

# Discrimination based on HIV/AIDS status: A comparative analysis of the Nigerian court's decision in *Festus Odaife & Ors v Attorney General of the Federation & Ors* with other Commonwealth jurisdictions

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## 1 INTRODUCTION

Nigeria is one of the countries in the world that has one of the highest number of people living with HIV/AIDS. A recent report shows that 4.4% of the population of about 140 million people is living with HIV/AIDS.<sup>1</sup> After South Africa, Nigeria has the largest number of people living with HIV/AIDS in Africa.<sup>2</sup> South Africa is estimated to have about six million people living with HIV/AIDS.<sup>3</sup> Prisoners, in particular, tend to be more affected due to their vulnerable nature. In 2002, the national HIV prevalence in Nigeria was about 5.8%, whereas that of the prisons was estimated to be about 8.5%.<sup>4</sup> At the onset of the epidemic, which was strongly denied, the government was seen as doing little or nothing about it. Persons living with or affected by the epidemic were discriminated against and stigmatised. There were documented cases of discrimination against persons living with HIV/AIDS (PLWHA) in the health care sector, the employment, environment, allocation of housing, within community, in the family and virtually every facet of life.<sup>5</sup> This has led to a serious human rights challenge for the affected persons. Many of them were, and still are, unable to seek legal redress for violation of their rights due to ignorance or fear of stigmatisation. The few who are bold enough to go to court encounter an unfriendly environment.

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- 1 Federal Ministry of Health(FMOH) *Report of the National HIV/syphilis sentinel Sero prevalence survey*, (2005).
- 2 UNAIDS *Report on the global AIDS epidemic* (2006) 6.
- 3 *Ibid.*
- 4 See HIV/AIDS prevalence in Nigerian prisons far higher than nation average <http://www.prisonpastor.com/newsline.htm>.
- 5 See Center for the Right to Health (CRH) *HIV/AIDS and human rights: Experiences of people living with HIV/AIDS in Nigeria*, (2001)5.

In 2000, a woman who had her employment terminated by her employer based on her HIV/AIDS status filed a case in a High Court in Lagos to challenge the purported termination of her employment as being unlawful, illegal and unconstitutional. During the trial, the judge had ruled that unless an expert gave evidence that the court room would not be infected, the woman would be barred access to court to give evidence in her case.<sup>6</sup> The case is now before a Court of Appeal in Lagos, the first case on HIV, to be filed in a Nigerian court. This article critically reviews the Federal High Court's decision in *Festus Odaife & Others v Attorney General of the Federation & Others* (*Festus Odaife case*)<sup>7</sup> relating to equal enjoyment of fundamental human rights of prisoners living with HIV/AIDS as guaranteed under Nigerian Constitution and other relevant international human rights instruments. Furthermore, this article compares critically the approach of the court's decision in the *Festus Odaife* with discussions in other Commonwealth jurisdictions.

Part 1 briefly states the facts of the case and the decision. Part 2 examines the decision of the court against the background of Nigerian laws and international human rights instruments protecting the rights to health, non-discrimination and life of people living with HIV, particularly prisoners. Part 3 is a comparative analysis of case law. Part 4 concludes the article and suggests the way forward.

## 2 FACTS OF THE CASE

The applicants in this case were four prisoners living with HIV/AIDS who were detained without trial at Kirikiri maximum prison in Lagos on the order of a Magistrate. They faced various capital charges, ranging from armed robbery to murder, which attract the capital punishment. While in detention the applicants became ill and were later diagnosed as HIV positive. They were subsequently stigmatised and discriminated against by prison officials. When the applicants suffered from opportunistic infections, the prison officials denied them treatment in violation of the law. The applicants then filed an action for the enforcement of their fundamental rights in accordance with section 46 of the Constitution<sup>8</sup> seeking declaratory relief that:

1. Their continued detention, without trial and consequent acts of segregation and discrimination based on HIV/AIDS status infringed their right to human dignity and freedom from non-discrimination guaranteed under sections 34 and 42 of the Constitution;
2. They were entitled to proper medical attention in accordance with the provisions of the Prisons Act<sup>9</sup>, Prison Regulations Law and the United Nations Minimum Standard Rules for the Treatment of Prisoners;
3. Their denial of medical attention violated their rights to human dignity and freedom from discrimination guaranteed under sections 34 and 42 of the Constitution, as well as article 5 of the African Charter on Human

6 *Georgina Ahamfevule v Imperial Medical Centre and other* [Unreported suit no ID/1527/2000 (HC)] (2004) AHRLR 205 (NgHC 2004).

8 Constitution of the Federal Republic of Nigeria 1999.

9 The Prison Act of 1945 Cap 29 Laws of the Federation 1990.

and Peoples' Rights.

4. They be relocated to public hospitals where they could receive proper medical care.

The applicants further claimed that their continuous incarceration in the manner shown in their affidavit was inhuman, unjust, primitive, counter-productive, null, void and that it offended the provisions of the 1999 Constitution on the dignity of the human being.

In his judgment Nwodo J of the Federal High Court in Port - Harcourt held that failure on the part of the prison officials to provide medical care for the applicants due to their HIV status violated section 8 of the Prison Act and article 16 of the African Charter on Human and Peoples' Rights. The Court held, while admitting that issues relating to socio-economic rights often raise the challenge of lack of resources, particularly with regard to medical care, that a state has the duty to comply with existing statutes with regard to providing treatment to prisoners. In particular, section 8 (1) and (3) of the Prisons Act requires Nigerian government to ensure that the applicants who had contacted HIV/AIDS while in detention be taken to a hospital for medical attention. Moreover, failure on the part of the state to provide treatment for the applicants, which was solely based on their HIV status, constituted an act of torture and was inhuman and degrading.<sup>10</sup> The Court, however, held that denial of treatment to the applicants who are HIV positive while it may constitute inhuman and degrading treatment – did not amount to an act of discrimination as envisaged by section 42 of the Constitution. According to the Court, disease status is not one of the enumerated grounds for non-discrimination in section 42 of the Constitution. Furthermore, the Court held that a denial of treatment to the applicants did not constitute a violation of their rights to life, as there was no medical evidence to show that HIV/AIDS is a life-threatening disease which may result in death if medical attention was not provided. This decision of the Court is now analysed based on the following subheadings.

