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EDITORIAL

In the last edition of this journal, we stated, among other things, that: "Department of Public Law, Kogi State University, Anyigba has taken a stand to continue with the publication of this Journal despite the problems associated with publication in Nigeria". We wish to reiterate our stand by restating explicitly that our commitment remains unshakeable and unchangeable. Our dream is no longer a mere glimmer of hope but has come to reality. Few months after the publication of the last edition we received, with glee, over sixty articles for publication. It was glaring to us that one set alone could not accommodate all the edited and publishable articles. We, therefore, decided to publish this edition in two sets as Volume 3, Number 1 and Volume 3, Number 2.

It is crucial to reveal that in many of the articles sent to us, the contributors did not comply strictly with our guidelines for publication; presumably they did not see or read our letter calling for articles. Indeed, members of the Board of Editors had difficulty in editing those articles. In this edition, we have published our guidelines at the last page, hoping that contributors will follow the guidelines.

This edition contains many articles on procedure, evidence and legal clinic or clinical education: "a practical approach to learning law", to borrow the sentiment of Titi Hameed. No doubt, it is a source of both substantive law and procedural law. We are sincerely grateful to the senior members of the academia who publish in this edition. Indeed, the younger members of the profession, who are desirous to publish, will benefit tremendously from your contributions.

We wish to acknowledge and congratulate three of our members of the Editorial Advisory Board, namely: Professor Joash Amupitan, Professor Felicia N. Monye and Professor Y. Y. Bambale that have been elevated to the rank of professor. That your professorial advice will aid in the development of our journal is not in doubt. We also congratulate two contributors in this edition - Osita Nnamani Ogbu and Muhtar A. Etudaiye, for successfully bagging their Doctor of Philosophy (Ph.D); and to all our contributors, we wish you flying colours in your academic undertakings.

Logan...
Timothy F. Yerima
Editor-in-Chief

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repression have been functional towards curbing breaches of IHL. Although perhaps, they might not have done enough to stop those who commit international crime, at least the mechanism does exist and be backed up as a means of progress towards a better implementation of international humanitarian law.

We suggest that, since the ICC, as an institution, lacks the machinery for arresting war criminals, High Contracting Parties should reinforce commitment and cooperation in the scene of procuring arrest of criminals for trial in ICC regardless of the fact that the criminal is their national. It is also recommended that High Contracting Parties should domesticate or amend their laws so that National Courts can exercise universal jurisdiction effectively.

AN EXAMINATION OF THE LEGAL FRAMEWORK FOR THE RIGHTS OF WOMEN WITH DISABILITIES IN NIGERIA *

I. Introduction

As the international community moves towards a more robust recognition of both human rights of disabled persons and the reproductive rights of women, there is need for an intersection comprising of the rights of disabled women and reproductive freedom. There are divergent views and opinions as to what constitutes disability rights, women's rights, and human rights. There is need, therefore, to articulate the human rights norms against the laws and policies affecting women's reproductive health rights especially in cases of blatant discriminations against women with disabilities. There is no international consensus on what constitutes a disability. Disabilities are often culturally constructed, and the prevailing terminology used in different languages is the source of dispute. There have been nonetheless efforts made towards a generally acceptable definition. The United Nations General Assembly Declaration on the Right of the Disabled Persons defines disabled as: "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."¹

The World Health Organization, in order to facilitate the United Nations launching of the World Programme of Action • Concerning Disabled Persons, distinguished between impairment, disability, and handicap. Accordingly, disability is defined as: "Any restriction or lack of ability resulting from an impairment to perform an activity in the manner or within the range considered normal for a human being...impairment is any loss or abnormality of psychological, physiological, or anatomical structure or function"²

