

UNDERSTANDING THE CONSTITUTIONAL GUARANTEE OF EQUALITY AND NON-DISCRIMINATION: A BRIEF REVIEW OF NIGERIA'S POSITION

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Abstract

Equality is foundational to the idea of justice. Thus, equality clauses are found at all levels of law, ranging from the Universal Declaration of Human Rights, numerous provisions in the human rights treaties of the United Nations and of regional system, to national, subnational, or local and communal constitutions, equality law does not always amount to a coherent body of norms, but as an instance of legal pluralism, equality law is more or less consistent, sometimes inherently ambivalent and even at times contradictory. Thus, equality may be simultaneously guaranteed and limited in constitutional and human rights law; the supreme law of the land may thus promise equality but also entrench inequality and institutionalize discrimination. Section 42 CFRN 1999 would seem to have dealt with the different forms of discrimination in Nigeria, however, immediately after the provision of this right, a proviso was created in same section [an exception]; permitting discriminatory practices in some cases. Hence, this paper critically examines the nature and scope of equality and discrimination, generally. Afterwards, this paper offered a quick review of Nigeria's constitutional position on the subject area (section 42 CFRN 1999).

Keywords: Human Right, Discrimination, Non-Discrimination, Equality, Inequality, Constitution

1. Introduction

Equality Rights are often phrased as a right to equal treatment, equality before the law or of the law, a principle of non-distinction, and, in more recent provisions, non-discrimination, or a combination of these terms and concepts. Equality is a vital part of the idea of justice and is

ubiquitous in treaties and constitutions¹ although the language differs significantly, as do levels of specificity in defining the meaning and scope of equality, the reality however is that such equality laws often express mixed ideas and are self-defeating. Even some equality clauses often also institute inequality. For example, the French Declaration of Rights of Man in 1789 did not extend its equality guarantee to women, inspiring an alternative draft by Olympe de Gouges in 1791; also, in spite of lobbying efforts, it did not prohibit slavery.²

The foregoing gives a glimpse of the circumstances surrounding the Right to Freedom against Discrimination, as enshrined in section 42 Constitution of the Federal Republic of Nigeria (CFRN), 1999 which in effect impedes efficiency, progress and development.³ Hence, Ezeilo,⁴ while considering the Human Rights documents relevant to women and children's rights in Nigeria, opined that:

Where, after all do universal rights begin? In small places, close to home-so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: The neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

2. The Notion of Equality

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¹M Rosenfeld & A Sajo *The Oxford handbook of comparative constitutional law* (2013) 982-984.

²as above.

³E Roosevelt *Teaching Human rights* (1963) 1.

⁴JN Ezeilo *Human rights documents relevant to women and children's rights in Nigeria* (2008) viii.

‘Equality is foundational...to law as a form or a mode of regulation, in that the very idea of legal norms implies that they apply to all legal subjects alike. In a sense, equality forms the bedrock of the rule of law and a key component of constitutionalism.’⁵The term equality (Greek, *isotes*; Latin, *aequitas*, *aequalitas*; French, *egalite*; German, *gleichheit*) may be guaranteed and interpreted in both Constitutional law and Human right law, as either a principle or a right.⁶As the former, equality informs the very idea of law as a general norm. Thus, equality often informs that all other human right are expressly stated to read, ‘...everyone has the right to...’ making equality ‘the starting point of all liberties.’⁷ While as the latter, it is an individual right directed against unequal treatment, and more specifically against discrimination.⁸

However, equality remains a quandary in both general and legal philosophy. It has been described as a ‘treacherously simple concept,’⁹ yet a spectrum of opinions exist in respect to the meaning, scope and practical application of equality. Indeed, Holmaat observed that:

When asked, hardly anybody would deny that he/she wants a situation where there is legal equality. A lot of people deem it desirable that there is also a certain amount of equality in social and economic life in order to prevent social uproar or political instability. However, when political philosophers and lawyers start to elaborate on the ‘principle’ of equality they hardly ever agree on what this principle means. Very often, these debates get so heated that one can doubt the practical use of any such principle in law or in political life.¹⁰

Hence, there are various ways of approaching the notion of equality in law:

❖ **Equality as Rationality:** i.e. likes should be treated alike unless there is a reasonable justification for not doing so. Prohibition of arbitrariness.¹¹In this instance, equality means to

⁵Rosenfeld & Sajo (n 1) 984.

⁶(n 1) 985.

⁷as above; *South West Africa cases* (1966) ICJ Reports 304 per Justice Tanaka.

⁸Rosenfeld & Sajo (n 1) 986.