### 3 ANALYSIS

An important issue considered by the court was access to treatment for the enjoyment of the right to health and the right to non-discrimination with regard to people living with HIV/AIDS. Under Nigerian law there is no specific legislation dealing with HIV/AIDS. However, the human rights provisions contained in Chapter 4 of the Constitution 1999 can be applied directly or indirectly to issues relating to HIV/AIDS. Chapter 4 of the Nigerian Constitution, amongst others, guarantees other human rights, such as the right to human dignity, privacy, life, liberty, non-discrimination, etc. Like the constitutions of most Commonwealth countries, the Nigerian Constitution does not guarantee the right to health as an enforceable right. The provision that makes reference to health in the Constitution is found in section 17 in chapter 2 of the Constitution. While section 17(1) of the Constitution provides for

<sup>10</sup> See *Festus Odaife* (fn 7 above) para 35.

'freedom, equality and justice', section 17(3)(d) places an obligation on the state to ensure that there are adequate medical and health facilities for all persons'. However, this section is under Chapter 2 of the Constitution, which is captioned 'Directive Principles of Government Policy,' and which, according to the Constitution, is not justiciable.<sup>11</sup>

There are no specific constitutional provisions directly applying to prisoners. However, section 8 of the Prisons Act<sup>12</sup> provides that in the event of a prisoner suffering from a serious illness, the prison authorities must provide him or her with medical treatment.

With the exception of the human rights provisions in the Constitution, no other piece of legislation in the country has specific provisions relevant to protecting the rights of people living with HIV/AIDS in the country. However, a National Policy on HIV/AIDS was launched in 2003. It contains relatively weak provisions dealing with access to treatment for people living with HIV/AIDS.<sup>13</sup> It provides that the government will work towards ensuring that all persons in the country shall have access to the quality of health care that can adequately treat or manage their conditions, including the provision of anti-retroviral medication.

It further states that:

- (i) Cost-effective and affordable care shall be made accessible to all people with HIV related illnesses including access to anti-retroviral therapy;
- (ii) The use of ARV shall be under medical supervision and shall be governed by established effective guidelines. This will be updated regularly with the result of the research;
- (iii) A cost-effective drug lists for the management of HIV/AIDS shall be developed and incorporated into Nigeria's essential drug list; and
- (iv) The sale of ARVs shall be provided solely under strict medical supervision.

These provisions do not seem to obligate the Nigerian government to guarantee access to treatment for people living with HIV/AIDS in the country. At present there is no prison policy relating to HIV/AIDS, despite the increasing prevalence of the epidemic amongst prisoners. Nigerian prisons are besieged by series of problems ranging from overcrowding to the lack of basic facilities for prisoners. Several reports have chronicled the near state of abysmal misery and despondency prevailing in Nigerian prisons.<sup>14</sup> This renders inmates particularly vulnerable to various forms of diseases including HIV/AIDS.

11 See s 6(6) of the Nigerian Constitution 1999, which provides that all rights, including the right to health, listed in ch 2 of the Constitution shall not be made justiciable.

12 The Prison Act ( fn 9 above).

13 Durojaye E and Ayakogbe O 'A rights-based approach to access to HIV treatment in Nigeria' (2005) 5 *African Human Rights Law Journal* 287 at 302.

14 See for instance Nigeria: Amnesty International Delegates say prison conditions 'appalling' Amnesty International Press Release available at <http://www.amnesty.org/library/index> See also Civil Liberty Organisation (CLO) *Behind the wall* (Lagos, CLO 1991) US Department of State Nigerian Human Rights Practices available at <http://www.dosfan.lib.uic.edu>.

#### 4. INTERNATIONAL INSTRUMENTS AND GUIDELINES

At international law there exist a number of non-legally binding guidelines and binding human right instruments directly and indirectly dealing with the protection of prisoners' rights in the context of HIV/AIDS. Some of these guidelines include the Basic Principles for the Treatment of Prisoners<sup>15</sup>, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>16</sup>, Standard Minimum Rules for Treatment of Prisoners (SMR)<sup>17</sup> and Recommendation No. R (98) 7 of the Committee of Ministers to Member States Concerning the Ethical and Organisational Aspects of Health Care in Prison.<sup>18</sup> Most of the principles stated in these guidelines or instruments, although they do not contain provisions on HIV/AIDS with regard to prisoners, provided for safeguarding the human rights of persons in detention, for example, the right to be free from degrading and inhuman treatment, discriminatory acts, and the right to enjoy the highest attainable state of health.

However, two important international guidelines, namely, the World Health Organization (WHO) Guidelines on HIV Infection and AIDS in Prisons<sup>19</sup> and the International Guidelines on HIV/AIDS and Human Rights<sup>20</sup> directly address the human rights of prisoners in the context of HIV/AIDS. The WHO guidelines, for instance, highlight standards that prison authorities in countries should strive to achieve with regard to preventing HIV/AIDS transmission in prison and at the same time ensuring care and treatment for prisoners infected with HIV/AIDS. Similarly, the International Guidelines on HIV/AIDS and Human Rights urge prison authorities to ensure prevention of HIV/AIDS in the prisons through availability of HIV-related information, education voluntary counseling and testing and facilitating access to care and treatment for those in need.

It is widely accepted that access to treatment forms part of an individual's rights to the highest attainable standard of physical and mental well-being. In short, access to treatment constitutes an integral part of the right to health and a denial of treatment to people living with HIV/AIDS amounts to a violation of their fundamental rights.<sup>21</sup> The UN General Assembly, in its Declaration of Commitment on HIV/AIDS, states that 'Access to medication is a fundamental element for achieving progressively the right of everyone to the

15 Basic Principles for the Treatment of Prisoners, UN GA Res. 45/111, annex, 45 UN GAOR Supp (No 49A) at 200, UN Doc. A/45/49 (1990), Principle 5.

