

**THE NIGERIAN CHILD’S RIGHTS ACT
AND RIGHTS OF CHILDREN WITH DISABILITIES:
WHAT HOPE FOR ENFORCEMENT?**

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ABSTRACT: *The Nigerian Child’s Rights Act 2003 guarantees the provision of ‘special protection measures’ or special needs of disabled children to enhance their enjoyment of rights contained in the Act. However, the Act makes the provision of such special needs or facilities subject to the availability of resources on the part of government or the person who has the duty to provide them. This paper analysed the implication of the ‘subject to available resources’ clause in the Act on the enjoyment of the rights of children with disabilities in Nigeria. It argued that although, the clause renders the rights of disabled children under the Act non-justiciable, the combined effect of other legislations and constitutional provisions guarantees at least the right of the disabled child to provision of special educational needs in a manner that may be enforceable in the court of law. The paper however, recommended an amendment of the Act to remove the offensive clause and the enactment of other legislations to guarantee specifically the provision of special needs for disabled children in various aspects of social, economic and political life.*

KEYWORDS: *Disabled children; child rights Act; available resources clause; non-justiciable; enforcement*

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1. INTRODUCTION

The Nigerian Child’s Rights Act 2003¹ has made elaborate provisions for the rights of children in Nigeria. It is not only the first comprehensive legislation on the rights of children (Igwenyi, 2005), but also a very ambitious legislation as far as the rights of disabled children is concerned in Nigeria.

This paper appraises the provisions of the Act on the rights of disabled children, particularly the implication of the ‘subject to available resources’ clause in the Act on the implementation and enjoyment of the rights. It assesses the relationship between the Act and the international² and regional³ instruments on children’s rights in respect of similar

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¹ Cap C50 Laws of the Federation of Nigeria, 2010 [hereinafter ‘CRA’].

² See the UN Convention on the Rights of Children, G.A. Res. 44/25, Treaty Series, vol. 1577 at 3, (Nov. 20, 1989) [hereinafter ‘CRC’]

provision and seeks to understand the rationale for its inclusion. The paper also analyses the relationship between the drawback clause and the non-justiciable social and economic rights contained in the Nigerian constitution with the view to determining the justiciability of the rights of disabled children under the Act. In all, the paper discusses the question of implementation and enforcement of the rights of disabled children under the Child's Rights Act.

2. NATURE OF RIGHTS OF DISABLED CHILDREN UNDER THE AFRICAN CHARTER, UN CONVENTION AND THE NIGERIAN ACT

It is a fact of common knowledge that children⁴ are usually incapable of managing their own affairs and protecting their rights without the help of adults (Beiter, 2005). This is why children are regarded as belonging to the vulnerable group (AjaNwachuku, 2017) (Bekink & Bekink, 2005). Thus, the various legal instruments at the global,⁵ regional⁶ and domestic levels attempt to protect children against unscrupulous adults and the society at large (Akinbola, 2010). These instruments particularly protects disabled children because of their special needs.⁷ The African Charter for instance, provides that:

*every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's...fortune... or other status.*⁸

Although, this omnibus provision did not specifically mention 'disability', however, the word 'fortune' is interpreted as meaning that the rights provided in the Charter are enjoyable by all classes of children without discrimination based on race, circumstances of birth, economic status or physical or mental ability (Deuter & Holloway, 2015). In fact, other provisions in the Charter particularly address the rights of disabled children, such as Article 11(1), (3)(e), which grants disabled children the right to equal access to education, every child shall have the right to education...and States Parties to the present Charter shall take appropriate measures with a view to achieving the full realization of this right and shall in particular...take special measures in respect of...disadvantaged children to ensure equal access to education for all section of the community.⁹

³ See the African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 (1990) [hereinafter 'ACRWC'].

⁴ These are persons who are not up to the biological age of eighteen, as stated in Article 2 of ACRWC; Article 1 of CRC and section 277 of the Act.

⁵ See CRC, *Op. cit.*, note 3, (Came into force on the 2nd day of September 1990).

⁶ See ACRWC, *Op. cit.*, note 4, (Came into force on the 29th day of November, 1999).

⁷ As could be gleaned from Article 13(1) and (3) of ACRWC and Article 23(1) of CRC, a child is disabled if he or she is mentally or physically impaired. Instances of mental disability include brain disability (which may be because of degeneration of the brain after birth or caused by emotional dysfunction and behavioural disturbance), cognitive or learning disabilities, and speech disorders; while instances of physical disability include mobility impairment, vision disability, or hearing disability. More reading on this could be made from (Okereke, 2011).

⁸ Article 3, ACRWC, *Op. cit.*, note 4.

