

# CHAPTER 5

## THE VOICELESS WOMAN: PROTECTING THE INTERSECTIONAL IDENTITY UNDER SECTION 42 OF NIGERIA'S CONSTITUTION

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### Summary

*This paper asks: Is intersectional discrimination experienced by women with disabilities or 'disabled' women recognised under section 42 of the 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution as amended)? This question is essential for two reasons. First, by asking this question, attention is drawn to the unacknowledged intersectional discrimination experienced daily by 'disabled women'. Academic writings and research on disability issues have gained momentum in Nigeria. Nevertheless, most research has paid little attention to the plight and the intersectional discrimination encountered by the 'disabled Nigerian woman'. Consequently, the question is whether the human rights of 'disabled' women are adequately protected in Nigeria, where there is a lack of acknowledgement of this kind of discrimination. Second, I explore the prohibited grounds for discrimination encapsulated in section 42 of the Nigerian Constitution. I argue that the listed or related 'grounds' perspective adopted by this anti-discrimination section is limited because it fails to accommodate the multiple and intersecting forms of oppression that 'disabled' Nigerian women encounter. More importantly, I discuss the decision of *Uzoukwu v Ezeonu* to demonstrate a possible threefold analysis and implications of a narrow and restrictive interpretation of the section for disabled Nigerian women.*

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# 1 Introduction

This paper interrogates how section 42 of the 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution as amended) addresses intersectional encounters of 'disabled'<sup>1</sup> women or women with disabilities. This interrogation is vital for two reasons. First, I draw attention to the voicelessness of women with disabilities because of the unacknowledged intersectional discrimination they experience in the country. Second, I explore how section 42 of the Nigerian Constitution, as amended, has approached intersectional discrimination by analysing the prohibited grounds for discrimination encapsulated in the section. More importantly, I discuss the decision of *Uzoukwu v Ezeonu*<sup>2</sup> to demonstrate three possible implications of a narrow and restrictive interpretation of the anti-discrimination section for disabled Nigerian women. This analysis underscores how discrimination based on a recognised ground or characteristic is limited in capturing the intersectional discrimination<sup>3</sup> encountered by disabled Nigerian women.

In terms of structure, this paper has six sections. Section one is the introduction. Section two attempts to answer the question: who qualifies as a woman with disabilities or a 'disabled' Nigerian woman? Section three defines intersectional discrimination, particularly concerning 'disabled' Nigerian women. This definition lays a good background for section four. Section four offers a brief analysis of the prohibited characteristics and grounds for discrimination encapsulated in section 42 and the implications of using a perspective that focuses on individual characteristics and grounds in protecting 'disabled' Nigerian women. This analysis exposes the limits of section 42 of Nigeria's Constitution as amended and its approach to 'disabled' women's intersectional discrimination experience.

Section five discusses how two international human rights treaties approach intersectional discrimination. This discussion focuses on the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) and the African Charter on Human and Peoples' Rights (African Charter) for two reasons. First, the CRPD adopted in 2006 is the first legal and human rights treaty applicable to persons with

1 I use the term 'disabled women' and 'women with disabilities' interchangeably in this article. I use the term 'disabled' women to demonstrate and reveal a potential intersectional insight and meaning to disability where a woman in Nigeria is not necessarily 'disabled' solely by her body or society as the term 'women with disabilities' seems to suggest. See A Johnson 'Hush woman! The complex "disabled" woman in Nigeria's legal and human rights framework: A deconstruction' (2020) 8 *African Disability Rights Yearbook* 4.

2 *Uzoukwu v Ezeonu* [1991] 6 NWLR (pt 200) 708.

3 The argument that a *grounds' approach* is limited in capturing intersectional discrimination is not necessarily a new one. However, what is arguably new is the focus on how section 42 of the Nigerian Constitution tackles the intersectional discrimination experienced by the disabled Nigerian woman.

disabilities globally.<sup>4</sup> Second, the African Charter is a regional human rights treaty adopted in 1981 and forms part of Nigeria's local law.<sup>5</sup> Section six offers conclusive arguments.

### 1.1 Providing context: Intersectional discrimination against women with disabilities in Nigeria

A woman with disabilities is subjected to discrimination at a greater severity in Nigeria.<sup>6</sup> The discrimination encountered by women with disabilities can be linked to deeply rooted sexist, social, cultural and religious beliefs, stereotypes and misconceptions about womanhood and disability prevalent in Nigeria and most African countries.<sup>7</sup> Referring to African countries generally, Grobbelaar-du Plessis confirms how the discrimination and violence that women with disabilities experience links to patriarchal tendencies that discriminate against them.<sup>8</sup> Popular negative stereotypes usually associated with women with disabilities, namely 'sick, helpless, childlike, dependent, in need of care and incompetent', increase this discrimination.<sup>9</sup> These negative stereotypes bear a striking resemblance to the traditional ones usually associated with women without disabilities as 'dependent, passive and needy'.<sup>10</sup> False beliefs, assumptions and misconceptions also reinforce the negative stereotypes ascribed to women with disabilities in Africa. One common misconception is the idea that women with disabilities are either asexual<sup>11</sup> or hypersexual.<sup>12</sup>

With these misconceptions, women with disabilities in most African countries are considered unsuitable for marriage and motherhood.<sup>13</sup> Yet,

4 UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution/adopted by the General Assembly (24 January 2007) UN Doc A/RES/61/106 (2007), adopted by the UN General Assembly on 13 December 2006 and came into force on 3 May 2008.

5 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1990.

6 See generally: GE Afolayan 'Contemporary representations of disability and interpersonal relationships of disabled women in south-western Nigeria' (2015) 29 *Agenda* 54 at 58. E Etieyibo & O Omiegbe 'Religion, culture and discrimination against persons with disabilities in Nigeria' (2016) 5 *African Journal of Disability* 192. CJ Eleweke & J Ebenso 'Barriers to accessing services by people with disabilities in Nigeria: Insights from a qualitative study' (2016) 6 *Journal of Educational and Social Research* 113 at 118.

7 GI Grobbelaar-du Plessis 'African women with disabilities: The victims of multilayered discrimination' (2007) 22 *South African Public Law* 405 at 406.

8 Grobbelaar-du Plessis (n 7) 408.

9 Grobbelaar-du Plessis (n 7) 406.

10 As above.

11 Afolayan (n 6) 58.

12 T Meer & H Combrinck 'Invisible intersections: Understanding the complex stigmatisation of women with intellectual disabilities in their vulnerability to gender-based violence' (2015) 29 *Agenda: Empowering women for gender equity* 1.

13 Grobbelaar-du Plessis (n 7) 410; J Morris *Feminism, gender and disability* (1998) 8. Morris shares evidence that shows disabled women get married and have children which dispels this misconception.

although paradoxically labelled asexual, women with disabilities are increasingly susceptible to suffer sexual violence.<sup>14</sup> This paradox is evident in Nigeria. Narratives describe how men are hypocritically willing to have sexual relations with women with disabilities in private but unwilling to be publicly associated with them.<sup>15</sup> Such actions reinforce the increased levels of negative attitudes and violence targeted at women with disabilities that are socially acceptable and commonplace.<sup>16</sup> Literature documents how women with disabilities are twice as likely to suffer increased gender-based violence,<sup>17</sup> including sexual violence<sup>18</sup> and state-sanctioned violence such as forced sterilisation,<sup>19</sup> coerced abortion<sup>20</sup> and tend to be victims of ritual killings.<sup>21</sup>

Consequently, literature that connects the severity of discrimination to the intersection between gender and disability is accurate.<sup>22</sup> The woman with disabilities is uncomfortably seated at the intersection of gender and disability identity categories while rendered voiceless. Despite the foregoing, the truth is that the plight of and the intersectional discrimination encountered by the Nigerian woman with disabilities has been mostly unacknowledged, downplayed and trivialised. Therefore, the significance of the question raised in this paper becomes clear.

## 2 Who is the woman with disabilities or 'disabled' Nigerian woman?

In this section, I attempt to answer the question: Who is the woman with disabilities or the 'disabled' Nigerian woman? Understanding disability is essential, considering the linkage between how the term is understood and the legal responses in Nigeria. In other words, if there is no proper understanding of who the disabled Nigerian woman is, it will be difficult, if not impossible, to protect her.

14 Afolayan (n 6) 58.

15 NSRP & Inclusive Friends 'What violence means to us: Women with disabilities speak' (2015) <http://www.nsrp-nigeria.org/wp-content/uploads/2015/09/What-Violence-Means-to-us-Women-with-Disabilities-Speak.pdf> (accessed 12 May 2021).

