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LITIGATING THE RIGHT TO HEALTH IN NIGERIA: JUDICIAL CHALLENGES AND EMERGING OPPORTUNITIES

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Abstract

Health rights litigation has emerged as a vital strategy for advancing the right to health in Nigeria. Despite notable successes, the effectiveness of this approach remains hindered by systematic challenges, institutional weaknesses, and socio-legal barriers. This critical assessment examines the complexities of health rights litigation in Nigeria and the extent of judicial activism in causing through these inexorable legal densities. Through a comparative lens, the work views the Indian judiciary in assessing the sort of pragmatism the Nigerian court may need.The doctrinal research methodology was adopted in this work in view of the library-based nature of the research. With the aim and objectives of ultimately improving the accessibility to and enjoyment of health right in Nigeria, the work concluded on the note that unrelenting pragmatism and defiant courage are indispensable for a judiciary that must serve as the hope of the common man in accessing health as a right.

Keywords: health right, judiciary, court, right.

Introduction

The right to health, enshrined in the Nigerian Constitution and international human rights instruments, remains elusive for many citizens due to the numerous challenges facing the Nigerian healthcare system which include inadequate infrastructure, insufficient funding and human resource shortages. These deficiencies have negatively affected Nigeria's healthcare trends and distribution, occasioning a precipitous decline in quality and effectiveness. The World Health Organization's survey done in 2021 ranked Nigeria's healthcare system as one of the worst in the world[42] while the maternal mortality rate for

42 E Nwanchuku, 'Nigeria: a Health Sector in Crisis' *Premium Times* (Lagos, 6th August, 2021) https://www.premiumtimesng.com/opinion/477854-nigeria-a-health-sector-in-crisis-by-emmanuel-nwachukwu.html?tztc=1 (5th June, 2024).

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that year stood at 917 deaths/100,000 live births.[43] This was as against the earlier rating of 2018 which was 545/100,000 live births[44] – an indication of a progressive decline in the country's healthcare system. In response, health rights litigation has emerged as a crucial strategy for holding governments accountable and advancing healthcare access. This response is necessitated by the non-justiciability challenge imposed by section 6(6)(c) of the 1999 Constitution as amended which reduced the "beautifully crafted economic, social and cultural matters in chapter II, which include the "soft" duty on states to provide healthcare" to causes that cannot be the subjects of determination before the courts.[45]
Health rights litigation in Nigeria has yielded significant victories, such as the landmark cases of *Festus Odafe v. Attorney-General of the Federation*[46] and *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*.[47] However, despite these successes, critical questions remain regarding the effectiveness, reach, and sustainability of health rights litigation in Nigeria.
In this context, the judiciary stands as a vital catalyst for potentially advancing the right to health through strategic litigation and judicial activism. The courts can hold governments accountable for ensuring the availability, accessibility, acceptability and quality of healthcare services. This article explores the critical role and effectiveness of health rights litigation, examining the Nigerian experience and suggesting innovative strategies to achieving and promoting equitable healthcare delivery for all.

Litigation and Health Right

Generally, the role of courts in enhancing the achievement of an effective health delivery system cannot be overemphasized. According to Glopen,[48] court room litigation offers the platform of holding leadership accountable to their responsibilities for rights in relation to health care service delivery. Accessing the court has its own challenges, though. For instance, there is socio-legal scholarship suggesting that the 'haves' have an upper hand in court and that even when litigation succeeds, court victories offer 'hollow hopes' bringing no real change.[49] Other scholars express the concern that litigation is not only ineffective and a waste of resources, it is counterproductive in that courts-centered

43 ibid

44Remigius N Nwabueze, *The Legal Protection and Enforcement of Health Right in Nigeria* (Cambridge University Press, 2014) 1.

45 Jennifer Heaven Mike 'Enhancing the Right to Health in Nigeria through Judicial Intervention' *Journal of African Law* (2023)67, 411. See also Obiajulu Nnamuchi 'Kleptocracy and its Many Faces: the Challenges of Justiciability of Right to Health Care in Nigeria' *Journal of African Law*, (2008) 52(1),7.

46[2004] FHC/PH/CS/680/2003

47Mr Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Att. Gen. of the Fed. [2005]6 AHRLR 152 (NgHC 2005)

48S Gloppen, 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008)1 0(2) *Health and Human Rights Journal* 21.

