

CONTEMPLATING DIGNITY AND INCLUSIVE EQUALITY IN EDUCATION FOR ‘DISABLED LEARNERS’ IN NIGERIA: AN EXPLORATION OF EQUALITY VALUES IN CANADA AND THE USA*

Abstract

Nigeria is still confronted with difficulties in effecting and entrenching the fundamentals for the establishment, interpretation and implementation of concepts like non-discrimination and equality for its diverse citizens. The concepts become even more contested and unacceptable when it is largely conceived in terms formal equality under the 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution). Formal equality in actual fact diminishes practical equality in the scheme of distribution and redistribution of socio-economic goods and services. Most commonly, ‘disabled learners’ are often denied equal opportunity in education and are generally depicted as being protected under the formal equality and non-discriminatory clause of the Nigerian Constitution. While ‘disabled learners’ continue to gain recognition as citizens with the same equal protection as their abled peers, they have not as yet truly emerged as equal citizens within the Nigerian context. In order to build upon the aspirations of providing a constitution for the purpose of promoting good governance of all persons in Nigeria on the principles of freedom, equality and justice, this paper ethically seeks to explore the non-discriminatory agenda in Canada and United States of America. This is for purposes of imparting future development of Nigeria’s equality provisions, particularly in the context of achieving dignity and inclusive equality in education for ‘disabled learners’ in Nigeria. Implicit in the use of the term ‘disabled learners’ in this article is an understanding that it is the socio-economic and political environments that impede access to participation in the society.

Keywords: inclusive equality, disabled learners, education, Nigeria

1. Introduction

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) provides a framework for the elimination of discrimination and realisation of equality as well as dignity in all aspects of life for persons with disabilities.¹ Thus the promotion of inclusive equality in education through appropriate steps is integral to a dignifying life for all persons, including disabled persons. This idea is supported by normative law,² comparative law, international research³ and a growing body of Nigerian law⁴ relevant to this area. However, the provision of inclusive equality in education for learners in Nigeria, especially ‘disabled learners’ is inadequate despite low percentage of basic literacy, lower levels of employment and higher poverty rates. The article is divided into five sections. The present section is the introduction. Section two provides an overview of the legal framework protecting education rights of ‘disabled learners’ in Nigeria. Section three examines the content of the equality and non-discrimination laws within the jurisdictions mentioned and analyses it in the context of education for Nigeria’s ‘disabled learners’. Section four discusses lessons which Nigeria can borrow from Canada and the United States jurisdictions. Section five is the conclusion.

Methodology

The research methodology is qualitative and incorporates library-based text analysis and evaluation of observed behaviour patterns in Nigeria that tend to ignore a group’s disadvantaged position. Based on the fact that law is expected to facilitate the common good by providing authoritative rules that solve the coordination problems in the society, the study makes use of ‘broadened new natural law theory’ thoughts as an analytical tool.

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¹ Adopted 13 December 2006 by General Assembly Res A/RES/61/106.

² CRPD arts 5 & 24; Universal Declaration on Human Rights (UDHR) adopted 10 December 1948 GA Res. 217 A (III); the International Covenant on Economic Social and Cultural Rights (ICESCR) Adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on the 3rd of January 1976 in accordance with art 27; the Convention on the Rights of the Child (CRC) adopted by United Nations General Assembly Resolution 44/25 of 20 November 1989; the African Charter on Human and Peoples’ Right (ACHPR) adopted June 27 1981 OAU DOC CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) see arts 17; African Charter on the Rights and Welfare of the Child (ACRWC) Adopted 1990 OAU Doc CAB/LEG/24.9/49 (1990) see art 11 & 13.

³ Runswick-cole K (2011) ‘Time to End the Bias towards Inclusive Education’ 38 *British Journal of Special Education* 98 to 223 at 112; Dyson A (1999) ‘Inclusion and Inclusions: Theories and Discourses in Inclusive Education’ in Daniels H & Garner P (Eds) *World Year Book of Education: Inclusive Education* 36; Ngwena CG & Pretorius L (2012) ‘Substantive equality for disabled learners in state provision of basic education: A commentary on *Western Cape Forum for intellectual disability v Government of the Republic of South Africa*’ 28 *South African Journal of Human Rights* 81 to 115 at 82.

⁴ ACHPR, arts 2, 3 & 18; Discrimination Against Persons with Disabilities (Prohibition) Act, 2018, signed into law January 2019.

Theoretical Framework

New natural law theory extols the idea that human beings share a universal nature and purpose, which are fulfilled by the pursuit of common basic goods including life, knowledge, practical reasonableness etc. It is expected that law and policy as given, including practice should enable the pursuit of basic goods and thus contribute to the flourishing of the human race.⁵ Hence this paper seeks to support the orientation of other theorists who critique the prioritisation of civil and political rights in place of the socio-economic good.⁶ Broadened new natural law theory is thus an idea that it is ethically moral for everyone to extol the idea of 'universal objective good'. More like a mass movement.