⁹R Holtmaat ‘The concept of discrimination’ (4 June 2004) *Academy of European Law Conference Paper at 2*.

¹⁰as above

¹¹Holtmaat (n 9) 4.

not differentiate between individuals in irrational ways, because we are essentially equal. This is a right to equal treatment, derived from a concept of humanity, featured most predominantly in Kantian rationality.¹² This symmetrical and formal approach dates back to Aristotle.¹³

But in the history of equality Jurisprudence, the focus on rationality has served to weaken claims for equal treatment. This weakness is derived from the similarity test, as the more we understand people or situations to be different, the less we demand equality for them. To name an infamous example, German Nazis relied on this concept to argue that since Jews are not similar to 'Aryans', they could be progressively excluded from the community of Germans, up to the point of mass murder.¹⁴ A similarity test generally allows for the exclusion and marginalisation of some for being 'different', rather than strive for equality for all. In modern times, widespread examples are laws on pregnancy and abortion, as the more one defines these to be unique, dissimilar, or 'different', the more one can justify 'different' treatment, which has the effect of discriminating against women, in the context of gender inequality.¹⁵ Thus, Justice McIntyre in *Andrews v Law Society of British Columbia*¹⁶ explained that;

...(the similarly situated) test as stated...is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similarly treatment was contemplated for all Jews...Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights.

At the other end of the interpretative spectrum, a right of equality may be understood as a prohibition of any irrational distinction. Hence, a general equal treatment clause in Constitutions, directed against arbitrariness, or specific equality clauses, as rights against discrimination may be provided. Such specific clauses may then be understood to strictly prohibit any distinction which

¹²Rosenfeld & Sajo (n 1) 986.

¹³See Aristotle *The nicomachean ethic* trans WD Ross (1999).

¹⁴Rosenfeld & Sajo (n 1) 986.

¹⁵(n 1) 987.

¹⁶(1989) 1 SCR 143

takes into account a difference that ‘doesn’t make a difference’.¹⁷For example, a right to sex equality may then be understood as a right against ever using sex to make a difference (which is discussed as ‘degendering’ in gender studies). Such an approach would indeed solve many problems of people who do not conform to a rigid sex-gender system, that is, intersexual or people with a transgender identity. On the other hand, an overly radical degendering may hinder an adequate understanding of diversity and pluralism, and of sex based inequality as well, that is, if one renders sex-differentiated data on inequality to be problematic.¹⁸A radically ‘blind’ approach with a focus on distinctions does not allow us to address the complicated cases relating to equality in a pluralist world. Instead, an asymmetrical approach to equality ‘seems fit to address the power relations involved, which lead to injustice in the form of discrimination’.¹⁹

❖ **Equality as Adjunct to Human Rights Protection:** there should be an equal enjoyment of all these fundamental ‘social goods’.²⁰Using ‘the envy test’ to explain the equal enjoyment of all fundamental social goods (resources), Dworkin²¹ gave a vivid illustration that:

Suppose a group of people are shipwrecked on an island with abundant resources. The group agree that antecedently no one is entitled to any particular piece of property. No division of resources is equal if any immigrant would prefer some other immigrant’s bundle of resources to his own. But, a single agent would not be able to divide up the resources adequately – A milking cow cannot be divided – Some combinations of goods in bundles suit some rather than others. The solution is to have an auction. Everyone gets the same number of tokens (claim shells). This serves as a metric for equality of resources. Every item (land, milking cows...) is put up for auction. Bidders can ask that any portion of a good (for example, a subdivision of land) be placed separately on the auction. The lots are then sold to the highest

¹⁷Rosenfeld & Sajo (n 1) 987.

¹⁸as above.

¹⁹as above.

²⁰Holtmaat (n 9) 2.

²¹R Dworkin ‘What is equality? Part 2: equality of resources’ (1981) 10(4) *Philosophy & Public Affairs* 283-345.

bidder. The envy test will be met. No one would prefer to have someone else's bundle, because by hypothesis they had the opportunity to buy it. No one will be unhappy with the make-up of their bundle, because they added items to it themselves.²²

❖ **Equality as Status Based Protection (Recognition) against Unequal Treatment or Discrimination:** a prohibition to discriminate based on the recognition that certain group are being treated less favourably or are excluded on the ground that they have some characteristics that are different from the dominant group or groups in society.²³