16 IO Smith 'Towards a human rights convention on persons with disabilities: Problems and prospects' (2002) 43 *Amicus Curiae* 8 at 9.

17 L Hershey 'Pursuing an agenda beyond barriers: Women with disabilities' (1996) 24 *Women's Studies Quarterly* 61; See also, S Kamga 'The rights of women with disabilities in Africa: Does the Protocol on the Rights of Women in Africa offer any hope?' Barbara Faye Waxman Fiduccia Papers on Women and Girls with Disabilities 2011, Center for Women Policy Studies (February 2011) 9 at 12.

18 Afolayan (n 6) 58.

19 AI Ofuani 'Protecting adolescent girls with intellectual disabilities from involuntary sterilisation in Nigeria: Lessons from the Convention on the Rights of Persons with Disabilities' (2017) 17 *African Human Rights Law Journal* 550.

20 Ofuani (n 19) 554.

21 E Etieyibo & O Omiegbe 'Religion, culture, and discrimination against persons with disabilities in Nigeria' (2016) 5 *African Journal of Disability* 3.

22 S Ortoleva 'Women with disabilities: The forgotten peace builders' (2010-2011) 33 *Loy of Los Angeles International and Comparative Law Review* 96.

Admittedly, there are no easy answers to this question. This difficulty is perhaps because the question is ambiguous and contentious. For instance, is *the disabled Nigerian woman born or made or both?* To understand who qualifies as the disabled Nigerian woman, I begin by unpacking and underscoring the ambiguities that such a question invokes.

## 2.1 Understanding disability: Who is the disabled woman in Nigeria?

The ambiguity that characterises the definition and understanding of disability has been widely documented and is undeniable.<sup>23</sup> By not explicitly defining disability, the CRPD drafters, for instance, amplify and confirm the ambiguity of the term.<sup>24</sup>

When writing about women with disabilities or the ‘disabled’ woman in Nigeria, there is a misleading assumption that there is clarity on who this woman is. For instance, when defining disability and determining who qualifies as a woman with disabilities, the concept of disability has been dominated by assuming that she is ‘born’ exemplified by the controversial medical versus social contentions.<sup>25</sup> Underlying this contention is whether a Nigerian woman is ‘*disabled by her body or society*’.<sup>26</sup> Bearing these contentions in mind, I outline three interrelated definitions and understandings of who qualifies as a ‘disabled’ Nigerian woman as documented by research.

First, when referred to as the woman with disabilities, this woman is usually portrayed as a victim of a flawed body or mind.<sup>27</sup> This portrayal, for instance, traces disability in Nigeria to biology and medicine.<sup>28</sup> The International Classification of Impairments, Disabilities and Handicaps (the ICIDH) developed by the World Health Organisation (WHO) in 1980 inspires this portrayal.<sup>29</sup> The ICIDH reasoning associates disability with a threefold understanding, namely: impairment, handicap and disability.<sup>30</sup> Understood from this perspective, a triple interrelated definition of

23 Preamble to the CRPD.

24 As above.

25 R Connell ‘Southern bodies and disability: Re-thinking concepts’ (2011) 32 *Third World Quarterly* 1369 at 1370.

26 VI Umeasiegbu & DA Harley ‘Education as a tool for social justice and psychological wellbeing for women with disabilities in a developing country: The challenges and prospects in Nigeria’ (2014) 14 *The African Symposium* 121.

27 BA Areheart ‘When disability isn’t “just right”: The entrenchment of the medical model of disability and the *Goldilocks* dilemma’ (2008) 83 *Indiana Law Journal* 181 at 185-186.

28 TB Abang ‘Disablement, disability and the Nigerian society’ (1988) 3 *Disability, Handicap & Society* 71 at 72.

29 World Health Organisation *International classification of impairments, disabilities and handicaps: A manual of classification relating to the consequences of disease* (1980).

30 As above.

disability is evident: disability as a product of a medical diagnosis,<sup>31</sup> a personal tragedy,<sup>32</sup> and an affliction caused by an impairment that requires a form of treatment and cure.<sup>33</sup> From this perspective, one can immediately assume that being 'disabled' has something to do with and is limited to having a form of impairment. A traditional impairment-based approach of identifying disability in Nigeria is, therefore, apparent. This traditional impairment-based approach of identifying disability, according to Silvers, is where disability relates to being physically, sensorily, or cognitively impaired.<sup>34</sup> Yet, this kind of impairment-based approach to identifying disability has been widely criticised, mainly for failing to acknowledge society's role in disablement.<sup>35</sup>

Second, when viewed as a woman with disabilities, the woman is portrayed as a victim of a flawed society.<sup>36</sup> Although the CRPD drafters do not explicitly define disability, its social dimensions are acknowledged.<sup>37</sup> With article 1, the CRPD's drafters seemed to suggest that although an individual might be physically, sensorily, or cognitively impaired, disability does not occur until society's lack of access hinders the individual's wheelchair-enhanced body.<sup>38</sup> Thus, with this reasoning, the woman is believed to be 'disabled by her society'.<sup>39</sup> However, this position has suffered criticism: for misconstruing disability as something that does not necessarily involve the body but is a consequence of social oppression.<sup>40</sup>

31 BA Areheart 'Disability trouble' (2011) 29 *Yale Law and Policy Review* 348 at 349. See also, Areheart (n 27) 185-186.

32 DFID 'Scoping study: Disability issues in Nigeria' (2008) [www.ucl.ac.uk/lcccr/downloads/scopingstudies/dfid\\_nigeriareport](http://www.ucl.ac.uk/lcccr/downloads/scopingstudies/dfid_nigeriareport) (accessed 12 February 2021); K Olaiya 'Commodifying the "sacred", beatifying the "abnormal": Nollywood and the representation of disability' (2013) 7 *The Global South* 137 at 139.

33 H Ndlovu 'African beliefs concerning people with disabilities: Implications for theological education' (2016) 20 *Journal of Disability and Religion* 29 at 31.

34 A Silvers 'Reprising women's disability: Feminist identity strategy and disability rights' (1998) 13 *Berkeley Journal of Gender Law and Justice* 81 at 92.

35 Areheart (n 31) 349.

36 This point is often made by scholars who argue for the social understanding of disability. For more information on the social understanding of disability. For example, T Shakespeare & N Watson 'The social model of disability: An outdated ideology' (2002) 2 *Research in Social Science and Disability* 9 at 12.

37 Preamble to the CRPD.

38 Art 1 of the CRPD. See also, A Schriempf '(Re)fusing the amputated body: An interactionist bridge for feminism and disability' (2001) 16 *Hypatia* 53 at 59.

39 R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1 at 5.

40 Kayess & French (n 39) 5.

Third, the 'disabled' woman is not necessarily disabled solely by her body or society.<sup>41</sup> This portrayal traces disability to the *Mercier* understanding.<sup>42</sup> Here, a disability could be the consequence of a 'physical limitation, a sickness, a social construct, a perceived limitation or a combination of these factors'.<sup>43</sup> In *Mercier*, the Court found that 'a person may have no limitations in everyday activities other than those created by prejudice and stereotypes'.<sup>44</sup> This understanding provokes contemporary and historical interpretations.

First, a Nigerian woman can be disabled because she has a form of impairment. Second, a woman who has no limitation or any form of impairment may be considered 'disabled' because her rights are limited and truncated. These truncated rights could be simply because of the prejudice associated with being a woman. This kind of reasoning is not farfetched. Tracing the original meaning and understanding of disability, Silvers, for instance, mentions how to be 'disabled' historically related to when certain groups of persons, particularly women, were given limited and truncated rights.<sup>45</sup> Insight shows how historically, to be labelled 'disabled' had served as a convenient means to justify inequality and discrimination.<sup>46</sup> To say that a person is 'disabled' meant that the person was undeserving and consequently deprived of the law's protection. This deduction is obvious from Silvers' point that labelling persons with physical, sensory, or cognitive impairments as 'the disabled' also paints the picture that they are ineligible to be equally protected by the law.<sup>47</sup> Her point suggests that a woman can be considered 'disabled' not only because she has physical, sensory, or cognitive impairments but also because law and tradition deem her incompetent.<sup>48</sup>

Using the example of citizenship in the United States, Baynton cites how historically, women were considered 'disabled' to disqualify, exclude and deny their voting rights.<sup>49</sup> He explained how, compared to the male standard, women's presumed physical, mental and psychological defects and deficits were often portrayed in a disabling manner. For example, women expressing emotions and feelings of hysteria was considered irrational and used as an excuse to disqualify them from acquiring

41 See generally scholarship that make this same argument include JS Beaudry 'The vanishing body of disability law: Power and the making of the impaired subject' (2018) 31 *Canadian Journal of Family Law* 7 at 46. Johnson (n 1) 4.