16 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN GA Res. 43/173, annex, 43N GAOR Supp (No 49) at 298, UN Doc. A/43/49 (1988), Principles 2, 4 and 7.

17 Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, annex I, ESC Res. 663C, 24 UN ESCOR Supp (No 1) at 11, UN Doc. E/3048 (1957), amended by ESC Res. 2076, 62 UN ESCOR Supp (No 1) at 35, UN Doc. E/5988 (1977).

18 Recommendation No. R 98(7) to Member States Concerning the Ethical and Organizational Aspects of Health Care in Prison adopted by the Committee of Ministers on 8 April 1998, at the 627th Meeting of the Ministers' Deputies [hereinafter Council of Europe Recommendation No. R 98(7)].

19 WHO Guidelines; Joint United Nations Programme on HIV/AIDS *Prisons and AIDS – UNAIDS Point of View and Prisons and AIDS: UNAIDS Technical Update*, Geneva, (1997)

20 Notes from the consultative meeting on International Guidelines on HIV/AIDS and Human Rights. UNCHR Res. 1997/33, UN Doc. E/CN.4/1997/150 (1997), para 29(e).

21 Durojaye & Ayankogbe (fn 13 above) 290.

highest attainable standard of physical and mental well-being'.<sup>22</sup> The right to health has been well recognised in numerous international and regional human rights instruments. One of the earliest documents to recognise this right is the Constitution of the World Health Organisation, which provides that health is a complete state of physical and mental well-being and not merely the absence of infirmity. In addition, this Constitution further declares that '[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of all human beings without distinction as to race, colour, and religion'<sup>23</sup> The other instrument to guarantee the right to health is article 25 of the Universal Declaration of Human Rights (UDHR). It provides that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'

Perhaps the most authoritative provision on the right to health is contained in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>24</sup> It provides that State Parties to the Covenant must recognise the right of every one to the enjoyment of the highest attainable standard of physical and mental health. It further stipulates the determinants essential for the enjoyment of the right to health.

The Committee monitoring the implementation of this Covenant has noted that '[t]he right to health must be understood as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health'.<sup>25</sup> It further noted that access to essential drugs constitutes a core obligation under the Covenant, which States Parties are expected to fulfil. According to the Committee, the enjoyment of the right to health is dependent on other rights, such as the right to life, dignity, privacy and non-discrimination, amongst others. Essentially, all health care facilities, goods and services must be available, accessible, acceptable and of good quality.<sup>26</sup>

The revised Guideline 6 to the International Guidelines on HIV/AIDS and Human Rights requires states to take necessary measures in ensuring equity in the availability and accessibility of quality goods, services, and HIV/AIDS prevention and treatment, including access to antiretroviral drugs for all persons.<sup>27</sup>

At the regional level, the right to health is guaranteed under article 16 of the

22 UN General Assembly Special Session on HIV/AIDS Resolution A/S-26/L2 June 2001 para 15

23 The Constitution of the WHO was adopted by the International Health Conference, New York, 19–22 June 1945 (opened for signature on 22 July 1946 by the representatives of 61 states 14 UNTS 185)

24 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force on 3 January 1976)

25 The Right to the Highest Attainable Standard of Health; UN Committee on ESCR General Comment No 14, UN Doc E/C/12/2000/4 para 12

26 *Ibid.*

27 Adopted at the Third International Consultation on HIV/AIDS and Human Rights (Geneva 25 July 2002), organised by the Human Rights Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS.

African Charter on Human and Peoples' Rights (African Charter)<sup>28</sup> and article 14 of the Protocol to the African Charter on the Rights of Women (Women's Protocol).<sup>29</sup> Article 16 of the African Charter provides that everyone has the right to enjoy the best attainable state of physical and mental health. On the other hand, article 14 of the Women's Protocol guarantees women the right to health, including reproductive and sexual health. This makes the African Charter the first human rights treaty to recognise explicitly reproductive and sexual health as human rights. Nigeria has ratified most of these international and regional human rights instruments and it has even gone ahead to incorporate the African Charter into its domestic law.<sup>30</sup> However, the mere fact that an international treaty can only be enforceable in the country if it has been incorporated into local law by the National Assembly makes the application of some of these international instruments difficult in the country.<sup>31</sup>

Notwithstanding the provisions in the international instruments, the right to health has been criticised for being too vague and for intersecting with other rights.<sup>32</sup> More importantly, like other social and economic rights, the right to health has been relegated to the background as a second generation right of lesser value, compared to civil and political rights.<sup>33</sup> Many Commonwealth countries, including Nigeria, do not guarantee the right to health as a justiciable right in their constitutions, but merely include it under the Directive Principles of Government Policy.<sup>34</sup> This impedes the enjoyment of the right. Commenting on this restrictive approach Bryne argues thus.

Traditionally, health issues when they reach the courts (particularly in those jurisdictions where there is no explicit guarantee to the right to health) have tended to be dealt with from a negative civil liberties perspective rather than consideration of the positive state obligations to provide adequate resources or access to treatment for effective enjoyment. This is particularly the case in relation to mental health where judgments have tended to focus on the restrictions placed on patients rather than their right to adequate treatment.<sup>35</sup>

In the *Festus Odaife* case, despite the absence of a clear provision guaranteeing the right to health in the Nigerian Constitution, the court found that the right to health of the applicants was violated by failure on the part of the prison officials to provide them with treatment. The court, in coming to this conclusion, relied on section 8 of the Prison Act, which requires that an

28 African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, (entered into force on 21 October 1986).

29 The Protocol of African Charter on Human and People's Rights on the Rights of Women in Africa approved by African Union governments in Maputo, 2003 CAB/LEG/66.6 (entered into force on 25 November 2005 after Togo became the 15<sup>th</sup> country to ratify the Protocol).

