



# **An Examination of the Scope of Freedom from Discrimination under the Universal Declaration Of Human Rights Convention**

**PATRICIA IZUKA TOM (MRS)**

**N.C.E., B.A. (Ed.) LL.B. (Hons) B.L., LL.M.  
Lecturer in Law, Directorate of General Studies.  
Delta State Polytechnic-Ozoro, Delta State, Nigeria**

## **ABSTRACT**

The emergence of the United Nations Organisation in 1948 and the adoption of the Universal Declaration of Human Rights marked the beginning of a universal attempt at ensuring that citizens across the world live a freer, happier and more meaningful life of equality with others. Several rights, in particular, right of freedom from discrimination which formed the basis of this article were incorporated into the constitutions of State Parties and to be given effect. This article examine the right of freedom from discrimination under the convention in selected jurisdictions, the scope of its expansion and how systemically discrimination is being used to violate other human rights. In conclusion, recommendations are made with a view to sustaining the aims and objectives of the Universal Declaration of Human Rights.

**Keywords:** Human Rights, Discrimination, Scope, Effect, Selected, Jurisdictions

## **INTRODUCTION**

Every human being is born equal to others irrespective of his age, sex, tribe, race, religion or culture. To this end such a person has a right not to be discriminated against.

The right such a person is entitled to be conferred on him at birth. It cannot be taken away from him except in certain circumstances permitted by law. These rights among others are known as human rights.

According to Malemi;

*Human right are the rights one has because one is a human being... Human rights are universal, equal and inalienable. Human right are owned against every person, against the state and society, that is against the state and every person.*

*... They are the common ground on which racial, religious, ethnic diversity and all other human differences can exist and flourish. However, all over the world, intolerance, discrimination and persecution are threats to human rights.*

Without human rights, life is meaningless, worthless and a mere shadow. Human rights are basic requirements in a civilized society. Perhaps this was why human rights, including right of freedom from discrimination was provided for under the Universal Declaration of Human Rights by the United Nations Organisation.

In 1948, the United Nations general Assembly adopted the Universal Declaration of Human Rights. In its preamble to the Convention, Members States pledged among others as follows;

*WHEREAS recognition of the inherent dignity and of equal and inalienable rights of all members of human family is the foundation of freedom, justice, and peace in the world.<sup>1</sup>*  
*... WHEREAS Member States have pledged themselves to achieve, in co-operation with the united Nations, the promotion of Universal respect for and observance of human rights and fundamental freedom...<sup>2</sup>*

The Declaration include right of freedom from discrimination. To this extent, Article 7 of the Declaration provides as follows;

*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.<sup>3</sup>*

Member States and Regional Organisations were enjoined to incorporate this provision in their Constitutions, Charters, or polices.

Regional Organisations referred to below have incorporated these Rights of Freedom from discrimination in their constitutions, Charters and Conventions.

Some of the Constitutions, Charters and Conventions are presented below;

The Nigerian Constitution<sup>4</sup> provides as follows;

*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.<sup>5</sup>*

*(a) be subjected either expressly by or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinion are made subject, or<sup>6</sup>*

*(b) no citizen of Nigeria shall be subjected to disability or deprivation merely by reason of the circumstances of his birth.<sup>7</sup>*

The disability or deprivation lifted from a child with reason by circumstances of his birth is commendable.

However, suppose disability or deprivation has to do with inheritance of property of a man, what happens where the child does not know his father or where the mother of this child does not know the man she had the son for? This issue of disability or deprivation by reason of the circumstances of a person's birth is yet to be settled finally.

This omnibus power of the State to derogate from the right of freedom from discrimination by the citizen could be abused as would be seen later in this article.

A derogation paragraph<sup>8</sup> is attached to this right which makes it lawful to impose restrictions to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or as a the member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria.<sup>9</sup>

<sup>1</sup> The word, "discrimination" is underlined for purpose of emphasis with respect to the topic of this article.