42 For more information on the *Mercier* case and its potentially intersectional insight, see: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)* [2000] 1 SCR 665 (*Mercier*). Johnson (n 1) 4.

43 Beaudry (n 41) 46.

44 *Mercier* (n 42).

45 Silvers (n 34) 92.

46 D Baynton 'Disability and the justification of inequality in American history' in DC Baynton, PK Longmore & L Umansky *The new disability history* (2001) 33.

47 Silvers (n 34) 92.

48 As above.

49 Baynton (n 46) 33.

citizenship.<sup>50</sup> Consequently, women similar to persons with impairments suffered discrimination because of the 'disability' attributed to them.

Unfortunately, the above situation is not purely historical but has a contemporary basis for Nigerian women today.<sup>51</sup> As scholarship proves, the reality is that Nigerian women are still subject to limited and truncated rights.<sup>52</sup> This situation inevitably introduces the thought that Nigerian women can be considered 'disabled'. As suggested elsewhere by the author, claiming that a Nigerian woman is 'disabled' does not necessarily indicate that all Nigerian women might have physical and mobility impairment.<sup>53</sup> The inference is that even though Nigerian women might not necessarily have any physical, sensory, or cognitive impairments that entitle them to the 'disability' label as used today, the label is earned by prejudice towards women. This prejudice is evident in limited and truncated rights and unequal legal protection in Nigeria.

Nonetheless, these three interrelated definitions and understandings of who qualifies as a 'disabled' Nigerian woman discussed above possibly bring to the fore the futility of the question. The insight proves that the question might be potentially unanswerable or as confusing as questions about any identity category.<sup>54</sup> Thus, it just might be enough to admit that a woman is disabled if she accepts that she is.

## 2.2 Who is the disabled Nigerian woman? Intersections of gender and disability

The disabled woman is in a dilemma. This dilemma occurs because mainstream feminist and disability perspectives have ignored the multiple and intersecting identities that a disabled woman embodies in defining who she is.<sup>55</sup> On the one hand, in determining who the disabled woman is, disability narratives tend to focus solely on the disability identity category. This situation means that disabled women tend to be defined exclusively by their disability to the detriment of other identities that they possess. The consequence of such a narrow definition that focuses solely on the disability identity category for disabled women is evident.

50 As above.

51 The patriarchal nature of Nigerian society has been well documented in scholarship. See for example, GA Makama 'Patriarchy and gender inequality in Nigeria: The way forward' (2013) 9 *European Scientific Journal* 115. E Durojaye 'Woman but not human: Widowhood practices and human rights violations in Nigeria' (2013) 27 *International Journal of Law, Policy and the Family* 176 at 198. NO Odiaka 'The concept of gender justice and women's rights in Nigeria: Addressing the missing link' (2013) 2 *Afe Babalola University: Journal of Sustainable Development Law and Policy* 191.

52 As above.

53 Johnson (n 1) 21.

54 C Ngwena 'Deconstructing the definition of 'disability' under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal on Human Rights* 613.

55 N Begum 'Disabled women and the feminist agenda' (1992) 40 *Feminist Review* 70.



First, with a definition that focuses solely on the disability identity category, preference is usually accorded to men with disabilities. This preference stems from a patriarchal culture and masculine hegemony, which bestows certain privileges on men with disabilities in Nigeria.<sup>56</sup> Several commentators trace this male preference to ‘white middle-class men in wheelchairs’ who introduced the social understandings of disability.<sup>57</sup> This argument could explain the disregard for the sex/gender identity category and the resultant disregard of women's specific concerns.

Second, a narrow definition hinged on the disability identity category alone disregards the specific experiences of women with disabilities. This disregard occurs because the disabled women's experience tends to be lumped together as part of the experiences of a perceived homogenous disability group in Nigeria.<sup>58</sup> Yet, the truth is that persons with disabilities are not homogenous. One could speculate that regarding persons with disabilities as a homogeneous group is tied to a concern that raising the gendered nature of disability could divide and weaken the strength of the dominant disability narrative.<sup>59</sup> This situation could explain why existing research regards ‘gender’ in the dominant disability narrative and ‘disability’ in the dominant gender narrative as irrelevant, resulting in genderless and gender-blind research.<sup>60</sup> Such an approach fails to acknowledge the unique experiences and realities that women with disabilities face, resulting in the complete disregard of their experiences and lived realities

Third, a narrow definition that relies solely on the disability identity category assumes a consensus on how the disability identity is defined, disregarding the ambiguities that the term invokes.

On the other hand, the feminist movement tends to focus solely on the sex/gender identity category to the detriment of the disability identity. The consequence of such a narrow definition that focuses on gender as the sole identity category is significant. By such definition, other characteristics and identities such as disability, race, class etc, that disabled women embody are overlooked. This disregard happens where the emphasis is on ableism and powerful images of womanhood.<sup>61</sup> Literature has compared the invisibility of women with disabilities to a ‘glass wall’ that needs breaking.

56 Johnson (n 1 above) 7.

57 Areheart (n 27 above) 185 & 186.

58 Afolayan (n 11 above) 55.

59 E Kim ‘Minority politics in Korea: Disability, interraciality, and gender’ in D Cooper et al (eds) *Intersectionality and beyond: Law, power and the politics of location* (2009) 61.

60 T Emmett & E Alant ‘Women and disability: Exploring the interface of multiple disadvantage’ (2006) 23 *Development Southern Africa* 445.

61 MP Kumar & SE Anuradha “‘Nonconformity incarnate’: Women with disabilities, “gendered” law and the problem of recognition’ (2009) 44 *Economic and Political Weekly* 37.

Similarly, a narrow definition of disabled women that relies on gender as the sole identity category assumes a stable and 'universal woman' experience and disregards the ambiguities that the concept of womanhood invokes. Nonetheless, this argument does not deny recent efforts by feminists to debunk dominant cultural narratives about disability in the quest for change.<sup>62</sup> Feminists have started to explore how the social understanding of disability and feminism can be synergic to tackle disability-based discrimination.<sup>63</sup> However, the challenge with feminist disability narratives becomes the tendency to essentialise disability in a way that suggests a false universal experience of gendered disability.<sup>64</sup>

From the above, the dilemma of disabled women who sits at the intersection of both gender and disability identity categories, therefore, becomes evident. The dominant disability and feminist narratives fail to fully address the multiple and intersecting identities that disabled women embody. This dilemma occurs because these two narratives wrongly assume that identity categories of sex/gender and disability are stable and can be fragmented or separated.

### 3 The disabled Nigerian woman and intersectional discrimination

Crenshaw introduced the term 'intersectionality'.<sup>65</sup> In her earliest work, she used the term to describe the unique discriminatory experiences of African American women that the United States' anti-discrimination law did not anticipate.<sup>66</sup> She provides a threefold insight as follows.<sup>67</sup>

First, she rejects the idea that there is a universal woman experience of discrimination. Using African American women as an example, her insight teaches how individuals such as the disabled women with multiple and intersecting identities can be discriminated against based on several grounds or characteristics simultaneously rather than one or two separate grounds.<sup>68</sup> Although the emphasis in her study is on two categories, namely race and gender, she does not discount the fact that there are other categories of identities, such as sexuality, disability, ethnicity and class.<sup>69</sup> However, scholars have pointed out a bias to categories of identities, such

62 Ngwena (n 54) 613. C Ngwena 'Developing juridical method for overcoming status subordination in disablism: The place of transformative epistemologies' (2014) 30 *South African Journal on Human Rights* 275 at 278.

63 Ngwena (n 62) 278.

64 A Clutterbuck 'Rethinking baker: A critical race feminist theory of disability' (2015) 20 *Appeal* 51 at 59.

65 K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) *University of Chicago Legal Forum* 139 at 151.

66 Crenshaw (n 65) 151.

67 As above.

68 Crenshaw (n 65) 149.

as race, gender, sexuality, and class, to the detriment of other identities such as disability and age.<sup>70</sup>

Crenshaw used the experiences of African American women to illustrate how when both race and gender intersect, they create discrimination that is greater than the sum of its parts.<sup>71</sup> An intersectional lens draws attention to women's encounters, such as the disabled woman who sits at the intersection of more than one identity category. The disabled woman, because of her multiple and intersecting identities, therefore, experiences intersectional discrimination. Consequently, using Crenshaw's guidance, it is possible to speculate that intersectional discrimination happens when women with disabilities experience discrimination based on their gender and disability, which cumulatively result in oppression that is far greater than if the two identity categories of gender and disability were considered separately

Second, Crenshaw used the experiences of African American women to draw attention to a significant flaw in anti-discrimination law. This flaw forces women with multiple and intersecting identities and the resultant discrimination to depend on a law that adopts a single-issue approach.<sup>72</sup>

Like many countries globally, Nigeria adopts a liberal singular focus to its anti-discrimination legal and human rights framework.<sup>73</sup> Yet, precisely because one cannot be sure on what ground a disabled woman has suffered discrimination, the inadequacies of a law that relies on a single issue to protect individuals, particularly women with multiple identity categories, become evident. The need to shift from the conservative notion that discrimination can be understood only from one viewpoint to the realisation that discrimination against any individual can be based on several individual identities is apparent.

