



Medical and health rights as human rights: A survey of national and international legal framework

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Abstract

The health of a nation reveals the wealth of such nation. Provision of affordable healthcare goods and services on the platform of equality in respect of access to them fosters the enjoyment of certain basic human rights. Thus, it is without doubt that there is a linkage between the right to health and the right to life as well as certain other rights. It is universally recognised that every human is born with certain fundamental rights which are protected by law and States should not derogate from these rights. This paper seeks to evaluate the import of medical and health rights using the doctrinal research methodology. The paper is basically divided into six segments which inter alia deal with the nature of human rights, international legal framework on health right, essence of medical and health rights and national laws in which the right to health is provided. Before its conclusion, this paper delved into the role of the Court in enforcing medical and health rights. It was discovered that the right to health can be enforced in Nigeria through expansive judicial interpretations of the national laws discussed in this paper and some rights in Chapter IV of the Constitution. Strong judicial intervention is required, as obtainable in the jurisdictions randomly chosen, and referred to in this paper. Thus, it was recommended that the Court should extend the frontiers of our jurisprudence to level up to present circumstances.

Keywords: autonomy and self-determination. consent. dignity of human person. highest attainable standard. jurisprudential frontier. right to health

Introduction

Health is very important to the sustenance of life and general well-being. It has been defined by the World Health Organisation as a state of complete physical, mental and social well-being and not the absence of disease or infirmity^[1]. A nation's wealth is not only dependent on its natural resource reserves or its rapid economic growth but also on the state of health of its population. Health is central to national development. Thus, the saying, "Health is wealth". The right to health is a recognised international human right. Some nations articulate a right to health in their constitutions or national healthcare and insurance laws. Some other nations articulate the right to health by ratifying an international legal treaty that contains health rights, and by taking the necessary measures to give the treaty a national effect^[2]. Of recent, the early focus on civil and political liberties has been complemented by a concern for economic, social and cultural rights, providing a link with development and social policy discourses. Yet these economic, social, and cultural rights have often been couched in rather instrumentalist terms, justified because they contribute to improving economic and social development indicators rather than because they intrinsically constitute a fundamental human right. In advocating human rights, legal experts and social scientists follow a parallel but separate path in their concerns with promoting fundamental freedoms^[3].

The paper is basically divided into six segments. The first four segments deal with nature of human rights, international legal framework on health right, the essence of medical and health rights and national laws in which the right to health is provided. Status of medical and health rights from a global perspective as viewed by different authors is discussed in the fifth segment. The last segment of this paper focuses on the role of the Court in enhancing

the enforcement of medical and health rights. In buttressing this point, reference will be made to court decisions of two randomly selected jurisdictions; South Africa and India. Although some authors classify the right to health as one of the economic, social, and cultural rights, and distinct from civil and political rights, this paper tends to agree with some other authors by placing medical and health right on a par with other civil and political rights. There is a linkage between the right to health and the rights to life, privacy, freedom of thought, dignity of the human person and freedom from discrimination. The right to health finds expression through various national constitutions, legislation, and conventions whether international or regional. Thus, every person is entitled to right to health. It only behoves of nations to make available and accessible medical and health facilities and services. This can be achieved through the nation's available resources, both human and material. The issue of human rights enshrined in Chapter IV of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 and the promotion of social justice are part of social policy agenda of the Federal Republic of Nigeria since it is a State based on the principles of democracy and social justice, with the welfare of the people of the State being the primary purpose of the government^[4]. In order to accentuate the issue of 'welfare of the people being the primary purpose of the government', an expansive interpretative role of the Court is required.

The Nature of Human Rights

Fundamental rights and freedoms have been expounded by the International Bill of Rights which comprises the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights^[5]. Every human being has certain fundamental rights which

every individual and government must uphold and respect^[6]. This is because all human beings are born free and equal in dignity and rights. Such rights include the right to life and right to dignity of the human person. Human rights are inherent in the nature of human beings in order to be able to function effectively^[7]. In the Supreme Court case of *Ransome Kuti v. Attorney General of the Federation*^[8] Eso JSC observed that human right is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself.