Approximately over three million women around the world have mental and physical disabilities. Globally women make up three-quarter of the disabled people in low and middle income categories,³ and between 65-70 percent of those women live in rural areas. Equally too, women with disabilities often had their reproductive health rights neglected.⁴ Women with disabilities like all other people enjoy the full canopy of human rights that are secured by international law and custom. For instance, the Vienna Declaration and Programme of Action 1993, provides that special attention must be given to ensure non-discrimination and the equal enjoyment of all human rights and fundamental freedoms by disabled persons, including their active participation in all aspects of the society. Reproductive rights are among these fundamental freedoms which include the right to: equality and non-discrimination; the right to marry and found a family; the right to comprehensive reproductive health care including family planning and maternal health services, education and information; the right to give informed consent to all medical procedures including sterilization and abortion; and the right to be free from sexual abuse and exploitation.⁵ The specific need of women with mental disabilities including developmental disabilities and mental illness, pose particular significant challenges in the human rights context. The fact remains that, it is not that the rights of women with physical disabilities do not deserve attention, but rather that State parties to some of these Conventions tend to equate mental disability with lack of legal capacity.

Women with mental disability should be involved in decision making about their reproductive rights to the fullest extent allowed by their capacities to the degree that a woman can give her informed consent she is entitled to so

* M.K Adebayo Esq., LL.B, B.L., LL.M. & Bunu Mallam Abubakar, LL.B., B.L., LL.M., Lecturers, Faculty of Law University of Borno-State Maiduguri

¹ Para. 1 Declaration on the Rights of Disabled Persons proclaimed December 9, 1975 G.A Res. 3447(XXX).

² Para 74, World Programme of Action Concerning Disabled Persons adopted December 3, 1982 G.A Res.37/52 U.N AGOR Also Leandro, D "Human Rights and Disabled persons" United Nations, New York. At 10-11 U.N Sales No. E.92 XIV.4 (1993).

³ CRC "Reproductive Rights and Women with Disabilities" Briefing Paper www.reproductivejustice.org, accessed 7th June, 2010.

⁴ *Ibid*.

⁵ Article 22 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna Austria, 14-15 June, 1993.

do.⁶ At the same time, women with mental disabilities may possess particular vulnerabilities that entitle them to heightened protection from sexual abuse and other form of sexual exploitation. Sexual freedom must not be unduly restricted, and reproductive health services, particularly contraception, sterilization and abortion must not be forcibly or coercively imposed.⁷

Many disabilities rights advocates observe that society dehumanizes the physically disabled and denies them any sexuality. In extreme cases of mental disability, substituted judgment may be appropriate when a severe emotional disturbance or cognitive impairment comprises an individual's ability to give informed consent. Any restriction or denial of decision making authority to a disabled woman should be the consequence of an objective procedure containing proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the capacity of the mentally disabled person by qualified experts subject to periodic review and appeal.⁸

Where a woman is under any form of disability, and has no ability to consent, those making reproductive decisions on her behalf must respect her individual needs as paramount. Any action which limits her reproductive rights must be as minimal as possible, and not based on the convenience of others. A diagnosis of a mental disability should never be automatically accompanied by a presumption of incompetence and assignment of decision making authority to another party. The paper among others is to create awareness and open a door for dialogue among the disabled women and human rights advocates.

II. The Identifiable Rights of Disabled Women

There are four interrelated reproductive health rights and disabled rights within the international human rights framework. These are:

a. The right to equality and non-discrimination: This is among the most fundamental of all human rights. The Convention on the Elimination of All Forms of Discrimination against Women directs states to condemn discrimination against women in all its forms. The Committee on the Elimination of Discrimination against Women General Recommendation on Health provides that special attention should be given to the needs and rights of women belonging to vulnerable and disadvantaged groups, such as women with physical disabilities.⁹

b. The Fourth World Conference on Women, Beijing Declaration and Platform For Action (FWCW), provides that efforts should be intensify to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their disability.¹⁰ Furthermore, government must strengthen and encourage the implementation of the recommendations contained in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, paying special attention to ensure non-discrimination and equal enjoyment of all human rights and fundamental freedoms by women and girls with disabilities, including their access to information and services in the field of violence against women, as well as their active participation in and economic contribution to all aspects of society.¹¹

⁶ Preamble and Article 4 Para. 1 Declaration on the Elimination of Violence Against Women adopted December 20, 1993 G.A. Res. 48/104.

