King James Version). Disability and law have interacted in different ways, with the law either protecting Persons Living With Disabilities (PLWDS) or defining their entitlements or limitations.

Phases in the recognition of the rights of PWDS, and the need to protect and promote same include: the charity/welfare, social welfare, and human rights stages. In the assessment of Lang, awareness of the equal rights of PWDS with other members of the society is currently low in contemporary Nigerian society and there is little appreciation that disability is fundamentally an issue inexorably linked to and rooted in human rights.¹ Lang also observes that the common perception, held by policy-makers and the public at large, is that disabled people and disability issues are viewed in terms of charity and welfare, a view which is “a significant, entrenched factor that seriously militates against the social inclusion of disabled people within the country”.² Firstly, he identified that at the national level, there is no disability discrimination legislation that has been enacted within Nigeria, despite the fact that two bills have been introduced into the National Assembly.

Secondly, there is no form of social protection for disabled people in Nigeria which exacerbates the level of poverty that they encounter. Thirdly, the

Ministry of Women's Affairs and Social Development is the lead government department for disability issues in Nigeria. However, the services that it provides are based on a charity/welfare approach to disability issues and mostly on special days, at festive periods, etc, with demand for such services far outstripping supply. There are some international NGOs that do supply services to disabled people, but their geographical coverage is very limited. Consequently, for the vast majority of disabled people living in Nigeria, particularly those living in rural areas, there is no access to disability services whatsoever. Again, this situation compounds the level of social exclusion that they experience.

Legal/ethical Perspective

The universal system of human rights established under the UN played a vital role in the promotion, enforcement and protection of international human rights immediately after the Second World War, although its wide geographical jurisdiction among other factors undermined its efficacy. The British Department for International Development (DFID) in its 2008 scoping study expressed the view that the ideological foundation of the international disability movement is the social/human rights model of disability, which maintains that disability arises from the attitudinal, physical and institutional barriers that systematically exclude disabled people from fully participating in society. Instead of emphasising the physical and/or psychological limitations of individuals, the social model emphasises, analyses and focuses upon the empowerment, social inclusion, choice and human rights. The DFID reported in its findings, that international disability movement also advocates that PWDS must be involved in decisions that affect them, with the slogan: "Nothing About Us Without Us", which emphatically drives home the demand that disability policies and practices should not be developed and implemented without the active contributions and involvement of PWDS and their democratically elected organisations and representatives or leaders. The tenets of the social model of disability (focused on human rights), have become the ideological hegemony of disability policy making and practice in the 21st century. It is observed that this trend is a healthy one and should be empowered with outright legal provisions, especially legislative enactments to ensure that inclusion becomes a reality for PWDS in every sphere of endeavour, for a holistic society where equality is the rule rather than the exception. The next part of this paper is devoted to closer examination of human rights.

Human Rights and Dilemmas in The Context of Disability

What are human rights? It is needful to point out here that generally in law, it is rare to find a concept that enjoys a universally accepted definition. Different schools of thought have their varied perspectives to the same issues and their

definitions follow the lines of their ideologies. Marie-Bénédicte, for instance, describes the lack of universality in the definition of human rights as follows:

Different people hold different concepts of human rights. This proposition might initially appear somewhat at odds with the commonly heard assertion that human rights are both universal and obvious (in the sense that they are derived from reason), which may suggest that human rights are unambiguous and uncontroversial. However, there is in practice a lack of agreement on what human rights are. Based on an analysis of the human rights academic literature...four schools of thought on human rights [are identified]. It proposes that "natural scholars" conceive of human rights as a given; "deliberative scholars" as agreed upon; "protest scholars" as fought for; and "discourse scholars" as talked about. It further proposes that these four schools act as ideal-types, which arranged around two axes, potentially cover the whole conceptual field of human rights....'