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights all confirm the notion already contained in the UN Charter that all persons are entitled to civil and political rights including the rights to life, integrity, liberty and security of the human person, privacy, freedom of religion or belief and of opinion and expression, movement, assembly and association, political participation, economic, social and cultural rights including the rights to work, trade union membership and involvement, an adequate standard of living including food, clothing, and housing, health care, education, participation in cultural life. All persons are declared to be entitled to these rights without distinction of any kind, to be equal before the law, and entitled without any discrimination, to equal protection from the law^[9]. In order to fully grasp what medical and health rights entail, it would be appropriate to first consider a few international instruments which refer to medical and health rights.

International Legal Framework:

Human rights have in the past tended to be seen as the domain of international relations and legal expertise with social scientists following a parallel but separate path in their concerns with promoting fundamental freedoms. The early concentration on civil and political rights has been complemented by a concern for economic, social and cultural rights^[10]. This segment of this work shall focus a few international conventions in which Nigeria is a State Party.

1. The International Bill of Rights and other International Instruments

The International Bill of Rights comprises the Universal Declaration of Human Rights (UDHR)^[11], the International Covenant on Economic, Social and Cultural Rights (ICESCR)^[12] and its Optional Protocol, the International Covenant on Civil and Political Rights (ICCPR)^[13] and its first and second Optional Protocols. The Universal Declaration of Human Rights is the basic international pronouncement of rights that cannot be taken away from all members of the human family^[14]. Universal Declaration of Human Rights Art25 which deals with medical and health rights provide that everyone has a right to a standard of living adequate for the health and well-being of himself as well as his family. This includes food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. The ICESCR Art12(1) provides that State Parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of both physical and mental health. The ICCPR takes a different dimension of medical and health right. It

provides in Article 7 that no one shall be subjected without his free consent to medical or scientific experimentation because that would amount to being subjected to torture or to cruel, inhuman or degrading treatment or punishment. The issue of consent which must be given voluntarily by a patient before any medical and scientific experiment is conducted on the person is a vital aspect of medical and health right.

Apart from the African Charter on Human and Peoples' Right (ACHPR) which has been domesticated in Nigeria, there are other human rights treaties dealing with medical and human rights to which Nigeria is a State Party. Such treaties, other than ICESCR^[15] and ICCPR^[16] stated earlier, include the International Convention on the Elimination of All Forms of Racial Discrimination^[17], Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),^[18] Convention on the Rights of Persons with Disabilities,^[19] and Convention on the Rights of the Child^[20].

Convention on the Rights of the Child Art24 amply provides for medical and health rights of the child, one of which is that State Parties to the Convention shall recognise the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State parties shall also strive to ensure that no child is deprived of his or her right of access to health care services^[21].

Essence of Medical and Health Rights

As stated earlier, the right to health is articulated in some national constitutions or through national health legislation or insurance laws. At the international sphere, the right to health is comprehensively articulated in the International Covenant on Economic, Social and Cultural Rights (ICESR) as earlier stated. Article 12 obliges states that have ratified the Covenant to recognise the fact that everyone has the right to enjoy the highest attainable standard of physical and mental health. This gives an inkling as to what medical and health right entails. The right to health entails the right to the highest attainable standard of physical and mental health^[22]. The United Nations Committee on Economic, Social and Cultural Rights, General Comment Number 14^[23] amply interprets the right to health, noting that it is not a right to be healthy^[24]. It is also not a right to healthcare^[25]. It is rather a set of freedoms and entitlements, among which is the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health^[26]. The right to health involves the right to the enjoyment of a variety of facilities, goods, services and conditions that are essential for the realisation of the highest attainable standard of health. The underlying determinants of health include *inter alia* access to safe and potable water and adequate sanitation; adequate supply of safe food and nutrition; housing; access to health-related education and information including sexual and reproductive health; safe and healthy working conditions; and healthy occupational and environmental conditions^[27]. From the above explanation of this right as expounded by the UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, the essential elements of the right to life have been distilled and they are Availability, Accessibility, Acceptability and Quality. These essential elements are applicable to all aspects of the right to health including the underlying determinants, the precise application of which will depend on the conditions prevailing in each country.

Availability

Public health and healthcare facilities, goods, services and programmes such as hospitals, clinics or other health-related buildings, trained medical personnel and essential drugs should be available to everyone requiring medical attention.

Accessibility

No one should be discriminated against from having access to healthcare facilities, goods, services, programmes or information. These should be within safe physical reach for all sections of the population and be affordable.