Context of the Study

Nigeria is party to several international agreements that recognise quality education for all. Yet access to inclusive education for disabled learners generally remains elusive in Nigerian primary schools. These include the Universal Declaration on Human Rights (UDHR), International Covenant on Economic Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), United Nations Convention on the Rights of Persons with Disabilities (CRPD), African Charter on Human and Peoples' Right (ACHPR), as well as the African Charter on the Rights and Welfare of the Child (ACRWC). The UN Committee on the Rights of Persons with Disabilities, General Comment No. 4 on the right to inclusive education, including the UN Committee on Economic Social and Cultural Rights, General Comment 11 on plan of action for realising compulsory free primary education for all also remain instructive.⁷ This is basically because General Comment 11 provides authoritative understanding of the CRPD as well as the UNCESCR. The aforementioned human right treaties, standards and laws are all closely connected to the realisation of Nigeria's Sustainable Development Goal 4 and Global Education for All initiative.⁸ The Nigerian Constitution⁹ provides for the right to education.¹⁰ This is to the extent that the 'Nigerian government shall as and when practicable provide free and compulsory universal primary education, strive to eradicate illiteracy and direct its policies towards ensuring adequate and equal opportunities at all levels'.¹¹ The implication is that the right to education and the rights in education which includes equality, human dignity and non-discrimination are implicitly non-justiciable. This unenforceability of the right to education is also in section 6(6)(c) of the Constitution.¹² It must be noted however that even though the Constitution does not specifically provide for the right to education of disabled learners, it remains the foundation for gleaning the rights of disabled persons in Nigeria.¹³

Domestically also, the Nigerian government has promulgated the African Charter on Human and Peoples Right Ratification and Enforcement Provisions Act (Ratification and Enforcement Act) 1998,¹⁴ the Child Rights Act of 2003, the Compulsory, Free Universal Basic Education (UBE) Act of 2004 and the Disability Act of 2018. The UBE Act was adopted in order to give effect to Nigeria's national policy on education.

Set against the foregoing context, it becomes necessary to explore how inclusive education can be realised for 'disabled learners' in Nigerian primary schools. The question asked is whether the Canadian and the USA contexts regarding equality can inform inclusive responses to the education of 'disabled learners' in Nigeria.

2. Protection of Education Rights of Disabled 'Learners' in Nigeria: Legal Framework Nigerian Constitution

Apart from the fact that the right to education as couched in the Constitution is considered non-justiciable and is further made subject to available resources.¹⁵ The Constitution also does not explicitly recognise the rights of 'disabled learners'. A reading of section 42 of the Nigerian Constitution shows that disability is not listed as a

⁵ J Finnis *Natural law and natural rights* (1980); J Keown & RP George (eds) *Reason, morality and law: The philosophy of John Finnis* (2013). G Grisez *The way of the Lord Jesus: Christian moral principles* (1983); T Chappell 'Reason, passion and action: The third condition of the voluntary' (1995) 70 *Philosophy* 453.

⁶ As above.

⁷ See ESCR General Comment No. 11, Plan of Action for Primary Education, UN Doc. E/C.12/1999/4 May (1999); See CRPD General Comment No. 4, UN Doc. CRPD/C/GC/4 September (2016); See CRPD General Comment No. 4, UN Doc. CRPD/C/GC/4 September (2016).

⁸ Nigeria's 2021 Voluntary National Review (VNR) on Sustainable Development Goals (SDGs) focuses on the key issues of poverty (SDG-1) and an inclusive economy (SDG-8), health and wellbeing (SDG-3), Education.

⁹ The term 'amended' suggest that Nigeria is still going through a process of 'Constitutional amendment' and this is an opportunity to include specific provisions on grounds of disabilities.

¹⁰ Nigerian Constitution, Sec 18(1) & (3).

¹¹ As above.

¹² Sec 6(6)(c) has been interpreted to mean that the right to education shall not by any means be challenged in any court of law in Nigeria as noted in *Attorney General of Borno & Ors v Rev Joshua Adamu & Ors* (1996) 1 NWLR (Pt 427) 68.

¹³ Sec 1(3) of Nigerian Constitution emphasises its supremacy.

¹⁴ Domesticated in Nigeria by virtue of Sec 12 of the Nigerian Constitution.