Third, using the experiences of African American women, Crenshaw's insight draws attention to how power relationships and structures work in ways that include and exclude some women.

The outcome of *Mahlangu v Minister of Labour*<sup>74</sup> provides some guidance on intersectional discrimination. The experience of a domestic worker who encountered multiple intersecting grounds of discrimination in the workplace was the subject of this recent South African

69 K Crenshaw 'Mapping the margins: Intersectionality, identity politics and violence against women of color' (1991) 43 *Stanford Law Review* 1241.

70 H Meekosha & R Shuttleworth 'What is so "critical" about critical disability studies' (2009) 15 *Australian Journal of Human Rights* 47 at 62.

71 Crenshaw (n 65) 149.

72 As above.

73 E Durojaye & Y Owwoeye "'Equally unequal or unequally equal": Adopting a substantive equality approach to gender discrimination in Nigeria' (2017) 17 *International Journal of Discrimination and the Law* 73.

74 *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC).

Constitutional Court case. Here, the Constitutional Court employed an intersectional lens to address the constitutional dilemma that section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) presented.<sup>75</sup> In the case, the Constitutional Court employed 'an intersectional approach to discrimination' and acknowledged the unique vulnerabilities of the complainant with multiple grounds of discrimination. The case involved a domestic worker who drowned in her employer's swimming pool while discharging her duties. Following the victim's death, her daughter, financially dependent on her mother, approached the Department of Labour seeking compensation. Unfortunately, her unemployment compensation application for her loss was denied because *domestic workers, primarily black women*, were not covered under the COIDA.<sup>76</sup>

Although a South African case, a threefold lesson can be drawn with respect to the disabled woman in Nigeria. First, similar to disabled women in Nigeria, the case demonstrates the susceptibility of domestic workers to intersectional discrimination because of the intersecting identities they embody. In reaching its decision, for instance, the Constitutional Court noted how the marginalisation of domestic workers rests on the intersecting and multiple grounds of race, class, gender and other grounds.<sup>77</sup> Moreover, drawing heavily on the intersectional lens, the court explored the structural and dynamic consequences of the interaction between these multiple forms and grounds of discrimination.

Second, as evident in the case, domestic workers who are mostly poor black women in South Africa are excluded from the definition of an employee in the COIDA perhaps because of their intersecting identities as black, woman and poor. Additionally, a parallel can be drawn with the situation of disabled women in Nigeria with the non-existent and, in some cases, narrow definitions of disability that either accommodate men with disabilities alone or the meaning of disability that is defined solely in the medical sense in Nigeria.

An example is the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (2018 Disability Act).<sup>78</sup> Section 1 of the 2018 Disability Act provides that 'a person with disability shall not be discriminated against on the ground of *his* disability by any person or an institution in any manner or circumstance whatsoever'.<sup>79</sup> The use of the male pronoun '*his*' creates doubts as to whether women with disabilities are included in the protection. This kind of narrow definition of disability potentially hinders and limits legal protection for disabled women.<sup>80</sup>

75 As above.

76 *Mahlangu* (n 74) para 3, 6 & 8.

77 *Mahlangu* (n 74) para 65.

78 2018 Disability Act (emphasis added).

79 Section 1 of the 2018 Disability Act (emphasis added).

80 Similar arguments made in Johnson (n 1) 14.

Third, one can assume that the same way that domestic workers were invisible and excluded from the COIDA because of their multiple and intersecting identities, disabled women in Nigeria also possess multiple and intersecting identities that potentially render them invisible to the law.

Having established the disabled Nigerian woman's intersectional identity, the argument presented in the next section demonstrates how the lived multidimensional and intersectional realities of disabled women pose distinct challenges to Nigeria's liberal vision of law. Therefore, in the next section, I argue that Nigerian law, by its liberal singular focus, is limited in protecting women, primarily when they, similar to disabled women, encounter intersectional discrimination because of their multiple and intersecting identities.

#### **4 Recognising intersectional discrimination: The formal approach to (non) discrimination in Nigeria**

Non-discrimination and equality are the two foundations of law and, specifically, human rights.<sup>81</sup> Equality is the outcome of the right to non-discrimination and the direct opposite of any unfair treatment encountered based on specific unique features.<sup>82</sup> Most, if not all, human rights documents acknowledge this definition. The Nigerian Constitution, as amended, is no exception. Its Preamble outlines the Nigerian Constitution's authority and superiority as the supreme law of the land by which everyone is bound.<sup>83</sup> As the supreme law, the Nigerian Constitution includes provisions on non-discrimination and equality. However, unlike other constitutions and international human rights treaties, there is no clear definition of discrimination in the Nigerian Constitution.<sup>84</sup>

With this lack of a definition of discrimination, it is unsurprising that there is no clear and consistent approach to understanding and interpreting section 42 of the Nigerian Constitution.<sup>85</sup> The lack of discrimination definition provides an avenue and leeway for inconsistencies and confusion on interpretations of discriminatory actions.

81 RE Howard & J Donnelly 'Human dignity, human rights, and political regimes' (1986) 80 *American Political Science Review* 801 at 802; J Donnelly 'Human rights and human dignity: An analytic critique of non-western conceptions of human rights' (1982) 76 *American Political Science Review* 303.

82 Durojaye & Owoye (n 73) 73.

83 The Nigerian Constitution. The Preamble of the document underscores its supremacy over all the laws in the land.

84 Durojaye & Owoye (n 73) 80. The South African Constitution provides a consistent definition of 'discrimination' unlike Nigeria's Constitution.

85 Durojaye & Owoye (n 73) 78.

Appropriate interpretation of discriminatory actions should ideally answer three main questions raised by Durojaye and Owoeye.<sup>86</sup> First, what should the starting point be in determining whether unfair discrimination has occurred? Second, when will an act amount to unfair discrimination under the Nigerian Constitution? Third, what determines whether there has been a violation of section 42 of the Nigerian Constitution? Unfortunately, precedence from court decisions proves an unwillingness by the Nigerian courts and the Supreme Court as the highest court of the land to offer a clear and consistent approach to interpreting section 42, even where there has been ample opportunity to do so.<sup>87</sup> Consequently, where the discrimination is not adequately articulated, appropriate resolutions and remedies might be difficult for the woman who encounters discrimination, much less a disabled woman with a tendency to face intersectional discrimination.

Nonetheless, in trying to understand the right to non-discrimination in Nigeria, scholars agree that there is a leaning and inclination towards liberal or formal roots. Durojaye and Owoeye attest to how the Nigerian courts, in making their decisions, still rely significantly on a formal or liberal perspective in explaining and interpreting section 42.<sup>88</sup> In elaborating upon what a formal or liberal perspective on equality signifies, Cain suggests that, as a principle of justice, formal equality easily manifests in a situation where *like cases, are treated alike*.<sup>89</sup> The opposite is also true in that unlike cases are then treated differently or in an unlike fashion.<sup>90</sup> Therefore, a liberal or human rights understanding of equality is rooted in an Aristotelian philosophy, which emphasises that likes must be treated alike. In contrast, *unlikes should be treated in an unlike fashion*.<sup>91</sup>

Specifically, section 42 of the Nigerian Constitution refers to the right to non-discrimination for all citizens, ostensibly including disabled women. It states the following:

- (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

86 As above.

87 As above.

88 E Chegwe 'A gender critique of liberal feminism and its impact on Nigerian law' (2014) 14 *International Journal Discrimination and the Law* 66.