49 GN Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*(2nd edn, University of Chicago Press, 2008); SL Carter, 'Do Courts Matter?' *Faculty Scholarship Series* Paper 2255 (1992)http://digitalcommons.law.yale.edu/fss_papers/2255 accessed 1st December, 2019.

activism can hinder social struggle by preventing radical challenges to the status quo.[50] Also it has been argued that litigation is not helpful to the cause of vulnerable population except they are empowered for justice in their demand for an improved service delivery.[51] The foregoing notwithstanding, literature has shown the extensive role of courts as agents of social change. On the point,Mietzner[52] demonstrates the effectiveness of the assertiveness of the Indonesian courts in enforcing constitutional rights, while Ginsburg[53] shows the role of courts as catalysts of democratic values and constitutional rights in South Korea, Thaiwan, Thailand and Pakistan.

Courts play a key role in the protection of civil liberties, and can be very relevant during public health emergencies by issuing order authorizing actions to protect public health or restraining actions in the interest of public health

Litigating Health Right: the Nigerian Experience

In Nigeria, the role of the judiciary in political transition has been an important factor in holding the country together as a political entity. The judicial response to socioeconomic and political disputes at individual and intergovernmental levels has generated a transitional jurisprudence in a society confronted with multifaceted challenges of post authoritarian governance reforms and democratic-institution building. The judiciary, particularly the appellate courts, has been inundated with social developmental cases and has become a strategic actor in policy-decision making at a level unprecedented in the country's history.[54]

However, as it relates to health, it seems that the Nigerian courts are quite reluctant to declare that the right to health is a human right. In an application by the human rights activist, Mr. Femi Falana (SAN) for an order of enforcement of his Fundamental Human Right to physical and mental health, the applicant brought an application against the Federal Government in *Femi Falana v. Attorney General of the Federation* (FHC/IKJ/CS/M59/10) seeking the following reliefs:

50SA Boutcher, 'Law and social movements: It's more than just litigation and courts'https://mobilizingideas.wordpress.com/2013/02/18/law-and-social-movements-its-more-than-just-litigation-and-courts// accessed 1st December, 2019; SA Scheingold, *The politics of rights: Lawyers, public policy, and political change*(2nd edn, University of Michigan Press 2004).

51 JC Mubangizi and BK Twinomugisha, 'The right to healthcare in the Specific Context of Access to HIV/AIDS Medicines: What can South Africa and Uganda Learn from Each Other?' [2010] 10(1)*African Human Rights Law Journal* 105-134; JP Ruger, 'Towards a Theory of a Right to health: Capability and Incompletely Theorized Agreements' [2006] 18(2)*Yale Journal of Law & the Humanities* 273 – 326.

52 MMietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: the Role of the Constitutional Court' [2010] 10(3)*Journal of East Asian Studies* 397–424.

53 T Ginsburg, 'The Politics of Courts in Democratization: Four Junctures in Asia' in DKapiszewski and G Silverstein and RA Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective*(Cambridge University Press, 2013) 45-46.

54 Hakeem O Yusuf, '*Robes on Tight Ropes: The Judicialisation of Politics in Nigeria*'[2008](8)(2)3*Global Jurist*, art. 8–9http://www.bepress.com/gj/vol8/iss2/art3/ accessed on the 27th of April 2020.

i. *A DECLARATION that Nigerians are entitled to the best attainable state of physical and mental health guaranteed by Article 16(1) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (CAP A9) Laws of the Federation of Nigeria, 2004.*
ii. *A DECLARATION that the failure or refusal to repair and equip public hospitals and medical centres in Nigeria constitutes a violation of the duty of the Defendant to protect the health of Nigerians and to ensure that they receive medical attention when they are sick as required by Article 16(2) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (CAP A9) Laws of the Federation of Nigeria, 2004.*
iii. *A DECLARATION that the failure of the Respondent to save lives through the provision of adequate medical facilities is illegal and unconstitutional as it constitutes a threat to the Applicants fundamental right to life guaranteed by Section 33 of the 1999 Constitution and Article 2 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (CAP A9) Laws of the Federation of Nigeria, 2004.*
iv. *A DECLARATION that the practice of having public officials treated at public expense in foreign hospitals is illegal as it violates the right of other Nigerians to equality before the law and equal right of access to the public property and services guaranteed by Articles 3 and 13 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (CAP A9) Laws of the Federation of Nigeria, 2004.*
v. *AN ORDER OF PERPETUAL INJUNCTION restraining the Defendant from taking any public officer to foreign hospitals for medical check up and/or treatment in any manner whatsoever and howsoever.*
vi. *AN ORDER directing the Defendant to repair and equip Federal Government owned hospitals and medical centres to ensure that Nigerians receive adequate medical attention when they are sick forthwith.*