⁷ Susan, S "Silencing the Different Voice: Competence Feminist Theory and Law, 4 U. Miami L. Rev 736 (1996).

⁸ *Ibid*.

⁹ Article 12 Susan, S "Silencing the Different Voice: Competence Feminist Theory and Law, 4 U. Miami L. Rev 736 (1996).

¹⁰ Paras 32. of Platform for Action of the Beijing Declaration, Fourth World Conference on Women 14-15th September 1995.

¹¹ *Ibid* Paras 232

c. The Declaration on the rights of disabled persons: Disabled persons, whatever the origin, nature, and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens.¹² Furthermore, that disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory nature.

d. The standard rules on the equalization of opportunities for persons with disabilities: It provides that states should recognize the overall importance of accessibility in the process of equalization of opportunities in all spheres of society, for persons with disabilities of any kind. States should introduce programmes of action to make the physical environment accessible; and undertake measures to provide access to information and communication.¹³ The Rules provide further that the principle of equal rights implies that the needs of each and every individual are of equal importance; and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.¹⁴

e. Principles for the protection of persons with mental illness and the improvement of mental health care: This Principle provides that there shall be no discrimination on the grounds of mental illness. Discrimination according to the Principle means any distinction, exclusion, or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measure solely to protect their rights, or secure their advancement, of persons with mental illness shall not be deemed to be discriminatory.¹⁵

The international community has acknowledged the compounded nature of the discriminations faced by women with disabilities and resolved to eliminate it. International agreements require governments to devote participation for women with disabilities.

f. National laws and policies: Disabled women must shoulder the double burden of discrimination based on sex and discrimination based on disability. The concomitant economic disadvantage this group experiences only serves to compound inequalities. This degree of discrimination against women with disabilities is so profound that laws and official policies often omit to address women disabilities entirely. Despite international human rights guarantees women with disabilities still suffer from vast inequality. For instance, disabled women are more likely to be destitute, malnourished, illiterate, and less likely to found a family than non-disabled women. Women with disabilities who do have children sometimes face rejection and scorn.¹⁶

g. The right to marry and found a family: The right to marry and found a family upon the free consent of both spouses is well established in international law. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights; guarantee the right to marry and found a family to men and women of majority age. The Universal Declaration of Human Rights; the Political Rights Covenant; and the International Covenant on Economic, Social, and Cultural Rights, further require the free consent of the spouses.¹⁷

h. Programme of action of the international conference on population and development: According to this Programme of Action, Government should take effective action to eliminate all form of coercion and

¹² Paras 3 of the Declaration on the Rights of Disabled Persons 1975.

¹³ Rule 5 of the Standard Rules on the Equalization of Opportunities for Persons With Disabilities adopted December 20, 1993 G.A. Res. 48/96.

¹⁴ *Ibid*, Para.25.

¹⁵ Principle 1.4 of Principle for the Protection of Persons With Mental Illness and the Improvement of Mental Health Care adopted December 17, 1991 G.A. Res.46/119.

¹⁶ Wahab, F. Empowering the Rural Disabled in Asia and the Pacific: Disabled Women in Rural Areas of the Region <http://www.iac.org/wa/cent/facinfo/sustdev/Ppdir/Ppdir042.htm> accessed 9th June, 2010.

¹⁷ CRC op. cit p14 notes 22-27.

discrimination in policies and practices. Assistance should be provided to persons with disabilities in the exercise of their family rights and responsibilities.¹⁸

- i. The standard rules: The Rules provide that states should promote the full participation of person with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationship, marriage and parenthood.¹⁹ Persons with disabilities must not be denied the opportunity to experience parenthood. Taking into account that persons with disabilities may experience difficulties in getting married and setting up family, states should encourage the availability of appropriate counseling.²⁰

International human rights law makes clear that states may neither restrict adult from marrying nor allow marriage without the spouse's consent. The foundational human right to marry and found a family has frequently been denied to women with disabilities. International human rights law makes clear that states may neither restrict adults from marrying nor allow marriages without the spouses' consent. Nonetheless, to the extent that a disabled woman can consent to marriage, she has the right to do so. Laws that prohibit marriage and parenthood for all mentally disabled women without regard to developmental level are broad and unnecessarily restrictive. Any restriction on the right of a physically disabled woman to marry and found a family is a violation of her human rights.