Acceptability

The health facilities, goods and services should be respectful of medical ethics and culturally appropriate which includes sensitivity to gender and life-cycle requirements.

Quality

The health facilities, goods and services are to be scientifically and medically appropriate and of good quality. This includes skilled medical personnel, scientifically approved drugs and hospital equipment^[28].

It is claimed that many of the economic, social and cultural rights such as right to a home, clean water, enough to eat, a safe environment, basic education for children or health care are unattainable or unrealistic^[29]. Despite this claim, the governments of different countries of the world spend billions of dollars yearly on armaments and ammunitions. Such amount would have been utilised to provide basic education for children or health care in order to reduce infant mortality^[30]. While it is important to protect the territorial borders of a country, it is also necessary that the wellbeing of the inhabitants of the territory being protected or secured are enhanced, hence life will be meaningless to them. Thus, without an adequate standard of living, without quality, medically acceptable, accessible, affordable and available healthcare facilities, goods and services, the constitutionally protected civil and political rights, particularly the right to life, will be jeopardised. The right to health has embedded in it other rights, and a breach of the right to health is a breach of several other rights. It therefore implies that the right to health can be enforced in Nigeria. This is emphatic because in Nigeria, the right to health is not only articulated in the Constitution but also through the national health legislation or insurance law and domesticated treaty which now forms part of our municipal law. A few national laws shall be considered in order to ascertain the legal status of medical and health rights in Nigeria.

National Legislation on the Right to Health

The Constitution of the Federal Republic of Nigeria and a few laws make reference to the right to health. The Child Rights Act 2003 makes reference to the right to health, mandating government to provide the basic medical assistance and healthcare services to all children because they are entitled to the best attainable state of physical, mental and spiritual health^[31].

1. Constitution of the Federal Republic of Nigeria 1999

According to Aguda, there are constitutional provisions which seek to endow the citizens of Nigeria with positive rights, that is the rights to expect and demand certain benefits from the State. There are also many other

provisions, scattered in various parts of the Constitution which protect, directly or indirectly, or which enhance the protection of the individual's rights^[32]. The Constitution mandates all organs of government and all authorities and persons exercising legislative, executive and judicial powers to conform to, observe and apply the provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999 which deals with Fundamental Objectives and Directive Principle of State Policy^[33]. Other than security, the primary purpose of the country is welfare, since Nigeria is a state based on the principle of democracy and social justice^[34]. Part of the Directive Principles of State Policy include ensuring that there are adequate medical and health facilities for all persons, the health, safety and welfare of all persons in employment are safeguarded and ensuring all citizens have the opportunity for securing adequate means of livelihood^[35].

Fundamental rights of individuals are provided in Chapter IV of the Constitution. These include the rights to life, dignity of the human person and freedom from discrimination enshrined in sections 33, 34 and 42 of the 1999 Constitution of the Federal Republic of Nigeria respectively. The right to health, though not expressly provided under Chapter IV of the Constitution, is directly connected to these fundamental rights. It would be a denigration of the rights to life and dignity of human person where there is no access to safe and potable water, adequate supply of safe food, health-related information including sexual and reproductive health or primary health care, healthy environmental conditions and healthy working conditions. Where there is no equality of opportunity for people to enjoy a variety of medical or health facilities, goods, services and conditions that are essential for the realisation of the highest attainable standard of health, this would amount to a breach of the right to freedom from discrimination.

Reiterating the importance of the right to health, it has been stated that the fundamental right to life entrenched in the 1999 Constitution would be meaningless in the absence of good healthcare delivery system, more particularly, functional and competent medical services that secure the legitimate expectation of the patient to leave the hospital better than he came, or at least not to have his ailment aggravated due to a medical personnel or doctor's incompetence or negligence^[36]. According to Olomjobi, ensuring the right to health means that Nigerian government, particularly the judiciary, must take positive steps to secure the enjoyment of this right. When the nation attains this standard and safeguards this right, then there would be an improvement in the living standards of her people^[37].