30 See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act cap 10 Laws of Federation 1990.

31 See s 12 of the Nigerian Constitution 1999, which provides that a treaty will only have force in the country if the National Assembly has enacted it into law.

32 David P F, *International law and infectious diseases* (1999) 12.

33 See, for instance, Evans T 'A human rights to health?' (2002) 23 *Third World Quarterly* 197 See also Fuller L 'The forms and limits of adjudication' (1978) 92 *Harvard L R* 353.

34 See Byrne I 'Making the right to health a reality: Legal strategies for effective implementation' a paper delivered at Commonwealth Conference, London September 2005. Available at [www.interights.org/doc/health%20paper.doc](http://www.interights.org/doc/health%20paper.doc).

35 *Ibid.*



inmate is entitled to medical care in case of serious illness. The court held that it is an understatement to say that HIV/AIDS is a serious ailment where in fact it is decimating lives around the world. The court cited article 16 of the African Charter to conclude that the government was under obligation to provide treatment to the applicants who are prisoners living with HIV/AIDS. According to the court, 'Article 16 (2) places a duty on the states to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'. The court undoubtedly took a bold and proactive step by invoking the provisions of the African Charter in favour of the applicants on this issue, given the fact that the right to health is not guaranteed as a justiciable right under the Nigerian Constitution

Arguably, the reasoning of the court on this issue would have been more convincing had the court cited relevant principles under international law. For instance, the court could have referred to the provisions of the International Guidelines on HIV/AIDS on the need to ensure access to HIV treatment for prisoners. As stated above, while these guidelines are not legally binding on states, they provide a framework and set standards that need to be observed by states with regard to dealing with prisoners. Moreover, the court could have cited international human rights jurisprudence for more persuasive interpretative guidance. For example, the decision of the African Commission on Human and Peoples' Rights in *International Pen & Others (On behalf of Ken Saro Wiwa) v Nigeria*<sup>36</sup> is a case in point. In that case, Ken Saro Wiwa, a writer and environmental rights activist, together with eight others, was sentenced to death by the military junta of the Abacha government for his conduct regarding social crusade activities in oil rich Ogoniland. While still in detention awaiting his execution with others, his health deteriorated to the point that he required medical attention. The Nigerian government denied him access to treatment. The African Commission held that Saro Wiwa's right to health under article 16 of the African Charter had been violated by the Nigerian government. In arriving at this decision, the Commission stated the following:

The responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities. The state has a direct responsibility in this case. Despite requests for hospital treatment made by a qualified prison doctor, these were denied to Ken Saro Wiwa, causing his health to suffer to the point his life was endangered ... This is a violation of article 16.

Similarly, the decision of the Commission in *Purohit & More v The Gambia*<sup>37</sup> could have lent greater force to the reasoning of the Nigerian Court on the issue of access to treatment. In that case, the Commission, while explaining the importance of the right to health under the African Charter, stated that the right to health includes guaranteeing the right to health facilities, access to goods and services to all without discrimination of any kind.

The radical but commendable decision of the Court in invoking article 16

<sup>36</sup> (2000)AHLR 212(ACHPR 1998).

<sup>37</sup> Communication 241/2001 decided at the 33rd Ordinary Session of the African Commission held from 15th–29th in Niamey, Niger May 2003



of the African Charter to guarantee medical attention to HIV positive prisoners is an act of judicial activism. It suggests that the African Charter could be invoked to override or make up for the deficiency of the constitutional provisions on human rights. But this is highly contentious. It is a path, which needs to be tread with caution. The Supreme Court in *Abacha v Fawehinmi*<sup>38</sup> held that the African Charter, after incorporation into Nigerian domestic law, became part and parcel of the country's law. But it warned that in the event of any conflict between the received law and the Constitution, the latter should take preeminence. The likely implication of the Supreme Court judgment on this subject is yet to be ascertained. For as long as this area of the law remains unsettled the court's judgment in *Festus Odaife* will encounter a degree of skepticism.

Another aspect of the Court's decision relates to the issue of the right to equality of prisoners living with HIV/AIDS. Equality, as a legal term, does not lend itself to a generally acceptable definition. However, it has been recognised that equality is tantamount to non-discrimination; hence an act of discrimination will lead to the violation of rights to equality.<sup>39</sup> According to the Canadian Supreme Court discrimination is described as

[a] distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.<sup>40</sup>

The principle of non-discrimination has been well recognised in virtually all human rights instruments. Article 2 of the African Charter forbids discrimination based on sex, race, religion or other status, while article 3 guarantees to every individual the right to equality and equal protection of the law. The notion of substantive equality implies that every individual is treated in the same manner, taking into consideration each one's peculiar circumstances. In other words, substantive equality, as different from formal equality, aims at promoting social justice and egalitarianism in a society, particularly for the marginalised or vulnerable groups.<sup>41</sup> The Committee on ICESCR, in its Comment 14, observes that access to health care facilities should be made available to all and in particular to marginalised members of society, such as women, prisoners, people living with HIV/AIDS, etc. In what appears to be a reaffirmation of the doctrine of substantive equality, the Committee notes that 'health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalised sections of the population, in law and in

38 (2001) 1 CHR 20.

39 See Shalev C 'Rights to sexual and reproductive health: The ICPD and the Convention on the Elimination of All Forms of Discrimination against Women' (2000) 4(2) *Health and Human Rights* 36 at 39.

40 *Andrews v Law Society of British Columbia*, 1989 1 SCR 143.

41 Rawls J A *theory of justice* (1971) 24.

fact, without discrimination on any of the prohibited grounds'.<sup>42</sup> It has been held that the *raison d'être* of substantive equality is to respect and protect the human dignity of all.<sup>43</sup>

The court, in *Festus Odaife*, after a careful review of the relief sought by the applicants, came to the conclusion that the denial of treatment to the applicants based on their HIV status did not amount to a violation of the right to non-discrimination as guaranteed by section 42(1) of the Constitution. That section provides that a 'citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person ...' be subjected to discrimination. The court reasoned further that disease or health status is not one of the enumerated grounds for non-discrimination in the Constitution. According to the court, '... [the] right to freedom from discrimination as enshrined in section 42(1) of the Constitution did not cover discrimination by reason of illness or disease'. The court then refused to accept that the provision of section 42 has been violated.

