

## **‘Equally unequal or unequally equal’: Adopting a substantive equality approach to gender discrimination in Nigeria**

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### **Abstract**

The purpose of this article is to critically assess the approach of Nigerian courts to interpreting section 42 of the Constitution. This article argues that Nigerian courts are yet to develop a substantive equality approach to interpreting section 42 of the Constitution. Rather, the courts have tended to adopt the formal equality approach to interpreting the section. Analysing some decisions of the Court of Appeal and the Supreme Court, the article argues that in order to safeguard women’s rights and address gender inequality in the country, Nigerian courts should lean towards substantive equality approach to the interpretation of section 42 of the Constitution. This is not only consistent with Nigeria’s obligations under international law but also crucial to addressing historical imbalances between men and women in the country.

### **Introduction**

About two decades ago, the international community affirmed in Beijing that women’s rights are human rights and that states are obligated to prevent discriminatory practices that may impair women from enjoying their fundamental rights on equal basis with men.<sup>1</sup> Since this affirmation, the international community has renewed its commitments at addressing discrimination against women. This is reflected in the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>2</sup> and the Protocol to the African Charter on the Rights of Women (African Women’s Protocol).<sup>3</sup> More importantly, the recently adopted sustainable development goals (SDGs) aim at eliminating gender inequality and promoting women’s rights.<sup>4</sup> Despite these positive developments, discriminatory practices against women stubbornly persist in many parts of Africa, including Nigeria. Discriminatory practices against women are reinforced by patriarchy and gender stereotypes. This is often exacerbated by deep-rooted cultural practices that regard women as second class citizens and deprive them of their basic rights. One of such cultural practices in the Eastern part of Nigeria does not accord the female child the right to inherit from her deceased father. This age-long controversial practice, sometimes referred to as the primogeniture system, has become subject of litigation on different occasions before Nigerian courts. It has been contended that this practice is inconsistent with Nigeria’s

obligations under international law and section 42 of the 1999 Constitution to address discrimination in all ramifications.

The purpose of this article is to critically assess the approach of Nigerian courts to interpreting section 42 of the Constitution. This article argues that Nigerian courts are yet to develop a substantive equality approach to interpreting section 42 of the Constitution. Rather, the courts have tended to adopt the formal equality approach to interpreting section 42. Analysing some decisions of the Court of Appeal and the Supreme Court, the article argues that in order to safeguard women's rights and address gender inequality in the country, Nigerian courts should lean towards substantive equality approach to the interpretation of section 42 of the Constitution. This is not only consistent with Nigeria's obligations under international law but also crucial to addressing historical imbalances between men and women in the country.

### **Cultural practices and gender discrimination in Nigeria**

Cultural practices play an important role in the lives of many Nigerians. Some of these practices may have implications for the enjoyment of women's rights. Given the patriarchal nature of many Nigerian societies, some cultural practices tend to perpetuate inequality and undermine women's fundamental rights. Gender discrimination and stereotyping are fuelled by customary rules that construct boys and girls differently. For instance, while in many cultures in Nigeria, a child is cherished and viewed as a blessing from God, different importance is attached to male and female children. Among the Igbos, it is believed that children perpetuate a race or lineage, and in order to do so, children are expected to continue Igbo tradition and ways.<sup>5</sup> Therefore, a distinction is made between a male and a female child, particularly with regard to inheritance matters.

While a male child is entitled to the right of inheritance under Igbo customary law, a similar privilege is not extended to a female child. Such a discriminatory practice tends to diminish the value of a female child compared with her male counterpart. It can particularly become a stumbling block to the realization of sexual and reproductive health and rights of Nigerian women. The CEDAW Committee has noted in its General Recommendation 31 that states should take appropriate steps and measures with a view to addressing harmful practices that may be inimical to the overall well-being of women.<sup>6</sup>

Experience has shown that Nigerian society tends to privilege male sexuality over that of female sexuality. Thus, while boys are permitted to express their sexual desires, girls are expected to remain sexually passive. This is more or less due to the sociological construction of boys' and girls' roles in society. Due to this social construction, boys and girls are assigned different roles and responsibilities while growing up. Writing on the experiences of female students in Nigerian universities, Odejide (2007) has observed that female students are usually portrayed and treated as subordinates to their male counterparts. She notes further that this is due to traditional cultures and social familial factors, which often perceive women as fragile, dependent on male protection and in need of

surveillance and control of their behaviour. It is further revealed in Odejide's study that female students' sexual agency is limited as compared with their male counterparts by some cultural and traditional beliefs.