2. National Health Insurance Scheme Act^[38]

This is an Act of the National Assembly which established the National Health Insurance Scheme with the objective of ensuring access to good health care services to every citizen of Nigeria and to protect Nigerian families from financial hardship of huge medical bills^[39]. National Health Insurance Scheme Act, s5 provides *inter alia* that the objectives of the Scheme shall be to ensure that every Nigerian has access to good health care services; protect families from the financial hardship of huge medical bills; limit the rise in the cost of health care services; ensure equitable distribution of health care costs among different

income groups; maintain high standard of health care delivery services within the Scheme; and ensure efficiency in health care services. The National Health Insurance Scheme established by section 1(1) of the Act is also for the purpose of providing health insurance which shall entitle insured persons and their dependants the benefit of prescribed good quality and cost effective health services as set out in the Act. Insured person as defined under the interpretation section of the Act ^[40] means any person who pays the required contribution to the Scheme under the Act. Persons who are not 'Insured persons' can apply to be registered as voluntary contributors under the Scheme, and after being so registered, would be expected to pay the specified contributions as required under the Act ^[41]. One other objective of the Scheme is to ensure the availability of funds to the health sector for improved services ^[42]. This is achieved, in a way, by compulsorily deducting a percentage of the wages of employees of Federal, State or Local Government resident in Nigeria ^[43]. The Act defines an employee as any person who is ordinarily resident in Nigeria and is employed in the service of the Federal, State or Local Government in a civil capacity or in any of the public services or under a contract of service or an apprenticeship within an employer whether the contract is expressed or implied, oral or written ^[44]. The percentage of employee's wages to be deducted is determined by the Governing Council established in section 2(1) of the Act, and this percentage can be reviewed either upwards or otherwise from time to time by the Council. Although the Act uses the generally discretionary word 'May' in section 16 which provides thus: 'An employer who has a minimum of ten employees may, together with every person in his employment, pay contributions under the Scheme, at such rate and in such manner as may be determined from time to time by the Council', no employee as defined by the Act is exempted from this deduction. Thus, this makes it compulsory for every employer of a minimum of ten employees to pay contributions under the Scheme.

3. National Health Act ^[45]

The essence of this legislation is to provide for the regulation, development and management of a national health system and to set standards for rendering health services in Nigeria ^[46]. The Act established the National Health System (NHS) which includes the Federal Ministry of Health, Ministries of Health in each State and the Federal Capital Territory, local government health authorities, ward health committees, private healthcare providers, traditional healthcare providers and alternative healthcare providers. It also established the National Council on Health ^[47] which shall in consultation with the Minister responsible for matters relating to health prescribe such conditions that would exempt certain categories of persons from payment for healthcare services at public health facilities ^[48]. The NHS responsibilities include providing best possible health services to persons living in Nigeria; protect, promote and fulfil the rights to have access to healthcare services ^[49]. In furtherance of promoting the right to healthcare services, the Act established a fund known as Basic Health Care Provision Fund for the provision of minimum package of health services to Nigerians; provision of essential drugs, vaccines and consumables in primary healthcare facilities, provision and maintenance of facilities and equipment for healthcare facilities ^[50]. This law appears to

comprehensively capture the right to health making healthcare delivery accessible and affordable to all Nigerians including those in remote rural areas.

4. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act ^[51]

Nigeria being a signatory to the African Charter on Human and Peoples' Rights (ACHPR) took a step further to domesticate the Charter, making it one of her municipal laws. By enacting the treaty into law, the legislature intends that the treaty, in compliance with the Constitution, should have the force of law in Nigeria ^[52]. Thus, courts are under an obligation to uphold this law just as they do to other municipal laws. The Supreme Court held in the case of *Abacha v. Fawehinmi* ^[53] that "Where a treaty is enacted into law by the National Assembly, as was the case with the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts." ^[54] The Act provides that every individual shall be equal before the law and shall be entitled to equal protection of the law. This is because human beings are inviolable. Consequently, every human being shall be entitled to respect for his life and the integrity of his person. Every individual shall also have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man such as torture, cruel, inhuman or degrading punishment and treatment are prohibited ^[55]. The Black's Law Dictionary defines cruelty as the intentional and malicious infliction of mental or physical suffering on a living creature, especially a human being ^[56]. Cruelty may be mental or physical. Mental cruelty is defined as a conduct, not involving actual violence, which creates such anguish that it endangers the life, physical health, or mental health of the other person ^[57]. The decision of the African Court on Human and Peoples' Rights is germane. It decided that deprivation of light, insufficient food and lack of access to medicine or medical care in Nigerian prisons constitute inhuman and degrading treatment and thus amounts to a violation of ACHPR Art 5 ^[58].

