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LEGAL AID SCHEME IN NIGERIA: ANY DIFFERENCE IN ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES?

Bukola Ruth Akinbola*

Abstract

This article examines the Legal Aid Scheme in Nigeria against the backdrop of its philosophy and objective of providing equal access to justice for all irrespective of financial limitations. It examines the peculiar needs of persons with disabilities and their vulnerability to poverty against the intendment of the Legal Aid Scheme to provide access to justice for all persons so that no one is excluded from access to justice by poverty. The article considers the linkages between poverty and disability and concludes that there is a great omission in the legal aid scheme in Nigeria in not specifically providing legal aid for persons with disabilities (PWDs) in the Legal Aid Act, beyond the general provisions. The article recommends that in view of the cyclic nature of disability and poverty, the Legal Aid Act should be amended to provide specifically for persons with disabilities.

1.0 Introduction

Human rights issues of discrimination continue to mar progress towards empowerment where those with a disability continue to be over-represented among the poor and face systematic barriers that prevent them from accessing the opportunities created for the achievement of equality.¹

*Department of Public & International Law, Faculty of Law, University of Ibadan, Ibadan, Nigeria.

Email: brakinbola@gmail.com

¹ Cotter, Anne-Marie Mooney, *This Ability: An International Legal Analysis of Discrimination*, Hampshire, Ashgate, 2007, p. 7.

It is the ideal thing in any people oriented nation to ensure that appropriate machinery is put in place for ensuring that nobody is deprived of his/her rights and liberties only for reasons of financial incapability or ignorance. Access to justice is a paramount issue in any egalitarian society and any country that purports to embrace and promote the principles of human rights needs to ensure that justice is made accessible to all without exception. The concept of justice has been central to civilizations from time immemorial and today, the concept of universal access to justice has gained global importance. Fair hearing is at the core of access to justice with its twin principles of "*Nemo dat quad non habet*" and "*audi alteram partem*", which literally mean "no one can be a judge in his own case and the two sides must be heard before arriving at a verdict", respectively. Legal Aid has come to ensure access to justice for indigent persons, as a widely accepted machinery for translating the ideals of fair hearing and universal access to justice into practical reality for members of society who have such limited resources at their disposal and cannot afford the cost of court actions without being assisted. Legal aid scheme is intended to make justice accessible to all. The trend towards the development of legal aid scheme is now a phenomenon sweeping across most countries of the world.²

Access means the act of approaching or entering, or the right or privilege to approach, reach, enter, or make use of something.³ Access to justice can therefore be described as the ability to obtain justice in one's case before a properly constituted court of law by exercising the right of entry or right to approach or the privilege to appear before the court for the hearing of his/her case. Ordinarily, the exercise of such a right entails some conditions which are expected to be fulfilled by a litigant, including filing of papers, subject to the payment of requisite legal fees. Such fees vary from one jurisdiction to another and sometimes the fees

² *Proceedings and Papers of the 6th Commonwealth Law Conference*, Nigerian Bar Association, Lagos, p. 327.

³ Hanks, Patrick (ed.), *Collins Dictionary of English Language*, London & Glasgow, Collins, 1985, p. 8.

could be so high that an intending litigant maybe unable to afford them. Lack of means to pay for a lawyer's services is therefore sometimes a reason for aggrieved persons to forfeit the pursuit of justice in a case or to have their cases heard without representation by a legal practitioner. Persons who have disabilities are often affected by intense poverty. Such PWDs may suffer infringement of their rights or be accused of offences and therefore require legal representation.

Physical and mental disabilities of any kind can be limiting factors in access to justice in view of the strong linkages that have been established between disability and poverty. The relationship between disability and poverty has been described as cyclic.⁴ It has been posited that any poverty reduction strategy has to put the disability issue in a prominent position. It is notable that "Perhaps more than for others, poverty for individuals with disabilities is not only monetary poverty...Among the dimensions put forward in recent poverty concepts, "voicelessness" and "powerlessness" are particularly important to understand the specific determinants of the poverty of disabled persons".⁵ In this paper, the voicelessness of PWDs is equated with lack of access to justice in the sense that PWDs are often so poor that they are not able to afford basic requirements for their sustenance, not to talk of prosecuting cases that bother on the infringements of their legal rights which occurs very frequently.

The article is divided into six parts comprising this introduction, followed by an examination of key concepts, including legal aid, disability and discrimination in the context of disability in the second section. An examination of legal aid in Nigeria and that of disability discrimination form part of the third part of the paper while the fourth part examines the linkages between disability and poverty, the provisions of the legal aid Act in Nigeria and the implications for access

⁴ United Nations Factsheet at:

<http://www.un.org/disabilities/default.asp?id=18> Retrieved on 6April, 2009

⁵ Understanding the Cycle of Poverty & Disability.