The above writer's perception is that the natural school embraces the most common and well-known definition of human rights, which identifies human rights as those rights one possesses simply by being a human being. These entitlements are based on "nature," a short-cut which can stand for God, the Universe, reason, or another transcendental source. Marie-Benedicte has posited that the universality of human rights is derived from their natural character, noting that comparatively, natural scholars believe that human rights exist independent of social recognition, even though recognition is preferable. They welcome the inscription of human rights in positive law. The natural school has traditionally represented the heart of the human rights orthodoxy.²⁶ It is submitted that social recognition imports the ethical aspect of human rights. For instance, to say that "It is not good to discriminate against a child with disability by providing such a child with education outside the mainstream classroom", appears to be a good proposition, until a situation arises where as a result of the presence of the child with disability, other children in the class who are the majority, are unable to learn due to distractions from the peculiar condition of the child with disability. Sometimes, in jurisprudence, morality may not exactly tally with the law, although the basis of most laws lies in morality. The kind of conflict which may sometimes emanate from the relationship of law, ethics and morality is exemplified by the case of *L v Minister for Education of Australia*. The facts are as stated below:

In mid-1995, a seven year old girl named "L" was suspended from her school in Brisbane, Australia. The girl, who was diagnosed with "global developmental

delay", attended the "Beta" primary school full time, where she was given an individual education programme, and funding for a teachers aid for twenty hours per week. L's teachers soon stated that they had difficulty managing her behaviour, which included the problems of "frequent crying, lack of concentration, a limited vocabulary and some hygiene problems, as well as managing the education of the rest of the class." Eventually, L was suspended from the school by the Deputy Principal, a suspension supported by the Queensland Department of Education.

L's mother took her daughter's case to the Queensland Anti-Discrimination Tribunal, arguing that the Department of Education had discriminated against L under the terms of the Anti-Discrimination Act 1991 (Qld), as the Act makes it illegal to treat an "impaired" child less favourably than an ordinary child would be treated under similar circumstances. The Tribunal found that the Department of Education had indeed discriminated against L, but that this discrimination was exempted because "unjustifiable hardship" would result. As a result, L was excluded from the mainstream state education system, and was told she could only attend a "special" school.

According to Butler and Atkins respectively in Gordon's *Disability and Ethical Responsibility*, L v Minister for Education became the subject of much discussion in Australia, not only among those involved in the field of "special" education, but also among mainstream classroom teachers, and even the media. The case reignited familiar debates as to whether a mainstream education is the best choice for those children with disabilities, or whether they are better off in specifically tailored surroundings. There were concerns raised about the costs to other children of the continued presence of the disabled in the classroom, while others argued that all children benefit from such contact, learning vital life-skills of flexibility, compassion, cooperation and respect for difference.

Gordon went further to highlight questions that were evoked by the case of L and the Minister of Education, which began with questions like, "What can teachers be expected to do?" and "Who should be in the mainstream classroom?" but later became: "What are the ethical responsibilities of a teacher, *vis-à-vis* disability?", questions which according to him, do not lend themselves to easy answers. Gordon concluded that the answer does not lie solely within teacher education manuals, school policy documents, or even within the pages of the *Queensland Anti-Discrimination Act (1991)*, nor with L's mother who was bound to differ from the Queensland Anti-Discrimination Tribunal.

The CRPD, 2006 in article five, provides for equality and non discrimination (among other similar provisions), and mandates states to include such provisions in their national legislations (a step which Nigeria as a party to the Convention, is yet to take). However, in situations like “L’s” case, ethical considerations must be factored into whatever decision is to be taken to resolve the conflict between the right of the child with disability and those of other children who must learn in the same classroom. Clearly, there is an intertwining of the law and ethics in maintaining equality and non discrimination in the context of disability and doing justice to all.