Dismissing the application, it was the view of the court that section 17 of the Constitution of the Federal Republic of Nigeria, which guarantees right to health, was not justiciable. The uninspiring outcome of this suit is significant to the country's tortuous journey toward a reformation of the health sector, especially in view of other third world countries whose constitutions similarly confine health right to the Fundamental Objective and Directive Principle (FODP) Chapter of the Constitution. In a number of cases in India, the Constitution of India has been interpreted by courts in the context of access to medical treatment being a fundamental human right. In *Paschim Banga Khet Mazdoor Samity v.*

State of West Bengel[55] the Plaintiff complained of having been denied medical assistance in Government hospitals. According to the Supreme Court of India, the State's first duty is to protect the welfare of its citizens, and part of that responsibility includes ensuring that they have access to proper medical services. In finding that Article 21's right to life had been violated and awarding damages, the Court noted that the right to emergency medical care was a crucial aspect of the right to health, which in turn was acknowledged as being a crucial component of the right to life. The Indian courts have additionally imposed a constructive duty on the State to broadly ensure access to medical care through judicial activism. In *Pt. Parmanand Katara vs. Union of India and Others*[56] the Supreme Court held that Article 21 imposed a duty on the government of India to preserve human life and specifically that government hospitals and government doctors had duties to save lives through offering medical assistance. The Court further ruled that the obligation to protect life was of the utmost importance and that no State action, statute, regulation, or process may impede or hinder government doctors from upholding their obligation. More positively, the Supreme Court in the case of *Consumer Education and Research Centres & Others v. Union of India*[57] held that having access to health care and other medical protections is a basic right, and that having health goes beyond simply being free from disease or mere absence of sickness.

What is significant about the above reference to India is that just like Nigeria, the Indian Constitution does not make right to health a fundamental human right. It only provides for it as a fundamental objective and directive principle of state policy which lacks enforceability. But the courts in India, particularly the Supreme Court, seem to have risen to the occasion through judicial activism to challenge the status quo.

This is important to the Nigerian experience in view of the health challenges faced by the Nigerian society. Nigeria is believed to have one of the highest maternal mortality percentages in the world, with over 900 deaths per 100,000 live births. It is estimated that 1 in 23 women will die during pregnancy or childbirth, compared to 1 in 9,200 women in Malta.[58]Odikpo and Durojaye note that other poor countries such as Lesotho and Swaziland have better maternal mortality ratios than Nigeria, while on the other hand Nigeria is said to have one of the highest maternity deaths rates in the world.[59] Quite disturbingly, Nigeria, like many developing countries, is still grappling with the challenges of maternal mortality whereas deaths arising from childbirth or pregnancy have almost

55(1996) 4 SCC

56AIR 1989 SC 2039

57(1955) 3 SCC 42

58 Ibid

59 Josephine Odikpo and Ebenezer Durojaye, 'Litigating Health Rights Issues: the Nigerian Experience' in Ebenezer Durojaye (ed) *Litigating the Right to Health in Africa: Challenges and Prospects* [Routledge, 2016] 142.

been eliminated in developed countries.[60] While death during pregnancy is generally preventable, maternal mortality has remained one of the leading causes of death and morbidity among women in most African countries. This is usually as a result of problems such as hemorrhage (25 per cent), unsafe abortion (13 per cent), eclampsia (12 per cent), infections (16 per cent) and obstructed labour and other direct causes (16 per cent);[61] although the reasons may differ from country to country.[62] In Nigeria the number of deliveries attended to by professional or skilled medical personnel is unfortunately put at 37% lower than the average in the region.[63] Even more disappointingly is the fact that Nigeria is one of the countries that has not made appreciable efforts towards reducing maternal death notwithstanding goal 5 of the UN MDGs. More so, other factors like corruption, misappropriation of resources, inadequate allocation of resources to health sector often contribute to, not just maternal mortality in the country, but to the general deplorable state of Nigeria's disease burden.

Violation of health rights often spirals into violation of other rights like life, work, housing, etc. Opportunities for redress of these violations are mostly inaccessible. Odikpo and Durojaye pointed out that at times a patient is given drugs with the label pilled off thereby depriving the patient the opportunity of having proper information of his medication.[64] This could lead to adverse effect like reaction to drugs or even deaths. This situation is even suffered more by vulnerable groups such as the uneducated, children, poor, patients with stigmatizing diseases like HIV/AIDs and women. Litigation affords the opportunity to affected individual to challenge some of these violations to human rights. That is why the role of the court is as important as a tool of social engineering in steering the wheels of progress or slowing it down, if not completely grinding it to a halt.