The initial idea of constitutionalism is the fundamental equality of human beings (based on metaphysics, or on politics), but the whole idea about being human is the ability to differ, by choosing to lead one's own life, in situations that differs tremendously, around the globe, but also within a region, a city, a social entity. This is why a constitutional right to equality is often interpreted as a right to recognition of such diversity.²⁴ Then equality is a claim to diversity and a call for equal treatment. Philosophers such as Gosepath²⁵ have argued that, in light of this, equality is not one concept, but a bundle of principles to ensure social justice.²⁶ Formal equality, i.e. equal treatment of equals (first part of the Aristotelian formula), equality before the law (equal treatment of those who fall under a certain legal classification – law application), may not help us in certain situations where we may need an accommodation of difference.²⁷ Equality law may therefore be seen as directed against a difference we care for. Also, this is why it is so important to distinguish between an understanding of equality as a right of or to differences and equality as a right against discrimination. Equality then means to modify the standards we live with, rather than modify a person who does not 'fit'.²⁸ Thus, human rights law like the UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD)²⁹ obligates states to respect and accommodate disabled people as equals.

²²as above

²³Holtmaat (n 9) 2.

²⁴Rosenfeld & Sajo (n 1) 987.

²⁵S Gosepath 'Equality' in EN Zalta (ed) *The Stanford encyclopaedia of philosophy* (Fall 2008 Edition)

²⁶Rosenfeld & Sajo (n 1) 988.

²⁷Holtmaat (n 9) 6.

²⁸Rosenfeld & Sajo (n 1) 988.

²⁹Arts 3 & 4.

❖ **Equality as Dominance:** This is an asymmetrical, substantive, or material accommodation of those who are disadvantaged, with a focus on dominance, subordination, discrimination.³⁰ Feminist lawyer and theorist MacKinnon³¹ has famously rejected the difference approach, and conceptualized the dominance approach to equality.³² Here, equality is a right against being hurt, against violating the harm principle of liberal constitutionalism according to which your liberty ends when others suffer.³³ Based on this, the European Court of Human Rights (ECtHR) in *Alekseyev v Russia*,³⁴ stated that lack of police protection for gay rights activists in Russia is a violation of human rights. It is, according to the Court, discrimination prohibited by equality law.

Ultimately, the focus on the notion of equality has historically shifted from an emphasis on similarity to a recognition of difference, and eventually, to dominance.³⁵ Also, the notion of equality is a vehicle to achieve structural change in order to eliminate discrimination.³⁶

3. The Nature and Scope of Discrimination

Basically, discrimination is treatment or consideration of, or making a distinction in favour of or against, a person or thing based on the group, class, or category to which that person or thing belongs, rather than on individual merit. Apart from slavery, discrimination is the most comprehensive systematic and severe deprivation of human rights.³⁷ Hence, the term discrimination has been defined as:

...the effect of a statute or established practice which confers particular privilege on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted, and between whom and those not favoured no reasonable distinction can be found. Unfair treatment or denial of

³⁰Rosenfeld &Sajo (n 1) 988.

³¹C MacKinnon 'Difference and dominance: on sex discrimination' (1988)*Feminism Unmodified* 32-45.

³²Rosenfeld &Sajo (n 1)

³³as above

³⁴(Applications nos. 4916/07, 25924/08 and 14599/09)

³⁵Rosenfeld &Sajo (n 1)

³⁶Holtmaat (n 9) 6.

³⁷MOU Gasiokwu *Human rights, history ideology and law* (2003) 223; KM Mowoe *Constitutional law in Nigeria* (2008) 499.

normal privileges to persons because of race, age, nationality or religion, a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.³⁸

Discrimination has also been described as; ‘Differentiation in the treatment of individuals based upon group categorisations having no rational relation to the genuine potential of the individual for contribution to the common interests commonly described in both legal and popular parlance....’³⁹

Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant.⁴⁰ Thus, in the Canadian case of *Andrews v Law Society of British Columbia*⁴¹ Justice McIntyre define discrimination thus;

[it] may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.

Rubin and Hewstone⁴² have highlighted some driving force of discrimination, based on Realistic-conflict theory and Social-identity theory. This driving force includes, inter alia;

³⁸Mowoe (n 37) 500.

³⁹as above.

⁴⁰Rosenfeld & Sajo (n 1) 989.

⁴¹(n 16)

⁴²Rosenfeld & Sajo (n 1) 985.

- ❖ **Realistic Competition** – This is the driving force of self-interest, and is aimed at obtaining material resources (for example food, territory, customers etc.) for the in-group (i.e. favouring an in-group in order to obtain more resources for its member and self).
- ❖ **Social Competition** – Under this head, the motivating factor is the need for self-esteem and is aimed at achieving a positive social status for the in-group relative to comparable out-group (i.e. favouring an in-group in order to make it better than an out-group).

