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AN APPRAISAL OF INTERNATIONAL HUMAN RIGHTS PROTECTION OF DISABLE PERSONS

INTRODUCTION

Discrimination is a treatment of persons based solely on their membership in a socially distinct group or category, such as race, ethnicity, sex, religion, age, or disability. Discrimination can be viewed as favourable or unfavourable, depending on whether one receives favours, or opportunities, or is denied them.¹ People living with disability have been subjected to a number of discriminations that no other person has ever been². They are kept out of fundamental rights and deprived of certain basic needs. Variations among human beings mental, physical and sensory functions have existed since the time yore. As a result, persons with severe functional limitations that is, disabled persons have often been excluded, isolated and marginalised from mainstream society and unfortunately that practice still continues unto this day³.

In advocating for their rights, disabled people have worked to establish several important principles. One is that they be considered on the basis of individual merit, not on stereotyped assumptions about disabilities. Another is that society must make certain changes to enable them to participate more easily in business and activities. An example is wheel chair access to public transportation, building entrances, and theatres. A third principle is that, to the extent appropriate for each individual, disabled people should be integrated with people who are not disabled.

Communities naturally tend to resist, and in some instance, react very negatively to the existence of handicapping condition. One condition that guarantees harmonious relationship among different segment of a community is the understanding that each person within the segment is unique. This uniqueness confers on him the distinguished honour of a complete entity. This unique aspect is that the individual is what he is, any defect in his person notwithstanding, he must therefore be accepted and related with purely based on an unaltered corporate and indivisibility of his existence. The individual could not be fragmented and conditional acceptance of him destroys the very basis of any accepted harmonious relationship and the foundation of a just and egalitarian society. This paper therefore examines the instruments protecting the rights of disabled in law, some notable discrimination against disabled persons, and court's attitude towards the societal reaction and howing the needs for specific legislation on the rights of disabled in State that cherished the existence of human being.

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For example, a senior citizens discount shows favourable discrimination towards senior citizens. However, in modern time usage, discrimination is usually considered unfavourable.

In prehistoric periods, the Spartan eliminated disabled people. The Masai Indians also killed their disabled children.

Even in the developed world, we hear of terrible tales or cruelties against persons with disabilities. For example, in the UK, a disabled man died after choking on his own vomit because staff in the care home deliberately ignored his calls for help. Also in US, a doctor was found to be performing unnecessary operations on disabled persons living in state-regulated institution. There is also a case in Netherlands, where a young disabled girl was found naked and chained up in cell-like room. Recently, in the UK, a disabled woman who had no hands nor legs attempted to board a flight to New York but was told by the employee of the Air France that one head, one bottom and a torso cannot possibly fly on its own and for this reason she would not be allowed to travel unaccompanied.

See Wright D. "the deafness" New York Stein & Day publishers (1969); Carmern R. "Our Endangered Hearing" Kodak press publishers, (1979).

II. MEANING OF A DISABLE PERSON

Disability according to the Oxford Advanced Learner's Dictionary is the physical or mental condition, which prevents a person from using a part of his body completely or easily or that, which prevents a person from learning easily.⁴ Disability is not always obvious. The Disability Discrimination Act (DDA) defines a person as disabled if they have a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.⁵ The key thing is not the impairment but its effect. Some people don't realize that impairments such as migraines, dyslexia, asthma and back pain can count as a disability if the adverse effect on the individual is substantial and long-term.⁶ Some conditions automatically count as disabilities for the purposes of DDA, from the point at which the individual first has them – these are cancer, HIV and multiple sclerosis (MS).⁷

The term "disabled person" according to the Declaration on the Rights of Disabled persons means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.⁸

In short, people with disabilities are persons with physical, sensory, or mental impairment that makes performing an everyday task more difficult. Under this broad definition, an estimated 54 million people in the United States or nearly 20 percent of the population live with disabilities. In Nigeria, about 10 million people live with disabilities and unfortunately more than 9 million of them live below poverty line. Some disabilities, such as a broken hip, may be temporary; others are relatively minor, such as vision impairments that can be modified by corrective lenses.⁹ Therefore, the disability contemplated by law may be permanent or temporary so far that it affects the ability of the person affected to carry out day-to-day activities for a long period of times. It must be one of permanent in nature (that is, not one which can be corrected). Going by this requirement, people living with HIV/AIDS or other diseases not necessarily physical in nature are also or for this purpose regarded as disabled in law.¹⁰

⁴ See the 6th edn. of the *Oxford Learner's Dictionary*.

