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NON-JUSTICIABILITY OF HEALTH RIGHT IN NIGERIA: IMPACT ON PRIMARY HEALTHCARE SERVICES IN AUCHI KINGDOM

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Abstract

75 years ago, the Universal Declaration of Human Rights proclaimed a wide spectrum of rights that every human being was entitled to. These rights did not just spread through civil and political rights such as freedom of expression, freedom from torture and ill treatment, but also included economic, social and cultural rights such as right to education, adequate housing and right to the highest attainable standard of both physical and mental health. Although Nigeria is a party to the Universal Declaration of Human Rights, 1948 and therefore legally bound by its obligations, the enjoyment of the right to health has not been adequately protected under the law. The normative provision on right to health as contained in the 1999 Constitution (as amended) has reduced the potency of the right to that of an ordinary policy that is non justiciable before any tribunal in Nigeria. This work examines the extent of the enjoyment of this right with particular bias to the Auchi Kindgdom of Edo State, Nigeria. The focus will show the impact of this non justiceability on primary healthcare services in the community and the community's general effort on achieving a healthy society within the kingdom. Against this backdrop, this work will call attention to the inevitable cul-de-sacs and fated conundrums encountered by litigants who believe that their rights (economic rights) have been breached and like every other right, same must be redressed in court. It will advocate the need for constitutional amendment to reflect the new trend as regards the enjoyment of right to health generally and specifically in community townships like Auchi kingdom.

Keywords: Health, justiciability, 1999 Constitution (as amended), economic rights, fundamental objective and directive principle, Auchi Kingdom.

Introduction

A possible point to start from is to risk the question, whether the right to healthcare is recognized in Nigeria as a basic human right. This poser is important because under the 1999 Constitution (as amended), right to health is not an actionable right as it is merely a fundamental objective and directive principle of state

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policy. Nigeria is a party to a number of international treaties on health right such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), African Charter on Human and Peoples' Rights (ACHPR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination (CEAD). As a result of this obligation it becomes imperative for Nigeria to operationalize her legal regime on health in view of her international obligations.

The constitution is a very important tool for the protection and promotion of human rights. Being the grundnorm, it is the supreme law of the land to which all other laws, municipal or domesticated international laws, are subject. Section 1(3) of the 1999 Constitution is to the effect that any law that is inconsistent with the constitution is void to the extent of its inconsistency. In the light of this provision, it has been argued that all legislation that make right to health justiciable in Nigeria are inconsistent with the constitution and therefore void.

The idea of rights has always formed a basis for assessment of a government and ground for agitation for better conditions. It appears that the Nigerian government has failed to give adequate attention to the public health sector and has demonstrated a lack of strong political will in its national health programs. The victims of the ill-equipped, understaffed and poorly funded health facilities are the common Nigerians who cannot afford to obtain better treatment through private health sectors or abroad. This adverse outcome is most felt in villages, communities and townships for obvious reasons.

Auchi Community

Auchi, a town located in Etsako West Local Government Area in the Northern part of Edo State housing an estimated 200,000 people, comes under reference here being a fast-developing township[47] and a strategically located community for middling. The traditional administration of the community under the aegis of the Otaru of Auchi takes a relatively special interest in healthcare of the community, both her people and her environment. In this light, the community has a Community Liasson on health who works hand-in-hand with the government on primary healthcare (PHC) in order to deepen the impact of healthcare system amongst the Auchi people while at the same time having a personnel of devote workforce that takes full charge of environmental sanitation of the community. Perhaps this structure accounts for why the community is fondly known by her habitants as Auchi Sacred Kingdom.

47 Auchi is regarded as the fastest developing town in Nigeria. See Ajayi, A.S; Ibrahim, Rasheed; Brai, M. A.; Seghosime, Sule (2019). "Overview of the Anthropogenic Causes of Soil Erosion in Auchi, Edo State, Nigeria" *Merit Research Journal of Agricultural Science and Soil Sciences*. **7** (8): 087–090. doi:10.5281/zenodo.3380575.

This step, apparently indicative of the profound interest of the community in ensuring access to health services for her people, underscores the importance of accessibility to health for average communities and townships. Unfortunately, the legal regime on health in Nigeria occasions a constitutional conundrum for such communities like the Auchi people who may want to exercise their health right collectively or otherwise.