Whatever may be the driving force of discrimination, it should be seen by its very nature as prejudicial, oppressive and undemocratic, affecting a person's dignity and self-worth. Discrimination may be based on different grounds, such as age, disability, race, language, nationality, ethnicity, religious beliefs, and inter alia, which may result in outright aggressive behaviour and violence, such as the often upsurge in xenophobic attacks in South Africa which often leads to the loss of lives and properties. However, not all discrimination is based on prejudice, such as positive or reverse discrimination (i.e. Affirmative Actions).

3.1. Some Forms of Discrimination⁴³

Generally, there are five forms of unfair and prejudicial discrimination, which includes;

- ❖ **Direct Discrimination** – This occurs when a person is expressly treated less favourably than others on grounds of gender, religious belief, nationality, ethnicity, colour, race, age, and inter alia.

Example 1 – Failure to select someone for promotion (even when they have met all the promoted post requirements) because he is a man, and it is thought that he won't fit in with an otherwise all female team, is direct discrimination on grounds of gender, inter se.

Example 2 – Failure to admit a candidate who scored a higher score than others from a different region who were admitted, because he came from an educationally advantaged region is direct discrimination on grounds of place of origin/ethnicity.

Such discrimination usually results from prejudice or ignorance, rather than fact and/or evidence.⁴⁴

⁴³Guidelines on equality and diversity (16 March 2007) *Cambridgeshire Fire and Rescue Service*

- ❖ **Indirect Discrimination** – This occurs when a criterion, provision, or practice is applied to everyone in a way that looks fair, but actually and indirectly disadvantages a specific group of people. This can often be unintentional.

Example – Requiring female staff to wear skirts and short sleeves blouses as corporate work wear could be applied to all women but those whose ethnic background or religion states they should normally dress modestly with arms and legs covered would be disadvantaged by not being able to meet the requirement. This would be indirect discrimination on grounds of ethnicity or religion.⁴⁵

Hence, in *Price v Civil Service Commission*⁴⁶ the Employment Appeal Tribunal, held that a maximum age limit on candidates applying for posts in the Civil Service amounted to indirect discrimination since the proportion of women who could comply with the age limit was considerably smaller than that of men since many women in their 20s (and 30s) would be giving birth to, and bringing up, children. The fact that in the abstract women could comply with the rule as easily as men was said to be irrelevant; the test is whether, in practice, in the light of normal female behaviour by the current standards of society, the rule is one with which a substantially lower percentage of women, than of men, can comply.⁴⁷ In Nigeria, the National Youth Service Corps' (NYSC), established by Decree No. 24 of 22nd May 1973, policy for all corps member, irrespective of sex to wear trousers may seem fair, but disadvantages a specific group whose ethnic background or religious belief is against female wearing trousers. Thus, one ToluEkundayo, a member of Faith Revival Apostolic Church [FRAC], and a 2013 Batch A female corps member was decamped by the NYSC, OgunState for wearing skirt at the Shagamu orientation camp [instead of the usual trousers]. She said, she was asked to leave the camp at about 11:00pm on March 8, 2013 by the Ogun State NYSC Co-ordinator for her refusal to put on trousers based on her religious belief and faith in God.⁴⁸ Recently also, Okafor Love Obianuju,

⁴⁴as above

⁴⁵as above

⁴⁶(1977) IRLR 291

⁴⁷as above

⁴⁸F Afisunlu 'Youth Corp members expelled from NYSC camp for refusing to wear Khaki trousers' *Daily Post* 13 March 2013 <https://dailypost.ng/2013/03/13/youth-corp-member-expelled-from-nysc-camp-for-refusing-to-wear-khaki-trousers/> (accessed 30 June 2020).

OdjiOritsetsolaye,⁴⁹Emeghoghena Julia Ikuoya, Patience NogideNwaogu and Grace AdewunmiAdeboye⁵⁰were de-kited and decamped for wearing skirt instead of the normal khaki trousers; in spite of their pleathat wearing trousers is against their religious belief. This is a clear example of indirect discrimination on grounds of religion/belief.

But in some circumstances, indirect discrimination can be justified. For example in the case of employment, to justify indirect discrimination an employer (or manager) would need to show that there is a legitimate aim (i.e. real business need) and that the practice is proportionate to that aim (i.e. necessary and there is no alternative).