<http://www.dfif.gov.uk/Pubs/files/disability.pdf> Retrieved on 6 April 2009

to justice for PWDs. It justifies the call to make specific provisions for access to justice for PWDs through the legal aid provisions in Nigeria, especially in view of the absence of a national disability specific legislation. Part five of the paper examines constitutional provisions for the protection of the rights of PWDs and the article concludes in section six with some recommendations for improving the rights of PWDs to justice and equality before the law through provision of legal aid.

2.0 Clarification of concepts

Some key terms, including legal aid and disability, will be examined here due to their centrality to this article.

2.1 Legal Aid

There seems to be a general consensus that one major hindrance to the realization to equal access to justice is economic.⁶ Legal aid is an instrument whereby an aggrieved party who lacks financial means is assisted by legal means to stand on equal footing with the opposing party in a court of law.⁷ It also refers to free or inexpensive legal services provided to those who cannot afford to pay full price⁸. It may also be in kind or in cash and has been defined as the money that is given by government or another organization, to somebody who needs help to pay for legal advice or a lawyer.⁹ The Legal Aid Act defines legal aid as:

⁶ Asein J. O., *Introduction to Nigerian Legal System*, 2nd ed., Lagos, Ababa Press., p. 320.

⁷ Achike, V. C. U., 'Legal Aid and the Criminal Justice Process'. Paper delivered at the National Seminar on the Administration of Criminal Justice in Nigeria held at the University of Lagos, Nigeria, 1990.

⁸ Garner, Bryan A (ed.), *Black's Law Dictionary* 8th ed., St. Paul (Minnesota), Thompson West 2004, p. 912.

⁹ *Oxford Advanced Learner's Dictionary of Current English*, 6th ed., New York, Oxford, 2000, p. 676.

- a. "the assistance of a Legal Practitioner including all such assistance as is usually given by a Legal Practitioner in the steps preliminary or incidental to any proceedings;
- b. representation by a Legal Practitioner before any court;
- c. such additional aid (including advice in civil causes and matters) as maybe prescribed.¹⁰

Legal aid in this paper include anything done to make justice accessible to an indigent person or a person who ordinarily would have been excluded from access to court as a result of financial poverty.

2.2. Disability

Disability has been variously defined and generally, the term defies a universally accepted definition. Disability is often defined alongside with similar terms like handicap and impairments. Some definitions of the term will be examined in order to put the term in perspective. According to the World Health Organization (WHO),

*"the concept of disability is classified as one of three: impairment, disability, and handicap. Impairment refers to the reduction or loss of normally existing physical, psychological or behavioral structures. Disability refers to the functional impairments resulting from primary damage, and the effect of the loss of function in daily life is thus the handicap."*¹¹

The United Nations Declaration on the Rights of Disabled Persons defines the term by reference to a disabled person and states that a "disabled person" is:

¹⁰ Legal Aid Act Cap. L9, Laws of the Federation of Nigeria (LFN) 2004.

¹¹ Ellamaa, A., Karu, L., Muklane, M., and Talvik, T., *Proceedings of the International Conference on Rehabilitation of Disabled Children: Present State and Future Trends*. Tallin, Estonia August 12–26, 1989. Estonia: Tartu University, p. 217 cited in Vardit Rispler-Chaim, *Disability in Islamic Law*, Dordrecht, The Netherlands, Springer, 1991, p. 1.

“any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities.”¹²

The International Labor Organization (ILO), on the other hand, states that “a disabled person means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment.”¹³

The Americans with Disabilities Act (ADA), signed into law in 1990 defines the term disability stating that: “A person with disability is defined as

1. having a physical or mental impairment that substantially limits him or her in some major life activity, and
2. having experienced discrimination resulting from this physical or mental impairment.”¹⁴

The British Discrimination Act 1995 defines disability by stating that a person must have four elements to be considered “disabled”:

- a. There must be a physical or mental impairment.
- b. The impairment must adversely affect the individual’s capacity to carry out normal day to day activities.
- c. The adverse affect must be substantial.
- d. The adverse affect must be “long term.”¹⁵

¹² Proclaimed by the Geneva Assembly’s Resolution 3447 of December 9, 1975.

¹³ Op.cit, (note 10 above), pp. 67, 75. RECONCILE CORRECT REFERENCE

¹⁴ Hardman, Michael L., Clifford, J. Drew, and Egan., M. Winston, *Human Exceptionality, Society, School, and Family*. Boston (MA), Allyn and Bacon, 2002, pp. 12–13.

¹⁵ Diesfeld, Kate, “Disability matters in medical law.” *Journal of Medical Ethics* vol. 27, pp 388-392 op.cit (2001), in Vardit, Rispler-Chaim, p. 27.