⁹ The word 'disadvantaged' was employed. This word contemplates 'the disabled'. After all, 'disadvantage' means 'something that causes problems and tends to stop somebody from succeeding or making progress': Deuter and Holloway, *ibid*, p. 432. A person who is disabled is by that fact, disadvantaged from 'succeeding or making progress'.

The Charter devoted Article 13 to disabled children, which it classifies as ‘handicapped children’. According to the provision, every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.¹⁰

This laudable provision was amplified in the two subsequent paragraphs of Article 13 but unfortunately, it was made ‘subject to available resources’. The two paragraphs stipulate as follows:-States Parties to the present Charter shall ensure, *subject to available resources*, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child’s condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the possible social integration, individual development and his cultural and moral development.¹¹

The States Parties to the present Charter shall use their *available resources*, with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway, buildings and other places to which the disabled may legitimately want to have access.¹²

Similar provisions are made in the UN Convention. However, the Convention did not employ the word ‘fortune’ to address the different categories of child disabilities. Instead, it made use of the appropriate word in providing the rights of disabled children, the States Parties to the present Convention shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child’s...*disability*, birth or other status.¹³

Article 23(1) of the Convention made specific provisions for the rights of disabled children, States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.¹⁴

Just like the African Charter, the Convention also contains the drawback clause, which invites the discretion of the state to determine if it has the resources to provide the very rights that the convention purports to grant disabled children. This is provided in Article 23(2) of the Convention:

States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, *subject to available resources*, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.¹⁵

Also in paragraph (3) of the provision, the Convention urged the state to extend assistance to disabled children free of charge ‘*whenever possible*’.¹⁶ These two clauses allow the state to exercise the discretion whether or not it has resources to provide facilities

¹⁰ Article 13(1), ACRWC, *Op. cit.*, note 4.

¹¹ Article 13(2), *ibid.*

¹² Article 13(3), *ibid.* Underlining mine, for emphasis. See generally, (Boezaart, 2011).

¹³ See Article 2(1), CRC, *Op. cit.*, note 3.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, Article 23(2).

¹⁶ *Ibid.*, Article 23(3).

to address the special needs of disabled children highlighted in the Convention. In other words, these provisions of the Convention and indeed, the African Charter are non-justiciable, in the sense that they cannot be enforced against the state.¹⁷

Nigeria being a member state of both the United Nations and the African Union is expected not only to ratify the above treaties, but also to domesticate their provisions so that the rights could be directly enforceable in the municipal courts. Although, Nigeria eventually signed and ratified the two instruments,¹⁸ it did not domesticate their provisions as provided in the Constitution of the Federal Republic of Nigeria¹⁹ because of dissatisfaction with the depth and scope of the rights contained in the two treaties (AjaNwachuku, 2017). Rather, Nigeria chose to enact its own law on child's rights in Nigeria albeit, borrowing heavily from the two treaties. This led to the enactment of the Nigerian Child's Rights Act, 2003.²⁰ Section 16(1) of the Act provides the omnibus clause, almost similar to the Charter and Convention above: Every child who is in need of *special protection measures* has the right to such measure of protection as is appropriate to his physical, social, economic, emotional and mental needs and under conditions, which ensure his dignity, promote his self-reliance and active participation in the affairs of the community.

Although this provision did not incorporate verbatim the content of Articles 11(3) and 13(1) of Charter and Article 23(1) of Convention, it captured the substance of these provisions. While the Charter and the Convention referred to 'handicapped' or 'disadvantaged' and 'disabled' children respectively, the Act failed to expressly qualify the category of child who should enjoy the rights mentioned in the section.²¹ However, there is a reasonable presumption that a child in need of special protection measures must definitely be impaired, disadvantaged, disabled or handicapped.²² In fact, the terms 'disability', 'impairment' and 'handicap' are used interchangeably to describe individuals with 'special needs', although, disadvantaged persons may also have special needs.²³ Notwithstanding, these terms are not always synonymous; impairment is described as

¹⁷ See Messele, R., 2002, 'Enforcement of Human Rights in Ethiopia', Action Professionals Association for the People, p.31, available at: <http://world.moleg.go.kr/fl/download/20194/4146KPWDD9UO03QHR63V> (accessed 19 August, 2017). See also (Raub, et al., 2016).

¹⁸ Nigeria signed the African Charter on 13th of July, 2001 and signed the UN Convention on 23rd day of July, 2001.

¹⁹ Section 12 of the Constitution of the Federal Republic of Nigeria provides that all international obligations of Nigeria (of which the Charter and the Convention are part of) must be enacted by an Act of the National Assembly, for the instruments containing the obligations to form part of her laws and be enforceable in Nigeria.