The right to health is specifically provided in Article 16 of the Act. Every individual shall have the right to enjoy the best attainable state of physical and mental health. Nigeria, as a State party and by incorporating the Charter into her domestic laws, is mandated to take necessary measures to protect the health of her people and to ensure that they receive medical attention when they are sick ^[59]. By this provision, medical and health rights are human rights guaranteed by an Act of the National Assembly, and can be enforceable by the courts ^[60].

5. National Human Rights Commission Act ^[61]

This is an Act of the National Assembly which established the National Human Rights Commission for the protection of human rights, dignity and freedom of Nigerians. The Act provides that the Commission shall deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, the African Charter on Human and Peoples' Rights, the United Nations Charter and the Universal Declaration on Human Rights, and other International Treaties on human rights which Nigeria is a signatory. It also assists victims of human

rights violation and seeks appropriate redress and remedies on their behalf ^[62]. It therefore means that a breach of the right to health can be redressed through the National Human Rights Commission.

Status of Medical and Health Rights

According to Gloppen and Roseman, realising the right to health also requires the realisation of a range of other rights which include the right to life; human dignity; nondiscrimination; equality; freedom from torture; access to information; and freedom of association, assembly, and movement. States' obligations towards realising the right to health are considered progressive and requiring resources which may be limited for its actualisation. However, States do have an immediate obligation to take deliberate, concrete and targeted steps toward full realisation and to do so in a nondiscriminatory manner. They also have a core obligation to ensure the satisfaction of, at the very least, minimum essential level of healthcare such as primary health care ^[63]. Most human rights issues arise from patient-care or an outright refusal of such to the detriment of the patient. Every patient is an individual vested with fundamental rights which must be respected by healthcare providers and agencies of government. The right to privacy, right to freedom from discrimination and right to dignity of the human person amongst others must be protected. Confidential information about the health of patients are revealed by the patients to medical professionals who owe fiduciary duties to these patients. Stigmatising a patient or refraining from treatment or suspending treatment of a person by reason of race, tribe, gender or nature of the illness where the medical professional is in the capacity to provide appropriate medical care that is available amounts to an infraction of the right to freedom from discrimination ^[64]. Denying persons held in detention or custody in correctional facilities from having access to medical facilities or healthcare when the need arises is a violation of their freedom from discrimination and right to dignity of human person because that can constitute both physical and mental cruelty ^[65]. It would amount to an infraction of a patient's right to dignity of the human person for a medical professional to conduct improper diagnosis of the patient's ailment or to administer improper treatment to the patient. Although this is medical negligence, it can be regarded as an infringement of the patient's right to dignity because the patient's vulnerability and state of total dependence on the healthcare providers was taken advantage of in the application of biology and medicine.

Furthermore, it would be improper or an infringement of the right to dignity of the human person and medical right to refuse treatment for a medical personnel to commence treatment on a patient, who is neither unconscious nor in a state of emergency, without first obtaining the consent of the patient once such patient has the competence or legal capacity to give consent ^[66]. This is referred to as informed consent. Informed consent is the process of making decisions about medical care that is factual, open, and honest communication between a healthcare provider or a medical professional and the patient or patient's family member where the patient lacks the capacity to give consent ^[67]. It can, thus, be inferred from this, that inherent in every patient is the right to give or withhold valid or informed consent. The patient is entitled to be informed on the nature of the treatment to be administered in order for the patient to

give or withhold consent. Every person that is an adult and of sound mind has a right to choose what should or should not happen to his or her body. This is the right to autonomy and self-determination. Any form of derogation from this is an infringement of the person's right. Where a patient is capable of consenting then no care or treatment will be lawful unless the patient has given a real consent. This requires the patient to have been informed in broad terms of the procedure in question and to have indicated his acceptance of it ^[68]. Thus, every person has a right to accept or reject medical treatment even if his rejection of such treatment would be detrimental to his well-being. It is an expression of his right to freedom of thought to reject the treatment if he is not fully convinced about such medical procedure or treatment irrespective of how potent and genuine the treatment may be. The Supreme Court has emphasised the paramountcy of consent when it has to do with any form of medical treatment or procedure in the case of *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo* ^[69] where it held that a patient's consent is paramount, consequently, the choice of an adult patient with a sound mind to refuse informed consent to medical treatment, barring state intervention through judicial process, leaves a medical practitioner helpless to impose any form of treatment on such patient.