¹⁵ Nigerian Constitution, s 18(3) .

ground for non-discrimination. This leaves the recognition and protection of the right to education of disabled learners in Nigeria at the wide-ranging discretion and understanding of the general non-discriminatory constitutional provision.¹⁶ Nevertheless the decision of the African Commission on Human and Peoples Rights in *Purohit & Moore v Gambia*¹⁷, influences one to consider that the non-listing of disability as a prohibited ground of discrimination under the African Charter on Human and Peoples' (African Charter) does not rule out a finding for discrimination. This is based on the understanding that the grounds could be expanded to other analogous grounds. Hence it can be argued in the Nigeria context, that, the non-discriminatory right to education of 'disabled learners' is protected under the general provisions of the Constitution regarding non-discrimination.¹⁸ Undeniably, the recognition of the rights of disabled learners in a general provision will undeniably not serve equal opportunity. It will also not dismantle the obstacles that prevent 'disabled learners' from accessing quality education. This definitely has not assisted in the distribution of educational goods and services for 'disabled learners' and will likely not encourage commitment in the distribution of other basic goods. Indeed, it is the presumption of equality status that has maintained formal justice (same treatment) for all regardless of its consequences to vulnerable groups including 'disabled learners'. The blanket condition on availability of resources is not at all encouraging as it has the possibility of withdrawing progressive obligation on the part of the Nigerian government to carry out its responsibilities. This is another major challenge that is inconsistent with article 4 of the CRPD which requires parties to the treaty to take 'such measures to the maximum extent of their available resources' with regard to the implementation of socio-economic and cultural rights.¹⁹ It also goes against the CRPD Committee and UN Economic, Social and Cultural Committee (ESCR Committee) stipulations concerning inclusive education delivery at a domestic level.²⁰ The ESCR Committee makes the realisation of basic education a right that is immediately realisable.²¹ The Committee also accentuates that basic education should be given priority over other socio-economic rights during resource distribution.²²

Ultimately, the provisions of the Nigerian Constitution relating to education and funding availability do not portray the government as committed to the promotion of the common good. In the same way, the non-listing of disability as a prohibited ground of discrimination under the Nigerian Constitution is not helpful. It is verifiable that prescriptive jurisprudence recognises that prohibited grounds of discrimination are not conclusive; however it is considered a challenge for individuals and disability activists to hold the courts accountable for compliance.²³ The dearth of case law development on disability issues in Nigeria further makes it difficult to see Nigerian courts work towards such an endeavour. Establishing an enabling inclusive equality interpretations and jurisprudence that comports not just with the notion of inclusive education, but inclusive citizenship generally is yet to be seen in Nigeria. In the case of *Uzoukwu v Ezeonu II*,²⁴ the Court of Appeal held among other things that an action for discrimination can only succeed under section 39 of the Nigerian 1979 Constitution, - (now section 42 of the present Constitution)-, where the discrimination complained against is listed as a prohibited ground, and where the ground complained against is also applicable to other Nigerian citizens.

In particular, the non-expansive discretion of the courts on the subject of interpretation of the general non-discriminatory constitutional provision presents reservations in this respect. Thus, one could argue that the vague inclusion of the rights of 'disabled learners' to the progressive access of free primary education as provided in the Nigerian Constitution enhances their discrimination and further places them in a vulnerable position.

African Charter Ratification and Enforcement Act

The African Charter on Human and Peoples Right Ratification and Enforcement Provisions Act (Ratification and Enforcement Act),²⁵ makes reference to disabled learners and their right to education.²⁶ The use of terms 'such as' and 'other status' to refer to the prohibited grounds of discrimination, portrays an understanding that the list

¹⁶ Nigerian Constitution, sec 42.

¹⁷ Comm. No 241/2001 (2003).

¹⁸ Unpublished: Umeh NC (2017) 'Realising Access to Inclusive Education for the Hearing-Impaired Learner in Nigerian Primary Schools' *Unpublished LLD thesis*, University of Pretoria at 97.

¹⁹ CRPD, art 4(2).

²⁰ General Comment No 4 on inclusive education, adopted by the UN Committee on the Rights of Persons with Disabilities 2 September 2016, CRPD/C/GC/4, para 27; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.13: The right to education (art.13 of the CESCR) adopted by the Committee on Economic, Social and Cultural Rights at the 21st session, UN Doc E/C.12/1999/10, December 1999. Nigeria has signed and ratified both the ICESCR and the CRPD see (note 6 & 8).

²¹ General Comment 13 (note 20) para 51.

²² General Comment 13 (note 20) para 14.

²³ *Purohit & Moore v Gambia* Comm. No 241/2001 (2003); *Glor v Switzerland* (2004) Application 13444 ECHR.

²⁴ (1991) 6 NWLR (pt.290) 708 CA; The criteria for discrimination which the Nigerian Constitution forbids include ethnic group, place of origin, sex, religion, political opinion or circumstances of birth.

²⁵ Domesticated in Nigeria by virtue of Sec 12 of the Nigerian Constitution.