But notwithstanding this effort by the community, the state of the primary healthcare in the Community leaves much to be desired. More worrisome is the fact that the non-justiceability of health right limits the people from being able to have resort to the Court to insist on their health rights.

The constitutional obligation for health provision is contained in section 17(3)(d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). But of a sad note is that this provision is contained in Chapter II of the Constitution which is non justiciable due to the provision of section 6(6)(c) of the Constitution. This tends to render impotent the obligation under section 17(3)(d).

This work argues for two things: that right to health must be construed as justiciable when addressed under appropriate circumstances which are envisaged in the Nigerian Constitution. Secondly, there is the need for government to invest more in facilitating access to primary healthcare through constitutional amendment and reframing of section 6(6)(c) in order to specifically realize access to healthcare goals as it pertains to the Auchi Community.

Right to Health

Right to the highest attainable standard of health was first articulated in the World Health Organization (WHO) constitution of 1946. (Bryant, 2010, p. 97). According to the preamble to the WHO constitution, "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being..." Fundamental rights are those species of rights which have been recognized and incorporated into the constitution of any nation. This position was advocated in Ransome Kuti and Ors. v. A.G. Federation (1985)8 NWLR (Part 6) 211.

The entrenchment of fundamental human rights in Nigeria in the modern sense could be traced to 1960 Independence Constitution and the 1963 Republican Constitution. The 1979 and 1999 Constitutions went further by creating a bill of rights. Also, it recognized economic and social rights as fundamental objectives and directive principles of state policies. The entrenchment of human rights in the Constitution is aimed at protecting the society and guaranteeing political freedom as well as the social and economic well-being of Nigerians (Office of the High Commissioner for Human Rights, 2006).

The protection of human rights must now recognize the indivisibility of civil and political rights on the one hand and economic, social and cultural rights on the other hand.

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Civil and political rights are a class of rights that protect individuals' freedom from unwarranted infringement by governments and private organizations, and ensure one's ability to participate in the civil and political life of the state without discrimination or repression. Civil rights include the ensuring of peoples' physical and mental integrity, life and safety; protection from discrimination on grounds such as race gender, sexual orientation, gender identity, national origin, colour, ethnicity, religion, or disability; and individual rights such as privacy, the freedoms of thought and conscience, speech and expression, religion, the press, assembly and movement. Political rights include natural justice in law, such as the rights of the accused, including the right to a fair trial; due process; the right to seek redress or a legal remedy; and rights of participation in civil society and politics such as freedom of association, the right to assemble, the right to petition, the right of self-defense, and the right to vote.

Economic, social and cultural rights are socio-economic human rights, such as the right to education, right to housing, right to adequate standard of living, and the right to health. Economic, social and cultural rights are recognized and protected in international and regional human rights instruments. Member states have a legal obligation to respect, protect and fulfill economic, social and cultural rights and are expected to take progressive action towards their fulfillment. The Universal Declaration on Human Rights recognizes a number of economic, social and cultural rights and the International Covenant on Economic, Social and Cultural Rights(ICESCR) is the primary international legal source of economic, social and cultural rights. The Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women (CEADAW) recognizes and protects many of the economic, social and cultural rights recognized in the ICESCR in relation to children and women. The Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination on the basis of racial or ethnic origin in relation to a number of economic, social and cultural rights. The Convention on the Rights of Persons with Disabilities also prohibits all discrimination on the basis of the disability including refusal of the reasonable accommodation relating to full enjoyment of economic, social and cultural rights.

This indivisibility of civil and political rights on the one hand and economic, social and cultural rights on the other is because the preservation of right to dignity, own property, and right to life are meaningless if one does not have good health or lacks access to essential medicines in order to enjoy good health. Thus, policy makers must spend as much time considering policies in terms of obligations to fulfill the right to health, as they do in developing elaborate and potentially impressive commitments to the eradication of discrimination or violation of dignity for example (London, 2008, p. 68).