A study has revealed that while boys may be permitted to go out and experiment with their sexuality so as to 'discover things for themselves', the sexuality of girls is often viewed in terms of 'vulnerability, danger, and by implication inferiority' (Izugbara, 2008). Izugbara (2005: 606) has summed up the subordination of women's rights to that of men in the country as follows:

The most pervasive and deeply entrenched culture or tradition of Nigeria is the role of women in society. In many parts of Nigeria, daughters from childhood are socialized into stereotypical roles. They imbibe an entire view of culture and society, aspirations bound by motherhood and wifhood functions with dispositions moulded in accordance with masculine/feminine dichotomy. While culture socializes daughters to be soft, meek and subservient, it socializes sons to be hard, aggressive and domineering.

Cook and Cusack (2010) have explained that gender stereotypes relate to social and cultural construction of men and women as a result of differences in physical, biological, sexual and social functions. They further note that gender stereotypes are 'the conventions that underwrite the social practice of gender'. It should be noted that 'gender stereotype' is a broad term that refers to a 'structured act of beliefs about the personal attributes of men and women'. As discussed below, 'gender stereotypes' can lead to discriminatory practices and thereby undermine women's fundamental rights and freedoms.

It should be noted that the rights to equality and non-discrimination obligate states to refrain from adopting laws, policies or practices that lead to distinctions, exclusions or restrictions on the basis of gender stereotypes.

### **The principles of non-discrimination and equality under international law**

Non-discrimination and equality are two pillars of human rights recognized in virtually all human rights instruments. Although there is no universally acceptable definition of the term 'equality', it is generally accepted that equality is tantamount to non-discrimination. Therefore, an act of discrimination will lead to the violation of the right to equality (Shalev, 2000). Foremost human rights instruments contain provisions on non-discrimination and equality. For instance, Article 7 of the Universal Declaration on Human Rights provides that '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>7</sup>

A distinction is usually made between formal and substantive equality. The former implies that individuals are treated in the same manner regardless of their socio-economic situations. The notion of formal equality is often traced to Aristotle (1980) who interpreted equality as sameness of treatment among equals, or treating equals equally or likes alike according to merit and their just deserts. Implicit in this explanation is that injustice would not follow when differences were recognized, and the different were treated in an unlike manner. Aristotle's notion of equality would seem to endorse the practice of slavery and the patriarchal domination of a family headed by a male. Fredman (1996: 202) argues that formal equality is only interested in treating 'men and women alike, irrespective of whether they are treated equally badly or equally well'. According to Barnard and Hepple (2000), the formal approach to equality 'embodies a notion of procedural justice' that does not lead to a particular outcome. In essence, formal equality tends to turn a blind eye to existing structural differences in a society, which may predispose some groups to disadvantage. While formal equality aims at 'equalization of rights', in reality it tends to deepen inequality in society. Goonesekere (2011) has argued that "The idea that "like should be treated as like," legitimised differences in treatment based on ethnicity or sex. Since men and women were biologically different, and racial characteristics were different, different treatment was not deemed an infringement of equality'.

On the other hand, a substantive approach to equality tends to treat individuals equally, taking into cognizance their peculiar circumstances. It strives at creating a level playing ground for all irrespective of their socio-economic background, gender or race. Fredman (1999) puts it succinctly; substantive equality 'aims to equalize the starting point'. Generally, a substantive approach to equality is founded on the core value of accommodating people's differences with the aim of achieving equality of outcome. Substantive equality is said to aim at realizing equality of result and equality of opportunity. In essence, substantive equality is concerned with achieving an egalitarian society. Sometimes realizing equality may mean treating those different the same, and in some situations, it may mean treating those who are different differently. A good illustration of the notion of substantive equality is contained in the opinion of Judge Tinaka of the International Court of Justice in the *South West African* case, where he notes as follows<sup>8</sup>:

The principle of equality before the law does not mean ... absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal ... To treat unequal matters differently according to their inequality is not only permitted but required.