The court's interpretation is rather narrow and restrictive. While it is agreed that the Nigerian Constitution does not cover discrimination based on illness or disease status, a purposive approach to section 42 would have no doubt covered a denial of treatment to prisoners solely based on their HIV/AIDS status. Under the provisions of Basic Principle 9 of the Council of Europe Recommendation, it is stated that access to health services should be made available in the prisons without discrimination on the ground of their legal situation.<sup>44</sup> As rightly observed by UNAIDS, prisoners are members of the community and the mere fact that they have been temporarily denied their freedom to liberty by reason of incarceration, does not in any way deprive them of the other fundamental rights they are entitled to as human beings.<sup>45</sup> Besides, the court could have invoked article 2 of the African Charter, which forbids discrimination on 'other status'. This phrase has been broadly explained to include health status and, in particular, HIV/AIDS status.<sup>46</sup> The African Commission in the *Purohit*<sup>47</sup> case, while explaining the importance of articles 2 and 3 of the African Charter, which both relate to equality and non-discrimination, has stated as follows:

Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the rights provided under the African Charter.

The court, in its earlier statement, had quoted copiously from the *Minister of Health & Ors v Treatment Action Campaign (TAC)*<sup>48</sup> case to emphasise the

42 See General Comment (fn 25 above).

43 *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999(1) SA 6 (CC)

44 See Basic Principle 9 of the Council of Europe Recommendation R 98(7) paras 10,11,and 19.

45 UNAIDS *Handbook for legislators on HIV/AIDS, law and human rights* (1999) 61.

46 Commission on Human Rights Resolutions 1995/44 of 3 March 1995 & 1996/43 of 19 April 1996

47 *Purohit and Moore v The Gambia* (fn 37 above).

48 [2002] 10 BCLR 1033 (CC).

devastating effect of HIV/AIDS in South Africa. One wonders what other evidence the court requires in this regard. This narrow approach of the court is in contradistinction to recent developments worldwide on the interpretation of the right to non-discrimination.

One cannot understand why the court was quick to invoke article 16 to justify a violation of the right to health of the applicants but failed to do the same in the case of non-discrimination. This merely exemplifies an inconsistency on the part of the court. The applicants in this case are a historically disadvantaged group who deserve protection in the society. They are detained under appalling conditions, thus rendering them vulnerable to other violations of their rights. It is the duty of the court to do substantial justice in this kind of pathetic situation in which the applicants (who are also HIV positive) find themselves. Nigerian courts are courts of law and should not cease to be courts of justice.<sup>49</sup>

The court also addressed the interrelatedness of the right to health to the right to life. As stated above, the right to health has been described as linking with other rights, such as life, human dignity, non-discrimination, etc.<sup>50</sup> This reaffirms the conclusions reached at the Vienna Programme of Action 1993<sup>51</sup> where it was agreed that all human rights, social and economic and civil and political, are interrelated, interdependent and indivisible. The UN Committee on Civil and Political Rights, in its General Comment 6 on the right to life, has explained that a progressive rather than a narrow interpretation be given to the right to life in the Political Covenant. Significantly, the Committee noted that the right to life affects other rights, such as the right to housing, food and medical care.<sup>52</sup> With regard to access to HIV treatment, Yamin has noted that a denial of treatment to people living with HIV/AIDS may ultimately deprive them of their right to life.<sup>53</sup> Specifically, regarding the position of prisoners, it has been argued that access to HIV prevention and care programmes for them guarantees prisoners' rights to life, security and human dignity.<sup>54</sup>

The right to life has been traditionally seen as a negative right, which requires governments to refrain from taking life. However, recent views seem to regard the right to life as a positive right where a state is expected to preserve lives.<sup>55</sup> For instance, the Indian Supreme Court has held that a denial of emergency medical attention to a patient amounted to the violation of the right to life guaranteed in the Indian Constitution.<sup>56</sup> The court, in reconceptualising the right to life as creating positive obligations on states, reasoned that

49 Per Nnamani JSC (as he then was) in *N Esiri & Ors. V Idika & Ors* (1987) 4 NWLR Pt. 66 503, 514 (SC).

50 General Comment (fn 25 above).

51 Vienna Programme of Action UN Doc A/CONF 157/24 Part 1 ch III.

52 The Right to Life UN GAOR Human Rights Committee 37th session Supp No 40.

53 Yamin AE 'Not just a tragedy: access to medication as a right under international law' (2003) 21 *Boston University International Law Journal* 326 at 334.

54 See Jurgens R and Bettridge G 'HIV prevention for prisoners: Public health and human rights imperatives' (2005) 15 *INTERRIGHTS Bulletin* 56 at 57.

55 Cook RJ et al *Reproductive health and human rights: Integrating medicines, ethics and law* (2003) 161.

56 *Pachim Banga Khet Majoor Samity v State of West Bangal* [1996] AIR (SC) 2426.

'preservation of human life was of utmost importance'.<sup>57</sup> Also, the Costa Rican Supreme Court came to the same conclusion when it held that denial of anti-retroviral therapy to people living with HIV/AIDS impugns on their right to life.<sup>58</sup> The African Commission, reaffirming the positive nature imposed by the right to life under article 4 of the African Charter on states in *International Pen & Others (On behalf of Ken Sarowiwa)* case<sup>59</sup> stated as follows:

The protection of the right to life in article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of article 4.

Similarly, in the *SERAC* case<sup>60</sup> the Commission found the government of Nigeria in violation of different rights amongst which were the rights to health, clean environment and life under the African Charter when multi national oil companies caused oil pollution in Ogoniland. This confirms the Commission's willingness to embrace the idea of the indivisibility and interrelatedness of all human rights guaranteed under the African Charter.