<sup>2</sup> Aduba, J.N and Oguche, S. Key issues in Nigerian Constitutional Law (First Edition) (Abuja, Nigerian Institute of Advanced Legal Studies, 2014) p. 161

<sup>3</sup> Quoted by Gasiokwu, M.O.U. Human Rights, History Ideology and Law (First Edition, Fab. Publicational Books, Jos-Nigeria, 2003) p. 255-255

<sup>4</sup> Chapter IV Nigerian Constitution 1999

<sup>5</sup> Section 42 (1) Nigerian Constitution 1999

<sup>6</sup> Section 42 (1) (a) Nigerian Constitution 1999

<sup>7</sup> Section 42 (1) (b) Nigerian Constitution 199

<sup>8</sup> Section 42 (2) Nigerian Constitution 1999

<sup>9</sup> Section 42 (3) Nigerian Constitution 1999

### **African Union Charter**

The African Union (AU) formerly Organisation of African Unity (OAU) was established in 1979 by some African States. A provision was adopted in the preamble to the charter known as Africa Charter on Human and People's Rights.

Although the Charter did not use similar words as contained in the Universal Declaration of Human Rights, the wordings of African Union Charter on Human and Peoples' Right, convey the same meaning.

The Charter provides as follows;

*Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.*<sup>10</sup>

These words are enough to clear embrace right of freedom from discrimination.

This Charter has re-enforced the provision of the Universal Declaration of Human Rights. African State Members of African Union have therefore further committed their countries to the aims and objectives of United Nations Charter and African Union Charter.

The Union re-affirmed her commitment to the actualization of the aims and objective of Charter of the United Nations and the Universal Declaration of Human Rights by pledging as follows;

*Reaffirming the pledge they solemnly made in Article 2 of the said chapter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.*<sup>11</sup>

### **EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOM**

The European Union was formed in 1950 to further strengthen the resolve of some European Countries already members of the United Nations Organisation who were signatories to the Universal Declaration of Human Rights and FUNDAMENTAL FREEDOM.

In its preamble the Convention provides as follows<sup>12</sup>

*Being resolved, as the Government of European countries which are like minded and have a common heritage of political traditions, ideals freedom and the rule of law, to take the first steps for the collective enforcement of certain rights stated in the Universal Declaration.*

The Convention went further to state that;

*The High Contracting parties shall secure everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention*<sup>13</sup>

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<sup>10</sup> Article 2 African Union Charter on Human and Peoples' Rights

<sup>11</sup> In 1979, the Assembly of Heads of State of some African Countries at their Sixteenth Ordinary session held in Monrovia, Liberia took Decision 115 (xvi) and presented a preliminary draft on an African Charter on Human and Peoples' Rights

<sup>12</sup> See Text amended according to the provision of Protocol No 3 which entered into force on 21 September 1970 and Protocol No 5 which entered into force on 20 December 1971

<sup>13</sup> See further the European Convention for the Protection of Human Rights and Fundamental Freedoms (with amendments) Rome 4.x1.1950

There are several rights which the Union pledged to secure to everyone within their jurisdiction but the relevant right to this topic is contained in Article 14 which provides as follows;

*The enjoyment of the rights and freedom set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origins, association with national minority, property, birth or other status.*<sup>14</sup>

As comprehensive as this provision is, it is however not exhaustive considering that new areas of human friction are emerging and different governments are now using policies to frustrate citizens' rights of freedom from discrimination.

### **ORGANISATION OF AMERICAN STATES**

In 1969, America came up with a Convention referred to as the Inter-American Convention on Human Rights in San Jose (Costa Rica).

In its preamble it was provides as follows;

*... Considering that these principles have been set forth in the Charter of the Organisation of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been re-affirmed and redefined in other international instruments worldwide as well as regional or scope...*<sup>15</sup>

Have agreed upon the following under the heading, Right to Equal Protection.

*All persons are equal before the law. Consequently, they are entitled, without discrimination to equal protection of the law.*<sup>16</sup>

To the drafters of this Convention, equal protection which is used as heading connotes the same meaning as freedom from discrimination. One should not be dragged into semantics as the Convention has adopted every part of the Universal Declaration of Human Rights which contains the word discrimination. It means a person could be regarded as not been discriminated if he is given right of equal protection of the law.

### **UNIVERSALITY OF RIGHT OF FREEDOM FROM DISCRIMINATION**

The writer has attempted to present the provisions of the Nigerian Constitution, and the Charters and Conventions of some Regional Organisations that are signatory to the Universal Declaration of Human Rights with particular reference to freedom from discrimination.

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<sup>14</sup> Article 14 European Convention for the Protection of Human Rights and Fundamental Freedoms (with amendment) Rome 4.x1 1950. See Robert G. Lee, Blackstone's Statutes on Public Law and Human Rights 2015-2016 (25<sup>th</sup> Edition, Oxford, Oxford University Press, 2015) p. 473

<sup>15</sup> See the Inter-American Convention on Human Rights, San Jose (Costa Rica), 22.x1 1969

<sup>16</sup> See Article 24 The Inter-American Convention on Human Rights.