⁵ Normal day-to-day means things that people do on a regular or daily basis, such as reading, writing, using the telephone, having a conversation and travelling by public transport. Long-term usually means the impairment should have lasted or be expected to last at least a year. Substantial means not minor or trivial.

⁶ <http://www.equalityhumanrights.com/en/yourrights/equalityanddiscrimination/disability/pages/introduction.aspx>; <http://www.equalityhumanrights.com/disabilityemploymentcode>;

<http://www.equalityhumanrights.com/en/forbusinessandorganization/publicauthorities/pages/whatdopublicauthoritieshavetodo.aspx>

⁷ See the Disability Discrimination Act 1995 code of practice on Employment and occupation.

⁸ See the Declaration on the Rights of Disabled persons (1975).

⁹ Some disabilities classified as severe may not represent a handicap – that is, the inability to take part in community life on an equal level with others. For instance, a person who uses a wheel chair may be able to live independently if physical and social barriers to mobility have been removed. In the year 2000 an estimated 34 to 43 million people in the United States had chronic disabilities.

¹⁰ See the Rehabilitation Act 1973.

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Declaration Doc. A/1003-12 Ibid.

INSTRUMENTS PROTECTING THE RIGHTS OF DISABLED PERSONS

Full citizens, people with disabilities are entitled to equal rights. In their daily lives, they continuously battle exclusion and restriction to their full participation in society, facing discrimination, poverty. People with disabilities are entitled to equal access to education and employment, equal rights to parenthood, property ownership, political rights, and legal representation.

Before a human rights perspective to disability requires society, and especially governments, to promote the conditions for all individuals to fully realize their rights. "Reasonable accommodation" (the necessary modifications without a disproportionate burden) must be made to ensure persons with disabilities the enjoyment of all human rights and fundamental freedoms. There are various instruments protecting the rights of disabled in law. A brief discussion of this is apposite.

Provisions on the Rights of Disabled persons require the states parties to ensure protection of the disabled against all forms of discrimination and degrading treatment¹¹. It stated thus:

Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible.

Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.

Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom. If the stay of a disabled person in a specialized establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.

Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.¹²

Articles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health declared in clear terms that the disabled persons are entitled and should enjoy all rights

Convention on the Rights of disabled persons, G.A res. 3447 (XXX), 30 U.N. GAOR supp. (No 34) at 88, U.N. Doc. A/RES/3447/XXX (1975).

contained in virtually all human rights instruments without any discrimination whatsoever¹⁴. Principle provides:

2. All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person.
3. All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment.
5. Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and in other relevant instruments, such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

The convention on the Rights of persons with disability obliged states to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability¹⁵. Article 3 of the Convention provides the following general principles:

The principles of the present Convention shall be:

- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article this article stipulates what is expected of State parties by general obligations when it provides *inter alia*:

1. State Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
 - (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
 - (c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

Principles for the protection of persons with mental illnesses and the improvement of mental Health care, G.A. res. 46/119, 46 U.N. GAOR supp (No 49) at 189, U.N. Doc. A/46/49 (1991).

Discrimination according to the principles means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of these Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.

INTERNATIONAL Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex 1, U.N. GAOR, 61st sess., supp. No 49 at 65, U.N. Doc. A/61/49 (2006) entered into force may,3, 2008.

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⁶ AG/RES. 1608,

⁷ *Ibid* at article 2.

⁸ *Ibid* at article 3.