- j. Right to reproductive health, including family planning and mental health services, information and education: These rights are most succinctly formulated in the women's rights Convention; they are also secured in other international instruments. The Women's Rights Convention explicitly urges states to ensure the right to family planning information, counseling, and services, and the right to determine the number and spacing of one's children.²¹

The Committee on the Elimination of Discrimination against Women's General Recommendation on Disabled Women, specifically requests that states report on measures taken to ensure that disabled women have equal access to health services. The Committee's General Recommendation on Health instructs states to take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities and are respectful of their human rights and dignity.²² In the same vein, the World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout life-span. The Conference re-affirms on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.²³

- k. The Rights to Physical Integrity: This is a central tenet of the broad rights to life, liberty and security of persons guaranteed by the Universal Declaration and Political Rights Covenant.²⁴ Physical integrity is also guaranteed by those instruments' prohibition against torture and cruel, inhuman, or degrading treatment or punishment.²⁵ The right to physical integrity encompasses two important reproductive freedoms: the right to make decisions concerning one's health, and the right to be free from sexual abuse and exploitation. Women and girls with disabilities must be guaranteed freedom from both types of encroachment on their

¹⁸ Principle 5.5 of the International Conference on Population and Development, Cairo, Egypt 1994.

¹⁹ Rule 9 of the Standard Rule 1993.

²⁰ *Ibid* Article 9.2.

²¹ Articles 10, 12, 14, and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

²² General Recommendation 18: Disabled Women Committee on the Elimination of Discrimination Against Women, 10th Sess., U.N. Doc. HRI/GEN/1/REV.1 AT 83 (1994).

²³ Para. 41 The Vienna Declaration and Programme of Action 1993.

²⁴ Universal Declaration of Human Rights 1948.

²⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 G.A. Res. 39/46.

physical persons.²⁶ The CEDAW General Recommendation on Health prohibits coercion and non-consensual sterilization, and requires health services to be consistent with women's human rights including the rights to autonomy, privacy, confidentiality, informed consent and choice.²⁷

Regarding sexual abuse and exploitation, the Declaration on the Elimination of Violence against Women notes that women with disabilities are among the groups of women who are especially vulnerable to violence and calls for the adoption of measures aimed specifically at eliminating violence against such groups.²⁸ Governments at all levels are urged to institute systems of monitoring and evaluation of user-centered services with a view to detecting, preventing and controlling abuses by family planning management and providers. Government should secure conformity to human rights and to ethical and professional standards in the delivery of family planning and related reproductive health services aimed at ensuring responsible, voluntary and informed consent and also regarding service provision.²⁹

Government should ensure that women with disabilities have access to information and services in the field of violence against women. Government should take special measures to eliminate violence against women, particularly those in vulnerable situations such as women with disabilities including enforcing any existing legislation.³⁰

III. The Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities is an agreement by countries around the world to make sure that people with disabilities and people without disabilities are treated equally. Conventions, sometimes called treaties, covenants, international agreements or legal instruments, tell the government what to do to make sure we enjoy our rights.

The Convention on the Rights of Persons with Disabilities was adopted on 13th December, 2006 and by 2nd April, 2008 twenty countries had ratified it. The Convention is for all persons with disabilities regardless of age or gender. People with different disabilities from many different countries worked together with their government to develop this Convention. They got ideas by looking at the good actions and laws that were helping people with disabilities go to school, get a job, have fun and live happily in their communities.³¹ The disabled rights are not new rights. They are the same human rights recognized in the Universal Declaration of Human Rights, The Convention on the Rights of the Child and other International Human Rights Treaties. The Convention on the Rights of Persons with Disabilities guarantees that these rights are respected for people with disabilities.