²⁶ Ratification and Enforcement Act 2004, a combined reading of arts 2, 17 and 18 (4) is instructive.

can be extended.²⁷ At the same time, the Ratification and Enforcement Act shows a remarkable alignment with the Nigerian Constitution by failing to discard the formal equality approach in the enjoyment of the rights guaranteed under the Act by the use of the term 'every individual'.²⁸ While the Ratification and Enforcement Act sought to remedy this neutral measure by explicitly mentioning that women, the aged, *children* and the *disabled* shall be entitled to special measures of protection in keeping with their physical and moral needs,²⁹ it still reads the *disabled* without explicit contextualisation under the Act. Nonetheless, it could be argued that implicit in the use of the term '*disabled*' by the drafters is an understanding that it is the socio-economic and political environments that impede access to full participation of 'disabled learners' in the society. This position finds support in the understanding that states are required to take special measures of protection in keeping with the physical and moral needs of disabled persons. It follows that the Ratification and Enforcement Act ought to be interpreted to reflect a sum total of rules that protect the general good by harmonising the different goods in the interest of individuals in the state.³⁰ However this opportunity has not been given effect by the Nigerian judiciary, especially in connection with 'disabled persons' or even the aged. The Ratification and Enforcement Act has a huge potential for promoting and protecting disability rights. However its prospects for promoting and protecting the rights of 'disabled persons' generally is yet to be taken seriously within Nigeria's societies. This is evidenced in the continuing indifference and inaction on the part of state actors regarding disability issues.

Child's Rights Act

The Child's Right Act is Nigeria's specific legislation that sought to mirror the principles contained in the CRC³¹ and the ACRWC.³² The Child's Right Act sets out the rights and responsibilities of the Nigerian child. The Act has provisions on 'free, compulsory and universal primary education' as the right of every child in Nigeria.³³ The rights guaranteed under the Act, like the right to compulsory education and the right to non-discrimination³⁴ can be presumed to cover the inclusive education rights of 'disabled learners' even though it is ultimately tethered to notions of formal equality.

Noteworthy is the fact that the Child's Rights Act specifies different standards of compulsory education for 'disabled learners' and 'regular' student. 'Disabled learners' are expected to be served in special schools where they are to be provided with services and facilities within available resources.³⁵ This means that accommodations are not expected to be provided in regular schools for 'disabled learners'. It also resonates with the understanding that 'disabled learners' in the special schools may access support at some point later but without reference to the extent, when or form the support might take. Reference is also not made as to the heterogeneous nature of disability and the need to provide varied accommodations. Thus the Act remains exclusionary because it comprehends 'disabled learners' against stipulated normative standards of human dignity and equality.³⁶ As well, the provisions of the Child's Rights Act regarding free and compulsory basic education clearly exclude children with intellectual disabilities.³⁷ This in essence forecloses the right of children with intellectual disabilities to education. The main misgiving regarding this exclusion is that the Act ought to be an enabling legislation in implementing the right to education of every child in Nigeria. Excluding learners with intellectual disabilities access to education is under-inclusive and indeed, sits uneasily with the diverse public sphere of substantive equality where capabilities have no knowledge centre.³⁸ It is reductionist approach that is insufficiently sensitive to human diversity and freedom.³⁹ State policy that values dignity, equality and freedom must not ignore or deny recognition in legislation, those values that instantiate the complete pursuit of education for 'disabled learners' holistically. In order for Nigeria not to detract from its international obligations, education for 'disabled learners' must be conceived at least in broader terms than just academic objectives.⁴⁰

²⁷ Ratification and Enforcement Act, art 2; Umeh (note 18) at 102.

²⁸ Ratification and Enforcement Act, art 2.

²⁹ Ratification and Enforcement Act, art 18, emphasis mine.

³⁰ Umeh (note 18) at 103

³¹ Signed and ratified by Nigeria on 19 April 1991.

³² Adopted and ratified by Nigeria on 13 July 1999 and 23 July 2001 respectively.

³³ Child's Right Act, sec 15.

³⁴ As above, sec 10.

³⁵ As above, sec 16.

³⁶ Soudien C & Baxen J (2006) 'Disability and schooling in South Africa' in Watermeyer et al (Eds) *Disability and Social and social change: A South Agenda* 49

³⁷ Child's Right Act, sec 15(7).

³⁸ Stein MA (2007) 'Disability human rights' 95 *California Law Review* 75-102 at 98; Ngwena CG (2013) 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' *African Disability Rights yearbook* 139-163 at 156.

³⁹ Ngwena (note 38) at 157.

⁴⁰ As elucidated by the South African High Court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another* (2011) 5 SA 87 (WCC) para 46.