That is not to say that nothing has been happening in the Nigerian judiciary in preservation of health. In *Sunday Akinyemi v. Attorney General of the Federation & Anor.*,[65] the right to health and the right to life were linked by the Federal High Court. On the trial judge's orders, the applicant in that instance, who was facing a criminal charge, was remanded at Ikoyi prison in Lagos. He became ill during the trial and was admitted to the Lagos University Teaching Hospital, where colon cancer was discovered. The applicant applied to the Federal High Court for the enforcement of his fundamental right to life since his

60 ibid

61 World Health Organization, *The World Health Report 2005 – Make Every Mother and Child Count* (WHO 2005).

62 Center for Reproductive Rights, *Failure to Deliver: Violationsof Women's Human Rights in Kenyan Facilities* (CRR 2007) 24. In Zimbabwe, a study has shown that lack of access to transportation is responsible for 28 per cent of maternal deaths in rural areas. See Centre for Reproductive Rights, *Briefing Paper: Surviving Pregnancy and Childbirth: An International Human Right* (CRR 2005). See also SHailu and others, 'Health Facility-based Maternal Deaths Audit in Tigray, Ethiopia'.*Ethiopia Journal of Health Development* [2009](23)115.

63 A Bankoleand others, *Barriers to Safe Motherhood in Nigeria* (AGI, 2009) 4.

64(n16)143.

65 Cited in F Falana, 'Nigeria: Health as Human Right' *This Day* (Lagos 20thDecember, 2017)www.allafrica.com/storiesaccessed on 29th January, 2020. See also Victor Okeke, 'Women's Rights as Human Rights - a Call to End Fistula in Nigeria' *Leadership* (Lagos, 5th February, 2018) https://leadership.ng/2018/02/05/womens-rights-human-rights-call-end-fistula-nigeria/(7th February, 2020).

health deteriorated while he was being held in detention. He requested permission from the Federal High Court to travel abroad for urgent medical care at his own cost because the defendants were unwilling to pay for it. Despite the Lagos High Court's refusal to grant the applicant bail, Justice M.B. Idris of the Federal High Court stated:

> "*There is no doubt that life is ultimate measure of all things and for that reason the right to life is unarguably the most fundamental of all liberties. Without the right to life, no other right can be enjoyed, and it is for that reason that it is guaranteed under section 33 of the Constitution, and Article 4 of the African Charter on Human and Peoples Rights...*"

Commendable as this case may be, it is noteworthy there is no positive pronouncement on health being a fundamental human right. But agreeably, it links health as an inexorable corollary to the enjoyment of right to life.

Due to the fact that health is not justiciable in Nigeria, litigating health right has mostly been less than fruitful. The fact that there is no explicit provision for health right under the justiciable section of the constitution continues to constitute a clog in the wheel of progress. The Court held in *Archbishop Okogie and Others v The Attorney General of Lagos State,*[66]that the provisions of Chapter II were not enforceable pursuant to section 6 of the 1979 constitution, which is similar to section 6 of the 1999 constitution, and the court did not have the authority to rule on the provisions in that chapter. Instead, either the executive or legislative branches of government should carry out this function. Prior to *Okogie*, any chance of pursuing legal action over socio-economic rights (included in chapter II of the Nigerian Constitution) was fatally wounded by the court. The Court has essentially shut the door on potential socioeconomic rights petitioners in Nigeria with its ruling.

Most of the litigations on health before year 2000 dealt with contractual issues. Others deal with law of tort, particularly the doctrine of informed consent to protect the individual's right to protection of bodily integrity, personal dignity, autonomy and self-determination. This status vests in the individual the right to refuse any medical treatment, test, examination, advice or counsel as he may deem fit for himself. Thus, in the Nigerian case of *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*,[67] the Supreme Court upheld the decision by a Jehovah Witness to refuse consent to blood transfusion in the exercise of his right. Apparently when a situation is more implicative, such as having permanent effect, the court will insist on clear and unmistakable consent. In *Okekearu v. Tanko,*[68] the Supreme Court per Niki Tobi JSC posited that:

