COURTS AND THE NEED FOR DYNAMISM IN THE PROMOTION OF REPRODUCTIVE HEALTH RIGHTS: A NIGERIAN PERSPECTIVE

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ABSTRACT

Courts have played, and can always play important roles in the protection, fulfillment and respect of reproductive health rights as a genre of human rights. In their roles of judicial law-making, courts can ingeniously and pragmatically adapt existing legal provisions to address emerging or novel reproductive health matters, without waiting for legislative interventions. Along this axis, in entrenching the rights of women to terminate unwanted pregnancies, the widely reported American case of Roe v Wade offers a remarkable illustration of how courts can courageously and creatively advance the frontiers of reproductive health rights. However, failure of courts to be dynamic in approach can suppress reproductive health rights, especially where there are no clear-cut legislative provisions affirming the guarantee of reproductive health rights, as is the case in Nigeria. Against this background, this article flags the need for dynamism on the part of Nigerian courts in engaging reproductive health rights issues.

I. INTRODUCTION

> While we celebrate the promise of a new administration that understands the importance of reproductive health care in women's lives and the role of government in ensuring access to care, we know that the courts continue to be an important avenue for restoring and protecting reproductive freedom.[1]

Reproductive health rights, as *human rights*, consist of two main components-individual freedoms and social entitlements. Realization of these components depends on

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1. ACLU (AMERICAN CIVIL LIBERTIES UNION), REPRODUCTIVE RIGHTS IN THE COURTS (2009), available online at <http://72.3.233.244/reproductiverights/38611res20090202.html>, (accessed on 13 October 2009) (emphasis added).

responsibilities on the part of stakeholders that include individuals, communities, social institutions and more particularly the government as the custodian of State resources and protector of collective interests.[2]

For emphasis, international treaties, national legislations and constitutions, consensus decisions at international conferences as well as international organizations have echoed and emphasized the sanctity of reproductive health rights.[3] The obligations of stakeholders, especially governments, to create an enabling social, economic and legal structure for the realization of reproductive health rights have resonated in the various international treaties and other mediums. Yet, there remains the important task of ensuring that stakeholders carry out their obligations in the global drive to make the enjoyment of reproductive health rights a reality, rather than the 'paper rights' it seems to be, especially in the developing countries of Africa such as Nigeria. Courts have crucial roles to play in the drive to achieve practical realization of reproductive health rights.

Against this background and from a Nigerian perspective, this article reflects on the roles of courts in promoting reproductive health rights (or undermining it—in the event of failure to act appropriately). Among others, the article highlights the global efforts to establish reproductive health rights as valid *basic rights* which the government and others owe an obligation to respect, fulfil and protect. The article also considers pertinent international human rights treaties that constitute the legal launching pad for the promotion of reproductive health rights across the world. In a more contextual vein, the article examines the validity of reproductive health rights claim in light of the Nigerian constitutional position on the right to health as a non-justiciable right.

It is argued that there is valid legal basis to claim the right to health, and by the same token, reproductive health rights in Nigeria despite the constitution's silence on it. At necessary points, the article draws on pertinent cases to underscore the remarkable roles which courts have played (and still need to continue playing) in the promotion of reproductive health rights in Nigeria and beyond. The role of the courts is considered in relation to the plethora of factors that affect the promotion of reproductive health rights.

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2. Ruth Dixon-Mueller et.al, *Towards a Sexual Ethics of Rights and Responsibilities*, 17 REPRODUCTIVE HEALTH MATTERS 111 (2009).

3. *Id.*

II. THE PROMOTION OF REPRODUCTIVE HEALTH RIGHTS AND THE COURTS: AN OVERVIEW

In a comprehensive scope, 'promotion' of reproductive health rights connotes the three-piece obligations to *respect*, *protect* and *fulfil* human rights in the specific context of reproductive health, as well as taking measures to attain these goals. The obligation to respect dictates that governments and non-governmental entities refrain from interfering directly or indirectly with the enjoyment of the right to reproductive health. The obligation to protect requires the government or the system to prevent third parties from interfering with the rights or freedom of the people to enjoy the right to reproductive health. The obligation to fulfil requires the government or the system to ensure that people have access to a system of reproductive health care that provides equal opportunity to everyone.[4] It would be unrealistic to expect that governments and other people would summarily uphold or safeguard reproductive health rights or any other basic rights. Rather, the reality, as various sources indicate, is that transgression and suppression of reproductive health rights and other rights abound across the world. The attainment of an acceptable level of respect, protection and fulfilment of rights remains a struggle, especially in developing countries of Africa where inconsiderate political leadership and harmful socio-cultural norms have morbidly collaborated in emasculating human rights.