In traditional medical views, “the long term or permanent functional limitations produced by physical impairments are called disability”¹⁶. According to Jones, a retired pediatrician while challenging the usage of the three commonly applied terms: (impairment, disability, and handicap), handicap is a discriminative term as it derives from “cap in hand”,¹⁷ “implying that the disabled are expected to beg favors of the able”.¹⁸

In terms of the purpose of definition of “who is disabled”, it has been posited that is also utilized by politicians and against politicians in various political scenarios.¹⁹ However, as observed by Vardit, the definition of “what is disability” must always remain relative.²⁰ This implies that a definition of disability can be very wide or narrow, depending on the context and purpose for it. For instance, in a society where the majority of girls are circumcised she who is not circumcised is “disabled”, while in other societies to be circumcised equals being mutilated. Also, in a society where many are undernourished, undernourishment is not considered a disability.²¹ Women in sexist societies “are physically handicapped”,²² since women in sexist societies are expected to lack the strength, skills and physical mobility that men are expected to have.²³

The Convention on the Rights of Persons with Disabilities (CRPD) does not explicitly define the word “disability”. The Preamble to the Convention acknowledges that “disability” is an evolving

¹⁶ Liachowitz, Claire H., (1988), *Disability as a Social Construct: Legislative Roots*. Philadelphia, University of Pennsylvania Press, 1988, pp. 3, 12.

¹⁷ Jones, R.B. (2001), “Impairment, disability and handicap – old fashioned concepts?” *Journal of Medical Ethics*. Vol. 27, pp. 377–9.

¹⁸ *Ibid.*

¹⁹ Wendell, Susan, *The Rejected Body, Feminist Philosophical Reflections on Disability*. New York/London, Routledge, 1996, pp. 11–12.

²⁰ Vardit Rispler-Chaim, p. 2.

²¹ Wendell, Susan, *op.cit.* p. 14.

²² Iris Marion Young’s assertion, in Wendell.

²³ Wendell, Susan, *ibid.* p. 15.

concept.²⁴ The Convention does not also define the term “persons with disability.” However, the treaty states that the term includes persons who have long-term physical, mental, intellectual or sensory impairments that, in the face of various negative attitudes or physical obstacles, may prevent those persons from participating fully in society.²⁵ In this article, disability will be used in the sense it has been understood in the CRPD 2006 being a broad and relative sense which allows for relativity in definition.

2.3 Discrimination in the context of disability

According to Degener and Quinn discrimination range from unjustified differentiation to direct or indirect unfavorable treatment to detailed lists of discriminatory practices.²⁶ The Convention on the Rights of Persons with Disabilities (CRPD) states that “Discrimination on the basis of disability” means

“any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation”²⁷

Any treatment that amounts to differentiation for the purpose of treating one better than the other or conferring advantages on one to the exclusion of the other, amounts to discrimination. In this paper, whenever persons with any impairments are excluded from privileges or

²⁴ Sub paragraph (e) Convention on the Rights of Persons with Disabilities (CRPD) 2006.

²⁵ Article 1, CRPD 2006.

²⁶ Degener, Theresia and Quinn, Gerard, *A Survey of International, Comparative and Regional Disability Law Reform*, Disability Rights Education & Defense Fund (DREDF), PLACE, 2000, p. 7.

²⁷ Article 2 of the CRPD 2006,

opportunities or any treatment that others receive, it amount to discrimination on the basis of disability. Theresia and Gerard also suggest that we can conclude that modern disability discrimination laws generally adhere to the principles of desegregation, de-institutionalization, and reasonable accommodation, which together work to actively abolish structural as well as overt discrimination²⁸. Discrimination is a great challenge to access to justice for PWDs in jurisdictions like Nigeria.

3.0 Development of Legal Aid in Nigeria

*"To build a new Nigerian Nation where there is equal access to justice for all irrespective of means and where all constitutional rights are respected, protected and defended to ensure justice for all"*²⁹

In Nigeria, the legal aid scheme was formally established by the promulgation of the Legal Aid Decree (LAC)³⁰. Its primary goal is to provide legal services to indigent persons. The LAC has the responsibility to operate the legal aid scheme for the grant of free or subsidized legal aid in order to 'enhance the rule of law'³¹ in Nigeria by facilitating legal representation for persons with inadequate resources to do so. The history of legal aid in Nigeria is traceable to the colonial era when Nigeria was a colony of Britain. The commencement date of legal aid services appears to be 1945 when the crown (now the state) or court normally assigned a legal practitioner to defend persons who could not afford counsel at their own cost in capital offences.³² The authority for

²⁸ Theresia Degener and Gerard Quinn, *op.cit.* p.21.