89 PA Cain 'Feminism and the limits of equality' (1989) 24 *Georgia Law Review* 803 at 818.

90 As above.

91 MA Freeman, C Chinkin & B Rudolf *The UN Convention on the Elimination of all Forms of Discrimination Against Women: A commentary* (2012) 53.

privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious 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.<sup>92</sup>

Scholarship has made a threefold assumption concerning the right to this non-discrimination section.<sup>93</sup> Durojaye and Owoeye argue as follows:<sup>94</sup> One is the understanding and interpretation that likes should be treated in a like or similar fashion. Undeniably, this confirms the narrow, restrictive and formal approach to discrimination. Second is the well-documented gender insensitivity reinforced by section 42. This insensitivity is exemplified in the pronoun usage 'he', exposing the patriarchal tendencies inherent in the section.<sup>95</sup> Third, there is a notion of a distinction between the public and private domains. This distinction manifests in the *Uzoukwu v Ezeonu*<sup>96</sup> case, where the Nigerian Court of Appeal limited the prohibited acts of discrimination to only those of public actors.<sup>97</sup> Such limits ignore Nigerian women's reality that demonstrates that private actors often perpetuate discriminatory acts.<sup>98</sup> Arguably, these threefold assumptions and understanding do not necessarily contemplate the intersectional encounters of the disabled woman.<sup>99</sup>

#### 4.1 Recognising intersectional discrimination: The prohibited grounds in section 42 of Nigeria's Constitution

The significance of the oft-cited case of *Uzoukwu v Ezeonu*<sup>100</sup> lies in its approach to the right to non-discrimination as encapsulated in section 42 of the Nigerian Constitution. In *Uzoukwu*,<sup>101</sup> the Nigerian Court of Appeal, concerning the right to non-discrimination in section 42, referred to the idea that a violation of this section can be applied only where the discrimination falls within the protected grounds. The court mentions that the section cannot be invoked if there are other reasons why a person is discriminated against in addition to the protected grounds. In other words, the decision states that an infringement of section 42 happens only where the discrimination falls within the protected grounds. Therefore, the question that needs answers is what this narrow and restrictive

92 Sec 42 of the The Nigerian Constitution.

93 Durojaye & Owoeye (n 73) 73.

94 As above.

95 Chegwe (n 88) 69.

96 *Uzoukwu v Ezeonu* (n 2) 798.

97 As above.

98 Durojaye & Owoeye (n 73) 77.

99 Arguably, threefold liberal strand ie universality; atomism and public/private distinction are inherent in Nigeria's liberal legal and human rights framework. With such a legal mindset, the intersectional encounters of the disabled woman are difficult to contemplate.

100 *Uzoukwu v Ezeonu* (n 2) 798.

101 As above.

interpretation of discrimination used by *Uzoukwu*<sup>102</sup> implies for the disabled Nigerian woman. It is possible to speculate a threefold analysis as follows.

#### **4.1.1 Recognising intersectional discrimination: Disability as a missing ground in section 42 of Nigeria's Constitution**

Section 42 of the Nigerian Constitution and its interpretation indicates that non-discrimination in the Nigerian context has been narrowly defined solely based on the listed grounds. These grounds include the *individual's membership of a particular community, ethnic group, place of origin, sex, religion and political opinion*.<sup>103</sup> Thus, disability is missing as a prohibited ground of discrimination.<sup>104</sup> Because of this omission, the Nigerian Constitution, unlike several constitutions in Africa, fails to protect and makes human rights implementation for persons with disabilities difficult.<sup>105</sup> What this could mean is that while section 42 of the Nigerian Constitution ostensibly guarantees the right to non-discrimination to all its citizens,<sup>106</sup> at the same time, it anticipates that these citizens must have specific characteristics before they can qualify for protection from discrimination.<sup>107</sup> In other words, an individual deserves protection only to the extent that the individual embodies certain recognised traits.

The word 'only' in section 42(1) supports this claim. The term 'only' as used in the section suggests that discrimination is forbidden only on the sole basis of the listed grounds.<sup>108</sup> It means that before the section's infringement, it must be clearly shown that the discrimination occurred because of one of the listed grounds.<sup>109</sup> Additionally, it could imply that there should be a recognised correlation between the causes of discrimination and the prohibited grounds before an unfair discriminatory act can be deemed to have occurred. Simply put, there must be a connection in the anti-discrimination law between the cause of the discrimination and the aftermath by using the listed grounds.

102 *Uzoukwu v Ezeonu* (n 2) 798. The court made other assumptions, such as: the discrimination must be on the basis of law; the discrimination must be seen as an act of government or its agencies; that the discrimination complained against does not apply to other Nigerians.

103 Sec 42 of the Nigerian Constitution.

104 As above. See generally scholarship that also mentions this omission. For example, I Imam & MA Abdulraheem-Mustapha 'Rights of people with disability in Nigeria: Attitude and commitment' (2016) 24 *African Journal of International and Comparative Law* 439 at 440. See also, NC Umeh 'Reading disability into the non-discrimination clause of the Nigerian Constitution' (2016) 4 *African Disability Rights Yearbook* 53 at 73.

105 Imam & Abdulraheem-Mustapha (n 104) 442.

106 The Nigerian Constitution secs 14, 15(2), 16(d), 17(2)(a) and (b) can be read to protect to protect all citizens including disabled women.

107 Umeh (n 104) 73.

108 Durojaye & Owoeye (n 73) 77.

109 As above.



The above problem is evident in the outcome of *Simeon Ilemona Akubo v Diamond Bank*.<sup>110</sup> In this case, the judge argued that the claimant could not claim that discrimination had occurred because of the non-recognition of disability as a discrete ground for non-discrimination in Nigeria. In other words, the judge's opinion confirms the narrow interpretation that if discrimination occurs on any ground other than those explicitly mentioned in section 42, discrimination cannot be said to have occurred. The assertion is also evident in *Festus Odafe v Attorney-General of the Federation*.<sup>111</sup> This case involved the realisation of the rights of persons living with HIV-AIDS (PLWHA). As argued elsewhere, the court applied a narrow and restrictive interpretation.<sup>112</sup> The Court reasoned that 'the applicants did not qualify for freedom from discrimination because health status is not a ground covered in the section'.<sup>113</sup> Such a restrictive understanding and closed, one-dimensional, perspective makes it more difficult for the law to recognise the disabled woman's intersectional discrimination. Intersectional discrimination might occur based on two or more intersecting grounds, particularly when one ground, such as disability, is not even recognised.

We can speculate about the implications of this outcome for a disabled Nigerian woman. She can only be said to be discriminated against if she can prove that an act of discrimination was committed or falls within the characteristics in the protected list in isolation. In a case of discrimination, this situation means that it would be sex/gender that would be considered separately, leaving behind her disability.

Nevertheless, Durojaye and Owoeye argue that section 42's interpretation should be purposive.<sup>114</sup> This approach could find support in the European Court of Human Rights case of *Glor v Switzerland*.<sup>115</sup> In this case, the Court held that even though disability is not explicitly mentioned, the grounds on which discrimination is forbidden under the European Convention on Human Rights are not exhaustive. In other words, the Convention includes disability as a prohibited ground. In addition, the progressive ruling in *Simeon Ilemona Akubo v First City Monument Bank*,<sup>116</sup> with similar facts but a different outcome where the judge relied on foreign jurisprudence, can be used to support this claim.

Consequently, bearing in mind this purposive reasoning, the phrase 'the circumstances of his birth' in section 42(2) has been interpreted to

110 *Simeon Ilemona Akubo v Diamond Bank* (Suit ID/763M/2010)

; See also, Umeh (n 104) 70-72.

111 *Festus Odafe v Attorney General* (Suit FHC/PH/CS/680/2003); (2004) AHRLR 205 (NgHC 2004). Similar arguments made in Johnson (n 1) 11.

112 Johnson (n 1) 11.

113 *Odafe* (n 111)

114 Durojaye & Owoeye (n 73 above) 76. Johnson (n 1) 11.

115 *Glor v Switzerland* (Application No 13444/04) ECtHR (30 April 2009).

116 *Simeon Ilemona Akubo* (n 110).

include disability.<sup>117</sup> However, as argued elsewhere, even if disability can be read into this phrase as suggested, disability portrayed in this way limits disability to merely a consequence of the circumstances of birth, when it is clear from *Mercier's* definition that disability cannot be limited in this way.<sup>118</sup> Additionally, the use of 'his' in the phrase is distracting because it confirms the gender bias and insensitivity in the section. With such insensitivity and gender bias, it is challenging to read sex discrimination, much less the reading of intersectional discrimination based on the intersecting grounds of sex/gender and disability.<sup>119</sup> Therefore, section 42(2)'s reference does not represent a reading of an intersectional approach to non-discrimination for disabled women.