- (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
- (g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost
- (i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, State Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

Article 5 bothers on equality and non-discrimination: It provides as follows:

1. States Parties recognize 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.

The International Convention on the Elimination of all Forms of Discrimination against persons with disability¹⁶ emphasizes on the prevention and elimination of all forms of discrimination against persons with disabilities and to promote their full integration into the society.¹⁷ To achieve the objectives of this Convention, the States parties undertake To adopt the legislative, social, educational, labour-related, or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into the society, including, but not limited to activities such as employment, transportation, communication, housing, recreation, education, sports, political and administrative activities.¹⁸

AG/RES. 1608, 7 June 1999.

ibid at article 2.

ibid at article 3.

One of the earliest instruments for regulating the interaction between states is the Universal Declaration of Human Rights which was regarded as the most basic and well known of all Human Rights instruments provides in its Article 1 that all human beings are born free and that everyone should act towards one another in a spirit of brotherhood¹⁹. In the same vein, Article 7 stipulates that everyone is equal before the law and that there should be equal protection by law against any unnecessary discrimination.²⁰

The African Charter on Human and Peoples Rights is regarded as being specific in nature because not only did it provide for basic rights but also imposes duty as well. Article 3 of the Charter provides for the equality before the law and enjoins equal protection of law without any discrimination.²¹ Article 5 prohibits all forms of exploitation, inhumane, degrading punishment and treatment against anybody.²² A similar provision appears in a number of conventions and political manifestos. These conventions provide ample evidence of the universal rights against discrimination. The international convention on economic, social, and cultural rights recognizes the right of everyone to equal economic and social rights²³. The international convention on the Elimination of all forms of racial discrimination enjoins states which are parties to the convention to recognize the rights of every person without any discrimination.²⁴

IV. NOTABLE DISCRIMINATIONS AGAINST PEOPLE WITH DISABILITY

A. Right to Employment or Work

The right to employment implies gainful involvement of person in productive activities²⁵. People living with disabilities are being denied this vital right notwithstanding their qualification. In advocating for their rights, disabled people have worked to establish an important principle that they be considered on the basis of individual merit and not on the stereotyped assumptions about disabilities. In the United States, before 1970s most legislations dealing with the problems of people with disabilities provided limited support²⁶. The change in the 1970s and 1980s, centred on the rights of disabled persons to the same protection under the law as enjoyed by the rest of the population. For example, the federal Rehabilitation Act²⁷ requires businesses that handle federal contracts to practice affirmative action in employing disabled people and to make reasonable accommodations to their needs.²⁸

¹⁹ See the Universal Declaration of Human Rights 1948.

²⁰ *Ibid.* For more detailed view, see Micheal J. Perry "Are Human Rights Universal? The Relativist Challenge and Related Matters, John Hopkins university press (1997).

²¹ Doc. CAB/LE9/67/3/Rev. 5 (1981) reprinted in 211. L.M. 59 (1982 (hereinafter African Charter.))

²² *Ibid.*

²³ International Convention on Economic, Social and Cultural Rights 1965.

²⁴ International Convention on the Elimination of all Forms of Racial Discrimination 1965.

²⁵ Global programme on AIDS, Geneva (13 May 1988) world Health Organization.

²⁶ See, for example, social security and public assistance entitlements guide.

²⁷ See the Rehabilitation Act 1973.

²⁸ Reasonable accommodation in employment consists of a variety of modification or adjustments. These include (a) modifying a job application procedure so that a qualified applicant with disability can be considered for the position.(b) changing the work environment, or the way the work is customarily performed, to permit someone with

A major landmark effects occurred in US with the passing of the American with Disability Act in 1990²⁹ which prohibits discrimination against people with physical or mental disabilities in employment, public accommodation, transportation, and telecommunication. Title 1 of the ADA prohibits private employer, state and local governments, employment agencies, and labour unions with 15 or more employees from discriminating against otherwise qualified people with disabilities. An otherwise qualified individual with disability is someone who meets the requirement for skill, experience, education, and other conditions needed for the position and who, with or without reasonable accommodation, can perform the essential function of the job.³⁰