²⁹ Mission statement of the Legal Aid Council, Nigeria as contained on its website at <http://www.legalaidcouncil.gov.ng/>

³⁰ Decree No. 56 of 1976, now Legal Aid Act (LAA), Laws of the Federation (LFN) 2004 establishes a Legal Aid Council (LAC).

³¹ Legal Aid Council, "How to obtain legal Assistance from the Legal Aid Council of Nigeria: Giving voice to the voiceless", Government Press, Nigeria.

³² Criminal Procedure Ordinance No. 42 (1945) ;later Cap: 43 LFN 1958, later consolidated Cap 80 LFN 1990 and now Cap 19 LFN 2004 (Equivalent is

this practice was found in the Criminal Procedure Act³³ which provided inter alia:

*... where a person is accused of a capital offence, the crown shall if practicable, be represented by a law officer, crown counsel or Legal Practitioner and if the accused is not defended by a legal practitioner, the court shall if practicable assign a legal practitioner for his defense....*³⁴

By the provision, 'the court shall if "practicable" assign a legal practitioner for the defense of an accused standing trial for a capital offence.' two things are apparent from this provision: (i) that this kind of legal aid was limited only to accused persons standing trial for capital offences and (ii) the scope of the aid was far too narrow. Further, the provision "if practicable" means or suggests that where it was deemed "not practicable" by the court, it was possible for an accused to be tried for a capital offence without the aid of a legal practitioner. The criteria for determining when practicable or not, was not within public knowledge. This situation allowed too much discretion on the part of the courts and was far less than the ideal. It was however a modest beginning for legal aid provision in Nigeria. By 1959, legal aid in Nigeria received a boost from the impact of the conference of the International Commission of Jurists held in New Delhi, India in 1959. The theme of the Conference was "The Rule of Law in a Free Society" This brought Nigeria closer to the ideals of a legal aid scheme. It created a consciousness of what should be done towards enhancing access to justice for all. After the conference, a Legal Aid Bill was presented to the Nigerian Parliament. It was however not passed into law

Section 186 Criminal Procedure Code Act Cap 87 1990 for the Northern States and the Federal Capital Territory, (FCT) Abuja.

³³ Section 352 Criminal Procedure Act 1945 later CPA Cap 80, 1990 LFN,CITE AS IN LFN 2004

³⁴ Osimiri, Uche, "Nigerian Legal Aid Scheme. The 21 Years Journey"(1998) *Nigerian Law and Practice Journal* Vol. 2 No. 1

until 1976³⁵ when it was passed as a military Decree by the then Federal Military Government of General Olusegun Obasanjo who was the Head of State. This is a clear attestation to the vital role of a legal aid scheme in the dispensation of justice. It gained prominence even under a military regime. The establishment of a statutory body to cater for the legal needs of economically deficient and less-privileged Nigerians was conceptualized in the early 1970s by some eminent members of the Nigerian Bar Association (NBA) under the umbrella of "Legal Aid Association" shepherded by Chief Chimezie Ikeazor (SAN) and ably assisted by Chief Debo Akande, (SAN), Chief Solomon Lar, (SAN), amongst others. The crusade for social justice was given legal backing with the promulgation of the Legal Aid Decree No. 56 of 1976 and the LAC became functional in 1977. Unfortunately, the Civilian Government of the first republic in Nigeria either did not consider establishment of a legal aid scheme very important on its priority list or the government was too short lived to have had the time to establish a legal aid scheme before it was overthrown by the 1966 *coup d'etat*. The pressures mounted by advocates of a legal aid scheme preceded 1976 but tangible outcome only became manifest from that year.³⁶ It is also notable that despite the way legal aid provision (under the 1945 Criminal Procedure Ordinance) was so limited in scope that it appeared to allow the possibility of an accused person standing trial without the aid of a legal practitioner in a capital offence trial, the judiciary was alive to its responsibility to ensure fairness. The courts therefore treated the provision of a legal practitioner for an accused standing trial on charges of a capital offence as a *sine quo non*. There is hardly any precedent of non-provision of a lawyer to defend an accused who stood trial for a capital offence under that dispensation. The judiciary in Nigeria is to be

³⁵ Legal Aid Decree No. 56 of 1976. It has been reviewed several times. The current one is the Legal Aid Act, Cap L9, Laws of the Federation of Nigeria (LFN) 2004.