Apart from Nigeria, the Regional Bodies or Organisations are; African Union (A.U), European Union (E.U), Organisation of American States.

In spite of the good intention of these Countries and Organisations to eliminate discrimination in its entire ramification, derogatory sections are common provision in their constitutions, Charters and Conventions. For instance, the Nigeria Constitution provides for restriction on and derogation from fundamental rights. It states as follows;

*Nothing in Section 37, 38, 39, 40, and 41 of this Constitution shall invalidate any law that is reasonably justified in a democratic society.*

*(a) In the interest of defence, public safety, public order, public morality or public health, or*

*(b) For the purpose of protecting the rights and freedom of other persons.*

There is no doubt that this sort of law<sup>17</sup> is necessary to check the excesses of certain citizens, but the word “reasonably” as used is objective. It could be used unjustly. Cases abound in Nigeria and other jurisdictions to buttress this. Otherwise how can one explain a particular debate in the Senate American State of Alabama in 2004, where a bill to abolish a system of school based on colour was defeated. No doubt those who sponsored the initial bill felt their action was reasonably justified.<sup>18</sup>

### **THE SCOPE OF INFRINGEMENT OF FREEDOM FROM DISCRIMINATION**

Giving an ordinary English meaning as contained in the Constitutions, Charters and Conventions of countries presented so far, one should be able to understand when he is being discriminated against. It will be a direct discrimination if I one is told that there is no admission for him into a school because his is either a white or a black. However, an indirect discrimination may be difficult to know even by the victim in certain instance. To this extent, discrimination could be classified into Direct or Indirect.

Again some discrimination may be lawful while some may be unlawful.

According to Claire De Than and Edwin Shorts<sup>19</sup>, some forms of discrimination are lawful and even justifiable.

The law on murder is a discrimination against people who kill with the requisite mens rea, but this does not mean that it is inappropriate. The law on discrimination attempts to deal with unjustifiable discrimination.

Discrimination is a very broad field. It requires knowledge of domestic and international approaches to a range of forms of discrimination. One would need to know the main details of the domestic legislation dealing with discrimination, as well as the way that the European Commission on Human Rights (ECHR) deals with discrimination. One would also need to be familiar with the arguments for and against these laws as they have been interpreted by the domestic courts and the ECHR, as well as proposals for reform in this area.

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<sup>17</sup> See Section 45 Nigeria Constitution, 1999

<sup>18</sup> State Constitution Education Clause Language by Molly A. Hunter, ELC (Education Law Centre) Newark N.J. Note: An amendment intended to remove the archaic language regarding segregation in this clause and others from the Constitution was defeated in 2004.

<sup>19</sup> Human Rights (3<sup>rd</sup> Edition, Pearson Education Ltd Edinburgh 2015) p. 73. See Law Express online, [www.pearsoned.co.uk/lawexpress](http://www.pearsoned.co.uk/lawexpress)

The right to freedom from discrimination has brought about legal complexities in its scope and interpretation of law by courts. Because of the new dimension discrimination has taken, there is need to know the difference between direct and indirect discrimination.

The Equality Act UK <sup>20</sup>2010 has consolidated and amended the existing law here on discrimination. Section 13, of the Act define Direct Discrimination as follows:

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B, if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats disabled persons more favourably than A treat B.
- (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
- (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
- (6) If the protected characteristic is sex:
  - (a) Less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding.
  - (b) In case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

### **Indirect Discrimination Defined**

‘Indirect discrimination concerns requirements, conditions provisions, criteria, or practices that are apparently neutral but which have a significantly disproportionate and unjustifiable adverse effect on members of a particular group. Again, the 2010 Act has consolidated the law here.

Section 19 defines Indirect Discrimination as follows:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic.
  - (b) It puts, or would put, person with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it.
  - (c) It put, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are;  
Age,  
Disability,  
Gender reassignment,  
Marriage and civil partnership,  
Race,  
Religion or belief,  
Sex,  
Sexual orientation

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<sup>20</sup> See. Section 13 The Equality Act UK 2010 as Consolidated

*Mandla v Dowell Lee*<sup>21</sup> relates indirect racial discrimination

In this case two claimants, father and son, were Sikhs and wore turbans over their unshorn hair in accordance with their tenets. The headmaster of a school refused to admit the son as a pupil at the school because the claimants would not comply with the school uniform rules and agree to the son cutting his hair and ceasing to wear a turban. They alleged indirect racial discrimination.