The court has also frowned at discriminating against people with disabilities or terminating employment on ground of disability. In *X v Y Corporation and Another*,³¹ the petitioner was employed in 1986 as a casual labourer with the respondent corporation, where he worked till 1994 when his employment was terminated after undergoing a medical examination conducted on the direction of the respondent corporation. His medical certificate, after the examination, revealed that he was infected with HIV virus but was otherwise physically fit for the duty. The doctor who conducted the examination also stated specifically in the medical certificate that government policy on employee's service prohibited termination of the petitioner's appointment due to his HIV status.

Following the medical doctor examinations, and in spite of the medical doctor's advice, the respondent went ahead and terminated the petitioner's appointment by a notice dated 16 February 1994. In his petition against the respondent corporation, the petitioner sought an order of the court quashing the decision to remove his name from selected list of casual labourers, a direction to absorb him to a regular post and an order quashing circular issued by the respondent corporation that job applicants and existing employees be screened, *inter alia*- HIV and that an employee found to be positive should have their employment terminated. The petitioner claimed compensation to be calculated as if he had been absorbed into regular employment from 1993. Allowing the petition, the Court held that the termination of his employment on basis of his HIV status despite medical report that declared him physically fit to work was arbitrary, unreasonable, unlawful, and infringed his constitutional rights³². It also held that the circular of the respondent company which directed that job applicants or existing employees found to be HIV positive would not be employed or would be terminated is unconstitutional, illegal and invalid. The petitioner was reinstated to his position as casual labourer³³.

Another case was that of *Chalk v United States District Court Central of California*.³⁴ In this case, Chalk was a certified teacher of hearing impaired students in the department of education. In February 1987 Chalk was diagnosed as having AIDS. Subsequently, the department reassigned Chalk to administrative position and barred him from teaching in the class room. Chalk then filed the action in the District court, claiming that the action of the department violated section 504 of

disability to fulfil the job's essential functions and (c) enabling an employee with disability to enjoy the same benefits of employment as employees without disabilities.

²⁹ American with Disability Act 1990.

³⁰ *Ibid*.

³¹ (2002) 2CHR p.235. (High Court of Bombay, South African).

³² *Ibid* at 237.

³³ *Ibid* at 238-239.

³⁴ (1987) 840 f2d 701.

Rehabilitation Act as amended which prohibited recipients of federal funds from discriminating against otherwise qualified handicapped persons. Chalk's motion for a preliminary injunction ordering his reinstatement was denied by the District court he then appealed to the United States court of Appeal. Allowing the appeal, the court considers the question: under what circumstances may a person handicapped with a contagious disease be otherwise qualified within the meaning of section 504? The court having been convinced that HIV/AIDS does not become a transmitted disease through everyday contact and with particular reference to its earlier opinion in *south eastern community college v Davis*,³⁵ granted the petitioner's prayer.³⁶

B. Social Rights

People living with disability are completely ostracised as members of the society. People disassociate themselves from the victim of disability. They are denied the rights to join any form of association. To some people, they constitute an element of threat and hazardous to the safety of society and a sign of insecurity against person and property.

In *CESC v SC Bise*³⁷ it was held that the right to social and economic justice is a fundamental right irrespective of one's status or position. In *Neera Mathur v Life insurance Corporation India*,³⁸ a Bench of two judges had held that right to economic and social equality is a fundamental right to every citizen.

The court in *Tellis v Bombay Municipal Corporation*,³⁹ *M/S Shantis Builders v Narayan Khimlani Totamme*,⁴⁰ and *Chameli Singh v State of UP*,⁴¹ held that the right of every person to social justice is an important facet of the right to life.

C. Public Accommodation

In most cases, land lords or other providers of public service are always reluctant in offering services to a person living with disability because of the general belief that disabilities victims are very rude, stubborn and peace broken. In United States, the American Disability Act⁴² prohibits all places of public accommodation from discriminating against people with disabilities⁴³. These categories include places of lodging, establishments serving food or drinks, places of exhibition or entertainment, places of public gathering, sales or rental establishments, service establishment,

³⁵ (1979) 442 US 397.