³⁶ Bamgbose, Oluyemisi "A Critical Examination of Legal Aid in Nigeria" in J.D.Ojo (ed.), *Ibadan University Law Essays*, Ibadan, University of Ibadan Faculty of Law, 1996, 212.

credited for this loyalty to the course of justice. In *Josiah v. State*³⁷ for instance, three accused were charged with armed robbery and murder. At the close of the case for the prosecution, two of them were discharged and the third appellant though unrepresented by counsel, was nevertheless called upon to defend himself. On appeal, he contended that he was not given a fair trial. The Supreme Court of Nigeria accepted the contention and held that the trial was a nullity. In *Nwanbe v. State*,³⁸ the court expressed the view that the assignment of a legal aid counsel to handle the case for an accused person who does not have his own counsel by the court, is not an imposition, but a symbol that the accused deserves humanitarianism. The Supreme Court held inter alia that:

1. The primary duty of an accused is to arrange how best he can defend himself.
2. As no legal practitioner appeared for the accused charged with murder, the trial court was constrained and enjoined by S. 352 of the Criminal Procedure Act (CPA) to make provisions for his defense.
3. In the instant case, the trial court order to ensure that the accused was represented by a legal practitioner referred the matter of his defence to the Assistant Director Legal Aid Council, a statutory body established to aid indigent accused persons and by that act, the trial court had discharged the statutory duty it owed the accused. The contention of the accused in that case was that he was not the one who made a choice of the legal practitioner who represented him in the case.

4.0 The Legal Aid Scheme in Nigeria: What difference for PWDs?

The human right principles of fair hearing and equality before the law are undeniably the underlying reasons for the establishment of a legal

³⁷ Bamgbose, Oluwemisi "A Critical Examination of Legal Aid in Nigeria" in I.D.Ojo (ed.), *Abadan University Law Essays*, Ibadan, University of Ibadan (LPN) 2004.

³⁸ S. 13 (4) LAA LFN 2004.

aid scheme in Nigeria. The concept of legal aid is an acknowledgement by the state that for reason of poverty, a person can be excluded from obtaining fair hearing in a legal dispute or lose the ability to protect his/her basic rights under the law. PWDs have been shown to experience a lot of challenges that are caused by poverty. There is therefore a great need for PWDs to enjoy legal aid as disability itself often predisposes them to human rights infringements. In terms of law reports, this article could not find any reported case of a person with disability who enjoyed legal aid for the protection of their rights. This could be as a result of several reasons including poor reporting or non-existence of such cases. It is however notable that reports of legal cases involving PWDs in Nigeria, are difficult and very far between in Nigeria. In terms of what could be responsible for the scarcity of legal cases involving PWDs there could be many reasons and it is submitted that poverty and inability to pay for legal services is a core reason. Another reason is ignorance of their rights and the existence of available legal aid entitlement for the protection and prosecution of their infringed rights. In terms of the historical development of legal aid, the Nigerian legal system has been largely influenced by the English legal system and has been patterned after the English law in many respects. This is understandably so as Nigeria was formerly a British Colony. As far back as 1216, the idea that everyone should have equal access to justice and the law has been enshrined under the English legal system. This was the period when the Magna Carta declared: "To no one will we sell, to no one will we refuse or delay right or justice."³⁹ In 1949, this ideology was instrumental in the establishment of the English legal aid scheme which was designed to guarantee that those persons who could not afford legal advice or representation by solicitors should be given access to these services. By inference, Nigeria had its fair share of legal aid scheme as at 1949 as it was then a British Colony and was subject to laws passed by the English Parliament except otherwise specified.

³⁹ The same philosophy is reflected in S. 26 Court of Appeal Act, (now S. 217 Constitution of the Federal Republic of Nigeria (CFRN) (1999)); S. 32, Supreme Court Act (now S. 210 CFRN 1999).

Access to legal aid was viewed as an element of access to justice and the absence of legal aid in many instances also can be equated to exclusion from access to justice. Inequality of justice results if trial depends on a man's means and the law through the provision of legal aid, seeks to take justice beyond having or not having the means, to the level of equality, equity and justice or fairness rather than financial ability or otherwise. As noted earlier, poverty often attaches to disability.

It is apparent that poverty and ignorance present formidable problems to the effective realization of the individual right to recourse procedure. The problems of poverty and ignorance can militate against the enjoyment of rights, which are protected under the law in any country, and this is not peculiar to Nigeria alone. For instance, the law of Criminal Procedure makes elaborate provisions which are designed to safeguard and protect the rights of an accused person between the time of his arrest and the time he is brought before the court. These provisions include the right to be informed of his offence at the time of his arrest,⁴⁰ the right to be visited by his relatives,⁴¹ the right to be brought before the court within 24 hours of his arrest⁴² and the right not to be interviewed by the investigating officers for more than the basic period of four hours after his arrest unless such period has been duly extended under the law.⁴³ These are however provisions which are not known to many Nigerians and unless some kind of legal aid or assistance is rendered appropriately, these rights will be infringed upon by law enforcement officers and state agencies without challenge and with no remedies to the victims of such violations. The legal aid scheme therefore provides the necessary information to the accused that cannot

⁴⁰ Lee, S. and Fox, M., *Learning Legal Skills*, London, Blackstone Press, 1992, p. 178.