66 (1981) 2 NCLR 350

67(2001)7 NWLR 206

68(2002) 15 NWLR pt 791 at 657 SC

> "*Consent, which is the act of giving approval or acceptance of something done or proposed to be done, is an exact conduct flowing from the person giving the consent. While consent could be implied in certain situations, it is my view that consent to amputate a part of the body should be exact and unequivocal. There should be no doubt that Tanko Danjuma, the amputee, gave his consent that his finger be amputated*"[69]

In some cases, health litigation in Nigeria has occurred in relation to personal injuries or workplaces. In the case of *Strabag Construction Ltd v. Ogarekpe,*[70] the appellant employed the Respondent as one of her electricians. On 17th of January, 1984, the respondent and five others were carrying out an electrical wiring job while the Respondent was on top of a tower crane being installed at a considerable height. In the course of the installation the crane shifted and the Respondent fell and broke an arm and severed his armpit. The orthopedic doctor that treated him put his disability at 25 percent and stated that he was no longer fit to perform his duty as an electrical technician. The Court held in his favour when he sued for negligence.

Much of the judicial pronouncements on health right stem from actions causing harm to the environment and endangering public health. In the case of *Gbemre vs. Shell Petroleum Development Company Nigeria Limited and Others*[71]it was the case of the applicants that their right to life and dignity of human person guaranteed under sections 33(1) and 34(1) of the 1999 Constitution (as amended) and reinforced by Articles 4, 16 and 24 of the African Charter of Human and People's Rights (Ratification and Enforcement) Act, Cap A9 vol. 1 Laws of the Federal Republic of Nigeria 2004 inevitably includes the right to clean poison-free, pollution-free and healthy environment. It was also their case that they have a right to respect for their lives and dignity of their persons and the enjoyment of the best attainable state of physical and mental health which right they alleged was being violated by the gas flaring activities of the respondent in the course of her gas exploration and production. The court, while granting the reliefs of the applicants held that the constitutionally guaranteed right to life and dignity of human person "inevitably include the right to clean, poison-free, pollution-free and healthy environment".

In the case of *Social Economic Rights and Accountability Project (SERAP) vs. Federal Republic of Nigeria*[72]the subject of environmental health obligation was before the ECOWAS Court

69 Ibid pp.12-13 paras. G-B.

70 1991, 1 NWLR Part 170 at 733 CA.

71 (FHC/B/CS/53/05, Federal High Court Lagos 14November, 2005) unreported, accessed 20th July, 2019, http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf.

72 ECW/CCJ/JUD/18/12

of Justice[73] for determination of the plaintiffs' right. The plaintiff contended that the Niger Delta has suffered for decades from oil spills which destroy crops and damage the quality and productivity of the farming soil of communities in the region and contaminate drinking water all due to the activities of the oil industries in the Niger Delta. The plaintiff submitted that the government's obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring and that the failure of the government to take the concerns of the community seriously and take steps to ensure independent investigation in the health impacts of gas flaring and ensure that the community has reliable information is a breach of internationally recognized standard of living, including adequate access to healthcare and healthy environment. These violations, the plaintiff submitted, were in violation of Articles 1 and 24 of the African Charter on Human and Peoples' Rights. The Court held in favour of the plaintiff.

In *Social Economic Rights Action Center &Anor vs. Nigeria*[74]there was an allegation of violation of the provisions of the African Charter on Human and People's Rights (ACHPR) by the defendant on the right to health, the right to dispose of wealth and natural resources, the right to a clean environment and family right due to the defendant condoning and facilitating the operations of oil corporations in Ogoniland.[75] The Commission ruled that the Ogoni has suffered violations of their right to health (Article 16) and right to a general satisfactory environment favourable to development (Article 24) due to the government's failure to prevent pollution and ecological degradation.

Two post 2000 cases have been described as 'leading cases' in health right litigating in Nigeria.[76] The courts made bold pronouncements in advancing individuals' rights to health in cases that are directly related to medical care and premised on discrimination against vulnerable group of persons. In the case of *Festus Odarefe & Ors. vs. Attorney General of the Federation & Ors.,*[77] the applicants were before the Federal High Court, Porthacourt, praying the court for the following:

> *1. A declaration that the applicants' constitutionally guaranteed rights to human dignity and their freedom from discrimination, as outlined in sections 34(1)(a) and*

73 Nigeria is signatory to the Treaty of Economic Community of West African States (ECOWAS) and according to article 15 of the Treaty, "Judgments of the Court of Justice shall be binding on the Member States, the institutions of the Community and on individuals and corporate bodies".

74 Cited as Communication No. 155/96 (2001). The judgment was rendered by the African Commission on Human and People's Rights http://www1.umn.edu/humanrts/africa/comcases/155-96.html accessed July 23rd, 2020.