Universal Basic Education Act (UBE Act)

The Universal Basic Education Act (UBE Act) is the main legislation governing basic education for purposes of a uniform and quality basic education in the states and local governments throughout Nigeria. As provided in the UBE Act, the Federal Government of Nigeria is expected to provide free, compulsory and universal basic education for every learner, including ‘disabled learners’.⁴¹ However, there is nothing in the Act that suggests the intendment of an education system that recognises diversity and participatory democracy in its articulations.⁴² For example, the Act does not contain any specific provision on the right to non-discrimination or on the need to provide learning materials. There is also no concrete directive on how to meet the education needs of diverse learners. It is commendable that UBE Act incorporates early childhood care and education as a necessary component in realising successful education for every child. However progress in aligning these provisions of the Act to education services available to ‘disabled learners’ is yet to be seen. It is obvious that early child education is not the norm in Nigeria in terms of education practice for ‘disabled learners’. The UBE Act professes to be universal but has remained exclusionary and protective of assimilation of ‘disabled learners’ into the majority without the recognition of difference and the fundamentals of providing necessary accommodations in line with individual needs.⁴³

Discrimination against Persons with Disabilities Prohibition Act (Disability Act)

The Disability Act of 2019 provides for the education needs of ‘disabled learners’.⁴⁴ It aims at providing access to education for all ‘disabled learners’ in an inclusive setting. The Act highlights the imperatives of an unfettered right to education without discrimination or segregation in any manner for ‘disabled learners’. Inclusive education is conceived somewhat broadly under the Act, but includes fundamental principles like the recognition of difference, the provision of accommodation for learners, training and retraining of all teachers in regular or special schools, identification of individual needs of learners, curriculum adaptation and the recognition of the potentials in every child. In fact the central idea emerging from the Disability Act is the need to ensure the full participation of ‘disabled persons’ in all sectors in Nigeria, including the education sector. Regrettably, a sizeable proportion of ‘disabled learners’ remain without access to inclusive education. In spite of the scarcity of funds, legislation and programmes that are intended to fulfil human rights ought to be reasonable not only in their content but also in their implementation. Courts in Nigeria also have a responsibility to depart from the same treatment of formal equality and instead inquire into the ‘reasonableness’ of laws, policies and programmes as provided. The realisation of inclusive equality in education for ‘disabled learners’ is hindered by ambivalence towards articulating, expounding and implementing substantive equality principles, which leaves disabled persons more vulnerable and unprepared for a dignified life.⁴⁵ Nigerian superior courts’ decisions relating to the interpretation of the equality and non-discrimination rights of disabled learners, in the context of education is nonexistent. There also seems to be little or no consciousness swaying such inabilities. This provides the basis for this research to help advance the possibility of lawyers and other citizens engaging the courts. To this end, the equality jurisprudence of Canada and United States of America is considered. The rationale for choosing Canada is set against a legacy of dignifying equality legal philosophy in the area of disability and education. The United States on other hand employs different frameworks of scrutiny that is apt to freeze the status quo and perpetuate structural inequality. This entrenched dissimilar scrutiny ought to be avoided by Nigeria in order not to render the promises of Nigerian law vacuous, especially disadvantaged vulnerable groups like ‘disabled learners’.

3. Exploring Other Jurisdictions Equality Jurisprudence

Canada

The reason for choosing Canada is based on the fact that the Canadian state has institutionalised progressive equality jurisprudence. It also has helpful appellate court pronouncements on inclusive education in connection with disabled persons.⁴⁶ Canada’s wide-ranging and inclusive equality outlook has been impacted by the need to realise human dignity and protect the linguistic rights of out-numbered aboriginal language groups, colonisation of the native people and common socio-political relationship among human beings.⁴⁷ Canada like Nigeria has equality provisions in its Constitution that was influenced by the Fourteenth (14th) Amendment in the US Constitution adopted in 1870. Canada has however moved forward to enhance the equality provisions in its

⁴¹ See Nigeria’s Compulsory, Universal Basic Education Act, s 2 as well as its interpretation section

⁴² Inspired for a reading of Bernstein BB (1996) *Pedagogy, symbolic control, and identity: Theory, research, critique* 6-7.

⁴³ Eddy EN & Akpan ME (2009) ‘The prospects of UBE Programme in Akwaibom State, South-South Nigeria’ 4 *International NGO Journal* 46-49 at 46.

⁴⁴ Disability Act s 22-24.

⁴⁵ Umeh (note 18) at 192.

⁴⁶ *Eaton v Brant County Board of Education* (1997) 1 SCR 241 at 258; *Law v Canada* (1999) 1 SCR 497 at 499; *Moore v British Columbia* (2012) SCC 6I at 67.

⁴⁷ Fredman S (2012) *Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South Africa and India* European Union: European Commission at 17.