The objective of the Convention is to promote, protect, and ensure the full and equal enjoyment of all human rights and freedoms by all people with disabilities including children.³² The principles of the Convention among others are: respect for everyone's integrity, dignity, freedom to make own choices and independence; non-discrimination; full participation and inclusion in society; respect for differences and accepting people with disabilities as part of human diversities; equal participation; accessibility i. e having access to transportation, places and information, and not being refused access because you have a disability; equality between men and women i. e having the same

²⁶ General Recommendation No.12 Violence against Women, Committee on the Elimination of Violence Against Women 1994.

²⁷ *Ibid* Article 12 Paras. 31(e).

²⁸ Article 4(1) Declaration on the Elimination of Violence Against Women 1994.

²⁹ Para. 7.17 of the International Conference on Population and Development 1994.

³⁰ Para 124 and 126 of the Fourth World Conference on Women Platform for Action 1996.

³¹ UNICEF "It's About Ability" @nyhqdoc.pernit@unicef.org accessed 6th June, 2010.

³² Article 1 Convention on the Rights of Persons with Disabilities 2006, Art. 1.

opportunities whether you are a girl or boy; respect for evolving capacity of children with disabilities and their right to preserve their identity i. e being respected for your abilities and proud of whom you are.³³

Furthermore, the Convention provides that there should be no laws that discriminate against people with disabilities. If necessary, government should create new laws to protect the rights of persons with disabilities and put these laws into action.³⁴ To develop new laws and policies, government should seek advice from people with disabilities, including children.

The Convention equally provides that Government should educate everyone about the rights and dignity of persons with disabilities and their achievements and skills. The Government should combat stereotype, prejudice and activities that might harm people with disabilities. In addition, Government should make it possible for people with disabilities to live independently and participate in their communities. Any place that is open to the public, including buildings, roads, schools and hospitals, must be accessible by persons with disabilities, including children. There should signs mounted in public places to guide the disabled.³⁵

Also unique, is the provision to protect the disabled in emergencies like war or natural disasters, they have the right to be rescued like others and should not be left alone because they are disabled. Also extant is the provision conferring full legal capacity on people with disabilities, like obtaining a loan from a bank, or renting of apartment.³⁶ No disabled person should be tortured or humiliated or treated with cruelty, nor refused medical or scientific experiments. Disabled persons should be protected from violence and abuse; they should not be mistreated or harmed in their homes or outside.³⁷ This provision could be employed to prosecute those who are in the habit of sleeping with our mad-women on the streets either for rituals of money or even disgracefully putting them in the family way without care or attention.

More so, the disabled should have the right to move about freely and be independent. Disabled should have the right to live with their families; the Government should support the family with disability-related expenses, information and services. For instance disabled children should not be separated from their parents on the ground of their incapability.³⁸ Spectacular, is the provision in the Convention that prohibits segregation of the disabled in schools in terms of education. They should have the same education with normal persons and curriculum as others. Akin to this is the right to have the same range and quality of free or affordable health care as provided to others. There should be job opportunities and freedom of choice of jobs without discrimination; right to food, clean water, clothing and access to housing, without discrimination.³⁹

People with disabilities have the right to take part in politics and public life. Once the person has reached the age set by laws, inclusive of the right to form a group, serve the public, access voting booths, vote and be elected to government position, in addition to the right to participate in and enjoy the arts, sports, games, films and other fun activities; therefore, theatres, museums, playgrounds, and libraries should be accessible by everyone.⁴⁰

³³ *Ibid* Article 3.

³⁴ *Ibid* Article 4.

³⁵ *Ibid* Article 8-9.

³⁶ *Ibid* Article 10-12.

³⁷ *Ibid* Article 15-17.

³⁸ *Ibid* Article 19-23.

³⁹ *Ibid* Article 24-26.

⁴⁰ *Ibid* Article 29-30.