Commenting on human rights and the right to consent as a component of medical and health right, McLean opined that while many human rights are adopted as part of national and international legal framework as a result of the abuse by States and their agencies of individuals, and forces which seem inherently wrong or dangerous, the right to consent in medical treatment is quite different ^[70]. Consent is much more than a legal device or invention designed to intimidate medical practitioners. It is a concept adopted by national legal systems and by international agreements, but it is primarily derived from a more general philosophical commitment to the essential right of individual to make choices about what can and cannot be done with one's own body and mind ^[71]. The right to informed consent is central to the right to health ^[72]. ICCPR Art7 emphasises the importance of consent to medical and health right. Subjecting a person to medical or scientific experimentation without his free consent basically amounts to subjecting the person to torture, cruel, inhuman or degrading treatment or punishment.

Major international organisations such as the World Bank and United Nations Development Programme (UNDP) have long emphasised the importance of providing education, adequate health care and other basic necessities ^[73]. However, these policy recommendations have often been couched in rather instrumentalist terms, justified because they contribute to improving economic and social development indicators rather than because they intrinsically constitute a fundamental human right ^[74]. Such concerns were, however, formalised in the United Nations Declaration on the Right to Development that placed economic, social and cultural rights on a par with civil and political right ^[75]. The right to health has been raised to the status of a human right through national and international instruments ^[76]. Thus, depriving a person of economic, social and cultural rights is tantamount to preventing such person from the enjoyment of most of his civil and political rights. Failure to pay pension to pensioners, or withholding workers' salaries or emoluments as at when due for no just

cause or unreasonable cause can be regarded a breach of their right to life and by extension, their right to health. Depriving a person of the enjoyment of his right to health is not only a violation of other rights but an infringement of the right to health itself. Medical and health rights can readily be enforced in courts. This points to the fact that the courts are a pivotal actor in achieving this milestone.

The Role of the Courts in Enhancing the Enforcement of Medical and Health Rights

Court is an indomitable engine of social change. The indispensability of the courts through judicial activism in their interpretative jurisdiction is germane to the sustainability of medical rights awareness in Nigeria. The Judiciary (or the Court) which is regarded as the last hope of the common man is not only a defender of fundamental rights but also a developer of the rights through its capability to expound the law. According to Oputa, judicial interpretation is not a mechanical or a mathematical process of two plus two make four. It is much more than that. The judicial function of interpretation involves an immense intellectual exercise in learning and logic in which an appeal to social history and, above all, the use of common sense are essential parts of the exercise. Thus, in exercising their interpretative jurisdiction, judges should be able to react with creativity and depth in the application of any law to the resolution of issues in dispute; able to choose between competing values and concepts which the words of the relevant law suggest and carry^[77]. In developing societies, the Judiciary is looked upon as the defender of fundamental rights. As these societies become more democratic, the Judiciary has to admit that there are certain fundamental democratic values such as the rule of law, equality before the law, human rights and liberties. These values are never static. They are ever changing concepts. And what is still more important is that these values are to be applied to changing social situations and circumstances. It is therefore the duty of the Judiciary in the exercise of its interpretative jurisdiction through the courts to nurse, nourish and develop these principles^[78].

Every individual in Nigeria can assert the right to health. The human rights dimension of this right must be appreciated in order for there to be more progress in enforcing medical and health right. It finds expression in Chapter IV of the Constitution through the right to life^[79], right to dignity of human person,^[80] right to private life or privacy^[81] - which involves right to self-determination and autonomy, right to freedom of thought^[82], right to freedom from discrimination^[83]. It also finds expression in the domesticated international treaty – African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act^[84] - by virtue of Article 16 of the Act, and other laws made by the National Assembly. There are sufficient laws guaranteeing the enforcement of the right to health in Nigeria. Are these laws inconsistent with the provisions and tenets of the Constitution and therefore void to the extent of their inconsistency?^[85] It is submitted that the laws are not inconsistent but rather conterminous and within the ambit of the tenets of the Constitution.