Constitution.⁴⁸ Canada, unlike the United States and Nigeria, has strengthened older and limited interpretations of equality to read in not just the general equality guarantee of equality before and under the law, but also the right to equal protection and equal benefit of the law. In addition, the validation of affirmative action and anti-discrimination provision as well as an expanded wording of prohibited grounds of discrimination based on understandings of dignity remain paramount in the Canadian Constitution.⁴⁹ Within the Canadian jurisdiction, the value often attached to equality and non-discrimination is that based on concrete or substantive consideration of individual circumstances.⁵⁰ In the Canadian context, there have been important insights that equality goes beyond identical treatment.⁵¹ Canadian courts have been inclined to imagine equality in terms of what is respectable and acceptable in any given circumstance in relation to the articulation and application of law. This they have also conceived as substantive equality or just dealing. In the Canadian case of *Andrew v Law and Society of British Columbia*,⁵² the Supreme Court of Canada explicitly linked the Canadian Charter with the application of the law under observable conditions by weighing against the lived experience of individuals in the society.⁵³ Implicit in the determination by the court in *Andrew's* case is that all distinctions or differentiation may not be considered unfair or discriminatory. The court in *Andrew's* case enunciated a test, to determine whether there has been a prima facie violation of equality rights. The test outlined by McIntyre J and adopted by the majority held that claims under section 15 of the Canadian Constitution would be assessed based on: 1) Actual differential treatment, 2) Based on one of the enumerated prohibited grounds in section 15 or one that is analogous to those grounds, 3) Which is discriminatory because of an imposed burden or denied benefit.⁵⁴ Further in the case of *Eldridge v British Columbia*⁵⁵ and *Emily Eaton v Brant County Board of Education*⁵⁶ the Canadian Supreme Court posited that preventing discrimination on grounds of disability is synonymous with making distinctions, and fine-tuning society in line with the actual personal characteristics of 'disabled persons'.⁵⁷ Under the Canadian law, the duty to accommodate is considered part of the objectives of the Canadian human rights law. Constitutionally, another significant aspect of equality within the Canadian jurisdiction is affirmative action.⁵⁸ This is based on the understanding that equality goes beyond sameness of treatment and that affirmative action can be used to achieve substantive equality. Within the Canadian jurisdiction, it was held in *R v Kapp*⁵⁹ that affirmative action complements the vision of substantive equality under section 15(1). In *Kapp's* case, the Supreme Court of Canada, dealing with an appeal from the British Columbia Court of Appeal decision held that a communal fishing license granted exclusively to Aboriginals did not violate section 15 of the Canadian Charter. The Supreme Court had to dismiss the appeal on the basis that a distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under section 15 if, under section 15(2): (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. In other words, the Court found that the *prima facie* discrimination was allowed because it was aimed at improving the situation of a disadvantaged group as allowed by section 15(2) of the *Charter*.

United States of America

America's equality jurisprudence is helpful not for the reason that it lays down related lessons when compared with the Canadian Jurisdiction, but the fact that it is different and can bring about hierarchical citizenship if applied unreasonably. Constitutionally, the US has a wide open-textured equality guarantee which does not specify any specific grounds but simply states that all persons are equal before the law. This gives the judges room to choose when a categorisation is not allowed under the Constitution. The result is the entrenching of a three tier framework of scrutiny- namely, heightened scrutiny, intermediate scrutiny and rational review by the US Supreme Court. This is to the extent that the Supreme Court has been deeply reluctant towards efforts at expanding strict scrutiny often considered the most exacting standard beyond race, ancestry and alienage. An intermediate assessment is often applied to gender, while age and disability classification has received a rational review which is considered the lowest level scrutiny and obviously differential. This approach as captured by Epstein & Chemerinsky is apt to bestow dissimilar equality statuses and could produce great dichotomies and stratified equality statuses which

⁴⁸ Nigerian Constitution drew from the American model of federalism, the presidential system of government and the process of constitutional amendment(s).

⁴⁹ See the Constitution Act 1982 Canadian Charter of Rights and Freedoms, sec 15 and the South African Constitution, 1996 (Act 108 of 1996), Sec 9.

⁵⁰ Ascertainable in s 15 of the Canadian Constitution.

⁵¹ As above.

⁵² (1989) 1 SCR 143.

⁵³ *Andrew's case* (note) per McIntyre J.

⁵⁴ Macklem P (2017) et al *Canadian Constitutional Law* (5th ed.) 1280

⁵⁵ (1997) 3 SCR 624 para 63.

⁵⁶ (1997) 1 SCR 241.

⁵⁷ *Eldridge's case* (note 55) para 65, *Emily Eaton's case* (note 56) Per Justice Sopinka. The decision in *Emily Eaton's* case is deemed antithetical to the decision in *Eldridge's case*, because in the final analysis, the Canadian Supreme Court in *Emily Eaton's* case, rejected a presumption in favour of integration, this shall be discussed as the chapter progresses.

⁵⁸ Canadian Constitution, sec 15(2).