Nevertheless, it is challenging to overlook *Simeon Ilemona Akubo v First City Monument Bank's* progressive ruling.<sup>120</sup> It is plausible that the progressive order was an exception rather than the rule made because the judge relied on foreign jurisprudence. Unlike the South African Constitution, there is no specific obligation in the Nigerian Constitution that demands deference to international law.<sup>121</sup>

Similarly, the omission of open-ended phrases like 'other status' reveals how an intersectional lens is underdeveloped in Nigeria's anti-discrimination law. A cursory look at section 42 supports this claim. Unlike non-discrimination provisions in most human rights instruments, section 42 does not include the phrase 'other status'.<sup>122</sup> Although grounds of (non)discrimination are usually listed in international instruments, they make room for other emerging grounds by including the 'other status' phrase.<sup>123</sup> The 'other status' phrase has been interpreted broadly by some treaty monitoring bodies to ensure that potential and new categories of prohibited grounds of discrimination are accommodated and systematically considered.<sup>124</sup> This interpretation includes recognising the combination and intersectionality of grounds as possibly another protected ground against discrimination. Therefore, scholarship finds that this oversight evident in section 42 contradicts and directly opposes international instruments.<sup>125</sup> Thus, the absence of such open-ended phrases like 'other status' leads to a limited perception of identity. Such limited perception ensures that the intersectional individual, such as the disabled woman, who cannot place herself neatly into one of the listed and

117 Ofuani (n 19 above) 553. Johnson (n 1) 11-12.

118 *Mercier* (n 42 above).

119 Johnson (n 1) 11-12.

120 *Simeon Ilemona Akubo* (n 110).

121 Sec 233 of the South African Constitution requires courts to defer to international law when making decisions.

122 Sec 42 of the Nigerian Constitution.

123 I Truscan & J Bourke-Martignon 'International human rights law and intersectional discrimination' (2016) 16 *Equal Rights Review* 103 at 109.

124 As above.

125 E Durojaye 'Substantive equality and maternal mortality in Nigeria' (2012) 44 *Journal of Legal Pluralism and Unofficial Law* 103 at 111.

accepted grounds or categories, finds herself voiceless and unprotected by Nigerian anti-discrimination law.

Moreover, the absence of disability from the list of protected grounds in section 42 of the Nigerian Constitution is quite revealing. It makes one question how the characteristics that should and (should not) be included in its list of grounds are determined. This question is relevant because the selection of grounds mirrors, according to Iyer, the dominant narrative about which social features are pertinent (and which are not) when distinguishing between individuals.<sup>126</sup> This question is apparent in Nigerian anti-discrimination law. It appears to be unacceptable to mistreat individuals on the grounds of sex, ethnic group and religion, but acceptable to differentiate on the grounds of gender and/or disability. Therefore, this situation suggests that what is included or excluded in the protected list of categories of Nigeria's anti-discrimination law is a matter of politics. Iyer succinctly summarises the argument that I make: once a list of characteristics has been set out in legislation, the list itself begins to appear neutral and permanent. It becomes part of the way things are; it seems as though everyone would agree with this list and no other, for all time.<sup>127</sup>

Finally, unlike section 42 of the Nigerian Constitution, several African countries like South Africa are beginning to adopt constitutions that recognise multiple and intersecting discrimination following constitutional review and amendments. For example, section 9(3) of the Constitution of the Republic of South Africa, 1996 forbids unfair discrimination on one or more of the listed grounds.<sup>128</sup> Such progressive provision creatively interprets and incorporates intersecting grounds into anti-discrimination laws, which is difficult with an archaic provision like section 42.

#### ***4.1.2 Recognising intersectional discrimination: Disability as a (non)additive ground under section 42 of Nigeria's Constitution***

Recently, disability has been recognised as a prohibited ground of discrimination in Nigeria. Accordingly, on 23 January 2019, the Nigerian Government enacted the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (Disability Act).<sup>129</sup> Section 1 of the Disability Act stipulates that 'a person with disability shall not be discriminated against on the ground of his disability by any person or an institution in any

126 N Iyer 'Categorical denials: Equality rights and the shaping of social identity' (1993) 19 *Queens Law Journal* 179 at 187.

127 As above.

128 Sec 9(3) of the South African Constitution provides that; 'Neither the state nor any person can unfairly discriminate against someone, either directly or indirectly. It is against the law to discriminate against anyone on any of the following grounds: race and colour, sexual orientation, marital status, gender, pregnancy, age, disability, ethnic origin, culture, language, religion and birth'.

129 Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (Disability Act).

manner or circumstance whatsoever'. Although from this provision, disability is now one of the protected grounds of non-discrimination, a twofold issue is evident. First, the traditional impairment-based approach of identifying disability evident in the Disability Act is limiting. It is limiting because it restricts the understanding of disability to functional abilities when insight from the *Mercier* understanding suggests that this is not necessarily the case. Second, the court's reference in *Uzoukwu*<sup>130</sup> that section 42 cannot be invoked if, in addition to protected grounds, there are other reasons why a person has been discriminated against is interesting.<sup>131</sup> Upon a cursory look at this reasoning, one can speculate that the court indicates that it cannot address additive thinking about discrimination. In other words, the court cannot handle the disabled woman's sex discrimination and then, on top of that, deal with another reason, which could be disability-based discrimination.

We can speculate about the implications of this. First, although disability is now a recognised prohibited ground of discrimination in Nigeria, it is possible to assume that the one-dimensional legal approach to interpreting the section still reinforces a medical or functional impairment approach to disability. Moreover, this one-dimensional legal approach leaves no room for other interpretations of disability, such as the one invoked in *Mercier*. As a result, this understanding does not consider the multiple, complex and intersectional discrimination that disabled women encounter in Nigeria.

Additionally, the Nigerian legal approach to disability as an identity perspective perceives the disabled woman's identity as singular, unitary and stable. This perception could explain why, once a woman is considered disabled in Nigeria, she is de-sexed.<sup>132</sup> As far as Nigerian law is concerned, this de-sexing means disabled women are either disabled or women and cannot be both at the same time. Yet, identifying only a single ground of discrimination will not adequately represent the lived realities of disabled women since it is usually not clear on which ground the discrimination occurred, whether based on sex/gender or disability or both. Thus, where discrimination is not adequately articulated, appropriate resolutions and remedies become a challenge for disabled women. The limits of the law in speaking to her lived, and intersectional reality is therefore apparent.

Similarly, although Nigeria's Disability Act now recognises disability as a prohibited ground of discrimination, it exposes and makes the invisibility and voicelessness of the disabled woman more apparent. The Disability Act's lack of reference to disabled women illustrates this point.

130 *Uzoukwu v Ezeonu* (n 2) 798.

131 As above.

132 T Shakespeare 'Disability, identity and difference' in C Barnes & G Mercer (eds) *Exploring the divide* (1996) 94.

The mere enactment of the Disability Act has proven the tendency of Nigerian anti-discrimination law to categorise and compartmentalise, which does not necessarily tell the entire story for the disabled woman. The woman cannot neatly categorise or compartmentalise herself to fit into the discrete grounds of discrimination that the new Disability Act has neatly laid out for her. This compartmentalisation is challenging because even if it is assumed that only one ground of discrimination seems relevant, it is nearly impossible to prove that a disabled woman was discriminated against solely because of her disability. If disabled women are oppressed because of disability, they are also oppressed because they are women and vice versa. For example, disabled Nigerian women are much more than a ground. The truth is that disabled women are more than several grounds. Disabled women are people who may be inter-subjectively formed and defined, but who is also more than that.<sup>133</sup> A disabled woman in Nigeria cannot encounter gender discrimination other than as a person with a disability. At the same time, the woman cannot experience disability discrimination other than as a woman.

Further, although disability is now recognised as a prohibited ground of discrimination in the Disability Act, complications emerge from Nigeria's federal legal structure. For instance, in this federal structure, each state in Nigeria has the legislative powers to enact its laws. This legislative power means that states can decide whether to pass their laws regarding disability or domesticate and take on board this newly enacted disability law. Yet, at the same time, states can choose to do neither. These complications make an intersectional analysis difficult, if not impossible, to achieve.

#### **4.1.3 *Recognising intersectional discrimination: Disability as a non-interactive and contextualised ground under section 42 of Nigeria's Constitution***

The court's reasoning in *Uzoukwu*<sup>134</sup> that section 42 can be infringed only where the discrimination falls within the protected grounds makes an unreasonable assumption. This assumption is that discrimination occurs solely based on prohibited grounds. The problem is evident in *Simeon Ilemona Akubo*.<sup>135</sup> In this case, the judge focused on abstract categories and generalisations rather than on a contextualised approach to discrimination that underlies specific experiences and consequences. For instance, the judge identified the respondent's actions (Diamond Bank) as lacking initiative, untactful and insensitive. Yet, the judge still reasoned as follows:

133 Clutterbuck (n 64) 59.

134 *Uzoukwu v Ezeonu* (n 2) 798.