Right to health is implicitly linked with the right to life which is a fundamental human right (Omonzejele, 2010 p. 41). If that be the case then human right to life needs to be protected and preserved. The minimum healthcare an individual is entitled to must not be evaluated

on the basis of one's ability to pay for basic healthcare. Hence the individual involved, whether rich or poor, is immaterial. It has been argued that valuation of life in terms of hard cash may be essential in the court room for the purpose of establishing damages and compensation. But in a doctor's surgery, all that counts is life irrespective of whatever market price may be attached to it (Thompson, 1977 p. 171). This will form the premises for the evaluation of the minimum healthcare entitlements in Nigeria.

In an impoverished society like Nigeria, where poverty level has been rated as among the worse in the entire globe (Subair, 2013), access to decent treatment and essential medicines is constantly hampered by poverty, physical inaccessibility, proliferation of fake drugs, lack of appropriate information, among other factors typical of impoverished societies.

A country's difficult financial situation, such as that obtainable in Nigeria, does not release it from the duty to ensure that the health safety and welfare of its citizens are guaranteed. State must guarantee the right to health to the maximum of their available resources even if these are tight. This obligation falls into three categories: the obligation to respect, protect and fulfill. (Subair, 2013, p. 25)

The obligation to respect requires states to refrain from denying or interfering with the right to health directly or indirectly. Limiting health care services, marketing unsafe drugs, imposing discriminating practices against women, limiting access to contraceptives, withholding, misrepresenting health information, are all examples of breach of this category of obligation.

The second obligation is the obligation to protect, which requires states to prevent third parties from interfering with the enjoyment of right to health. States are obliged to ensure that legislation that conform to human rights standards are in place so as to guide actors in health care services. Examples include preventing women from undergoing harmful traditional practices or third parties from coercing them to do so, prevent female genital mutilation, preventing environmental degradation.

The obligation to fulfill requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to health. For example, states must adopt policies that ensure the provision of healthcare, including immunization program against infectious diseases, services designed to minimize and prevent further disabilities, equal access for all to the underlying determinants of health such as safe and nutritious food, sanitation and clean water. Communities like Auchi are usually the first beneficiaries of such developmental measures. Conversely, they suffer the most in the typical cases of serious want of accessibility to healthcare. It is hardly arguable that the most effective capitalization in health development is constitutional protection of the right. Until that is achieved in Nigeria, small and developing communities like Auchi will suffer greatly.

Right to a healthy environment is essentially a part of the right to health. This right is also provided for only as a fundamental objective under the 1999 Constitution (as amended). The issue of environment is no longer viewed simply as an ecological concern. Its core ramifications have political, developmental, sociological and scientific implications all of which are anchored to the concept of sustainable development. (Abdulqadir & Sambo, 2009, 61) Increasingly there is recognition of the serious impact that a degraded environment has on human health and wellbeing. This points to the need for a more articulated approach to the issue of health as the Constitution currently does not take into contemplation the modern trend on the issue of health.

Fundamental Objectives and Directive Principles (FODP) and the Right to Health

The 1999 Constitution of the Federal Republic of Nigeria (as amended) makes provision for Fundamental Objectives and Directive Principles (FODP) of State Policy in its Chapter Two. These objectives merely provide a guide for any government in power in Nigeria and contain essential needs of the people in Nigeria on political, economic, social, educational, environmental, media, national ethics matters and duties of citizens (Okeke, 2013). They are directions given to the government to guide the establishment of a just society and "commit" the state to promote the welfare of the people by affirming socio-economic and political justice, as well as to fight economic inequality. According to Section 13 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), "it shall be the duty and responsibility of all organs of government and of all authorities and persons exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution" even though they are non-justiciable in nature. The Supreme Court of Nigeria, in Attorney General of Ondo State vs Attorney General of the Federation & 35 ors. (2002) 27 WRN, 1, has interpreted the above provision to apply not just to the government but also to private individuals.

These objectives and principles, if turned into human rights, would lead to a society devoid of the series of setbacks – problems such as unemployment, lack of basic amenities, low level of welfare, crisis of varying nature and degree – which have presently plagued the Nigerian society.

The idea of Fundamental Objectives and Directive Principles of State Policy in the Nigerian constitution, a concept which is said to have been borrowed from India (Akande, 2000), originated from the Constitution of Ireland. (Anand, 2010) It is traceable to the Declaration of the Rights of Man proclaimed by Revolutionary France and the Declaration of Independence by the American Colonies. (Pylee, 1999, 23) The Indian Constitution from which Nigeria borrowed its idea was also influenced by the United Nations Universal Declaration of Human Rights (UNDHR) of 1948.