²⁰ The Act effectively made provision to accommodate the peculiarities of Nigeria. For examples, it provided for the right of the child not to be bought or sold (section 30(1)); not to be used for begging of alms (section 30(2)(4)); not to be used for guiding beggars (section (2)(a)); not to be used for hawking of goods and services (section 30(2)(c)). It also conferred on the child, the right not to be betrothed and the right not to be involved in marriage (sections 21 – 23).

²¹ See Boezaart, *Op. cit.*, note 17, p.278 (fn.104), (noting that the Nigerian Child's Rights Act did not directly address the rights of disabled children and that it only referred to children with special needs).

²² The expression 'special protection measures' contemplates the mentally or physically disabled child, because according to section 277 of the Act, child in need of special protection measures includes a child who is mentally or physically disabled and a street child. See also Raub, *et al*, *Op. cit.*, note 22, pp.212-213.

²³ See (Asiwe & Omiegbe, 2014). (noting that although, children of nomadic, pastoral, migrant fishers or farmers and hunters may not be impaired or disabled but due to their lifestyles and means of livelihood are unable to have access to the conventional facilities, services and education provisions, thus requiring special provisions to meet their special needs).

“physical disorder, abnormality, malformation or dysfunction, damage, defect, imperfection, deviation and any other shortcoming of the various structures affecting the organs of the body” (Ozoji, 1993). Disability on the other hand, is “the loss or limitation of the ability to take part in the normal life of the community in an equal level with others due to physical and social barriers” (Okeke, 2002). Disability may lead to handicap when it “interferes with the normal functioning of an individual due to barriers, difficulties, or problems that place limitations on the individual’s capabilities expected of him in the society” (Olabiyi, 2009).

Section 16(2) of Act further amplified the rights of disabled children as follows:

Every person, authority, body or institution that has the care or the responsibility for ensuring the care of a child in need of special protection measures shall endeavour, *within the available resources*, to provide the child with such assistance and facilities which are necessary for his education, training, preparation for employment, rehabilitation, and recreational opportunities in a manner conducive to his achieving the fullest possible social integration and individual development and his cultural and moral development.

This provision like the Charter and Convention limits the enjoyment of the rights of disabled children to the availability of resources and allows the discretion of the person or authority whose duties it is to provide the special needs of disabled children to decide if it is possible within the available resources to do so. This, to the writers, is a significant drawback to the enjoyment of the rights of disabled children contained in the Act, especially against the backdrop of the lack of political will and inadequate infrastructure for the provision of child rights in Nigeria.

‘Special protection measures’ or ‘special needs’ in the context of rights of disabled children has to do with provision of facilities, which enhance integration of disabled children in the society if their specific needs and requirements are not met by the mainstream infrastructure and services in the different areas of life. This include education, access to public places, transport, recreation, sports and health services.²⁴ In the case of education, the Nigerian Education (Minimum Standards and Establishment of Institutions) Act²⁵ recognises the education of children with disabilities as special education, which it guarantees by the provision of special services and infrastructure.²⁶

3. IMPLICATION OF THE ‘SUBJECT TO AVAILABLE RESOURCES’ CLAUSE IN ENJOYMENT OF RIGHTS OF DISABLED CHILDREN IN NIGERIA

There is no doubt that the inclusion of the rights of disabled children in the Nigerian Child’s Rights Act is a commendable feat. As noted earlier, the status of disabled children make them even more vulnerable to the niceties of life and thus, they have special needs in addition to the usual rights accorded to children under the Act. The nature of these special needs require an active participation of the person or authority who has the burden or duty to provide them. Notwithstanding, the drawback clause subjecting the provision of the special needs of disabled children to the availability of resources stands as a major

²⁴ See UNICEF, 2007, *Promoting the Rights of Children with Disabilities*, Innocenti Digest, No. 13, pp.5 & 17; (Combrinck, 2008). See also Boezaart, ‘The Children’s Act’, *Op. cit.*, note 17, p.266.

²⁵ Cap. E3, Laws of the Federation of Nigeria (LFN) 2010.

²⁶ See section 25, *ibid.* See also the Nigerian *National Policy on Education* 2004, paras. 96 & 97.

clog to the full enjoyment of the provisions of the Act. Indeed, we argue that the inclusion of this clause in the Act is tantamount to taking back with the left hand what the right hand has given, and that although, the provision seems to render the duty of government to provide the facilities and services (special needs) of disabled children non-justiciable, a purposive construction of Nigerian laws implies otherwise.