IV. Conclusion

The rights of people with disabilities are the same as those of others. The world should be made to know of this Convention. People must speak out and actions taken if the societies must include everyone. The Convention gives the disabled, the Government, and the family tools for achieving this plethora of rights and dreams. There is urgent need, therefore, to change the attitudes of people and rules toward the disabled, because many people don't treat people with disabilities fairly. There is need for an awareness campaign, hold fund raising, form clubs, organizations to promote this Convention. Also seminar presentations could be organized in schools and institution about the rights of people with disabilities.

Notable is the fact that the Convention contains goals and objectives that are presently non-justiciable in Nigerian *corpus-juris*. The Convention can best be described as set of objectives, principles and policy goals which the Government is obligated to pursue for the betterment of her disabled citizens; they form part of the second generation rights; economic, social and cultural rights. The Nigerian Constitution 1999 set out some of the objectives of the Convention as directive principles of state policy in Chapter II, and are also not justiciable.⁴¹ Under the Nigerian Constitution, directive principles in Chapter II enjoins the state to ensure full realization of economic, social and cultural rights such as health, employment, education, environment, security, welfare, promote integration and so on. However, Section 6 (6)(c) of the same Constitution provides that the judicial powers vested by the Constitution on the courts:-

Shall not extend... to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directives principles of state policy set out in chapter II of the Constitution*.

The wider conception and interpretation given to this provision is that Chapter II of the Constitution contains economic, social and cultural rights provision, and Section 6(6)(c) disallows the courts from entertaining complaints of breach of those rights. In effect the provisions and objectives of the Convention on the Rights of Persons with Disabilities are at present non-justiciable rights and do not qualify as fundamental human rights with all its attributes as contained in Sections 33-44 under Chapter IV of the 1999 Constitution. Thus in the case of *Uzoukwu v. Ezeonu*,⁴² following the case of *Okogie v. Attorney General of Lagos State*,⁴³ the Court of Appeal held concerning economic, social, and cultural rights that:

There are, other rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the Constitution as under the fundamental objectives and directives of state policy under chapter II of the Constitution.

Against the foregoing discourse, for the legal protection and promotion of economic, social and cultural rights; the Convention on the Rights of Persons with Disabilities, we shall advocate for two basic strategies. Firstly, the Government of Nigeria had ratified the African Charter on Human and Peoples Rights and incorporated it into the municipal laws in 1983.⁴⁴ By this development human rights activist, lawyers and advocates can explore the local use of the Charter since its domestication to promote and protect the enforcement of the economic, social, and cultural rights, because international treaties, documents, and conventions have no domestic force of law unless expressly enacted into law by the Legislature.⁴⁵ Thus, in the case of *Gani Fawehinmi v. General Sanmi Abacha*,⁴⁶ the

⁴¹ Chapter II Sections 13-24 of the 1999 CFRN.

⁴² (1991) 6 NWLR Pt.200 p.708 at pp.761-762.

⁴³ (1981) 2 NCLR p.337.

⁴⁴ African Charter on Human and Peoples Rights (Enforcement and Ratification) Act Cap A10 LFN, 2004.

⁴⁵ Section 12 of the 1999 CFRN.

⁴⁶ (1996) 9 NWLR Pt. 366 p.1.

Court of Appeal held that the African Charter by virtue of its domestication is on a class of its own from other national laws and supersedes other municipal laws including the Constitution and Military Decrees. The African Charter contains a number of recognized economic, social and cultural rights such as rights to education, safe environment, health, maternal and reproductive health rights and so on.

Secondly, the mode of interpreting of guaranteed fundamental rights has also been called the purposeful and effective or integrated interpretation of human rights. This is to construe constitutional guaranteed rights to give them meaningful and effective contents. In this way, economic, social and cultural rights would be interpreted and enforced as integral parts of civil and political rights. For example the right to life; right to dignity of human person; right to personal liberty; right to private and family life; right to freedom of thought, conscience and religion; right to peaceful assembly and association; right to freedom of movement; and right to freedom from discrimination,⁴⁷ can be synchronized and used to campaign for the relevant provisions and objectives of the Convention on the Rights of Persons with Disabilities, 2008.