Furthermore, the Inter-American Court on Human Rights has held that the maltreatment of street children by the Guatemalan government is a violation of the right to life of the children. In coming to this conclusion, the Court stated:

The fundamental right to life includes not only the right of every human being not to be deprived of his/her life arbitrarily but also the right that he/she will not be prevented from having access to conditions that guarantee a dignified existence.<sup>61</sup>

The decisions in the above cases clearly and cogently emphasise the positive nature of the duty imposed by the right to life and the indivisibility and interrelatedness of the right to health with the right to life. This should have been the approach of the court particularly if one bears in mind the precarious situation in the Nigerian prisons where overcrowding is rife and access to basic health facilities is acutely lacking, thus threatening the lives of inmates.<sup>62</sup> No doubt, had the court addressed its mind to these decisions it would have come to a different, albeit purposive conclusion on the interrelatedness of the right to health with the right to life of the applicants. The failure of the court to embrace this recent, but positive development at international law has been prejudicial to the interests of the applicants.

57 See Byrne (fn 34 above).

58 *Alvarez v Ccaja Costarricense de Seguro Social Exp 5778-V-97 No 5934-97(SC)*.

59 *International Pen and others (On behalf of Ken Sarowiwa)* case (fn 36 above)

60 *Social and Economic Rights Action Center (SERAC) and Another v Government of Nigeria* Communication 155/96 decided at the 30th Ordinary Session of the African Commission held from 13 to 27 October 2001, Banjul, The Gambia.

61 *Villagran Marales et al v Guatemala* Series C No 65 19 Novemebr 1999(IACHR) para 144; See also *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 decided at the African Commission's Ordinary Session held from 13 to 27 October 2001.

62 See for example the Concluding Observation of the Human Rights Committee on Nigeria 24/7/96 CCPR/C/79/Add.65.

## 5 PURPOSPIVE INTERPRETATION OF THE CONSTITUTION: LESSONS FROM OTHER COMMONWEALTH JURISDICTIONS

It is worthy of note that the court in *Festus Odaife* decided to invoke the provision of article 16 of the African Charter without even considering a creative interpretation of the human rights provisions under Chapter 4 of the Nigerian Constitution. Although, while this proactive stance of the court is commendable, it pitches the court against the decision of the Supreme Court in the *Abacha*<sup>63</sup> case. The Supreme Court, the highest court of justice in Nigeria, has held that in the event of any conflict between the provisions of the Nigerian Constitution and that of the African Charter the former should supercede. This is more so when one takes into consideration the fact that the doctrine of judicial precedence is well known to Nigerian legal system.

The court could have avoided this 'apparent confrontation' by making references to the ingenuity and intrepidity of the Indian courts on this issue. It is to be noted that India shares a similar common law background with Nigeria. Under the Indian Constitution, social and economic rights (just as the case in Nigeria) fall under directive principles, hence are non-justiciable. However, Indian courts have creatively interpreted this portion of the constitution so as to give life to its enforceability. For instance, the court in the celebrated case of *Olga Tellis v Bombay Municipal Corporation*<sup>64</sup> found that the eviction of the petitioners from their dwellings amounted to a deprivation of their livelihood. This decision provides an avenue for courts to imply violation of civil and political rights in a case dealing with social and economic rights. Similarly, in the *Majoor Samity*<sup>65</sup> case the Indian Supreme Court held that a denial of emergency medical treatment to an individual violated the right to life under article 21 of the Indian Constitution.

This kind of approach is not only creative but also realistic as it recognises the inherent deficiencies in a constitution with regard to the enforceability of social and economic rights, but simultaneously pinpoints the role of the court in the effective interpretation of the constitution.

On the issue of costs of treatment for the applicants who are living with HIV/AIDS the Court, in *Festus Odaife*, came to the conclusion that costs cannot be an excuse for the prison authorities to fail to provide medical treatment for the applicants. The rationale for the court's decision needs to be regarded cautiously since the respondents in the case (the Attorney General and the Nigerian Prison Authorities) did not file any defence that could have assisted the court to come to a logical conclusion on this issue. But the fact remains that over the years Nigerian prisons have been grossly underfunded and cannot meet their myriad needs.

But a reference to other jurisdictions, such as South Africa, to demonstrate how similar cases have been decided by the courts could have given the court

63 *Abacha v Fawehinmi* (fn 38 above)

64 (1985)3 SCC 545

65 *Pachim Banga Khet Majoor Samity v State of West Bangal* (fn 56 above)

in *Odiafe* a more enlightened insight into this issue. The government's duty to provide resources with regard to social and economic rights has remained a thorny issue even when social and economic rights are explicitly guaranteed in a constitution. A case in mind in this regard is the South African Constitutional Court decision in *Soobramoney v Minister of Health, KwaZulu-Natal*.<sup>66</sup> In that case, a man suffering from renal failure and in need of renal dialysis was refused treatment in a public hospital. He instituted a constitutional action, claiming that he was entitled to treatment under section 27(3) which deals with the right to emergency treatment and section 11 of the Constitution, dealing with right to life. However, the Constitutional Court refused to grant his request, holding that granting such a request would have great consequences for the resources of the state. It further held that since resources are often inadequate, a refusal of treatment to the applicant did not amount to either a violation of section 27 or section 11 of the South African Constitution. Ngwenya has argued that though this decision was correctly arrived at taking into account the peculiarity of the case, the reasoning of the court was not convincing enough as it placed a restrictive interpretation on section 27(3) of the Constitution and equally painted a picture of undue judicial deference to matters of allocations of resources in the health care sector.<sup>67</sup>

More importantly, the subsequent decision of the Constitutional Court in the landmark case of *Minister of Health & Ors v Treatment Action Campaign*<sup>68</sup> (thereafter *TAC* case) could have served as a good inspiration to the Court in arriving at its decision. Although the Court in *Odiafe* referred to *TAC* case, it did not clearly expound on the reasoning of the court in that case. In the *TAC* case, the government of South Africa was held to have violated the right of children under section 28 and the right to health care under section 27 of the South African Constitution for failing to provide nevirapine (an anti-retroviral) free of charge to pregnant women to prevent mother-to-child transmission of HIV/AIDS at public health institutions. Unlike the case of *Soobramoney* the Court adopted a more purposive interpretation of the South African Constitution, rejecting lack of resources as an excuse for the government's inability to meet its obligations under sections 28 and 27 of the Constitution. Drawing inspiration from the *Grootboom*<sup>69</sup> case, the court found that the government's policy, which restricted availability of nevirapine, was unreasonable and prejudicial to the interest of children.