First, it is important to note that the Nigerian Constitution does not contain affirmative or justiciable rights of children, not to talk of disabled children although, this may be implied with respect to prohibition of discrimination against disabled persons including children in section 42(2) of the Constitution.²⁷ Thus, it would seem that the inclusion of the “subject to available resources” clause in the Child’s Rights Act was deliberate to render the rights of disabled children to the provision of special facilities and services (special needs) non-justiciable as already contained in Chapter II of the Constitution.²⁸

Note that although, the provision of ‘special protection measures’ in section 16(1) of the Act borders on non-justiciable social and economic rights to the extent that they are made subject to the availability of resources, however, where these rights are subsequently granted in different legislations, they become not only justiciable but compulsory on the part of government to provide.²⁹ A good example is section 15(1) of the Child’s Rights Act, which provides for the right of free, compulsory and universal basic education for children notwithstanding that the right to education generally, is non-justiciable under the Constitution.³⁰ This means that the government not only has the duty to provide compulsory basic education for children, but especially for disabled children, the government has the compulsory duty to provide the ‘special needs’ to enable them acquire the basic education provided in the Act. Failure of government to provide special needs of disabled children in the area of basic education would amount to discrimination against them on the basis of the circumstances of their birth, which is contrary to section 42(2) of the Constitution (Basser & Jones, 2002).³¹ In this sense, we argue that the ‘subject to available resources’ clause in the Child’s Rights Act becomes non-applicable as far as the provision of special educational needs of disabled children is concerned and that this renders the provision of such ‘special needs’ compulsory and justiciable in the court of law (Akinbola, 2010).

²⁷ Section 42(2) of the 1999 Nigerian Constitution (as amended) reads, “No citizen of Nigeria shall be subjected to any disability or deprivation merely by *reason of the circumstances of his birth*”.

²⁸ See sections 16(2)(d) and 18(3) of the Constitution, which are non-justiciable social and economic rights by virtue of section 6(6)(c) of the 1999 Constitution of Nigeria. See the case of *Uzoukwu v. Ezeonu II*, (1991) 6 NWLR [Pt. 200] 708, at 761-762.

²⁹ See the judgment of the Economic Community of West African States (ECOWAS) Court in *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit ECW/CCJ/ App/0808) delivered on 27 October 2009 (where the court held that section 6(6)(c) of the Nigerian constitution, which renders Chapter II of the constitution non-justiciable is not sacrosanct if a separate legislation guarantees the right contained in the Chapter). See also *Adebiyi Olafisoye v. Federal Republic of Nigeria*, (2004) 4 NWLR [Pt. 864] 580 at 659.

³⁰ See the combined effect of section 18 and section 6(6)(c) of the Constitution of Nigeria 1999. But see also section 2(1) of the Nigerian Universal Basic Education Act 2004, which grants the right of basic education to children.

³¹ See also the Australian cases of *Welsh v. Commissioner, Soil Conservation Service of NSW* (1991) EOC 92-330; *L v. Minister for Education* (1996) EOC 92-787.

Perhaps, it was in the realisation of this onerous duty that the Nigerian government formulated the National Policy on Education in 2004.³² Government is obligated under the policy to provide all necessary facilities to ensure easy access to education for children with disabilities; provide inclusive education and integrate special units into public schools; provide special education equipment and materials; and ensure that architectural design of school buildings remove barrier to free access for handicapped children.³³ Unfortunately, despite this commitment, there is still a huge gap between the policy commitment and the actual provision of the required facilities and services to disabled children in the area of education in Nigeria.³⁴ Inadequate funding of the educational sector and lack of political will appears to be the major problem for the inability of government to discharge its obligation in this respect (Adebisi, 2014). However, we argue that even though, government has fallen short of its obligation in the area of providing special educational needs of disabled children in Nigeria, at least government cannot rely on the 'subject to available resources' clause in the Child's Rights Act to refuse its obligations. In fact, it is opened for disabled children in Nigeria to sue the government and enforce their right to education by insisting that government provide the facilities and services necessary for them to enjoy their right to education.³⁵

Conversely, disabled children may not be able to exercise the same liberty to enforce their right to the provision of 'special protection measures' or special needs in other areas in which separate legislations have not been enacted to guarantee the right to those facilities and services. For example, disabled children need special facilities to enable them have access to public buildings, public transportation, health care and sports. However, the obligation of government to provide these special needs and facilities is subject to the 'availability of resource' as provided in section 16(2) of the Child's Rights Act. Therefore, government is not under an enforceable duty to provide them, as the right is non-enforceable. This means that barring an amendment of the Act, such facilities and services may never be provided to disabled children in Nigeria. The alternative is for an enactment of a generic legislation for the rights of disabled persons in Nigeria to provide specifically for these rights without the drawback clause.