It is important to note that human rights are rights inherent in all human beings, notwithstanding their nationality, sex, or ethnic origin, colour, religion, language, or any other status. Having a disability is not a basis for losing one’s human rights. The rights are to be equally applied to people as entitlements without discrimination. In terms of their nature, human rights are universal, interrelated, interdependent and indivisible. In scope, universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. For the purpose of enforcement, international human rights law puts obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

At the domestic level, human rights are constitutionally provided for in the fourth chapter of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), (herein after CFRN, 1999) which also provides for other rights considered as fundamental rights.⁶⁷ They include the right to fair hearing, religion, freedom of association, freedom of movement, right to own property, freedom of speech, etc. Human right by its nature, accrues to all human beings irrespective of their gender, race, colour, or other differences, (including disabilities). The right to life is particularly important as it is the most basic, without which all other rights cannot be realised.⁶⁸ Generally, it is also notable that virtually all the rights are interrelated and interdependent and the denial of one can invariably mean the loss or inaccessibility to the other fundamental rights.

Legal and ethical considerations

Law has been defined as a “rule enacted or customary in a community and recognised as enjoining or prohibiting certain actions and enforced by the imposition of penalties”.⁶⁹ Legislation refers to law making process or the laws which have been enacted by the body of persons empowered to make laws or to legislate. Ethical issues, on the other hand, are moral standards of behaviour,

which are applicable to a particular society but vary from one place to another. According to Salmond (1993), "primarily, law and morality are both systems of rules having normative characteristics; they both order and regulate human conducts in a society". Salmond however, went further to warn that though law and morals are similar in regulating human conduct, they differ in several respects. For instance, while law is a coercive order, morality is a persuasive system; sanctions attached to the breach of law have different nature from those that attach to a breach of moral codes. Also, rules of law are enforced by powers external to the individual but moral rules are enforced by internal forces like the conscience of the person expected to comply with the moral code.

In the current state of the law in Nigeria, protection of PWDS is easily located in the realms of ethics rather than law simpliciter, especially because there is no disability-specific federal law. However, the Constitution of the Republic of Nigeria 1999 (CFRN) provides for fundamental human rights which are applicable to all Nigerians, including those with disabilities, on equal basis with everyone else. Also, Nigeria has a national policy for education, dated 2004, which specifically mentions the need to provide education for all, and in particular, PWDS. Thus scholarships are provided for PWDS to pursue education at any level. The reality however, is that many PWDS do not easily access these scholarships. The Child's Rights Act 2003 also provides for the right of children and that cover the rights of children in Nigeria with disabilities.

Also, there is the Nigerians with Disabilities Decree, 1993 that provides protection for PWDS in Nigeria, which is the Nigerians with Disability Decree (NDD). It was promulgated in 1993 by the Federal Military Government (FMG) of Nigeria. The Decree has 14 major sections covering different aspects of life that impact on the quality of life of a PWDS. Fields covered in the Decree include its general principles^a, Declaration of policy^a, Interpretation^a, Rights and privileges of persons with disability^a, Education^a, Vocational rehabilitation and employment^a, Housing^a, Accessibility^a, Transportation^a, Supportive social services^a, Sports and recreation^a, Telecommunications^a, Voting access^a and Legal services^a. The Decree clearly stated the intention of the FMG as follows:

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

Unfortunately, this decree never came into force till date in Nigeria. It was passed by an outgoing Military Government and upon its exit from power, successive Nigerian Governments have not given life to the content or intent of the Decree.

Some Nigerian States however, have gone ahead to legislate in order to provide for the rights of PWDS. Lagos State and a few others like Plateau State have laws for the protection of PWDS, which are already in application.

In terms of its obligations under international Law, by virtue of being a party to the Convention on the Rights of Persons with Disabilities (CRPD, 2006), Nigeria's National Assembly is expected to have domesticated the convention in compliance with the section 12 of the CFRN, 1999 (as amended). Several efforts have been made as reported by the media to do this, but the CRPD is yet to become effective in Nigeria because appropriate steps have not been taken under the constitution to make it enforceable, by enacting a national law to make it so. It is however notable that some states within Nigeria such as Lagos and Plateau among others, have enacted state laws within their constitutional authority, to protect and promote the rights of PWDS in their states.