From a feminist point of view, Minow (1988, 53) opines that 'Equality requires same or different treatment, depending on the circumstances and the position of the individual in relation to his or her group-based systemic disadvantage'. Also, Cook and Howard (2007) have noted that given women's historical disadvantaged position, there is need for the

development of an anti-discrimination approach that must take into cognizance their lived experiences as well as aim towards restoring their dignity. These views would seem to coincide with the notion of substantive equality. Although not all discrimination amounts to violation of rights, an adverse discrimination, which occurs when a person is being treated unfairly, is unjustifiable at law. It has been noted that a substantive equality approach should aim at correcting structural and entrenched disadvantage in society and, at the same time, aspire to maximize human development (Albertyn and Goldblatt, 1998; Fredman and Goldblatt, 2015: 314). Albertyn and Fredman (2015: 430) have identified a four-dimensional framework for substantive equality. This includes addressing stigma, prejudice and violence; redressing socio-economic disadvantage; facilitating participation; and valuing and accommodating difference through structural change. It has been noted that committing to substantive equality requires the examination of the context of an alleged rights violation and its relationship to systemic forms of domination within a society (Albertyn and Goldblatt, 1998). Unlike formal equality, which does not recognize personal differences, substantive equality recognizes such personal differences and seeks to adopt a pragmatic approach to accommodate them.

Human rights instruments specifically relating to women have adopted the notion of substantive equality. For instance, CEDAW (1979: Article 1) defines discrimination against women broadly to include:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, 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.

States parties to the treaty are, therefore, enjoined to take steps and measures to eliminate discrimination against women within their territories. Its counterpart at the African regional level, the Protocol to the African Charter on the Rights of Women, requires states to remove practices that discriminate against women and urges states parties to take all appropriate steps to eliminate social and cultural patterns and practices that are discriminatory to women.<sup>9</sup> Reaffirming the provision of CEDAW, the Protocol defines discrimination against women widely to include:

[A]ny distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

More importantly, Article 5 of the Protocol enjoins African governments to take appropriate measures including creation of public awareness on harmful cultural practices, adoption of appropriate legislation to address such practices, provision of support to women

who are victims of harmful cultural practices and protection of women at risk of harmful cultural practices. The CEDAW Committee in its General Recommendation 25 explains that to achieve substantive equality, some remedial measures may be necessary to address the historical disadvantaged position of women.<sup>10</sup> It further requires states to adopt concrete measures to 'address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law and legal and societal structures and institutions'.<sup>11</sup>

From the foregoing, it is clear that both CEDAW and the African Women's Protocol aim at achieving substantive notion of equality. In addition to these women-specific human rights instruments, freedom from discrimination is recognized in other human rights instruments. For instance, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to equality before the law and freedom from discrimination. The Human Rights Committee, responsible for the monitoring of the implementation of the ICCPR, in its General Comment 28 has explained that 'Non-discrimination together with equality before the law and equal protection of the law without discrimination constitutes a basic and general principle relating to the protection of human rights'.<sup>12</sup> In *Nahlik v. Austria*, the Committee explains that Articles 2 and 26 of the ICCPR obligate a state to ensure that all individuals within its territory and subject to its jurisdiction are free from discriminatory practices, whether perpetrated in private or public sphere.<sup>13</sup>

Under the African Charter, Article 2 provides that everyone is equal before the law and that no one should be discriminated against on grounds such as gender, religion, political beliefs or other status. Article 3 similarly guarantees to every individual the right to equality and equal protection of the law. The African Commission on Human and Peoples' Rights in *Purohit and Moore v. The Gambia*<sup>14</sup> has noted as follows:

Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the rights provided under the African Charter.

This statement captures the broad understanding of the African Commission on the principles of equality and non-discrimination. It summarizes the importance of realizing the notion of substantive equality in any society.

### **The approach of Nigerian courts to section 42 of the Constitution**

The non-discrimination provision of the Nigerian Constitution of 1999 can be found in section 42. This section provides as follows:

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 of 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
  - 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.