Although, it is still debatable whether such a legislation exists in view of the 1993 Nigerians with Disability Decree under the Military Government,³⁶ a similar bill is however, pending before the National Assembly (legislature) to enact an Act for Persons with Disabilities in Nigeria.³⁷ The bill contains several provisions that guarantee the rights

³² See also section 25 of the Education (Minimum Standards and Establishment of Institutions) Act, *Op. cit.*, note 34.

³³ See paras. 96 and 97 of the National Policy on Education, 2004.

³⁴ See Final Report of the Special Rapporteur of the Commission for Social Development Monitoring the implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Geneva: United Nations, 2003) A/52/56 annex.

³⁵ See the US case of *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* 334 F. Supp. 1259 (1971). See also (Boezaart, 2012), 'A Constitutional Perspective on the Rights of Children with Disabilities in an Educational Context', 27 *South African Journal of Public Law (SAPL)*, p.460.

³⁶ See Akhiero, P.A., 2011, 'Mainstreaming Persons with Disabilities in the Vision 20:20 Agenda – A Call for the Enforcement of their Social, Economic and Political Rights', Paper presented at the 1st NAPVID "Rights Above Charity" Lecture to Mark the International Day for People with Disabilities, held at Benin-city, 2nd December, pp.7-8. See also (Umeh & Adeola, 2013).

³⁷ See Discrimination against Persons with Disabilities (Prohibition) Bill 2011, National Assembly Journal, vol.8, no.48, February 13th 2012, pp.C.3559-3580.

of persons with disabilities including children, such as the right of access to public premises,³⁸ right of access to transportation,³⁹ right to first consideration on queues and emergencies,⁴⁰ right to free health care⁴¹ and liberty not to be used as beggars.⁴² Unfortunately, until this bill becomes law in Nigeria, children with disabilities may not be able to enjoy or enforce the rights contained in it against the government. However, the situation may be different depending on the particular jurisdiction in Nigeria. This is because some federating states in Nigeria have already enacted their own separate laws conferring some of the above rights to persons with disabilities within their jurisdiction.⁴³ The most notable examples are the Lagos State Special People's Law 2011,⁴⁴ and the Plateau State Handicapped Law 1981.⁴⁵

4. RECOMMENDATIONS AND CONCLUSION

Having discussed the import of the 'subject to available resources' clause on the full enjoyment of the rights of disabled children to the provision of special needs in Nigeria, it is pertinent to conclude by making appropriate recommendations on the way forward to overcome the impasse. The first reasonable action is to liberalise the provisions of the Child's Rights Act by amending the Act to remove the discretionary clause to make it compulsory for government to provide the special facilities and services needed for disabled children to enjoy the rights contained in the Act. However, even if the obnoxious clause is removed, disabled children may still not be able to command the provision of facilities and services in all aspects of their peculiar needs unless these are specifically guaranteed a separate legislation. Thus, we recommend the speedy enactment of the Discrimination against Persons with Disabilities (Prohibition) Bill currently pending before the National Assembly. Unless this Bill is enacted, disabled children may only be able to enforce their right to special educational facilities, which as we have argued above, accrues to them by virtue of section 15 and section 2 of the Child's Rights Act and Universal Basic Education Act respectively.

On the aspect of failure of government to provide the special needs of disabled children in the area of education despite the right of free and compulsory education in Nigeria, we recommend that non-governmental organisations championing the rights of disabled persons in Nigeria bring the issue to court for determination, in order to enforce the right against government. We have already argued in the paper that the right to education is justiciable and indeed, that disabled children have the additional right to demand the provision of special facilities to operationalize the right in their favour. Lastly,

³⁸ Part III of the Bill comprising sections 3-8, *ibid*.

³⁹ Parts IV, V and VI of the Bill, sections 9-16, *ibid*.

⁴⁰ Part VII, sections 17 and 18, *ibid*.

⁴¹ Section 26, *ibid*.

⁴² Part VII, section 19, *ibid*.

⁴³ Nigeria operates a federal system in which executive, legislative and judicial powers are divided between the federating states and the federal government. Many issues including social welfare, transportation, health, education etc are on the concurrent legislative list where both the federal government and the federating states have power to legislate. See the Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended).

⁴⁴ See sections 23(1) and 24(3) of the Law.

⁴⁵ See Akhiehiero, *Op. cit.*, note 47, p.8

we recommend that the 1999 constitution of Nigeria be amended to incorporate the right of disabled persons including children, which must be made justiciable.

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