Judicial interventions are sometimes required in order for certain laws to be enforced. Strong judicial interventions are by no means the sole prerogative of systems of government with constitutionally entrenched rights^[86] such as Nigeria. It is obvious that strong judicial interventions exist also in

countries which favour focused legislation over grand constitutional claims. Thus, courts have the role in such systems to ensure that the legal rights for which the state has legislated are properly implemented^[87]. Two, randomly chosen, jurisdictions with constitutionally entrenched rights like Nigeria, in which the courts have delivered notable judgments shall be considered. These jurisdictions are South Africa and India. Referring to these jurisdictions serves as a call for Nigerian courts to expand the frontiers of our legal jurisprudence and enforce constitutional socio-economic rights such as the right to health, through the enforcement of the right to life, dignity of the human person and other related rights. The background of the cases below is rooted in the Constitutions of these countries. Chapter Two of South African Constitution 1996 which comprises sections 7 to 39 makes provision for the Bill of Rights; the cornerstone of democracy in the country and affirmation of the democratic values of human dignity, equality and freedom. Sections 10 and 11 provide for right to human dignity and right to life respectively, and in section 27, it provides that "Everyone has the right to have access to ... health care services, including reproductive health care; ... sufficient food and water; ... social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."^[88] Thus, in the South African case of *B v. Minister of Correctional Services*^[89], a High Court ordered state prison authorities to provide expensive antiretroviral combination therapy to two HIV-infected prisoners on the ground that the state had failed to provide satisfactory evidence of lack of financial resources. The prisoners had relied on section 35(2)(e) of the Constitution which provides *inter alia* that everyone in detention has a right to medical treatment^[90], and prison detainees' rights are also part of the right to health provided in section 27 of the Constitution.

The Indian courts have shown more judicial enthusiasm to deviate from the usual characteristic manner of judicial review. The courts have been more dynamic and impressive in their decisions while interpreting the Indian Constitution. In the case of *Vincent v. Union of India*^[91], the Supreme Court held that in a welfare State, it is the obligation of the State to ensure the creation and sustenance of conditions congenial to good health. The court also held in the case of *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*^[92] 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 context of constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints..."^[93] A more dynamic and pragmatic decision was held in the case of *Kirloskar Brothers Ltd. v. Employees State Insurance Corporation*^[94] thus: "The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in the welfare State. The Government discharges this obligation by running hospitals and health centers which provide medical care to the person seeking to avail those facilities. Article 21

imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.”^[95] Expounding the connotation of ‘life’ in Article 21 of the Constitution, the Supreme Court of India held that “The expression ‘life’ assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the work place and leisure facilities and opportunities to eliminate sickness and physical disability ...”^[96] These decisions emphasize the fact that the right to health is an integral part of the right to life^[97].

Just like that of Nigeria, the right to health is provided under the Directive Principles of State Policy which is in Part IV of the Indian Constitution. Article 39(E) directs the State to secure health of workers. Article 42 directs the State to just and humane conditions of work and maternity relief. Article 47 imposes a duty on the State to boost the nutrition levels and standard of living of people and to enhance public health^[98]. Given no explicit recognition of the right to health or healthcare under the Indian Constitution, the Supreme Court of India in the case of *Bandhua Mukti Morcha v. Union of India & Ors*^[99] interpreted the right to health as a subset of the right to life provided in Article 21 of the Constitution^[100]. In the case of *State of Punjab & Ors v. Mohinder Singh Chawla*,^[101] the Supreme Court also reaffirmed that the right to health is fundamental to the right to life and should be put on record that government had a constitutional obligation to provide health services^[102].

The power of the people to litigate can help to secure the protection of their right to health^[103]. Judicial intervention can bring justice and equity to a health system. It is a legitimate way to exert pressure on the government to act according to the rule of law, and within constitutional boundaries^[104]. In Nigeria, the case of *Abacha v. Fawehinmi*^[105] is very notable. The Supreme Court while referring to the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, held in that case that -

Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law ... it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts.... The African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens ... rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning^[106].