A major point of departure between the *TAC* case and *Soobramoney* case is the fact that in the *TAC* case, while the court conceded that the executive has constitutional pre-eminence with regard to policy decision-making, nonetheless, it did not interpret the doctrine of separation of powers 'as implying

66 [1997] 6 BCLR 78 (CC)

67 See Ngwenya C ' The historical development of modern South African health care system: From privilege to egalitarianism (2004) *De Jure* 290 at 308

68 *Minister of Health and ors v Treatment Action Campaign* (fn 48 above)

69 *Government of the Republic of South Africa v Grootboom* 2000 3 BCLR 227 (CC). This case has been regarded a pace-setter in the promotion of socio-economic rights in South Africa.



judicial abdication on policy matters that impact on fundamental rights<sup>70</sup>

In addition, one might argue that the case of *B v Minister of Correctional Services*<sup>71</sup> would have been very apposite as a persuasive authority for this case since it had been decided at the time of the court's decision in *Odaife*. In that case, four prisoners living with HIV/AIDS, who were refused anti-retroviral therapy, brought an action against the South African prison authorities claiming that they were entitled to treatment at government expenses under section 35(2)(e) of the South African Constitution. Just as in the *TAC* case, the South African government raised the issue of lack of resources for its inability to provide medical care for the applicants. The court rejected this argument, holding that there was insufficient evidence showing lack of resources on the part of the government. The court ordered that medical care be provided for two of the applicants based on medical reports. This case however, has been criticised for its want of depth in international human rights jurisprudence.<sup>72</sup>

More recently the AIDS Law Project, on behalf of about 15 prisoners living with HIV/AIDS in Westville Prison in KwaZulu-Natal<sup>73</sup>, lodged an application at a High Court seeking the removal of barriers to prisoners' access to treatment. In their complaints the applicants had claimed that they were entitled to be granted access to treatment in accordance with sections 27 and 35(2)(e) of the Constitution and the Operational Plan for Comprehensive HIV/AIDS Care, Management and Treatment of 2003. In his judgment delivered in July of 2006, Judge Pillay granted the order and ordered the Department of Correctional Services and the prison authorities to indicate to the prisoners and the court how treatment access could be speeded up. The judge observed that the steps taken by government to assure access to HIV treatment for the prisoners, in accordance with its obligations under sections 27 and 35(2)(e) of the South African Constitution, were not only slow but inadequate and unreasonable.<sup>74</sup> The government later failed to comply with this court order, thereby necessitating another application to enforce the judgment. In the hearing of this application,<sup>75</sup> the court, on 28 August 2006, ordered the government to make available to it by 8 September 2006 plans of how treatment would be provided to the prisoners in the Westville Prison. The court castigated the negative attitudes of the government to its earlier order on the same issue, emphasising that such attitudes could pose a serious threat to the principle of separation of powers and respect for the rule of law.<sup>76</sup>

70 See Ngwena (fn 65 above) 304

71 [1997] 6 BCLR 789 (C)

72 Ngwena C 'Access to anti-retroviral therapy to prevent mother-to-child transmission of HIV as a socio-economic right: An application of section 27 of the Constitution' (2003) 18 *South African Public Law* 83

73 *EN and others v The Government of South Africa and others* Unreported case No 4567/06 delivered on 25 July 2006 available at <http://www.alp.org>

74 *Ibid* para 27

75 See *EN and others v The Government of South Africa & Others* Unreported case No 4576/06 delivered on 28 August 2006 available at <http://www.alp.org>.

76 *Ibid* para 33



Unlike Nigeria, South Africa has adequate laws and policies to protect prisoners living with HIV/AIDS. Apart from the specific provisions under section 35 of the Constitution, the Correctional Services Act<sup>77</sup> contains detailed provisions protecting the prisoner's access to health care services. Section 12 of the Act specifically enjoins the government to make available health care services to prisoners within its 'available resources'. Moreover, the 1996 Policy on the management of HIV/AIDS in Prisons contains detailed procedures against preventing the spread of the epidemic in South African prisons and providing care and support for those infected. The court in *Odaife* could have availed itself of decided South African cases to come to a more differentiated decision.

Although decisions by courts in other jurisdictions are not binding on Nigerian courts, they have persuasive authority. More importantly, Nigerian courts are likely to treat with greater respect decisions of courts in other Commonwealth jurisdictions than those of other jurisdictions. Over the years there have been emerging trends in some Commonwealth countries, such as South Africa, India, and Botswana of adopting a purposive interpretation of the wordings of the constitution. The South African Constitutional Court in *Hoffman v South African Airways (SAA)* (herein after called *Hoffman case*)<sup>78</sup> adopted such a purposive approach when a prospective employee living with HIV was denied employment by SAA due to his HIV status. The court found that such denial of employment to the plaintiff because of his HIV status was unfounded and a violation of the right to equality under section 9 of the South African Constitution. The court reached this decision despite the fact that disease or health status is not listed as one of the grounds for non-discrimination in the Constitution. In arriving at its decision the court relied on its earlier decision in the *Harksen case*<sup>79</sup> where it laid down the factors to consider in determining unfairness of discrimination in accordance with section 9 of the Constitution. These include the following:

- (a) the position of the victim in the society;
- (b) the purpose sought to be achieved by the discrimination;
- (c) the extent to which the rights and interest of the victims of discrimination has been affected; and
- (d) whether the discrimination has impaired the human dignity of the victim.