75 The African Charter on Human and People's Rights (Ratification and Enforcement) Act states that "As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights (ACHPR) shall have the force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria". The ACHPR is also held by the Court of Appeal in *Ubani vs. Director SSS*1999 11 NWLR pt 129 to be applicable in Nigeria.

76 That is the case of *Festus Odafe and Others v Attorney General of the Federation and Others* (FHC/PH/CS/680/2003, Federal High Court of Nigeria, Port Harcourt judicial division, 23 February 2004)and *Georgina Ahamefule v Imperial Medical Centre and Another*(ID/1627/2000,Lagos High Court, 27 September 2012) unreported. See Josephine Odikpo and Ebenezer Durojaye, (n16)152.

77(AHRLR 205 (NgHC 2004) with Suit No. FHC/PH/CS/680/2003.

> *42(1) of the 1999 Constitution, have been violated by their ongoing detention and the ensuing segregation and discrimination of them as confirmed HIV/AIDS patients.*
> *2. A declaration indicating, in accordance with the Prisons Act, the Prisons Regulation Law, and the United Nations Standard Minimum Rules for the Treatment of Prisoners, the applicants as confirmed HIV/AIDS patients have a right to appropriate medical care while in detention.*
> *3. A declaration that the officers, servants, agents, and privies of the respondents have subjected the applicants, who have been diagnosed with HIV/AIDS, to inhuman and degrading treatment and in violation of their fundamental rights as protected by sections 34 and 42 of the 1999 Constitution of the Federal Republic of Nigeria and article 5 of the African Charter on Human and Peoples' Rights, while they were being held in custody.*
> *4. A declaratory order directing the applicants to be transferred to specific government-owned hospitals so they can receive the necessary medical care.*

The court held that the respondent failed to comply with the provisions of section 8(1) and (3) of the Prisons Act and the article 16 of the ACHPR which treaty had been ratified by Nigeria. The court held further that the second to fourth respondent had a duty to provide medical attention for the applicants and failure to do so were non-compliance with article 16 of the Charter and that the socio-economic rights of a person entrenched in the Charter must be observed by Nigeria being a signatory to same:

> *A dispute concerning socio-economic rights such as the right to medical attention requires the Court to evaluate state policy and give judgment consistent with the Constitution. I therefore appreciate the fact that the economic cost of embarking on medical provision is quite high. However, the statutes have to be complied with and the state has a responsibility to all the inmates in prison, regardless of the offence involved, as in the instant case where the state has wronged the applicants by not arraigning them for trial before a competent court within a reasonable time and they have been in custody for not less than two years suffering from an illness. They cannot help themselves even if they wanted to because they are detained and cannot consult their doctor.*

The court therefore ordered the respondents to relocate the applicants to a hospital in accordance with section 8 of the Prisons Act.

In the 2012 case of *Georginia Ahamefule vs. Imperial Medical Center & Dr. Alex Molokwu*[78] the plaintiff challenged the termination of her employment as an auxiliary nurse by the

78 Suit No. ID/1627/2000 (unreported), accessed July 23rd, 2019,

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defendants based on her HIV-positive status. In 1989, the plaintiff started working as an assistant nurse at the Imperial Medical Center. When she experienced boils on her skin in 1995 while pregnant, she went to her employer, Dr. Alex Molukwu, for care. However, he performed medical exams and diagnostic tests without telling her what they were for or what the results were. When Georgina had a positive HIV test, her work agreement was immediately terminated. The termination letter stated that Georgina's HIV positivity posed hazards to the hospital's management, who could not put the institution or its patients at risk. Georgina miscarried after experiencing mental and psychological trauma as a result of learning that she was HIV-positive and losing her job. Even though medical ethics and the law require counseling to be conducted, Georgina was never given any kind of counseling either before or after the tests were performed.