❖ **Disability – Related Discrimination** – Under this head, the reason for the discrimination relates to the persons disability. This can occur when a general policy or practice used in an organisation ends up having a discriminatory effect upon those who are disabled. This disability may be from as little as regular sickness to fatal physical disability [i.e. loss of a limb, an arm, or an eye].⁵¹

Example – Dismissal on grounds of regular sick leave, or being infected with a terminal illness.

❖ **Harassment** – This is a form of bullying. It is unwanted and unwelcomed conduct, affecting the dignity of men and women in different sphere in the society. It includes unwelcomed physical, verbal, or non-verbal conduct on grounds of status and social standing, or being uneducated and unskilled. It may involve a single incident or it may be persistent.⁵²

❖ **Victimisation** – This occurs when some action (amounting to a disadvantage) is taken against someone because they have made a complaint or because they have acted as a witness or informant in a case of alleged discrimination.

⁴⁹I Lawal‘NYSC, expelled graduates and dress code controversy’*The Guardian* 14 November 2019 <https://guardian.ng/features/nysc-expelled-graduates-and-dress-code-controversy/> (accessed 30 June 2020).

⁵⁰The Nation‘Furore over NYSC “skirt”’*The Nation Online*24 January 2020 <https://thenationonline.net/furore-over-nysc-skirt/> (accessed 30 June 2020).

⁵¹Holtmaat (n 9).

⁵²Rosenfeld &Sajo (n 1).

Example – A person informs his boss that a colleague has been calling him racist names. His colleagues won't speak to him and he is excluded from the normal social conversation by everyone in the team.⁵³

Ultimately, it is clear that discriminatory actions take many forms, but they all involve some form of exclusion or rejection. Hence, in *JAA dewale and ors vLateefJakande of Lagos and others*,⁵⁴ a breach of section 39 CFRN 1979 [impari material with section 42 CFRN 1999] was alleged. It was held, that the right of every citizen of Nigeria, in Nigeria, to freedom from discrimination on grounds of ethnic or communal belonging, sex, religion, or political opinion, having been guaranteed by section 39 CFRN 1979 [Now section 42 CFRN 1999], the proposal of the Government which tended to make citizens of Nigeria in Lagos State to be subject to disabilities not available in other states of Nigeria, is unconstitutional.⁵⁵

4. An Overview of Section 42 CFRN 1999

The Nigerian State is not unfamiliar with the universal concept of discrimination and its far reaching effects, if not checked. Hence, in a bid to downplay the incidence of discrimination within the country has enshrined certain provisions into the constitution which guarantees right to freedom from discrimination. Consequently, section 42 CFRN 1999 provides for this right, but does not use the word 'discrimination' except the side note, but conveys the same idea as follows;

42. (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action by the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

⁵³as above.

⁵⁴[1981] 1 NCLR 25.

⁵⁵PAO Oluyede *Peter Oluyede's constitutional law in Nigeria* (1992).

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

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

Additionally, section 15(2) CFRN 1999 reinforces this right by providing thus: ‘Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.’ Although, it should be noted that section 15(2) CFRN 1999 is generally not enforceable, being a ‘Fundamental Objective and Directive Principles of State Policy’, and by virtue of section 6(6)(c) CFRN 1999. Hence, this study reviews section 42 CFRN 1999.

Under section 42(1) CFRN 1999, the protection against discrimination is restricted to Nigerian citizens only.⁵⁶ Similarly, any disabilities or restrictions, privileges or advantages to any person based ‘only’ on any of the above stated groupings or classifications are regarded as discrimination. The word ‘only’ used in section 42 (1) CFRN 1999 means that discrimination is prohibited only when solely based on any of the specified grounds. Thus, Mowoe⁵⁷ is of the opinion that it would appear that if discrimination is on any of these and other grounds, it is not prohibited, and that whilst this may be the obvious meaning of the section, the conclusion to be reached should depend on the circumstances of each case. For example, where the main reason for discrimination under the law (which would include customary, religious or other laws), or any executive or administrative action is on any of the stated grounds, even where there are other grounds, it should still be regarded as being prohibited under the provisions of the constitution.⁵⁸

Further, it seems that section 42 (1) CFRN 1999 prohibits only discrimination under the clear provisions of ‘any law in force in Nigeria’ (which covers customary law, Islamic law and

⁵⁶Ben Nwabueze *The presidential constitution of Nigeria* (1982) 452.

⁵⁷Mowoe (n 37) 501.