From this provision, certain points need to be made. First, the prohibited grounds for discrimination under the section should not be construed as exhaustive. In other words, a purposive rather than a restrictive interpretation should be applied to this provision. Second, the section covers both legislative and administrative acts capable of leading to discrimination on the prohibited grounds. Third, unlike some constitutions in Africa,<sup>15</sup> this section is not qualified or made subservient to the application of customary law. It should be noted that section 1(3) provides that the Constitution is supreme and that any law that is inconsistent with it will be null and void according to its inconsistency. Fourth, the provision also prohibits discrimination on 'circumstances of birth' a phrase hardly found in other non-discrimination provision of other constitutions in Africa. This provision is aimed at specifically addressing discriminatory attitudes against children born out of wedlock. Fifth, the provision would seem to address both direct and indirect discrimination. This is commendable and important in relation to gender discrimination. Sixth, the language of the provision (use of the pronoun 'he') is gender biased. It has been criticized, and rightly so, for being gender insensitive. On a few occasions, Nigerian courts have had the opportunity to interpret this provision. While some of the decisions are commendable, others leave much to be desired as they either fail to clearly formulate a consistent approach to interpreting section 42 or adopt a substantive equality approach. In *Uzoukwu v. Ezeonu*,<sup>16</sup> the Nigerian Court of Appeal held, among other things, that to non-discrimination of the Constitution presupposes first that the discrimination complained against must have been based on law; second, it must flow from the act of government or its agencies; third, it does not apply to other Nigerians, and finally, that it can only be invoked if the conditions therein provided are the only reasons for discriminating against the individual.<sup>17</sup> Without doubt, this is a restrictive and formal equality approach to interpreting the provision of the Constitution. It will not in any way benefit vulnerable and marginalized groups that deserved to be protected under the Constitution. Limiting the acts of discrimination prohibited to only those of government or its agencies would seem to be insensitive to the needs of women who may experience discriminatory practices from family members. Indeed, most of the discriminatory practices against women flow from cultural practices perpetrated by private actors.

In the latter case of *Mojekwu v. Mojekwu*,<sup>18</sup> the Court of Appeal in condemning a cultural practice among the Igbo that denies rights of inheritance to a female child notes as follows:

.. . We hear of and read about customs which discriminate against the womenfolk in this country. They are regarded inferior to the men folk. Why should it be so? All human beings – male and female – are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and this is constitutional. Any form of societal discrimination on grounds of sex; apart from being unconstitutional, is an antithesis to a society built on the tenets of democracy, which we have freely chosen as a people.<sup>19</sup>

While this decision has been lauded as progressive and capable of advancing women's rights under the Nigerian Constitution, it fails to formulate the proper approach to adopt in determining a violation of the non-discrimination provision of the Constitution. Moreover, it is merely concerned at ensuring that both male and female children are treated in the same way under customary law but does not deal with the effects or consequences of differential treatment. In essence, the court adopts a formalistic approach to equality without clearly reflecting the lived experiences of women who are daily subjected to discriminatory practices. Beyond a 'sympathetic' approach to discrimination against women, what is required is a rigorous analysis of the non-discrimination provision of the constitution in a way that mitigates its negative impacts on women.

In *Ukeje v. Ukeje*,<sup>20</sup> the Supreme Court was called upon to determine a number of issues including the Igbo cultural practice that denies inheritance rights to female children. In that case one, Lazarus Ukeje had died intestate leaving a wife and four children. The respondent/plaintiff happened to be one of the female children of the deceased. She brought an action against the appellants/defendants-mother and son-who had obtained letters of administration over the deceased estate without the respondent's knowledge. The respondent/defendant had claimed that as one of the daughters of the deceased, she was entitled to sharing in the estate of her late father. Some of the issues before the Supreme Court were whether the respondent/defendant as the daughter of the deceased, though born outside wedlock, was entitled to sharing in the estate of her deceased father and whether letters of administration obtained by the appellant/plaintiffs were legal and valid. The trial court had denounced the Igbo customary law, which does not recognise a female child as entitled to share in the estate of her late father. This decision was upheld by the Court of Appeal. On further appeal to the Supreme Court, it was held that the Igbo customary law that denies inheritance rights to female children was inconsistent with section 42 of the Nigerian Constitution. In arriving at this decision, Justice Rhodes-Vivour JSC on behalf of the Court notes as follows:

No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking, in the sharing of her deceased father's estate is in

breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.<sup>21</sup>

Concurring with his learned brother Ogunbiyi JSC notes as follows:

The trial court, I hold, did rightly declare as unconstitutional, the law that dis-inherits children from their deceased father's estate. It follows therefore that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The reproduction of the section states thus:- '42(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth'.<sup>22</sup>

This position of the court is much more progressive than the earlier case of *Mojekwu v. Iwuchukwu*, where the Supreme Court failed to find that a similar cultural practice impugns the right to non-discrimination of women.<sup>23</sup> Indeed, the Supreme Court had berated the justices of the Court of Appeal for declaring the primogeniture practice a violation of women's rights to non-discrimination. By so holding, the Supreme Court missed a great opportunity to clarify the nature and scope of the non-discrimination provision of the Constitution. *Mojekwu* case presented the Supreme Court an opportunity to develop the non-discrimination jurisprudence of the Constitution. Sadly, however, the Supreme Court filtered away this opportunity. Commentators have been highly critical of the conservative and 'lacklustre' position of the Supreme Court in that case (Chinwuba, 2015; Durojaye, 2013).