In terms of the progress on having a national law on disability or making the CRPD, 2006 applicable in Nigeria, Onyekwere has stated that former President, Goodluck Jonathan told the 66th UN General Assembly on Wednesday September 21, 2011 in New York that 'in order to demonstrate his government's commitment to human rights, Nigeria recently ratified the Convention on the Rights of Persons with Disabilities'. Onyekwere recalled that the convention provides that "*parties to the treaty shall adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention*", a step which Nigeria has not taken as at September 2015 as part of its commitment under the CRPD 2006.

AFFIRMATIVE ACTIONS

Affirmative action refers to action favouring those who suffer discrimination, for instance, the use of quota system in Nigerian educational systems with a view to make all parts of Nigeria enjoy equal educational opportunities. As part of affirmative action in the context of disability, Nigeria is ethically and legally obliged to legislate and establish appropriate institutions as mandated by article 27 of the CRPD, 2006, but the country is yet to do so. Provisions in the CRPD 2006 seek to provide equality between PWDS and those without disabilities. The CRPD 2006 articulated the reasons why affirmative action is imperative in the protection of the rights of PWDS in the following terms in its pre-amble:

- (f) Recognising the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,
- (g) Emphasising the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,
- (h) Recognising also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,
- (i) Recognising further the diversity of persons with disabilities,
- (j) Recognising the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,
- (k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

The CRPD then provided that states need to actively pursue equality among all members of their communities without discrimination on the ground of disability. The CRPD 2006 provides that there must be equality and non-discrimination against PWDS in all facets of life thus:

1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. *In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*
4. *Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.*" (Emphasis added)

The state of legal and social protection of PWDS in Nigeria has not enjoyed optimum effect of the law as the internal report published by Leonard Cheshire Disability in 2007 depicts below:

The abuses that disability communities face are such that they are contrary to spirit of the Nigerian Constitution, the African Charter on Human and Peoples Rights, the Continental Plan of Action for the African Decade of Persons with Disability, and the United Nations Convention on the Protection of the Rights and Dignity of Persons with Disability. They are often, treated as second-class citizens, shunned and segregated by physical barriers and social stereotypes. This discrimination occurs in a range of arena, including the workplace, schools, health centres, recreational facilities, and many societal contexts. As a fall-out of social discrimination, economic marginalization, and a broad range of other human rights violations, people with disability face difficult challenges in living a normal life. To add insult to their injury, they are ignored and sometimes excluded from development policies and programs. While some governments and societies have adopted a social inclusion and rights-based approach to disability issues, Nigeria relies on charity models of assistance and a narrow medical model that focuses on finding medical "solution" to limitations caused by a disability and ignores the need to address the vast array of limitations created and imposed by discrimination, exclusion, ignorance, and lack of access."

The picture of disability and the rights of PWDS cannot be said to have drastically changed to date as there is yet to be any national disability-specific law in Nigeria to date. Even international conventions and other instruments, including the Convention on the Rights of Persons with Disabilities (CRPD, 2006) to which Nigeria is a party, have not become effective within Nigeria's constitutional jurisprudence.

A clear picture of affirmative action is as illustrated below in a table on making water available and accessible to PWDS:

Box 4: Basic criteria for the universal design of water supply and sanitation facilities

- Sanitation facilities must meet the needs and capacities of users: ask persons with disabilities what they need.
- Sanitation projects should go beyond technical solutions and address institutional and attitudinal barriers to accessible sanitation as well.
- Facilities should use appropriate and affordable technologies.
- Distances to the homes or shelters of persons with disabilities should be minimised.
- Access to water points should be smooth and water lifting devices easy to use.
- Easy access to latrines should be ensured: enough space should be allowed to move a wheelchair at the entrance and within the facility. The facilities should also include handrails and ropes for support to move to and from the seat and to close the doors.
- Privacy is important: it should be possible to open and close the door from inside the latrine.
- Sanitation facilities should be easy to clean and maintain.
- Water and cleansing material should be easy to reach.