135 *Simeon Ilemona Akubo* (n 110).

'I am very doubtful that it can be reasonably be regarded as one offending the applicant's right to human dignity or discrimination.'<sup>136</sup>

Specifically, the judge's reference to human dignity in the above case is interesting, considering Pothier's claim that the actual limitation of non-discrimination for disabled claimants might not necessarily stem from the requirement of grounds but its impact discrimination, that is, a human dignity element.<sup>137</sup> Unfortunately, the problem with this is that human dignity is a malleable term that can be made to mean anything the judge wants it to mean.<sup>138</sup> Therefore, there is justification in asking what human dignity or its absence means for the judge. One can easily speculate that the judge's reasoning stems from a narrow understanding of discrimination far removed from reality. Yet, as shown from the *Mercier*<sup>139</sup> understanding, discrimination does not necessarily occur because of the characteristics of disabled women, for instance, disability or sex, but because of what society thinks disabled women represent as individuals who do not necessarily fit into Nigerian society.

Perhaps this is why disabled women continue to encounter discrimination in Nigerian society. Take, for example, the rape of a disabled woman whose case was not taken seriously.<sup>140</sup> The narrative indicates that a disabled woman suffers discrimination because of how society treats her and not necessarily because of any inherent characteristic. The negative attitude that disabled women are not expected to have sex and to have children, yet they can be raped fuels discrimination. From the scenario, it is possible to speculate on two things. First, when disabled women are raped, it is not only because they are women but also because they are both disabled and women simultaneously.

Consequently, the lived encounters of disabled women show that discrimination does not always occur due to the acts of one person against disabled women based on an individual ground. Second, the implication is that disabled women have most likely been discriminated against because Nigerian society thinks she does not fit in and not because of any identifiable grounds. This point is reinforced by the fact that in the cited rape case above, the police did not take the rape seriously – even the family members did not want to pursue it.<sup>141</sup> Nigerian society's general approach appears to be that if a disabled woman is raped, she should be grateful that

136 Umeh (n 104 above) 70-72.

137 D Pothier 'Connecting grounds of discrimination to real people's real experiences' (2001) 13 *Canadian Journal of Women and Law* 37 at 56.

138 Pothier (n 137) 56. The malleability of human dignity is also clearly evident in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

139 *Mercier* (n 42).

140 The narrative of the woman in a wheelchair that was raped was taken from Eleweke & Ebenso (n 6) 118.

141 Eleweke & J Ebenso (n 6) 118.

someone wanted to have sex with her.<sup>142</sup> From this misleading perception, one can infer that the discrimination that disabled Nigerian women encounters stem from complex structural, systemic and institutional factors instead of inherent characteristics or grounds.

Therefore, we can speculate about the uphill battle that disabled women will face in translating the complexities of the discrimination she has suffered into the discrete, protected categories Nigerian anti-discrimination law recognises. This monolithic legal mindset dictates that related forms of oppression, such as sexism and disability, become mutually exclusive grounds and categories. Such an approach of Nigerian anti-discrimination law means it is almost impossible for an individual to claim discrimination based on simultaneous and intersecting grounds such as sex/gender and disability. Thus, Nigerian law's approach renders disabled women at the intersection of several identity categories voiceless.

In making the above point, I draw inspiration from the Supreme Court of Canada's reasoning in *Egan v Canada*.<sup>143</sup> The Supreme Court of Canada confirmed that discrimination would never be entirely tackled if the focus continues to be on abstract grounds, categories and generalisations, rather than on specific consequences or the aftermath of the discrimination. The court emphasised that:

When the focus is on the grounds for the distinction instead of the impact of the distinction, there is the danger of undertaking an analysis that is distanced and desensitised from real people's real experiences ... More often than not, disadvantage arises from the way in which society treats particular individuals rather than from any characteristic inherent in those individuals.<sup>144</sup>

The importance of *Egan v Canada* lies in its striking reasoning concerning Nigeria's anti-discrimination law. Referring to *Egan*, where the focus is on grounds as exemplified in Nigerian anti-discrimination law rather than on the impact of the discrimination, it cannot speak to lived experiences. The narrow approach to discrimination emphasises the characteristics of a disabled woman rather than society's treatment of her.

With no recorded court cases dealing with disabled women,<sup>145</sup> lessons can be drawn from the *Mojekwu* case in Nigeria.<sup>146</sup> The complainant's point was that he was entitled to inherit property under a Kola tenancy land tenure system as the only surviving male relative. The complainant claimed the property was his because of the *Oli-Ekpe* tradition,<sup>147</sup> which prevents daughters in a household from inheriting their father's property.

142 As above.

143 *Egan v Canada* [1995] 2 SCR 513.

144 As above.

145 Umeh (n 104 above) 73.

146 *Mojekwu v Mojekwu* (1997) 7 NWLR (pt 512) 283 (CA).

147 Durojaye & Owoeje (n 73) 76.

One of the issues that were brought before the Court of Appeal was whether this tradition was discriminatory. The court held that this tradition was discriminatory on the grounds of sex. Although this case is widely celebrated as progressive and successful, it exposes Nigeria's anti-discrimination law's narrow and restrictive stance. The case was won based on procedural matters and legal technicalities, that is discrimination on the grounds of sex is unconstitutional without investigating and overlooking the underlying social inequality and oppression of Igbo women, which are at the root of the case. Pothier makes the exact point: Even where cases are won and expected to engender some kind of social change, what happens instead is that these moments play a role in naturalising the status quo by magnifying one form of legally recognisable and prohibited discrimination.<sup>148</sup>

The most relevant point here is the court's failure to identify the intersectional positioning of the women that suffered discrimination. In other words, how did sex interact with culture and ethnicity to cause discrimination? This means that the result is still unsatisfactory because it has failed to reflect upon and recognise the woman's lived realities and the extent of the oppression encountered. This argument is validated by Durojaye and Owoeye's description of how the court was preoccupied mainly with ensuring that men and women are treated equally in customary law, without having regard to the consequences of differential treatment.<sup>149</sup> The court still relied on a formal perspective on equality without clearly reflecting on women's lived encounters subjected to discrimination daily.

The example clearly shows that Nigerian law does not entirely resolve sexism and ableism because it focuses on observable legally forbidden discrimination and the relatively isolated acts of individuals – the kind that commentators have described as narrow acts of 'objective discrimination'.<sup>150</sup> It is, therefore, crucial to reiterate how discrimination cannot be resolved entirely if the focus remains on abstract and isolated categories rather than specific consequences.<sup>151</sup> The danger of exploring the grounds for the distinction instead of examining the impact and aftermath of the distinction is that it does not reflect the lived realities and sensitivity to the actual experiences of disabled women.

148 Pothier (n 137 above) 56.

149 Durojaye & Owoeye (n 73)76.

150 Pothier (n 137 above) 56.

151 P Uccellari 'Multiple discrimination: How law can reflect reality' (2008)1 *Equal Rights Review* 24.



## 5 Recognising intersectional discrimination: Disability as an intersectional ground under international law

This section looks at how intersectional discrimination is approached by two international human rights treaties: the CRPD and the African Charter on Human and Peoples' Rights (African Charter).

### 5.1 The Convention on the Rights of Persons with Disabilities (CRPD)

Unlike previous human rights treaties, the CRPD is the first human rights treaty to recognise the intersectional discrimination that disabled women face daily explicitly.<sup>152</sup> Literature abounds that supports this assertion.<sup>153</sup> In its Preamble, for example, the CRPD drafters acknowledged

the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination based on race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.<sup>154</sup>

Further, the CRPD forbids discrimination against disabled people 'on all grounds'.

Specifically, General Comment 3 issued by the Committee on the Rights of Persons with Disabilities (CRPD Committee) recognises intersectional discrimination faced by disabled women and girls.<sup>155</sup> The CRPD Committee explained the susceptibility of disabled women and girls to intersectional discrimination because of their multidimensional identities.

However, although it is clear that the CRPD considers the intersectional discrimination experienced by disabled women, Ribet points out that this intersectional consideration is weak. For her, the

152 Preamble and art 6 of the CRPD.

153 G de Beco 'Intersectionality and disability in international human rights law' (2020) 24 *The International Journal of Human Rights* 593 at 596. G Beco 'Protecting the invisible: An intersectional approach to international human rights law' (2017) 17 *Human Rights Law Review* 633 at 638.