The above principles enunciated by the South African courts on equality were inspired by Canadian jurisprudence. For example, in *Law v Canada (Minister of Employment and Immigration)*<sup>80</sup> (known as the Law Test) the Canadian Supreme Court enumerated several factors that must be considered before establishing unfair discrimination under section 15 of the Canadian Constitution. Firstly, the position of the complainant in the society, that is, whether or

<sup>77</sup> Act 111 of 1998

<sup>78</sup> [2000] 11 BCLR 1235 (CC)

<sup>79</sup> *Harksen v Lane NO and others* 1999(1) SA 300(CC)

<sup>80</sup> *Law v Canada (Minister of Employment and Immigration)* (1999) 1 SCR 497; 170 DLR (4<sup>th</sup>) 1 para 39

not the complainant has been a disadvantaged person in the society. Secondly, the purpose of the differentiation, that is, did the law aim to achieve a vital societal goal in favour of one who is vulnerable or had been disadvantaged? Thirdly, the impact of the differentiation on the rights of the complainant, that is, does the law impact adversely on his or her fundamental human dignity? The court further emphasised that the paramount consideration in determining the violation of the equality clause of the Constitution is the protection of the dignity of the complainant.

Another good example of the purposive interpretation of a constitution is the Botswana case of *Makuto v State*<sup>81</sup> where an accused person charged with rape was made to undergo an HIV test in accordance with section 142(2) of the Penal Code of Botswana. Section 142(2) (b) of the law requires that an HIV positive person convicted of the offence of rape be sentenced to a maximum punishment of 20 years imprisonment. The accused in this case tested positive to HIV and was therefore sentenced to 16 years imprisonment and strokes with a light cane. He contended on appeal that the provision of the law, which requires harsher punishment for an HIV positive sex offender, is discriminatory and contrary to section 15 of the Botswana Constitution.<sup>82</sup> The Constitution does not specifically proscribe discrimination based on HIV status. Notwithstanding, the court held that the provision of section 15 is not meant to be exhaustive and as such can accommodate other grounds of discrimination, such as HIV status. The court therefore concluded that harsher punishment for HIV positive offenders is discriminatory and violates section 15 of the Constitution. However, the court was able to justify this harsher punishment based on section 15(4)(e), which provides for limitations on individual rights to non-discrimination on certain justified grounds. The willingness on the part of the court to expand the scope of section 15 of the Constitution to cover HIV status is quite commendable and undoubtedly an enlightened approach to the meaning of discrimination. That could have been the approach in the *Festus Odaife* case

Similarly an Indian High Court in *Mr X v State Bank of India*,<sup>83</sup> has condemned discrimination against persons living with HIV/AIDS in the workplace. In that case, a sweeper who had worked for the State Bank of India for nine years on a contract basis was denied a permanent position after testing HIV-positive. The court held that the earlier ruling in *M/s ZY* prohibited employment discrimination based on HIV status alone and insisted that Mr X be absorbed into a permanent position. The pronouncement of the court in that case is noteworthy. Shah J emphasised the need for an inclusive, supportive approach to those infected and affected by HIV, stating the following

Most people with HIV/AIDS continue working which enhances their physical and mental well-being and they should be entitled to do so. They should be enabled to contribute their creativity and productivity in a supportive occupational setting. HIV positive persons may have years of constructive, healthy service ahead of them. To exclude them

81 (2000) 5 LRC 183. Botswana Court of Appeal

82 S 15 of the Botswana Constitution proscribes discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed

83 High Court at Bombay Writ petition No.1856 of 2002, heard 2004

lacks a rational foundation and is unfair. HIV infected persons need maximum understanding and help wherever possible.<sup>84</sup>

Had the court in *Odaife* adopted the above reasoning, it would have been easy for it to reach a different conclusion on the interpretation of section 42 since, clearly, people living with HIV/AIDS have continued to be stigmatised and discriminated against in the country. Rather than the formal approach adopted by the court, it could perhaps have considered the impact of refusal of treatment based on HIV/AIDS status on the human dignity of the prisoners. As the court rightly puts it in the *Hoffman* case:

At the heart of the prohibition of unfair discrimination is the recognition under our Constitution that all human beings, regardless of their position in the society must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against.<sup>85</sup>

## 6 CONCLUSION

The decision of the court in *Odaife*, the first decided case on HIV by a Nigerian court might be described as a mixed blessing in the sense that the court was very proactive in holding that the applicants' right to health was violated. However, the decision was disappointing in the sense that the court fell short of holding that a denial of treatment to HIV positive prisoners amounted to discrimination and violation of the right to life. Furthermore, the court failed to take a critical look at international human rights jurisprudence on the link between right to health and other rights. This robbed the decision of its jurisprudential importance. Cases decided in other jurisdictions, such as South Africa and India could have been useful to the Court in reaching its decision.

Even though the court proactively invoked article 16 of the African Charter to find the Nigerian government to be in violation of the rights of the applicants, the court surprisingly, made no reference to the jurisprudence of the African Commission nor to international guidelines or principles relating to the situation of prisoners. Clearly, this is an oversight which in turn can be regarded as a shortcoming. For while some of these guidelines and principles may not be binding on the Nigerian government, they no doubt lay down standards that should be followed with regard to the treatment of prisoners.

This decision in *Festus Odaife* case clearly highlights again the need for the enactment of legislation dealing with the stigmatisation and discrimination of people living with HIV/AIDS in Nigeria. The fact of the matter is that at the UN Declaration of Commitment on HIV/AIDS, world leaders agreed that to enact anti-discrimination legislation dealing with HIV/AIDS in their respective countries by the end of 2003. Nigeria has yet to live up to this commitment. There can be no better time to do this than now.

<sup>84</sup> *Ibid* para 8

<sup>85</sup> *Hoffman* case ( fn 78 above) para 27

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