⁴¹ Part 2 Chapter 41, S. 5 Criminal Procedure Act (CPA) provides for notification of Cause of arrest and the necessity to inform an accused person of his offence at time of arrest.

⁴² S. 9 Cap. C41 of the CPA provides for the right of an accused to be visited by his relations.

⁴³ SS. 17, 482 (3), 483 (1), 484 of the CPA variously provide for the right to be brought to court within 24 hours of arrest.

afford legal services. Legal aid helps in the enforcement of the rights of an accused⁴⁴ through legal representation and related services. Nigeria also as a signatory of the Universal Declaration on Human Rights⁴⁵ and having bound itself in its national constitution, chapter IV of which is devoted to the protection of human rights, is obliged to do all within its powers to ensure that no one is excluded from having justice in their cases on grounds of poverty and inability to afford the cost of being heard before a court of law, especially in criminal cases. This further makes the establishment of a legal aid scheme for the actualization of the ideals of human rights principle of fair hearing, an imperative in a country like Nigeria where poverty is widespread especially among the rural populace. Another common feature of the rural populace is the high level of illiteracy. PWDs are particularly affected by both poverty and illiteracy. Legal aid has been held to include or embrace educating the indigent recipients about their legal rights and other relevant information as contained in the constitution.⁴⁶ It is notable that the Legal Aid Act does not mention PWDs in any of its sections. Perhaps this presumes that they have been provided for along with all other persons in need or due to an act of outright omission. The importance of recognizing the special needs of PWDs and therefore providing legal aid in a manner that is accessible to them makes affirmative action necessary. The next part of this article is devoted to this need.

5.0 Why the inclusion of disability-specific provisions in the Legal Aid Act?

5.1 Equalization of opportunities for PWDs disabilities

It is important to note that the laws that generally protect and provide for the right to fair hearing both under the constitution and other legislations in Nigeria do not expressly exclude PWDs, which means that PWDs are

⁴⁴ For instance, an accused is not to be interviewed or interrogated for more 4 hours unless extended by law.

⁴⁵ Universal Declaration of Human Rights (UDHR), 1948.

⁴⁶ SS. 33 – 46, Constitution of the Federal Republic of Nigeria (CFRN) 1999.

included in their protective scope. Why then is it necessary to make disability-specific provisions to make legal aid accessible for PWDs? Similar concerns were raised at the international level before the adoption of the CRPD. There were series of arguments to justify the need for a UN disability specific convention. The same justifications will apply to a great extent in justifying the need for specific provision for PWDs in the legal aid Act in Nigeria. Theresia and Gerard have stated that there were at least six major reasons marshaled in favour of a new treaty on disability rights.⁴⁷ Some those arguments are adopted for the purpose of this article thus:

First, the inclusion of disability-specific provisions in the Legal Aid Act would be a significant advance in the creation of binding disability law and will enhance the ability of PWDs to take action to prevent disability discrimination. In contrast, the current generalized provisions of legal aid represent a regime that does not even acknowledge the peculiar needs of PWDs to actual human rights advocacy.

Secondly, inclusion of disability-specific provisions would legitimise claims for additional attention and resources from the human rights agencies of government and other organisations.

Thirdly, the inclusion of disability-specific provisions in national legal aid Act would provide an opportunity to both add specific content to the human rights of persons with disabilities and address hitherto unexplored areas, such as the right to be different. In the light of recent developments in the area of bioethics and biomedicine concerning the detection and appropriate "treatment" of physiological differences, the right to be different might be as fundamental as the right to equality for persons with disabilities.⁴⁸

⁴⁷ Degener, Theresia and Quinn, Gerard, *op. cit.*, p. 8

⁴⁸ For more on this issue see Degener, Theresia *Disabled Persons and Human Rights: The Legal Framework*, *ibid.* at 36; Tomasevski, Katarina "The Right to Health for People with Disabilities," in *Human Rights and Disabled Persons*, 7, pp. 131-46.

Fourthly, inclusion of disability-specific provisions in the national legal aid Act would give disability rights organisations a specific tool for promoting human rights for persons with disabilities in domestic contexts and to the government.

Fifthly, inclusion of disability-specific provisions in the national legal aid Act would be a catalyst for empowering and mobilizing the Nigerian PWDs to join the global disability rights movement⁴⁹.