The House of Lords held that, “the claimants had been the victims of racial discrimination.” One of the main issues in this case was whether Sikhs are a racial group for the purposes of the 1976 Act, which turned on the definition of ‘ethnic origins’. Lord Fraser held that, an ethnic group for the purposes of the 1976 Act is one that regards itself, and is regarded by others, ‘as a distinct community by virtue of certain characteristics’. He outlined two essential conditions in this respect: (1) ‘a long shared history, which the group knows distinguishes it from other groups, ‘and the memory of which it keeps alive’, and (2) ‘a cultural tradition of its own’. He also identified five subsidiary factors, including matters such as ‘a common geographical origin, or descent from a small number of common ancestors’.

Lord Templeman agreed with Lord Fraser’s conclusion about Sikhs, but more simply stated that the concept of ‘ethnic origin’ applies to groups that possess certain characteristics of a race, ‘namely group of geographical origin and a group history’.

In *London Borough of Lewisham v Malcolm*<sup>22</sup> tenant breached a tenancy agreement with his local authority by sub-letting the premises, and the local authority consequently sought a possession order. The local authority was unaware that the tenant suffered from schizophrenia. The tenant argued that he was a disabled person for the purposes of the 1995 Act. He claimed that the court could not make a possession order against him, since the possession proceedings were a form of unlawful discrimination contrary to Section 22 (3)(c) and 24 of the 195 Act. Section 22 (3)(c) makes it unlawful for a person managing any premises to discriminate against a disabled person occupying those premises...by evicting the disabled person, or subjecting him to any other detriment. Section 24 defines ‘discrimination’ for the purposes of Section 22.

The House of Lords decided that, the Local Authority was entitled to possession. It held that, the tenant was a disabled person for the purposes of the Act, but that there had been no discrimination against him. According to the House, the proper comparator was a person without a mental disability who had sub-let landlord’s premises in breach of his tenancy agreement and gone to live elsewhere, i.e. acted in the same manner as the tenant. Since the Local Authority would have sought possession against any non-disabled tenant who had acted in the manner, the House held that, the disabled tenant had not been treated less favourably than the comparator and therefore had not been discriminated against for the purposes of the Act.

Knowledge of the disability by the alleged discriminator was a crucial factor, at least where the act was not ‘inherently discriminatory’, for instance, Lord Bingham stated that ‘knowledge, or at least imputed knowledge, is necessary’, and Lord Scott similarly held that the tenant needed to show that his disability played some motivating part in the council’s decision.

In *Eweida v British Airways*,<sup>23</sup> christian employed was asked to either not wear a cross around her neck or to cover it up. She refused, and claimed that the policy was discrimination on grounds of religion. The wearing of jewellery is required for some faiths but not for Christianity, and employees who were Sikhs or Muslim were allowed to wear religious jewellery or garments. The tribunal found that the compulsory Sikh bracelet was not an appropriate comparison since the wearing of a visible cross is not required by christianity. On appeal to the Court of Appeal, the issue was indirect discrimination.

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<sup>21</sup> (1983) 2 AC 548

<sup>22</sup> 2008) UKHL 43

<sup>23</sup> (2010) EWCA Civ 80

The rule that personal jewellery should be concealed did not constitute indirect discrimination on groups of religion or belief. The claimant suffered a disadvantage due to her personal beliefs, not as part of an identifiable section of the workforce who shared her beliefs. Her personal objection to the policy was not a requirement of her religion. Sedley L.J. stated that even if the policy had constituted indirect discrimination, it would have been justified as a proportionate means of achieving a legitimate aim. The Supreme Court refused leave to appeal, so Eweida took a case to the ECHR, which was heard with three others in February 2013. She won, but the other three applicants failed. The reasoning of the ECHR was that, although the English legal framework provided enough protection for Eweida's right to manifest her religion, a fair balance had not been struck in her case since her cross was small and discreet and the national court had given too much weight to the company's wish to project a particular corporate image.

### **INDIRECT DISCRIMINATION IN NIGERIA**

The Nigerian case of Festus Odafe & Others V. A.G Federation and Other<sup>24</sup> is a good example of indirect discrimination.