Furthermore, in considering the question ‘whether an individual can rely on the Act to sustain a cause on the basis that his human rights protection under the Charter has been violated’, the dictum of Uwaifo JSC is noteworthy. The learned Justice is of the view that “The Charter contains a number of rights recognised and guaranteed to every individual....These and other Articles of the Charter show that individuals are assured rights which they can seek to protect from being violated and if violated to seek

appropriate remedies.... In other words, those individual rights are justiciable in Nigerian courts.”^[107] Uwaifo JSC further opined that -

It seems to me that where we have a treaty like the African Charter on Human and Peoples’ Rights and similar treaties applicable to Nigeria, we must be prepared to stand on the side of civilized societies the world over in the way we consider and apply them, particularly when we have adopted them as part of our laws.... The judiciary must not be seen as assisting those who step on liberty and justice to effectively press them down.

Thus, socio-economic rights such as the right to health provided in Article 16 of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act can be validly enforceable in Nigerian courts. It only takes an exercise of the power of the people to litigate and strong judicial interventions. Nigeria is a State based on the principles of democracy and social justice. The security and welfare of the people are the primary purpose of government, and its policies are directed towards ensuring that there are adequate medical and health facilities for all persons. The laws are for the good governance of the country and should be respected by all and sundry. Good governance should not be viewed as an option but as an indispensable requirement. Courts should expand the frontiers of Nigerian jurisprudence by utilising their interpretative mechanism in a creative and an in-depth manner in the application of any law. Reference to the severe socio-economic consequences of the non-observance of the provisions of Chapter II of the Constitution has been made by different authors. There can only be a legal revolution and development of our jurisprudence when these laws are continuously tested in court eliciting the human rights dimension in asserting medical and health right. As stated by Oputa earlier, fundamental democratic values such as human rights are not static but are an ever changing concept, and it is the duty of the court (judiciary) to nourish, develop and expand these values or principles to keep pace with changing social circumstances.

Conclusion and Recommendation

The entrenchment of human rights clauses in the written constitutions of developing countries, including Nigeria, is one noticeable legal development in these countries. The idea of a Bill of Rights derives from the theory that the individual citizen has rights upon which the State must not intrude. This idea is further fortified by the fact that everyone accepts that government exist not only to protect these rights but also to enhance them.^[108] Providing affordable healthcare goods and services on the basis of equality in respect of access to them does foster the enjoyment of several basic human rights. Every person is entitled to right to health. This is because other basic rights cannot be enjoyed without the right to health which has a linkage to the rights to life, privacy, freedom of thought, dignity of the human person and freedom from discrimination. Thus, the right to health finds expression through national constitutions, legislation, and international conventions. It only behoves of nations to make available and accessible medical and health facilities and services. This can be achieved through the nation’s available resources. Every nation aspiring to be or to remain great would strive to achieve the highest attainable standard of physical and mental health knowing that the health of a nation is the wealth of such nation.

In Nigeria, there is a plethora of national laws which provide for the right to health. The right to health is also articulated in the Constitution and the domesticated international treaty. None of these laws oust the jurisdiction of the court to entertain matters relating to human rights and the right to health is a human right recognised internationally. As an indomitable engine of social change, the role of the court cannot be over-emphasised. More so, as the defender of fundamental rights and the last hope of the common man, the court has a major role to play in expanding the frontiers of Nigerian jurisprudence by developing fundamental democratic values of the rule of law, equality before the law, human rights and liberties to meet changing social situations and circumstances through its interpretative capability. The human rights dimension of this right must be appreciated in order for there to be more progress in enforcing medical and health rights^[109].

It is therefore recommended that all legal framework should be employed to assert the right to health. This right should also be enforced through the right to life, the right to dignity of the human person and other related rights as obtainable in the jurisdictions discussed in this paper. Nigerian courts should borrow a leaf from the dynamic nature of Indian courts. Judicial decisions should be devoid of political sentiments in order to achieve legal revolution. The interpretative role of the Court is quite germane and should be utilised in extending the frontiers of our jurisprudence to level up to present circumstances. The Supreme Court has laid the foundation to assert socio-economic rights and by implication, the right to health. Consequently, litigating in this respect is not out of place and should be matched with strong judicial interventions. More Supreme Court pronouncements such as that in *Abacha v Fawehinmi*^[110] are expected but cases must first be determined in the High Court before there is a final appeal to the Supreme Court in the judicial cadre. Thus, High Court judges should be allowed to perform their judicial functions without distraction or fear of frequent petitions to the disciplinary body for judicial officers; National Judicial Council. If Nigeria must attain legal revolution and enforce the right to health and all other socio-economic rights, all hands must be on deck, and the laws must continually be tested in courts.

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