⁵⁹ 2008 SCC 41, para 16

do not align with the unrestricted thrust of substantive equality jurisprudence.⁶⁰ Besides, in recent years, the US Supreme Court in spite of its recognition that equality means more than treating individuals alike, has adopted a progressively more restrictive approach to constitutional formalistic guarantees of equality.

However, it is to be noted that the principle of equality has been expanded beyond formal equality by the US Supreme Court with respect to some statutory context, and in practice, to some extent. For example, the American with Disabilities Act (ADA) 1990 recognises the non-provision of reasonable accommodation for employees as discrimination, except the employer is able to show that provision of any said accommodation would impose an undue hardship on the operation of its business. In 2017, the Supreme Court ruled in favour of students with disabilities when it decided in furtherance of the Individuals with Disabilities Education Act (IDEA) in *Endrew F v Douglas County School District*⁶¹ that the federal statute requires public schools to do more in the provision of free education and children's education needs. Similarly in *Cedar Rapids Community School v Garret F*,⁶² the US Supreme Court announced that there was no undue burden exemption, and ruled that the related IDEA services provision required public schools districts to fund 'continuous one-on-one nursing care for 'disabled children'. The aforesaid cases indicate that the provision of individual accommodation is an important aspect of substantive equality, and the achievement of basic equal opportunity goal of the ADA and IDEA. This has sometimes extended towards an acceptance of affirmative action as an antidote for ascertained past discrimination. In *Fulliore v Klutznick*⁶³ it was held that substantive reverse discrimination was a necessary means to achieve equal opportunity.

Comparatively, the equality sensibilities of the American constitutional jurisprudence is one that reflects an adherence to formalistic conception of equality that is at times not contextualised and alive to individual difference. At the risk of repetition, Nigeria equality provisions have been influenced by the Fourteenth (14th) Amendment in the US Constitution. In this way, equality is imagined as political freedom and a negative obligation to protect citizens on the part of the government.⁶⁴ The formal idea of American equality thought is ascribable to a reassessment of the flawlessness and fairness of a constitutionally recognised white domination and the imperatives of redressing the political segregation of black Americans after the American civil war.⁶⁵ Therefore in a bid to end the separateness of black Americans, the 13th, 14th and 15th Amendments were added to the original American Constitution which appeared not having an equality clause that embraced everyone in the United States.⁶⁶ However, effort is not aimed at dismissing the comparative significance of American constitutional jurisprudence, rather its value lies in raising consciousness about what should be different about Nigeria's equality jurisprudence and teaches us about the dangers of over simplified comparativism. It sharpens our understanding of the Nigerian jurisdiction and the need to seek alternative means of achieving inclusive equality for everyone including 'disabled persons'. It further makes us aware of the equality understandings that Nigeria should move away from based on the fact that they are not analogous and will possibly reinforce limited equality outcomes and benefits for individuals and groups. This conviction finds root in the construction of equality under the Equality Clause in the 14th and 5th Amendment of the American Constitution and the understanding gleaned from interpretations provided by the United States Supreme Court.⁶⁷ Notwithstanding the fact that the American legislature has made significant efforts to introduce legislation with equality jurisprudence that somehow goes beyond formal equality, but contemplates at the minimum an attenuated idea of substantive equality.⁶⁸

⁶⁰ Chemerinsky E (2002) *Constitutional Law: Principles and Policies* New York: Aspen Publishers at 651-652, 668-669, 723-727; Epstein L & Walker TG (2018) *Constitutional law for changing America* Washington DC: CQ Press at 651.

⁶¹ Re-1, 137 S. Ct. 988.

⁶² (1999)526 US 66.

⁶³ (1980) 448 US 448, 100 S Ct 2758.

⁶⁴ Fredman S (2008) *Human rights transformed: Positive rights and positive duties* Oxford: Oxford University Press at 176.

⁶⁵ Epstein & Walker (note 60) at 651.

⁶⁶ See the 1787 Constitution of the United States and the assertion of the US Supreme Court in the case of *Dred Scott V Stanford* 60 US 393(1857) (US Supreme Court) 411. The 13th Amendment, ratified in 1865 specifically sought to end slavery, the 14th Amendment, ratified in 1868 which among other things talks about equal protection of the law for everyone, highlighted a common American citizenship, the 15th Amendment, ratified in 1870 sought to abolish race as a basis for voting.

⁶⁷ In this regard, Barron and Dienes observe that the era of the Warren Court and the Burger Court developed different levels of scrutiny for probing into discriminatory acts of the state. In relation to this, Epstein & Walker argue that the Justices of the Supreme Court are yet to agree on the soundness of the different level tests as some are opting for a unified test. See Epstein & Walker (note 60) at 651.

⁶⁸ The IDEA which requires public schools to provide equal access to learners with disabilities, ADA, Individuals with Disabilities Education Improvement Act, and other federal anti-discrimination laws are instructive here.