The four suspects in this case were in prison remand custody in Lagos for capital offence. They had been in remand for about four years. They were diagnosed as positive to HIV a condition that formed the crux of this to appeal case for enforcement of their fundamental rights under Section 34 (1) and 42(1) of the Nigerian Constitution 1999. The provision state as follows;

*No person shall be subjected to torture or to inhuman and degrading treatment.*

The question that arose was whether the applicants prolonged detention without trial amounts to "torture" or inhuman and degrading treatment in the peculiar circumstance of the applicant's health condition.

In addition to the central question of torture, the case implicate issues such as, stigma induced" discrimination against the applicants by both fellow inmates and prison officials as well as the right of prison inmate of any characterisation to medical care under the provisions of the African Charter on Human and Peoples' Rights.

...Whether the acts of segregation and discrimination against the applicants amounts to an infraction of the applicant's right to freedom from discrimination under Section 42 (1) (a) of the 1999 Constitution.

The Court held that discrimination on grounds of illness is not one of the types recognised as actionable under Section 42 (1)(a) of the 1999 Constitution of Nigeria.

This is one clear case of indirect discrimination.

The Section 7 and 8 of the Prisons Act<sup>25</sup>,Cap 366 of 1999 provides that, 'a person in prison custody has a right to medical care and that prison officials are under duty to provide medical care for such inmates. This shows that the right granted them by the law and the provision of the African Charter on Human and Peoples' Rights have been violated.<sup>26</sup>

Here, there was evidence that nobody was getting close to them in the prison again to serve them drugs or food.

The court still went ahead and gave a judgement that;

*Discrimination on grounds of illness is not one of the types recognised as actionable under Section 42 (1)(a) of the 1999 Constitution.*

Indeed right to medical care is not a fundamental right. But prison inmates who need medical care are entitled to it under the Prison's Act. If they are denied such right because they demanded for it under discrimination, what do you call such refusal?

<sup>24</sup> (FHC/PH/CS/680/2003, (2005) CHR p. 209

<sup>25</sup> See Prisons Act Cap 366 Laws of the Federation of Nigerian, 1999

<sup>26</sup> See Section 16 (2) of the African Charter on Human and Peoples' Right

The refusal by the court to grant this right to the inmates, is an extension of the scope of discrimination. The court however took a different position in Mrs Helen Ughochukwu v Stephen Ughochukwu's case<sup>27</sup>. It was a case in which the applicant was forced to leave her late husband's house. The court relied on the provision of United Nations Convention on the Elimination of Discrimination Against Women (CEDAE) by stating that;

*Locking the applicant, a widow, out of her matrimonial home is discriminatory and amounts to degrading treatment.*

While commending the court over this decision, one wonders which the court in Odafe's case did not rely on African Charter on Human and Peoples' Right which is an International Law In Hughes & Anor v Elections Canada,<sup>28</sup> H, a sufferer of post-polio syndrome and user of a walker alleged that he was denied an accessible polling location and adversely differentiate against on account of his disability when voting in two federal elections.

The Court held that *the right to vote is protected in the Canadian Charter of Rights and Freedoms*. The Court went further to state that;

*The object of the Disabilities Act is to provide equal opportunities, care, protection, maintenance, welfare trading and rehabilitation to persons with disabilities to persons with disabilities.*

## CONCLUSION

There is no doubt that the Universal Declaration of Human Rights as adopted by several Countries and International Organizations is intended to ensure that people across the world exercise their rights as provided for under the Declaration. However, several constraints have made it impracticable. Among the constraints are derogation clauses, and direct and indirect discriminations, and the characteristics of discrimination. Some local and foreign cases were also reviewed with the hope of highlighting recent developments in the area of freedom from discrimination and recommendations are hereby made as follows;

That Section 42 of the Nigerian Constitution which relate to disability and deprivation arising from the circumstances surrounding the birth of a child should be reviewed so that a child who cannot identify his father could derive legitimacy through his or her mother.

That Nigerian courts should apply International Conventions to which Nigeria is a signatory in deciding discrimination cases where the plaintiff's claim do not properly fit into chapter iv of the Nigerian Constitution.

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<sup>27</sup> HAM/14M/2002 (2006) CHR p. 344.

<sup>28</sup> 7 Commonwealth Human Rights Law Digest Vol. 7 No. 3 Summer 2012 at 244. See Full text of judgment at [http://www.chrt-tcdp.gc.ca/search/files/ti373-1030\\_8e120210.pdf](http://www.chrt-tcdp.gc.ca/search/files/ti373-1030_8e120210.pdf)

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