5.2 Affirmative Action/Positive Discrimination

The inclusion of disability-specific provisions in the Legal Aid Act would be an affirmative action (AF) in the protection of the rights of PWDs. AF has been viewed as a kind of discrimination but a positive one. Cotter explained the import of affirmative action in the context of disability thus:

Affirmative action or positive discrimination is a policy

or a program providing access to systems for people of a minority group who have traditionally been

discriminated against, with the aim of creating a more egalitarian society. This consists of access to education,

employment, health care or social welfare. The terms affirmative action and positive discrimination originate

in law, where it is common for lawyers to speak of affirmative or positive remedies that command the

wrongdoer to do something. In contrast, negative remedies command the wrongdoer to not do something

or to stop doing something. In employment, affirmative action may also be known as employment equity or

*preferential hiring*⁵⁰.

In this context affirmative action requires that institutions increase hiring and promotion of candidates of mandated groups. Affirmative

⁴⁹ General Comment No. 2 (1994) on Persons with Disabilities, Report on the Tenth and Eleventh Sessions, U.N. ESCOR 1995, Supp. No. 2 [according to U.N. Doc. E/1995/23/Cer.1-E/C.12/1995/20/Cer.1-E/C.12/1994/20 (1995)].

⁵⁰ Cotter, Anne-Marie Moody, *op. cit.*, p. 9.

action originally began as a government remedy for past government and social injustices. Affirmative action exists to change the distribution of jobs, education, wealth, or other things, based on certain characteristics.⁵¹ Affirmative action is to say the least, a necessity in the context of disability rights advocacy, in view of the vulnerability of PWDs to discrimination in most contexts. Disability has a history of discrimination that is as old as the human race, while the principle of non-discrimination is a cornerstone of human rights law and a principle included in all human rights treaties.⁵² According to Degener and Quinn, both de jure and de facto discrimination against persons with disabilities have a long history and take various forms.⁵³ They range from invidious discrimination, such as the denial of educational opportunities, to more "subtle" forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers.⁵⁴

5.3 Developing with International anti-disability-based discrimination trend

Under international law and for the purposes of the UN International Covenant on Economic Social and Cultural Rights (ICESCR), "disability-based discrimination" may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights⁵⁵. The General Comment No. 5, of the ICESCR which the committee adopted in 1994, was the first and only legal United Nations

⁵¹ *Ibid.*

⁵² For the Convention on the Rights of Persons with Disabilities [CRPD] see at a glance <http://www.un.org/disabilities/default.asp?id=223> .

⁵³ Degener, Theresia and Quinn, Gerard, *op. cit.*, p. 7.

⁵⁴ *Ibid.*

⁵⁵ *General Comment No. 5 (1994) on Persons with Disabilities, Report on the Tenth and Eleventh Sessions*, U.N. ESCOR 1995, Supp. No. 2 [according to U.N. Doc. E/1995/22/Corr.1-E/C.12/1994/20/Corr.1], at 102, ¶ 15, U.N. Doc. E/1995/22-E/C.12/1994/20 (1995).

document that broadly defined disability-based discrimination, before the adoption of the CRPD in 2006.

The General Assembly had earlier adopted soft law (the non-binding) instruments like the U.N. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (Standard Rules) in 1993.⁵⁶ The Standard Rules firmly build on the World Programme of Action Concerning Disabled Persons (WPA) and clearly accentuate equality, which it defined as follows:

*The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.*⁵⁷

The Standard Rules is a soft law and therefore lacked binding force, making its provisions inadequate, until the adoption of later instruments which have binding force, such as the ICESCR

Equalization of opportunities means: "the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all"⁵⁸

⁵⁶ *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, G.A. Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49, Annex at 202-11, U.N. Doc. A/Res/48/49 (1994) [hereinafter *Standard Rules*].

⁵⁷ *Standard Rules*, *Ibid*.

⁵⁸ United Nations, General Assembly, 1982, World Programme of Action Concerning Disabled Persons; Report of the Secretary-General: Addendum, at 21, U.N. Doc. A/37/351/Add.1.

Discrimination on the basis of disability is defined in the Convention as *“any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”*

Discrimination against PWDs is a factor of economic considerations and particularly poverty

6.0 Linkages between Disability and Poverty

The World Bank has released several data, showing that poverty and disability are very closely linked together. For instance, a former president of the World Bank has stated that: “... disabled people are also more likely than other people to live in grinding poverty. More than 1.3 billion people worldwide struggle to exist on less than [US] \$1 a day and the disabled in their countries live at the bottom of the pile”⁵⁹ Further information from the World Bank estimates that 20 per cent of the world's poorest people have some kind of disability, and tend to be regarded in their own communities as the most disadvantaged⁶⁰. Recent World Bank estimates indicate further that people with disabilities may account for as many as one in five of the world's poorest people⁶¹, suggesting that of the World Bank's 1.3 billion living on less than \$1 per

⁵⁹ J Wolfensohn, Former World Bank President, 2002, Retrieved on 8 May 2009 at Disability Knowledge and Research,

<http://www.disabilitykar.net/learningpublication/disabilitypoverty.html>

⁶⁰ Factsheet on Persons with Disabilities Overview. Available at

<http://www.un.org/disabilities/default.asp?id=18> Retrieved on 6 April 2009.