While the Supreme Court in *Ukeje* found that the Igbo cultural practice, which denies female children rights of inheritance, constitutes a gross violation of the right to non-discrimination, the reasoning falls short of a convincing jurisprudence on equality under the Nigerian Constitution. Beyond declaring the cultural practice as being in violation of section 42 of the Constitution, the Court did not provide reasons for its decision. Some questions further need clarifications. For instance, given that the prohibited grounds of discrimination in section 42 are couched in a restrictive language, it will be important for the Supreme Court to clarify which acts are covered or not covered. If a member of a marginalized or vulnerable group approaches the court seeking for justice under section 42, what should be the starting point in determining whether unfair discrimination has occurred against such a person? When will an act or measure amount to unfair discrimination under the Constitution? What should be taken into consideration in determining whether there has been a violation of section 42 of the Constitution? This is even so given that Nigeria has ratified international and regional human rights instruments that subscribe to a substantive approach to equality. More importantly, what should be the place of Articles 2 and 3 of the African Charter, which has been domesticated in Nigeria? The approach of the Supreme Court would seem to lean more towards a formal equality approach rather than a

substantive equality approach. From the reasoning of the court, the important consideration is that both female and male children should have equal rights to inheritance and nothing more. This is a formalistic approach to equality-treating equals as equal. Rebouche (2009: 725) has noted that the essence of a substantive equality approach is to achieve equality of result and redistribute resources and power between men and women. The Court fails to appreciate the historical disadvantage of women often perpetuated by patriarchy in the country. As noted earlier, true justice cannot be achieved by adhering to formal equality. The Court could have engaged in a robust and nuanced analysis of the provision of section 42 vis-à-vis the Igbo cultural practice that denies rights of inheritance to a female child with a view to contextualizing its negative impact on women. An enquiry into how women have historically been denied property rights and ownership of land as a result of patriarchy and the consequent pauperization of women could have been more appealing (Albertyn and Goldblatt, 1998).

The failure of the Supreme Court to develop a non-discrimination test has created a gap in the jurisprudence of the country. Moreover, it is capable of leading to inconsistency in the approach of courts while interpreting section 42. For instance, a Federal High Court in *Odafe* case held that the denial of healthcare services to four prisoners living with HIV was not in violation of section 42 of the Constitution since health status is not one of the prohibited grounds for non-discrimination. This decision has been criticized for its narrow approach to interpreting section 42 of the Constitution (Durojaye, 2007). To avoid a similar occurrence, it is imperative that the Supreme Court develops a pragmatic guideline in interpreting the non-discrimination provision of section 42. Such an approach must be consistent with the notion of substantive equality. In particular, it must be assuring and serves as a beacon of hope to vulnerable and marginalized groups.

### **Lessons from other jurisdictions**

Following the inconsistent approach by Nigerian courts to the interpretation of the non-discrimination provision in section 42, some lessons can be learned from other jurisdictions where substantive equality approach has been applied to interpreting non-discrimination provision of the constitution. In this regard, one can draw lessons from the approaches of the courts in South Africa and Canada. The South African Constitutional Court in *Harsken and Lane*,<sup>24</sup> where the constitutionality of sections 21, 64 and 65 of Insolvency Act vis-à-vis section 8 of the Interim Constitution was the issue before the court, has elaborated on this issue. While interpreting the equality clause in section 8 of the Interim Constitution (similar to section 9 of the 1996 Constitution),<sup>25</sup> the Court made a distinction between discrimination and unfair discrimination. According to Goldstone J, discrimination is pejoratively referred to as an unequal treatment of people based on attributes and characteristics attaching to them. On the other hand, unfair discrimination is described as treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.<sup>26</sup> The Court further laid down the factors to consider in determining unfairness of discrimination in accordance with section 8 of the Interim Constitution (section 9 of the 1996 Constitution). These include the following:

1. The position of the victim in the society.
2. The purpose sought to be achieved by the discrimination.
3. The extent to which the rights and interest of the victims of discrimination has been affected.
4. Whether the discrimination has impaired the human dignity of the victim. The Court, quoting from its earlier decision in *Hugo* case<sup>27</sup>, said as follows:

The prohibition of unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups . . .

This statement is very important in that it underscores the relevance of respect for human dignity as the foundation of the prohibition of discrimination. More importantly, the statement is particularly relevant in the context of addressing gender inequality in the country. In *Hugo* case, the Constitutional Court was asked to consider the constitutionality of the president's pardon given to women prisoners who had children under the age of 12 as against their male counterparts. The High Court had ruled that the president's action amounted to discrimination against male prisoners who had children under 12. However, on appeal to the Constitutional Court, the majority of the Court reasoned that given the peculiar situation of women and the role they play in society, the president's action was not discriminatory. In justifying its position, the court noted as follows:

For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment . . . It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.<sup>28</sup>

This reasoning of the Constitutional Court is consistent with substantive equality approach, which is aimed at ensuring egalitarianism in society. This can only be achieved if special measures are taken to address the disadvantage of the past. The Court would seem to have put into perspective the peculiar challenges women encounter with to childbearing and rearing. In other words, the Court had taken into consideration the disadvantaged socio-economic position of women in society before arriving at its decision.

The test formulated by the Court in *Harken* case serves as the benchmark for determining unfair discrimination and when the equality provision of the Constitution has been violated. The Court had laid down a useful and unambiguous threshold which must guide any enquiry into the violation of the equality clause of the Constitution. It is consistent with substantive equality approach as it is not merely concerned with the 'form' but also takes into cognizance the historical experiences of disadvantaged and vulnerable persons. In essence, this test addresses both *de facto* and *de jure* discrimination. This approach by the Constitutional Court is commendable as it has provided certainty and consistency in the interpretation of the equality clause of the South African Constitution.

With specific reference to the impact of cultural practice on section 9 of the Constitution, the Constitutional Court has had the opportunity to address this in *Bhe & Others v. Magistrate Khayelitsha*.<sup>29</sup> In that case, the Constitutional Court in condemning a customary practice that denies inheritance rights to the girl child notes as follows:

The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family . . . The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property.

The South African jurisprudence on equality has substantially been influenced by decisions from Canadian courts. For instance, the Canadian Supreme Court has enumerated in *Law v. Canada (Minister of Employment and Immigration)*<sup>30</sup>, known as the Law Test), crucial factors that must be considered before establishing unfair discrimination under section 15 of the Canadian Constitution. First, the position of the complainant in the society (i.e., whether or not the complainant has been a disadvantaged person in the society) will need to be considered. Second, the purpose of the differentiation must be explored, that is, did the law aim to achieve a vital societal goal in favour of one who is vulnerable or had been disadvantaged? Third, the impact of the differentiation on the rights of the complainant must be ascertained, that is, does the law impact adversely on his/her fundamental human dignity? The Court further emphasized in that case that the paramount consideration in determining the violation of the equality clause of the Constitution is the protection of the dignity of the complainant. This approach of the Canadian Supreme Court is aimed at ensuring substantive equality and can be beneficial to Nigerian courts. The approach can be applied to affirm the right to equality of women, especially in relation to customary practices that denies right of inheritance to women and girls. Given that sociocultural factors often perpetuate low status of women in Nigeria, a proper interpretation of section 42 should seek to protect women from such discriminatory practices.

Furthermore, in *Eldridge v. British Columbia (Attorney-General)*,<sup>31</sup> the Canadian Supreme Court has demonstrated the importance of substantive equality in access to healthcare services for vulnerable groups. In that case, some of the issues before the Court were premised on whether sections 3, 5 and 9 of the *Hospital Insurance Act* and the Regulations infringed section 15(1) of the Canadian Charter of Rights by failing to require hospitals to provide medical interpreter services for the deaf, and if the answer was in the affirmative, whether the impugned provisions were saved under section 1 of the Charter. The court held that failure to provide facility for sign language interpretation that would assist hearing-impaired patients to communicate with health service providers in the same way as unimpaired patients constitutes discrimination in violation of the Canadian Charter on Rights and Freedoms. According to the Court, the adverse effects of discrimination are relevant in the context of people with disabilities. The Court further explained that:

In the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone. Once it is accepted that effective communication is an indispensable component of the delivery of a medical service, it is much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.<sup>32</sup>

The Court summarized its position by noting that 'the principle that discrimination can accrue from failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in human rights field'.<sup>33</sup>

This decision is relevant in ensuring equality for all and in particular for marginalized groups such as women and people with disabilities in realizing their rights. Moreover, it demonstrates that, where necessary, special attention may be to be given to the situation of women and girls in society. This is because socio-cultural practices within Nigerian society tend to repress the sexual autonomy of women and treat them as inferior to men. The decision also confirms the fact that courts have an important role to play in holding governments accountable for failing to realize equality of result for vulnerable and marginalized members of society.