On July 14, 2000, the Social and Economic Rights Action Center (SERAC) filed a lawsuit against the Imperial Medical Center and its Chief Medical Director, challenging the termination of Georgina Ahamefule's employment. In an emblematic decision, Justice Y.O Idowu of the Lagos High Court held that the termination of the Plaintiff's employment was "illegal, unlawful, and based on malice and extreme bad faith". The Court also held that the Defendant's action in subjecting the plaintiff to HIV testing without her informed consent constituted an unlawful battery. In addition, it determined that the Defendants' failure to provide the Plaintiff with pre- and post-test counseling services amounted to unlawful negligence of a professional obligation. Finally, the Court established that the Defendant's action in denying the Plaintiff medical care on grounds of her HIV-positive status constituted flagrant violation of the right to health guaranteed under Article 16 of the African Charter on Human and People's Rights (Ratification and Enforcement), Act CAP 10 Laws of the Federation of Nigeria, and Article 12 of the International Covenant on Economic, Social and Cultural Rights (ratified in Nigeria in 1993). The Court made an order of 5 Million Naira in general damages for the wrongful termination of the Plaintiff's employment and an order of 2 Million Naira in compensation for unlawful HIV testing without the Plaintiff's informed consent and the Defendant's negligence.This judgment has been considered epochal for being the first ever HIV discrimination lawsuit in Nigeria.[79] While this judgment is symbolic for its clear pronouncement on the right to health, it still awaits the blessings of the Supreme Court.

It must be noted that for the purpose of litigating rights under chapter IV of the Constitution, or as in recent actions, to litigate health as a right *simplicita*, it must be

http://www.escrnet.org/sites/default/files/Mrs%20Georgina%20Ahamefule%20v.%20Imperial%20Medical%20Centre%20%26%20Alex%20Molukwu.pdf.

79 Patience Ogbo, 'Nurse Wins Landmark Case in Nigeria Over Dismissal for Testing Positive to HIV' *The Eagleonline*(Lagos, 10th October, 2012)https://theeagleonline.com.ng/nurse-wins-landmark-case-in-nigeria-over-dismissal-for-testing-positive-to-hiv/ accessed 4th December, 2019.

instituted in court in accordance with the Fundamental Rights Enforcement Procedure Rules (FREP Rules).[80]

The procedure laid down by the rules is as follow:

7. An applicant may apply to court by any originating process acceptable to the Court for enforcement of his fundamental rights which shall, under the provisions of order 2 rule 2, lie without leave of Court.
8. It must be supported by statements that set out the description and name of such applicant.
9. The reliefs sought must be clearly set out as well as the grounds thereof.
10. It must be accompanied by a verifying affidavit containing depositions to the facts to be relied on by the applicant[81]

The aforetasted procedure is the current move to inject expeditiousness into the dispensation of justice as it pertains to rights. Initially the FREP Rules were applicable only to fundamental rights provisions contained in Chapter IV of the Constitution. However the Court has held in *Ohakosim v. Commissioner of Police Imo State*,[82] that pursuant to the African Charter on Human and People's Rights (Enforcement and Ratification) Act Cap A9, LFN 2004, the ACHPR constitutes part of the laws of Nigeria and must be upheld by all courts in Nigeria. Consequently the Rules must apply to the ACHPR and all other instruments domesticated and enacted in Nigeria. On this the 2009 FREP Rules elaborately provides the overriding objectives of these Rules as summarized below:

(a) The Constitution, particularly Chapter IV, as well as the African Charter, shall be construed and enforced broadly with a view to furthering and realizing the rights and freedoms inherent in them and providing the protections envisaged by them.

(b) The Court shall respect municipal, regional, and international bills of rights cited to it, brought to its attention, or known to the Court, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions, for the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms. These laws include (i) the African Charter on Human and Peoples' Rights and other instruments (including protocols) in the regional human rights system for Africa, and (ii) the Universal Declaration of Human Rights and other instruments (including protocols) in the UN human rights system.

80"Fundamental rights" is defined as "any of the fundamental rights contained in Chapter IV of the Constitution" in the fundamental rights enforcement guidelines made by the CJN in accordance with sections 43(3) of the 1979 Constitution and section 42(3) of the 1999 Constitution. See *Fajemirokun v Commercial Bank Nig. Ltd* (2009) 5 NWLR Part 1135 at 588 SC.

81 See generally Order II of the FREP Rules, 2009.

822009, 13 NWLR 1164 at 229.

What Can We Do Differently?