Essentially, the US Supreme Court has not always encouraged these congressional initiatives and looks set to continue with its conservative ideas.⁶⁹ For instance, over the past few years, the US Supreme Court has been restrictive in interpreting congressional anti-discrimination legislation, especially when the legislation has the possibility of granting individual redress against state governments in federal courts. Thus, a provision in the ADA which allowed persons the right to seek damages against states in employment cases was struck down.⁷⁰ In spite of the Constitutional recognition of equal protection that was not readily realised for almost a century until the decision in *Brown v Board of Education*⁷¹ in 1954, where the US Supreme Court with certainty rejected the 'separate but equal' doctrine and upheld equal protection of the law guaranteed in the 14th Amendment.

4. Lessons which Nigeria can Borrow from Canada and The USA

So far, it can be seen that Nigeria's approach when compared with that of Canada and the United States approaches regarding equality and non-discrimination in the context of education for disabled learners follows a different trajectory. The Canadian Constitution prioritises human dignity and provides favourable insights with respect to equality and disability conceptions in their respective constitutions in relation to which every statute and decision is situated and interpreted. Canada when compared with that of Nigeria go beyond formal equality that presumes equality of status to suggest a substantive approach to equality. The Canadian jurisdiction has also formulated useful enquires for determining unfair discrimination by incorporating the effect of the harm on the victim(s). As well, possible violation of the victim(s) human dignity is also assessed in considering supposed discrimination.⁷² The United States jurisdiction on other hand attests to a sphere of formalistic equality with stratified inequalities which is the consequence of a judicial persistence on the earliest objectives of the Equal Protection Clause. It is an approach that foundationally satisfies that discrimination experienced by individuals or groups in the society is never represented by the Supreme Court as a compelling equality issue. Usually, the effect of discrimination on the lived experience of individuals or groups is not often prioritised. Often times an intermediate or rationality test is used in cases where the court does not readily read a suspect classification or a fundamental breach of right to equality or education for instance. An intermediate or rationality test ordinarily imposes the least burden of proof on the government.

Hitherto, the focus on Canadian and American jurisdictions is not necessarily to compare, rather it is to illuminate equality approaches adopted by the various jurisdictions in their Constitutions and statutes and the need for Nigeria to take positive steps towards achieving inclusive equality for all learners, including the 'disabled learner'. Relatively, openness regarding context and how it should be used ought to be cultivated. The key focus particularly lies in illustrating approaches that can be emulated and disappointments that must be avoided. Indeed, the Nigerian society should be transformed to give effect to substantive equality on the basis of human dignity. Admittedly, it may be argued that the texts of Nigeria's law and the foreign jurisdictions are not similar. However, considering that Nigeria is still a transitional society with its Constitution seemingly passing through a deliberative process, looking towards salient and relevant constitutional equality jurisprudence is fundamental in order to build complementary equality jurisprudence for Nigeria. Learning from the foundational experiences of the highlighted jurisdictions in relation to their transformative contents (Canada) and developing facilitative content (United States) regarding disability inclusivity in education is considered valuable. It is true that within the Nigerian context, there appears to be a dearth of case law development on disability issues in Nigeria, but we can find policies and laws that could assist in the realisation of inclusive equality in education for 'disabled learners' if normatively interpreted. Unfortunately, the law as articulated and more significantly, interpretations that have been given and even programmes as implemented does not resonate with the normative objectives and comparative law./ Ultimately, respect for the human dignity of disabled learners should aim at achieving the full development of human potential and self-worth. It must seek to facilitate disabled persons in the advancement of their unlimited potential.⁷³

5. Conclusion

The aim of the comparative approach adopted in this paper is to create awareness regarding the equality and non-discrimination agenda in other jurisdictions. In this instance, Canada, and the USA were explored. The underlying intent was to instantiate reasonably the future development and interpretation of Nigeria's non-discrimination provisions in the context of achieving inclusive equality in education for disabled learners in Nigeria. It is thought that exploring and revealing the equality contents in the Constitutions of Canada and USA can morally influence change regarding Nigeria's constitutional formal equality disposition and interpretations. This is targeted at making Nigeria responsive to the non-discriminatory aspirations of disabled learners, in the enjoyment of the right to education. The study considers that positive lessons could be learnt from these jurisdictions.

⁶⁹ While the 14 Amendment gives Congress the authority to enforce the substantive guarantees of the Equal Protection Clause by passing needed legislation, the Court has held that it is the responsibility of the Court, not Congress, to describe the substance of constitutional guarantees, see *City of Boerne v Flores*, 521 US 507 (US Supreme Court).

⁷⁰ *Board of Trustees of the University of Alabama v Garrett* 531 US 356 (2001) (US Supreme Court).

⁷¹ 347 U.S. 483 (1954)

⁷² Ngwena (note 38) at 297.

⁷³ CRPD, art 24(1)(b).