The positions of South African and Canadian courts with regard to equality jurisprudence discussed above can be of help in interpreting section 42 of the Nigerian Constitution. Nigerian courts can draw inspiration from the decisions of the Canadian courts by ensuring that an analysis of section 42 of the Constitution takes into cognizance the patriarchal nature of the Nigerian society and the disadvantaged position

of women. More importantly, the interpretation can be adopted to guarantee social justice for women who continue to experience discrimination in all facets of life.

### **Conclusion**

This article has shown that Nigerian courts are yet to embrace the substantive equality approach in interpreting the non-discrimination provision of the Constitution. Although progress has been made in addressing discriminatory practices against women in recent times, the approach of the courts leaves much to be desired. Adopting a substantive equality approach to interpreting section 42 of the Nigerian Constitution is important in the sense that it can go a long way in protecting the rights of vulnerable and marginalized groups. More importantly, it can provide a bulwark to gender-based discrimination often perpetuated against women as a result of cultural practices. The courts are often regarded as the last hope of disadvantaged and vulnerable groups in society. Therefore, for Nigerian courts to truly live up to this role, a substantive equality approach to interpreting section 42 of the Constitution is imperative. In this regard, courts in Nigeria can draw inspirations from South Africa and Canada where the courts have been more progressive in adopting a substantive equality approach to interpreting non-discrimination provisions of their constitutions.

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## Notes

1. Fourth World Conference on Women Beijing held on 15 September 1995 A/CONF.177/20.
2. Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/180 UN GAOR 34th Session Supp No. 46 UN Doc A/34/46 1980.
3. Adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003).
4. See goal 5 of the Sustainable Development Goals adopted by the UN General Assembly contained in paragraph 54 United Nations Resolution A/RES/70/1 25 September 2015.
5. Ibid.
6. UN Committee on Elimination of All Forms of Discrimination against Women (CEDAW) Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women on harmful practices CEDAW/C/GC/31.
7. Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (10 December 1948).
8. ICJ Rep, 1964 p. 4.
9. See Article 2 of the Protocol to the African Charter on the Rights of Women Adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003), which drew its inspiration from Article 2 of CEDAW.
10. CEDAW General Recommendation 25 (Article 4, paragraph 1: Temporary Special Measures)
11. adopted at the 13th Session 2004.
12. 11. Ibid., para 7.
13. 12. Human Rights Committee General Comment 28 on the Non-Discrimination clauses of the ICCPR (adopted on 9 November 1989, para 12).
14. 13. (1997) 4 IHRR 279, IHRL 2198 (UNHRC 1996), 22nd July 1996.
15. *Purohit and Another v. The Gambia* (2003) AHRLR 96 (ACHPR 2003). Communication 241/ 2001.
16. See, for instance, Constitution of Swaziland.
17. *Uzoukwu v. Ezeonu* (1991) 6 NWLR (pt. 200) 708. 17. Ibid., 777–780.
18. *Mojekwu v. Mojekwu* (1997) 7 NWLR (part 512) 283 (CA). 19. Ibid., 304–305.
19. (2014) LPELR-22724(SC).
20. See pages 32–33 para E-G.
21. See page 37 paras A-E.
22. (2004) NWLR (pt. 883) 196 2.
23. *Harksen v. Lane NO and others* 1999(1) SA 300(CC).
24. The section provides thus:
  - Everyone is equal before the law and has the right to equal protection and benefit of the law.
  - Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
  - No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
  - Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
26. Ibid., para 322.
  27. *President of Republic of South Africa and others v. Hugo* 1997 (3) SA 1012. 28.
  28. Para 727–728.
  29. [2005 (1) BCLR 1 (CC)].
  30. *Law v. Canada (Minister of Employment and Immigration)* (1999) 1 SCR 497; 170 DLR (4th) 1 para 39.
  31. (1977) 151 DLR (4th) 577.
  32. Ibid., 7.
  33. Ibid., 8.

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