These objectives aim to create social and economic conditions under which the citizens can lead a good life. They also aim to establish social and economic democracy through a

welfare state. They are yardsticks to measure the performance of a government and vote it out of power if it does not meet the expectations of the people.

These directive principles are non justiciable by virtue of section 6(6)(c) of the 1999 Constitution provides which provides that

S.6 The judicial powers vested in accordance with the foregoing provisions of this section –

> *6(c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution*

It would therefore appear that the duty and responsibility on all the organs of government is limited to the extent that the judiciary cannot enforce any of the provisions. To that extent, it would seem that the executive does not have to comply with the provisions.

Section 20 of the 1999 Constitution (as amended) provides for the protection of the environmental health. "The state shall protect and improve the environment and safeguard the water, air and land, forest and wildfire of Nigeria". Unfortunately, despite the obligatory nature of this provision with the use of the word 'shall', it is rendered non-justiceable by the fact that the section comes under Chapter 2 which is the non-justiceable section affected by section 6(6)(c) of the Constitution. This has over the ages militated against effectiveness of the law in cubing environmental menace in Nigeria.

State of Primary Healthcare Services in Auchi Kingdom

The primary healthcare centers (PHCs) in Auchi Kingdom are six.[48] They are unevenly dispersed around the community with some parts of the community clearly not contemplated in their dispersal, such as the entire Utsogun Heritage Village. Some of the PHCs are completely nonfunctional, lacking in both human and material resources in order to keep the facility running. Only three are actually functional subject to varying degrees of efficiency. The website, www.hospitalbook.com, analyzed services offered in Primary Health Centre 4 in Auchi under eleven headings viz: Medical Services, Surgical Services, Pediatric Services, Ambulance Services, Special Clinic Services, Obstetrics and Gynecology Services, Dental Services, Onsite Laboratory, Mortuary Services, Onsite Imaging, Onsite Pharmacy. Only one (Special Clinic Services) checked as services being rendered while it was shown that none of the other ten services was available.

The Federal Government of Nigeria adopted a document in 2012 known as "Minimum Standards for Primary Healthcare in Nigeria" (NPHCDA, 2012) whose overall goal was to uniformly define a minimum standard structure for PHCs in terms of systems, staffing equipment and service delivery in order to improve access and quality services. Quite depressingly, this very promising document has failed to bring the intended improvement to access to health. In fact, but for the Community's supplemental effort, access to healthcare in Auchi Kingdom is unmistakably unsatisfactory.

48 Located at Iyekhei, Aibotse in Idani Balhliki, Akharumha in Igbe, Idani Lhace, Omemhi and down Isamhi.

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The Auchi Community's representatives recently engaged stakeholders on the reason for the poor delivery at PHCs in Auchi. That was when it was discovered that apart from retirees which are not replaced by government, many staff have gone for further studies thereby foisting vacancies in their offices. It was also noted that up to six staff were bid for retirement come year 2024 which would further deplete the already poor services. The community's intervention, notwithstanding, government has yet to take any responsive steps. Perhaps the community would have considered compelling the government to take steps assuming the legal regime permitted such remedial approach. But because of section 6(6)(c) of the Constitution that option is not available and as a consequence, many ordinary members of the community will have to endure poor access to quality health with the attendant catastrophic implications immediately and in the future.

The impact of non-justiceability of health on Auchi Kingdom as a right is underscored by this constitutional gap and the need to construct health, like many other jurisdictions are doing now, as a right and not just a Fundamental Objective and Directive Principle (FODP) which makes jest of the "Minimum Standards for Primary Healthcare in Nigeria" since noncompliance with same cannot form a basis for a court litigation by the provisions of section 6(6)(c) of the Constitution as amended.

Auchi Community's Effort on Environmental Health Management

Auchi community has a structured managerial system for the management of environmental health system through a committee that is saddled with the function. The head of the committee is designated to be the community's liaison person linking and synchronizing the community's environmental sanitation efforts with that government of Edo State. This unorthodox approach to environmental management around the community has been become necessitated by the indiscriminate waste disposal around the locales of Auchi without regard to the harmful effect of haphazard dumping of waste. This problem has overtime defeated government's effort over the years and in fact overwhelmingly so. While the community's approach is commendable, it certainly has much to do to meet up with the challenges which the poor attitude of the community's residents have towards waste management.