⁵⁸as above.

common law as well as statutes)⁵⁹ or its practical application ‘or any executive or administrative action of government’. In other words individual action amounting to discrimination is generally not covered by this section. However, the courts have taken an approach of attempting to create a remedy where a wrong has been done.⁶⁰ This obviously is in accord with the equitable maxim *ubi jus ibi remedium*- where there is a right, there is a remedy. Thus, in *Madu v Onuaguluchi*,⁶¹ the trial court held that fundamental right was not enforceable against private individuals, but only against public officials. Although the trial court noted that there were no exhaustive reasons for this. On appeal, this decision was reversed. Similarly, in *Onwo v Oko*,⁶² the appellant, a member of Assemblies of God, alleged that contrary to her faith, the respondent assaulted her, removed her belongings from her marital home, forcefully shaved her hair, and locked her in a room, in conformity with the traditions of mourning her husband who was not a Christian. Her application was dismissed by the trial court on grounds that fundamental rights were not enforceable against individuals. On appeal, the court of appeal unanimously held that it has become necessary to extend the protection of individuals against the acts of the State to that of fellow citizens. Hence, where an individual invades the rights of a person [which includes the right to freedom from discrimination under study], the victims right to a remedy inures. However, Mowoe⁶³ observed that while the court approach is commendable, it is difficult to interpret into the wordings of section 42 CFRN 1999 [which is similar to section 39 CFRN 1979], except if it is linked to the operation of customary law. He further stated that the drafters of section 42 CFRN 1999 obviously had the intention of limiting enforcement of the right against the action of government and its agencies, since an individual will not be able to employ the provisions of any law, or the power of the state to uphold a discriminatory act.⁶⁴ True as this strict interpretation may sound, it is to be seen that the limited scope of this provision is one of the major reason for the rapid and wide spread reign of discrimination in various sphere [both private and public sector] in the country. Where a citizen of Nigeria is treated like a slave by a fellow citizen and has less privilege and less access to basic benefits, inter alia. Thus, it has been stated that inequality are often deeply embedded in our society, which is why a right against discrimination may be

⁵⁹Gasiokwu (n 37).

⁶⁰Mowoe (n 37) 500.

⁶¹(1985) 6 NCLR 356.

⁶²(1996) 6 NWLR (pt 456) 584.

⁶³Mowoe (n 37) 503.

⁶⁴as above.

rendered ineffective if it is limited to address state actions only, as private actors engage in discrimination with regards to economic, social and cultural equality, whether intentionally or not.⁶⁵ According to EU equality law, private actors, both in employment as in market of goods and services, are bound by strong equality directives. Also, UN human rights law expressly addresses some inequalities in private spheres, as does CEDAW(1979)⁶⁶ to protect women in all works of life.⁶⁷

Again, it is to be noted that the words ‘restriction’ and ‘advantage’ used in the provision are words of the widest import and carry the scope of the provision far beyond what is implied by the word ‘disabilities’ and ‘privilege’. The latter are essentially words of art. Disability indicates ‘an incapacity for the full employment of ordinary legal rights’, while privilege implies something approximating to a legal right, such, for instance, as the non-liability of members of the National Assembly in the Legislative Houses (Powers and Privileges) Act.⁶⁸ The words ‘restriction’ and ‘advantage’, on the other hand, are not so limited in their ambit.⁶⁹

Furthermore, a perusal of the day to day activities in the country proves that this provision has failed to checkmate discrimination in the limited area of its operation. Swiftly, the express specified grounds, pertaining particularly to Nigerian citizens, covered by section 42 CFRN 1999 are briefly examined below.

4.1. Particular Community

The word ‘particular’ [acting as an adjective] denotes a unique or specific person, thing or category separate and distinct from others [from Latin ‘*particula*’ - small part], and in Middle English the word meant something that referred to a single person or thing.⁷⁰ In other words, it is used to single out an individual member of a specified group or class. While the word community [which is derived from the Latin word ‘*communitas/communis*’, ‘things held in

⁶⁵Rosenfeld & Sajo (n 1) 1000.

⁶⁶United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW), 1979 – UN Treaty Series, vol 660, 195

⁶⁷Rosenfeld & Sajo (n 1) 1000.

⁶⁸Cap. L12, Laws of the Federation of Nigeria 2004

⁶⁹Nwabueze (n 56) 453.

⁷⁰Vocabulary.com Dictionary ‘Particular’ (undated) <https://www.vocabulary.com/dictionary/particular> (accessed 1 July 2020).

common’]⁷¹broadly denotes ‘a group or network of persons who are connected [objectively] to each other by relatively durable social relations that extend beyond immediate genealogical ties, and who mutually define that relationship [subjectively] as important to their social identity and social practice.’⁷²

A contextual reading of both definitions and section 42 CFRN 1999 brings to bear a connotative meaning of the phrase ‘particular community’. Hence, ‘particular community’ under section 42(1) CFRN 1999 refers to any of the various geographical communities within Nigeria, which maybe as small as a hamlet or as big as a village.