Source: *Water Aid / Share: Briefing Note, Including Disabled People in Sanitation and Hygiene Services, 2011.*"

Conclusion and Recommendations

The need for a stronger national protection and promotion of the rights of PWDS in Nigeria cannot be over emphasised in order to achieve equality and ensure that they enjoy human rights in the same way as others. It is therefore recommended that the bill, which has been pending before the National Assembly, be passed into an Act and an agency of government at Federal government level as well as States and Local Government levels be established for the implementation of the policy on the rights of PWDS. Affirmative action will also be a welcome development in all spheres of life to create more equality between PWDS and other members of society. These are necessary

steps for the protection and promotion of the rights of PWDS in Nigeria and in keeping with global trends in law and disability.

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- 1 Raymond Lang Research Fellow Leonard Cheshire. *Disability and Inclusive Development*. Centre University College, London.
- 2 Lang. *Disability and Inclusive Development*. London
- 3 During this period, the UN was the key (if not the only) enforcer of human rights globally, making it practically impossible for it to effectively address all concerns on human rights violations.
- 4 DFID. Scoping Study: *Disability Issues in Nigeria*, April, 2008, 12.
- 5 DFID. Scoping Study. *Disability Issues in Nigeria*.2008.
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- 7 Marie-Bénédicte, D. 2010. "What Are Human Rights? Four Schools of Thought". *Human Rights Quarterly*, 32.1:1-20 at 2.
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- 15 Gordon Tait. "Disability and the Ethical Responsibilities of the Teacher..." 3-4.
- 16 Gordon Tait. "Disability and the Ethical Responsibilities of the Teacher..."
- 17 Sections 33-45, CFRN, 1999.
- 18 Section 33, Constitution of the Federal Republic of Nigeria, 1999 (as amended).
- 19 *Illustrated Oxford Dictionary*, Oxford University Press, 457.
- 20 Section 1
- 21 Section 2 titled Declaration of Policy, declares as follow:
 - (1) Disabled persons shall be guaranteed treatment as equals to other Nigerians for all purposes in the Federal Republic of Nigeria. Accordingly it shall be the duty and responsibility of organs of government and of all authorities and persons

to adopt and promote policies that will ensure full integration of the disabled into the mainstream of the society.

(2) Government shall ensure within the context of economic, political and social idea and objectives to Nigerians that:

(a) Disabled persons are fully integrated into the national economy.

(b) Disabled persons shall have equal rights, privileges, obligations and opportunities before the law.

(c) Disabled persons are provided equal and adequate education.

22 Section 3

23 Section 4

24 Section 5

25 Section 6

26 Section 7

27 Section 8

28 Section 9

29 Section 10

30 Section 11

31 Section 12

32 Section 13

33 Section 14

34 See section 1 on the general principles of the Nigerians with Disabilities Decree 1993, which discloses that its purpose is to provide a clear and comprehensive legal protection and security for Nigerians with disability as well as establish standard for enforcement of the rights and privileges guaranteed under the decree and other laws applicable to the disabled in the Federal Republic of Nigeria.

35 Akinbola, B. R. 2014. "The Right to Education of Persons with Disabilities in Nigeria". An Unpublished Ph.D Thesis, University of Ibadan, Nigeria.

36 Joseph Onyekwere, "Disability Bill 2015 Persons with disabilities bill and the burden of Presidential assent," <http://www.ngrguardiannews.com/2015/03/persons-with-disabilities-bill-and-the-burden-of-presidential-assent/>

37 Article 5, sections 1-4, titled: Equality and non-discrimination, and particularly sections 3 and 4 of article 5.

38 Leonard Cheshire Disability. *Three Year Strategic Plan for Nigeria*, Leonard Cheshire Disability, London. 2007, 5. In Disability Scoping Study in Nigeria, April, 2008.

39 Culled from Disability Scoping Study in Nigeria, April, 2008.