Asunnogie, Momoh and Osagioduwa (2022) noted that the attitude of the people in the fast developing community, both indigenes and non-indigenes, has really worsened the state of the environment as regards solid waste management. They pointed out that socioeconomic factors such as education and income significantly affect peoples' perception of waste management. Also is the factor of cooperation and social cohesion among people; it is another critical factor in sustainable environmental sanitation management. For instance, it is suggested that people in urban centers tend to make and enforce the law to promote environmental sanitation in their environment through social association.

CONCLUSION AND RECOMMENDATIONS

This work has analyzed the issues surrounding right to health – accessibility and justiciability on health right, and the current world trend on the concept of health care as a fundamental human right as against a mere directive principle of state policy. The work further examined the impact of non-justiceability of health right on Primary Health

Centers as well as environmental health management in the Auchi Community, as the impact of poor access to quality health is most suffered by the ordinary people at the grassroots.

Health obligation is a normative concept under the Nigerian constitution. Considering the fact that Nigeria is party to several international treaties on the protection of health, improving the justiciability of this right is a concern that resonates with interest groups and NGO's.[49] One would assume that having ratified a robust document on socio-economic rights like the ICESCR with its ample provisions on health right Nigeria will be a forerunner in the preservation of this right in Africa and the third world countries in general. But the difficulty that faces this conception is that only civil and political rights are positively protected in Nigeria. But the scope of the term human right has been and continues to be subject to change in pace with the evolution of the society. This evolution or development has steadily progressed towards an enlargement of the human rights concept in which socio-economic rights are also included in the conception of rights. Of what import is right to privacy for a person who lives under a flyover? What dignity has such person? In a country where poverty and inaccessibility of health facility are familiar indices, what meaning has "rights" to a people struggling to stay afloat under very adverse economic, social and political conditions? Rights have to be concrete in the sense that their practical import is visible and relevant to the existence of the people to whom they apply. In other words, civil and political rights can only make sense where economic rights are given a meaning. This is in tune with the preamble to the African Charter on Human and People's Rights which emphasizes economic, social and cultural rights as basis for civil and political rights:

> "… it is therefore essential to pay a particular attention to the right to development and that civil political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights"

For a community that has been acclaimed as the fastest developing community in Nigeria, it only aligns with reason that such development should be reflected in all its aspects including health with all the enabling facility to compel infrastructural development, human resources and service provision.

The world has woken up to the need for the justiciability of the right to health. Much of the ill health, disease, premature death, and suffering we see on such a large scale in many third world countries, Nigeria inclusive, is quite needless as sophisticated and effective interventions are available for prevention and treatment. But the power of the system that delivers them to those in greatest need of them is crippled by the legal systems of the country which begs the question of how justified is health right in Nigeria.

It is hereby suggested that the constitutional provisions on health be amended and made a positive right actionable and justiceable like every other right in Nigeria. This is necessary considering the contemporary world trend on health right. Besides, right to life is made

49 Such groups include Social Economic Rights Accountability Project (SERAP), Social and Economic Rights Action Centre (SERAC), Centre for Rights and Development (CERAD), etc.

jest of where health right is not protected under our laws as right to health is indeed a precursor to the full enjoyment of the right to life.

It is suggested that there by more public enlightenment through for a that will inform the ordinary people of the need for everyone to be part of a clean environment and ultimately breed a conscientious environmental attitude. It is one thing to have a weak legal system, but it is entirely another to have a weak mental or attitudinal framework in regards to the health issues generally and environmental health in particular.

It is also suggested that there be a pragmatic enforcement mechanism to the extent the law allows. As much as the law does not give its full constitutional weight to health enforceability, there are ancillary enforceable approaches which if deployed, will effectively achieve a better health system and environmental health management for the public.

Finally, the government should encourage the communities, such as Auchi Community, that have designed and put into operation their own internal structures for the management of health systems as it relates to environmental health. Possibly, such effort should be encouraged through provision of requisite facilities for effectiveness of the community's effort.

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