4.2. Ethnic Group

In the view of People & Bailey:⁷³

...an ethnic group is a named social category of people based on perceptions of shared social experience or one’s ancestors’ experiences. Members of the ethnic group see themselves as sharing cultural traditions and history that distinguish them from other groups. Ethnic group identity has a strong psychological or emotional component that divides the people of the world into opposing categories of “us” and “them.”

Hence, Lord Fraser defined an ethnic group by reference to the possession of a number of features in *Mandla v Dowell Lee*,⁷⁴ he stated thus:

For a group to constitute an ethnic group... it must... regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential but more or one of them will commonly be found and will help to distinguish the group from the surrounding community. The

⁷¹LDOCE ‘Community’ (undated) <https://www.ldoceonline.com/dictionary/community> (accessed 30 June 2020).

⁷²P James et al *Sustainable communities, sustainable development: other paths for Papua New Guinea* (2012) 14.

⁷³J People & G Bailey *Humanity: an introduction to cultural anthropology* 9thed (2010) 389.

⁷⁴(1983) 2 AC 548.

conditions which... [are] essential are...: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition,... the following characteristics are... relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered group (say. The inhabitants of England shortly after the Norman Conquest) and their conquerors might both be ethnic groups.⁷⁵

Lord Templeman said more succinctly: ‘...a group of persons defined by reference to ethnic origins must possess some of the characteristics of race, namely, group descent, a group of geographical origin and a group history.’⁷⁶ These meanings can be deduced from the context of section 42 CFRN 1999.

4.3. Place of Origin

Place of Origin is a combination of two words; Place and Origin. Place has been defined as a particular region, centre of population, or location,⁷⁷ while Origin has been defined as the place, social situation, or type of family that a person comes from.⁷⁸ Hence, place of origin under the subsection refers to a particular region, centre of population, location, place, social situation, or type of family that a person comes from. Place of origin is different from place of birth or residence, which may be in same or different location. Hence, a person's place of birth might be in

⁷⁵(n 74) 562.

⁷⁶(n 74) 569.

⁷⁷Merriam-Webster ‘Place’ (2020) *Merriam-Webster Dictionary (Mobile App)* para 3.

⁷⁸Merriam-Webster ‘Origin’ (2020) *Merriam-Webster Dictionary (Mobile App)* para 2 introductory part.

England, U.K, and yet his place of origin [i.e. place of ancestry] might be Okada [Ovia North East Local Government Area] in Edo State, Nigeria.

However, these three groupings are often discussed together in relation to the right guaranteed under section 42 CFRN 1999, because it has been opined that they are often interchangeable and encompass race, town, local government or state.⁷⁹Hence, under the section any distinction, exclusion, restriction or preference based on ethnicity, communal affiliation, place of origin, by any law in force in Nigeria or its practical application, or any executive or administrative action of government, which has the purpose of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life is thereby prohibited. Also, there is guaranteed an equal access to any place or service intended for use by the general public such as transport, hotel, restaurants, cafes, theatres and parks. This is in conformity with the United Nations Convention on the Elimination of all forms of Racial Discrimination 1965 (CERD).⁸⁰

4.4. Sex

Under the subsection the reference to ‘sex’ means the biological make up of a person, which is traditionally male and/or female. Hence, under this provision, any distinction, exclusion or the restriction made on the basis of sex, by any law in force in Nigeria or the practical application of such law, or any executive or administrative action of the government, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by any of each gender, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, is thus prohibited. This is in conformity with CERD. The application of this right connotatively extends to the legal capacity of both male and female gender, parental rights, reproductive rights in relation to spacing and number of children, property, marriage, choosing a family name, profession, education, and inter – alia.

4.5. Religion

⁷⁹Rosenfeld & Sajo (n 1)985.