³⁶ See also *Jaishanker Prasad v State of Bihar* (1993) 2 SCC 597; *Raman Dayaram Shetty v International Airport Authority of India* (1979) 3 SCR 1014 at 1034; AIR 1979 SC 1628 at (1637-1638).

³⁷ (1992) 1 SCC 441.

³⁸ (1992) 1 SCC 286.

³⁹ (1987) 1 CRC (const) 351.

⁴⁰ (1990) 1 SCC 520.

⁴¹ (1996) 2 SCC 549.

⁴² American with Disability Act 1990.

⁴³ A place of public accommodation is a private business that offers goods, services, or activities to the general public.

public transportation facilities, places of public display or collection, places of recreation or exercise, places of education, and social services establishment⁴⁴.

V. THE CASE FOR EQUAL CONSIDERATION

Efforts to better the lots of persons with disabilities have been hinged primarily on the establishment of institutions and homes which provide vocational training for disabled persons and the provisions of such amenities like wheel chairs and crutches can at best be situated within the Sympathy Syndrome Principle. This principle is the provision of services to persons with disabilities out of sympathy rather than as of right. In the same vein, the current efforts being adopted to assist disabled persons in Nigeria, do not remove the stigmatisation nor address discriminatory practices which in most cases prevent the acceptance or integration of persons with disabilities in the mainstream society. It is therefore high time that government in Nigeria and worldwide at all levels started to enact and implement laws recognising the rights of disabled not on the basis of sympathy but as of right.

Persons with disabilities who have vocational training need to put their training to use and this is only possible if there is an enabling environment within which to operate. We are of the firm belief that a disabled friendly environment can only be created and sustained by statute. We are not unaware that there are promises concerning the provisions of services individuals with disabilities as contained in Nigeria's National Policy on Special Education. However, due to lack of mandatory legislation, implementation of the services has not been forthcoming. It is therefore clear that it is only the presence of law that can protect the rights of persons with disabilities. This has become the norm in countries like the USA⁴⁵, Europe and Japan where there are mandatory laws regulating the protection of persons living with disability. The point being made is that the rights of disabled persons are more likely to be met where there is a faithful, united and concerted effort for the cause of people with disability. Today references are made to United States and other countries but in fact they secured these rights through hard earned efforts and with faithful co-operation with each other.

There is therefore the need for the government and the law making body to take an imperative and decisive measure by promulgating a law or emulating the drastic step taking by the United States congress in the protection of the rights of disabled persons. This will help to ameliorate and eradicate the indecorous and dejected attitude of people towards victims of disabilities.

The law should forbid an employer from terminating its employee's appointment on the ground of suffering from disability once he or she qualified to do the job. Most people with disabilities want and wishes to continue working which enhances their physical and mental well being and they should be entitled to do so.

In Nigeria also, persons with disabilities want to be recognized as being able to work as teachers, pilots, engineers and so on. They also want to be able to access good job of their choice and able to access everything that the so-called normal people have. This can only be realised through legislation because there are lots of ability in disability.

⁴⁴ See generally Title III of the American with Disability Act.

⁴⁵ See the American with Disability Act 1990.

VI. CONCLUSION

People living with disabilities do not ceased to be human beings. The protection of human rights and dignity of disabled persons is essential to the prevention and control of discriminatory and societal attitude. One of the greatest needs of this very unfair world is the provision of law that ensure equal opportunities for all. In the absence of mandatory laws which are necessary to give birth to actions and strategic plans in relation to disability, goals are yet to be achieved. The urgency to proclaim such laws should not thus be under estimated. Persons with disability are not gentiles and should refuse to await the crumbs from the table because they are legitimate children of their country. Therefore, there is the need to orientate our people on the position of the law towards the victims of disabilities and the need to relate with them purely as members of the society and not on sympathy ground.