The court system has apparently not put her feet down like some other jurisdictions such as India. India does not have an explicit statutory provision on health right, but the courts have creatively found ways of rejecting the excuse of lack of resources and have held the government accountable for health rights violations. In *Paschim Banga Khet Mazdoor Samity v State of West Bengal*,[83] the Indian Supreme Court held that: It is no doubt true that financial resources are needed for providing these facilities. But at the same time, it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the matter of allocation of funds for medical services, the said constitutional obligation of the State has to be kept in view. Similarly in the Colombian vascination case, involving the general failure of the state to provide for the vaccination of children, the Colombian Constitutional Court concluded that: The negligent abstention by the State, its passivity regarding the marginalized and discriminated groups of society, does not meet its duty to put in place an equitable social order –which constitutes the basis for the legitimacy of the Welfare State under the rule of law. It also fails to comply with the constitutional provision proscribing marginalization and discrimination. In these circumstances, the role of the judiciary is not to replace public authorities which are liable for this abstention. It is rather to order the State to fulfill its duties, where it is clear that failure to act violates a fundamental constitutional right.[84]

The following recommendations are made to strengthen health right litigation in Nigeria:

1. Capacity Building for Judges and Civil Society
   No doubt that the capacity of the judges to come up with ground breaking and landmarking judgments depends on their professional competence and creativity, access to relevant knowledge and command of the necessary legal remedies. There is the need to sensitize the judges and civil societies. One practical way to achieve this is through the Nigerian Bar Association organizing seminars on health right for judges. Also, experience sharing with counterparts in jurisdictions with similar experiences, challenges and exposure to health rights violations. Civil societies should identify potential cases for litigation and take the bold step to file such cases in court.
2. Creative Strategies for Litigation
   In the absence of substantive right to health and in view of the fact that a constitutional amendment in that light is not foreseeable in the near future, the creative approach to health right cases becomes inevitable. Byrne noted that the

83 (1996) 4 SCC 37.

84 Constitutional Court of Colombia, Decision (Sentencia) SU-225/98, May 20, 1998, paragraph 29 (unofficial translation provided by International Commissions of Jurists)

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lack of express constitutional protection for health rights provides courts, lawyers and activists with significant but not insurmountable challenges for enforcement.[85] Suggested approaches could include: adopting constitutional provisions to argue for justiciability, reinterpreting the right to health as an inevitable corollary to right to life as has commonly been done in India, and relying on the need for equality and non-discrimination to argue for the need to recognize and provide for the differences and specific needs of vulnerable groups that generally face particular health challenges such as higher mortality rate.

3. Creating Special Procedures for Health Right Litigation
   Considering the place of health which is a natural corollary to the enjoyment of right to life, it is often time in urgent need of intervention. Where one needs to seek protection for a foreseen violation of his health under the existing legal regime, it is most likely that such violation will occur before an eventual succor. It is therefore recommended that a special procedural system be created for courts to achieve expeditious hearing where the matter is determined to be health right litigation. Such system will not allow for procedural technicalities in the dispensation of justice. Importantly, the Supreme Court in a plethora of decisions is now heavily inclined towards substantial justice generally in all types of cases such that substantial justice will not be sacrificed on the altar of technicality.[86]
4. Need for More Efficient Law Reporting on Health Litigation
   There is the need to operationalize health law reportage in order for ease of accessibility for lawyers and judges. There is an observable dearth of case law on health right litigation, perhaps because most of such cases are not appealed to the apex courts. For instance the all-important case of *Sunday Akinyemi*[87] filed by Femi Falana SAN at the Federal High Court never saw beyond the four walls of the court of first instance despite its very important place and its cardinal theme of linking health right to right to life. It is not out of place to suggest that such cases could yet be reported for the purpose of organization and easy sourcing for all its persuasive impact and reference for judges. More so, reportage of High Court Cases is not something that is unprecedented in our legal milieu as the late doyen of the bar, Chief Gani Fawehinmi, had a High Courts of Nigeria Law Reports, 1985 which reported High Court cases.

85 I Byrne, 'Making the Right to Health a Reality: Legal Strategies for Effective Implementation' http://www.interights.org/doc/health%20paper.doc accessed 18th August, 2023.

86Shehu Mohammed Koko v. ShehuMuhammed Bello Koko &Ors. (2023) 13 NWLR (Pt. 1901) 249; (2018) LPELR-46333 (SC).

87 See (n 22)

Conclusion

The use of litigation as a mechanism to realize the right to health in Nigeria remains a developing area with significant untapped potential. Achieving meaningful progress in this area will require innovative legal strategies, unrelenting activism and defiant courage from both the judiciary and civil society to attain the desired goal. Importantly, courts can only act when cases are not instituted in them, underscoring the urgent need to initiate and pursue health right cases. Given the current state of health right litigation, it is imperative for litigants and civil society organizations to push these cases to the Supreme Court to secure authoritative pronouncements. Such landmark decisions from the apex court have the power to reshape the legal landscape, drive systemic reforms, and set the stage for a transformative approach to health rights enforcement in Nigeria.

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