⁸⁰United Nations Convention on the Elimination of all forms of Racial Discrimination, 1965 – UN Treaty Series, vol 660, 195

Religion under the subsection signifies the service and worship of God or the supernatural, which entails commitment or devotion to religious faith or observance, a cause, principle, or system of beliefs held to, with ardour and faith.⁸¹

Religion is the opium of a people, it is addictive, and any uncharitable comment about it, is like touching their eyeballs. Some may inflict injury on others, and/or are also prepared to get injured for their religion. Some are even ready to kill and/or be killed for their religion. Hence, the inclusion of this category into the subsection is very vital and crucial, as providing for the right to freedom of thought, conscience and religion under section 38 CFRN, would lose relevance without the inclusion of 'religion', as one of the grounds a citizen of Nigeria has a right to freedom from discrimination. The consequence would have been that a person haven exercised his right of freedom of thought, conscience, and religion, may be subjected to certain discrimination that indirectly affect the persons free choice of religion. It's like saying you have a right to wear any clothes, and then those who choose to exercise that right by wearing casual wears or native attire is eventually ask to sit outside or behind, and those wearing corporate are asked to sit in the front row. This will obviously affect the free choice of clothes to be worn, as the discriminatory act against a particular wear, limits the right to wear any clothes.

Consequently, the subsection ensures that a person is not discriminated against, by any law being in force in Nigeria or the practical application of it or any executive or administrative action, after exercising his right to freedom of thought, conscience and religion. In essence this provision guarantees equality in political, economic, social, cultural, civil or any other field irrespective of one's religious affiliation.

4.6. Political – Opinion

Under this head, any discrimination based on differences of political ideologies or affiliations is prohibited. This is essential, especially in cases where a person belongs to a minority or unpopular political party, or believes in such ideology.⁸²

4.7. Circumstances of Birth

⁸¹Merriam-Webster 'Religion' (2012) *Merriam-Webster Dictionary (Mobile App)*.

⁸²Mowoe (n 37) 507.

Under subsection (2) of section 42 CFRN 1999, it ensured that children born out of wedlock, which formerly could not claim even where acknowledged, are now treated as legitimate children for purposes of inheritance if acknowledged as children by the putative father. Indeed, the original draft of the committee specifically stated that no citizen of Nigeria shall be the subject of discrimination merely on ground ‘that he was born out of wedlock.’ The objection to this provision and which was expressed by many members of the Drafting Committee as well as of the Constituent Assembly in respect of the 1979 Constitution is that it is repugnant to morality. They argued that for example, under Islamic law, a child born out of wedlock has no right to the estate of his deceased putative father and a constitutional provision which presumably nullifies this would be contrary to the way of life of a large majority of the population.⁸³

This provision also upholds the law, which sought to remedy the disabilities traditionally, attached to members of the ‘Osu’ Caste in the eastern part of Nigeria.⁸⁴ The disabilities or deprivation suffered by reason of circumstances of birth, such as physical disabilities/illness, inter alia, is also covered by this provision.

5. The Exception under Section 42 CFRN 1999

The right to freedom from discrimination under the section is not an absolute right, as immediately after the provision of this right, a proviso was created in same section [an exception]. Consequently, section 42 (3) CFRN 1999 provides:

Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

⁸³Federal Ministry of Information (FMOI) *Report of the constitution drafting committee containing the draft constitution* vol 1 (1976).

⁸⁴Mowoe (n 37) 507.

In essence, law imposed restrictions are permissible with respect to four categories, which includes appointment of;

- ❖ any person to any office under the State,
- ❖ any person as a member of the armed forces of the Federation,
- ❖ any person as a member of the Nigerian Police Force,
- ❖ any person to an office in a statutory company. An example of a statutory company is the Federal Inland Revenue Service, established by the Federal Inland Revenue Service [Establishment] Act 2007 as amended.

Thus, a law may for example exclude certain class of persons from appointment under the four stated categories, based on public policy.⁸⁵ Furthermore, government may also implement special programmes and measures to assist specific categories of people who are under particular disabilities, disadvantages, or less opportune communities and minorities to enable them to meet up, or properly participate in the development of a modern and united country.⁸⁶ This is the notion of positive discrimination.

However, it is to be noted that the proviso of subsection (3), only applies to subsection (1), but does not in any way extend to subsection (2). As the words ‘Nothing in subsection (1) of this section’ used in subsection (3) indicate so. Hence, the right to freedom from discrimination under section 42 (2) CFRN 1999, appears to be an absolute right.

6. Conclusion

Ultimately, a democratic constitution founded on the worth of the individual as an autonomous legal entity, should not tolerate discrimination, whereby people are treated differently in the distribution of restrictions and advantages, not because of any real and substantial differences between them, but simply because they belong to different social classes, whether the classification is based on sex, place of origin, ethnicity, religious or political opinion. Fairness and/or justice demand that people be treated equally.⁸⁷

⁸⁵(n 37) 509.

⁸⁶E Malemi *The Nigerian constitutional law* (2006) 238.

⁸⁷Nwabueze (n 56).