⁶¹ Elwan, Ann, Poverty and Disability, a background paper for the World Development Report, World Bank, October, 1999.

day⁶², approximately 260 million have a disability (or an estimated 43% of the total disabled population). It is notable that developing countries have a disproportionately large share of the population of PWDs. Despite the Millennium Development Goals (MDGs) 2000, poverty appears to trail disability. For instance, eighty per cent of persons with disabilities live in developing countries, according to the UN Development Programme (UNDP)⁶³. Research reports have provided ample evidence of the interconnected and multi-layered symbiotic relationship between poverty, impairment and disability. These have been succinctly summed up as follows:

- a) Disabled people are typically among the very poorest, they experience poverty more intensely and have fewer opportunities to escape poverty than non-disabled people.
- b) Disabled people are largely invisible, are ignored and excluded from mainstream development.
- c) Disability cuts across all societies and groups. The poorest and most marginalized are at the greatest risk of disability. Within the poorest and most marginalized, disabled women, disabled ethnic minorities, disabled members of secluded castes and tribes, and so on will be the most excluded.
- d) DFID cannot be said to be working effectively to reduce poverty and tackle social exclusion unless it makes specific efforts to address disability issues⁶⁴.

Unfortunately, notwithstanding the foregoing, disability was not part of the framework of the MDGs as those who constructed it did not

⁶² See Wolfensohn, James D. "Poor, Disabled and Shut Out." *Washington Post* Tuesday, December 3, 2002, p. A25.

⁶³ Factsheet on Persons with Disabilities Overview. Available at <http://www.un.org/disabilities/default.asp?id=18>. Retrieved on 6 April 2009

⁶⁴ Disability KaR Programme Research Report on Disability, Poverty and the Millennium Development Goals (Ref. A7). Retrieved on 8 May 2009 at <http://www.disabilitykar.net/learningpublication/disabilitypoverty.html>

mainstream disability in the fight against poverty. For instance, disability is not explicitly mentioned in any of the eight MDGs or the documentation for the new instruments or procedures.⁶⁵ It has been left to disabled peoples' Organisations (DPOs) and their allies to champion the campaign of getting disability into the development/poverty agenda even at international level.⁶⁶

7.0 Conclusion

The paper started with an introduction and then examined key terms including legal aid, disability and discrimination in the context of disability. It traced the development of legal aid in Nigeria from the colonial era to date, noting that there has never been any specific acknowledgement of the special need of PWDs for protection in terms of legal aid. The paper noted the inextricable linkages that exist between disability and poverty. PWDs are largely invisible, are ignored and excluded from mainstream of development and even in the process of legislation, (including those pieces of legislations that protect human rights) they are excluded. The Legal Aid Act though it specifically set out to make justice more accessible to persons, makes no mention or acknowledge the special need of PWDs in any of its provisions. It is recommended that the Nigerian Legal Aid Act in its present form, needs to be reformed to make specific provisions for making justice accessible to PWDs, who have been rated as some of the poorest of the poor globally. Women and girls with disabilities for instance, are particularly vulnerable to abuse and according to the UN, PWDs are more likely to be victims of violence or rape, and are less likely to obtain police intervention, legal protection or preventive care⁶⁷. Furthermore, their population is quite high and justifies particular attention in terms of legal aid provision. For instance, some 30 per cent of street youths have some kind of disability, and in developing countries, 90 per cent of children

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Global Issues, Persons with Disabilities, UN Web page accessed on 29 October 2009 at <http://www.un.org/en/globalissues/disabilities/>

with disabilities do not attend school⁶⁸, which implies that their ability to know and enforce their rights, is weaker than those who have no disability. Therefore, legal aid provision that recognizes the peculiarities of PWDs is a necessity in view of the vulnerability of PWDs to human rights abuses which often occur and are not prosecuted due to ignorance and lack of financial wherewithal. Provisions should therefore be included in the Legal Aid Act to protect the right to be "different" as it has been found that in the light of recent developments in the area of bioethics and biomedicine concerning the detection and appropriate "treatment" of physiological differences, the right to be different might be as fundamental as the right to equality for PWDs. To date, there is little or no difference to the access to justice for PWDs even with the Legal Aid Scheme which has now existed for about 34 years. This paper calls for a reform of the Legal Aid Act to make disability-specific provisions that would make access to justice a reality for PWDs. Such a reform should shift the onus of proof to the persons without disability who allege that a PWD has committed physical violations like rape and physical assault against him or her. Filing fees should also be waived in favour of litigants with disability where such a person is suing for discrimination against them on grounds of disability.

⁶⁸ *Ibid.*