A CRITICAL ANALYSIS OF AFRICAN CONCEPT OF HUMAN RIGHTS*

I. Introduction

It is agreed by all human right experts that the concept of human right is universal in application. The natural law school believes that human right is derived from the supreme being and is discernible by human reasoning and is therefore metaphysical or from human nature. This presupposes that human right is derived from God. The very definition of human right as the right which people have simply because they are human beings also presupposes that human right is attached to man as a moral right held unconditionally and unalterably by all and only human beings.

However, there has been a debate about whether human rights actually existed in traditional Africa. Human Right is a universal concept which is as old as human existence itself. This presupposes that the issue of Human Rights permeates and pervades all cultures and people in their natural environment. At its most basic level, a human right is a safe guarded prerogative granted because a person is alive. This means that any human being granted personhood has rights by virtue of species of membership. And a right is a claim to something (by right holder) that can be exercised and enforced under a set of grounds of justifications without interference from others.¹ Universality is best stated in the Preamble to the Universal Declaration of Human Rights (UDHR)² which proclaims the Declaration to be as:

Common standard of achievement for all peoples and nations, to the end that every individual and every organ of society... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

The basis for this assertion of the universality of human rights is often said to flow from the very fact of being human, this being based on views drawn variably from principles of natural law, morality, philosophy or anthropology.³ On the basis of such studies, it can be asserted with confidence that all cultures everywhere have standard rules of practice, which show respect for human beings, that there are rules of natural justice and norms of behaviour. In broad principle, therefore, all cultures should be capable of assenting to the proposition in the Universal Declaration that 'All human beings are born free and equal in dignity and rights in that they can identify something of their own practices and mores in that statements'. Human rights may not have been understood or accepted in all cultures in exactly the same way or in the absoluteness of its application but a consciousness of those principles has a universal and cross-cultural ring to it.⁴ The Vienna Declaration and Programme of Action of 1993 has also suggested and settled the

* Oyelade Olutunji Sunday, Senior Lecturer and Acting Head, Department of International Law, Faculty of Law, Obafemi Awolowo University (O. A. U.), Ile-Ife.

¹ R. Cohen 'Endless Teardrops: Prolegomena to the Study of Human Rights in Africa' in *Human Rights and Governance in Africa*, ed. Ronald Cohen et al., (University of Florida) at p. 4.

² N. Barney Pityana, *The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context in The African Charter on Human and Peoples' Rights, The System in Practice*, 1986-2000; eds. Malcolm Evans and Rachel Murray (Cambridge University Press) p. 219; The General Assembly Resolution 217A (III) 1948). It was adopted by forty-eight votes for, with none against and eight abstentions. Of those African states then members of the U.N. (most being under colonial rule at the time), Egypt, Ethiopia and Liberia voted for the adoption of the Declaration, whereas South Africa abstained.

³ *Ibid.* citing Y. Ghai, 'Universalism and Relativism: Concretising the Debate' (unpublished paper distributed by the International Council on Human Rights Policy, Geneva, June 1999); C. Brown, 'Universal Human Right: A Critique', *International Journal of Human Rights*, (2) (1977) 41-55; M. Freeman, 'Universalism, Communitarianism and Human Rights: A reply to Christ Brown', *International Journal of Human Rights* 2(1) (1999) 79-92; D.O. Sullivan, 'The History of Human Rights Across Regions: Universalism vs. Cultural Relativism', *International Journal of Human Rights* 2(3) (1999) 20-48; M. Wa Mutua, 'The Banjul charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, Review of the African Commission on Human and Peoples' Rights 6 (1996-7) 16-18; J.D. Van der Vyver, 'Universality and Relativity of Human Rights: American Relativism', *Buffalo Human Rights Law Review* 4 (1998) 43-78.

⁴ N. Barney Pityana, *ibid.*, p. 220.

⁴⁷ Sections 33-43 of the 1999 CFRN.