154 Preamble of the CRPD.

155 CRPD Committee General Comment 3: Article 6: Women and girls with disabilities (2016) UN Doc CRPD/C/GC/3 dated 2 September 2016 para 5. It recognises that disabled women themselves are not homogenous.

intersectional lens adopted by the CRPD Committee is weak because it is a response to law's essentialist identity tendencies alone.<sup>156</sup>

The Nigerian government ratified the CRPD and its Optional Protocol.<sup>157</sup> Its ratification makes it safe to assume the government has expressed commitment to protect disabled women and girls from intersectional discrimination in Nigeria. However, this commitment can be rightly questioned. These doubts are valid given that since the ratification of the instrument, Nigeria is yet to domesticate the CRPD into local law and fulfil its reporting obligations. Furthermore, there is no provision in the Nigerian Constitution like section 233 of the South African Constitution, allowing courts to defer to international law when making decisions.

## 5.2 The African Charter on Human and Peoples' Rights (African Charter)

Nigeria ratified the African Charter in 1983.<sup>158</sup> Unlike the CRPD, the African Charter is part of Nigerian local law by the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act.<sup>159</sup> By this domestication, some commentators have pointed to *Abacha v Fawehinmi*<sup>160</sup> to argue that this Treaty can be enforced in the same way as Chapter 4 of the Nigerian Constitution. For instance, in that case, the Supreme Court, the highest court of the land, had decided that the African Charter, having been domesticated into local law, could be used by Nigerian courts to apply and grant remedies to human rights infringements under the instrument. This judgment makes the rights under the Treaty justiciable.<sup>161</sup>

If the previous argument is to be trusted, it makes sense to briefly analyse how the African Charter approaches the intersectional encounters of the disabled Nigerian woman. Article 2 of the African Charter, for instance, provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any

156 B Ribet 'Emergent disability and the limits of equality: A critical reading of the UN Convention on the Rights of Persons with Disabilities' (2011) 14 *Yale Human Rights and Development Law Journal* 155 at 159 & 178.

157 Nigeria signed and ratified both the Convention and its Optional Protocol on 30 March 2007 and 24 September 2010 respectively.

158 ACHPR 'Ratification table' <https://www.achpr.org/ratificationtable?id=49> (accessed 20 September 2021).

159 African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act, 1990.

160 *Abacha vs. Fawehinmi* Case SC45/1997 (2000) 6 NWLR 228, Nigeria Supreme Court (28 April 2000).

161 I Ikimi 'Development of the human rights of women in cultural milieu' (2018) 9 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 58.

kind such as ... sex.... or other status ... Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.<sup>162</sup>

This provision is significant. It stipulates that rights are to be enjoyed without any distinction of any kind, such as sex. Simply put, the provision can be interpreted to mean that Nigeria must ensure that all individuals, including women with disabilities, are equal before the law and that discrimination against women because of their sex/gender is forbidden. In addition, with the *other status*<sup>163</sup> phrasing, although 'disability' is not explicitly mentioned in the prohibited list, it has been included implicitly. Thus, it is possible to speculate that the African Charter has allowed some form of intersectional analysis as the phrasing; *other status* provides for a degree of leeway to accommodate new forms of discrimination that could include intersectional discrimination.<sup>164</sup>

Another article that deals specifically with equality and non-discrimination of women is article 18(3). It provides that Nigeria as a state party shall prohibit every form of discrimination against women – and the child.<sup>165</sup> Article 18(4) provides that: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'<sup>166</sup>

This article is significant because it represents the first time the 'disabled' is mentioned in the Treaty. Unfortunately, since it does not define disability, there is an assumption that there is a consensus understanding of the 'disabled'. Section two shows that this is misleading as disability is still a highly contested and fluid term. In addition, this provision accords the 'disabled' *special measures of protection*. It is possible to speculate that the disabled are viewed from what Oyaro refers to as a rudimentary medical understanding of disability from the language choice.<sup>167</sup> As he explains, the use of the language '*special care*' and '*special measures of protection*' in the article indicates a medical understanding of disability almost to the exclusion of inherent rights.<sup>168</sup> By this article, the specific and intersectional encounters of the woman who could be disabled in multiple ways other than just the medical sense are obscured from view. It is not just about the obscurity of her encounters, but she practically disappears, and her intersectional encounters, unvoiced. Finally, the article also glaringly lumps the needs of the aged and the disabled together to suggest that one can only be disabled when one is aged, or one cannot be aged without being disabled.

162 Art 2 of the African Charter.

163 As above (emphasis added).

164 Truscan & Bourke-Martignon (n 123) 109.

165 Art 18(3) of the African Charter.

166 Art 18(4) of the African Charter.

167 LO Oyaro 'Africa at crossroads: The United Nations Convention on the Rights of Persons with Disabilities' (2015) 30 *American University International Law Review* 347.

168 As above.

Nonetheless, it is essential to note that the intersectional discrimination of disabled women is likely to remain unrecognised. This situation is likely to occur because the African Charter's domestication hardly holds any promise if critics, pointing to the same case of *Abacha*, argue that the supremacy of the Nigerian Constitution and particularly section 42 is to be upheld over every other law, including international treaties.<sup>169</sup>

## 6 Conclusion

The above analysis demonstrates the problems that Nigeria's formalistic perspective has presented for disabled women. Because it focuses on the prohibited grounds of discrimination, section 42 is limited to addressing and responding adequately to the complex and intersectional forms of oppression and discrimination that disabled women encounter. The anti-discrimination section's problem is its failure to recognise the disabled woman's intersecting grounds of discrimination. I have demonstrated that disability is overlooked in the Nigerian Constitution or reduced to a liberal conception of discrimination, where acknowledging discrimination is only a matter of recognising difference. The argument developed in the paper shows that although disability has now been recognised as a ground for non-discrimination in Nigeria, an approach that focuses on grounds will reinforce the poor use and representation of identities relative to the complexity of identities and experiences.

Therefore, the question is whether Nigeria's anti-discrimination law has any value at all. Nigeria's legal approach is not necessarily useless,<sup>170</sup> but it becomes a problem when used in a formalistic manner that Nigeria adopts. Without a careful understanding of the grounds in anti-discrimination law, an analysis of discrimination is limited. An understanding of the dynamics of the grounds is needed to foster a relational understanding of discrimination. This position is consistent with Pothier's point that an understanding of the variety of ways in which discrimination functions will lead to the emergence of a more complex and comprehensive appreciation of equality.<sup>171</sup>

169 D Peters 'The domestication of international human rights instruments and constitutional litigation in Nigeria' (2000) 18 *Netherlands Quarterly of Human Rights* 357.

170 In another article, I discuss Nigeria's anti-discrimination law fully and how it protects disabled women. The scope of this paper is limited to an analysis of sec 42 of Nigeria's 1999 Constitution.

171 Pothier (n 137 above) 56.

Some suggestions can be made from the preceding arguments for developing an intersectional analysis concerning the right to non-discrimination in section 42. First, significant research supports the idea that intersectional discrimination should be a separate analogous category on its own. The Supreme Court of Canada's decision in *Law v Canada*<sup>172</sup> supports this claim. The significance of the *Law* case lies in its reasoning, as suggested by Aylward. In her analysis, she notes that an intersectional discrimination claim by disabled women and their sexual assault and rape encounters could be expressed as a distinct form of discrimination based on stereotypes about disabled women's sexuality.<sup>173</sup> According to her, for intersectional claims, the starting point should be a discourse of the various forms of discrimination, followed by an intersectional analysis of the particular form(s) present in the case at hand, rather than as additions to the discrimination encountered by heterosexual, non-disabled, middle-class women, for example.<sup>174</sup>

In the Nigerian context, an intersectional analysis helps formulate an anti-discrimination law that addresses the reality of different women's lives while helping the courts produce a suitable solution in the circumstances. An intersectional analysis also assists with an increased understanding and revelation of oppression in Nigerian society, its underlying roots and the roles individual Nigerians could play in perpetuating oppression. The counter-argument to this suggestion might be that it still relies on categories, which have been challenged. However, the critical thing to note is that while there is still value in categorisation, disabled women do not fit into rigid categories. Therefore, the categorisation needs to be fluid, open-ended and allowed to intersect. Thus, the list of grounds in section 42 must become more open-ended in a manner that pays attention to the fact that discrimination can occur based on more than one ground and can occur based on several intersecting grounds.

Finally, part of the crucial attention to grounds/characteristics involves recognising the importance of the intersection of grounds/characteristics and resisting the legal bias that concentrates on a single ground/characteristic. Such tendency will lead to falling into the traps of categorisation and compartmentalisation. Moreover, intersecting grounds bring to the fore the idea that discrimination can occur in multiple directions simultaneously.

172 CA Aylward 'Intersectionality: Crossing the theoretical and praxis divide' (2010) 1 *Journal of Critical Race Inquiry* 40.

173 As above.

174 Aylward (n 172) 40-41.