As various decided cases reflect, the courts in different contexts have played (and will continue to play) vital roles in the unceasing struggle for the promotion of human rights. Through courageous decisions and imposition of sanctions in deserving cases, courts have curtailed inordinate transgression of human rights. Also by means of dynamic and pragmatic utilization of judicial mechanisms, courts have also used existing or established rules and principles to sustain emerging or novel human rights issues. It is through this approach that the courts, *inter alia*, have expanded the frontiers of human rights to accommodate reproductive health as distinct from the generic right to health.

Tacitly and explicitly, series of international treaties, national constitutions and legislations have recognized and given credence to the sanctity of reproductive health rights.[5] Courts at high levels in different parts of the world have also upheld the rights

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4. *See,* R.J. COOK, B.M. DICKENS & M. FATHALLA, REPRODUCTIVE HEALTH AND HUMAN RIGHTS, INTEGRATING MEDICINE, ETHICS AND LAW 37 (2003).

5. *See e.g.*, NIGERIA CONST. (1999); International Covenant on Economic, Social and Cultural Rights, U.N.G.A. Res. 2200A (XXI) of 16 December 1966, *entry into force* 3 January 1976, in accordance with article 27 ('Economic Covenant'); African [Banjul] Charter on Human and Peoples' Rights, 27 June

of citizens to reproductive health on different fronts.[6] Consensus decisions of high-calibre global conferences such as the International Conference on Population and Development (ICPD) held in Cairo, Egypt in 1994[7] and the Fourth World Conference on Women (FWCW) held in Beijing, China held in 1995[8] have further strongly affirmed the inviolability of reproductive health rights. A wide spectrum of learned writers, activists and stakeholders also agree on the importance of promoting reproductive health rights.[9] Despite all these, the acceptance of reproductive health rights in its different dimensions as legitimate human or basic *right* remains a contentious issue in different parts of the world. This makes unfettered enjoyment of the right a challenging task, even in developed countries such as the USA, where reproductive health rights seem to have been taken for granted.[10]

Religious, socio-cultural and other norms and mores are among the factors that militate against the realization of reproductive health rights. Law as a tool of social control and regulation has a crucial role to play in addressing these elements. But law usually is a reflection of the prevailing norms and mores in a society. Thus, the norms in a society may precipitate or aid laws that support the suppression of reproductive health rights. In such a scenario the courts in their ultimate "lawmaking" capacities can intervene to reconcile the unfriendly domestic legal situation with the prevailing international legal order on reproductive health rights, thereby creating an enabling legal framework for the effective promotion of reproductive health rights.

In another vein, promotion of reproductive health rights may be hampered because of ambiguity in the laws touching on reproductive health. Due to uncertainty, the government and policy makers may find it difficult to take required measures for promoting reproductive health rights. In such a situation the courts can also intervene to clear the ambiguity and thus create a legal atmosphere helpful to the promotion of reproductive health rights. Indeed the courts at different times have acted creditably in

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1981, OAU Doc. CAB/Leg/67/3 Rev. 5, 21 ILM 58 (1982), *entered into force* 21 Oct. 1986 (now domesticated in Nigeria as African Charter on Human and People's Rights Act, Cap. A9 Laws of the Federation of Nigeria, 2004).

6. *See e.g., Roe v. Wade* (1973) 410 US 113, and *R v. Morgentaler* (1988) 4 DLR (4th) 385 (Canada).

7. UNITED NATIONS, REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT (Cairo, Egypt, 5-13 September 1994, United Nations Doc. N.Y. A/Conf. 171/13 Rev.1, U.N. Sales No. 95. XIII.I8 [hereinafter the Cairo Programme]1994).

8. UNITED NATIONS, REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN [THE BEIJING DECLARATION AND PLATFORM FOR ACTION], (United Nations Doc., New York, N.Y, A/Conf. 177/20, 1995).

9. *See generally*, COOK, DICKENS & FATHALLA, *supra* note 4.

10. *See*, ACLU, *supra* note 1.

upholding the sanctity of reproductive health rights in the face of unfriendly societal norms and ambiguous laws.[11]

III. REPRODUCTIVE HEALTH RIGHTS: EVOLUTION AND INTEGRATION

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capacity to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.[12]

The above stated definition was entrenched and given prominence at the Fourth United Nations International Conference on Women held in Beijing in 1995.[13] The definition is a modification of the broader concept of *right to health*.[14] Moreover, reproductive health is a genre of health as a whole. Building on the definition, the Beijing Conference further elaborated on reproductive health rights:

> These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health….It also includes their right to make decisions concerning reproduction free from discrimination, coercion and

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11. *See generally*, LAW STUDENTS FOR REPRODUCTIVE JUSTICE, MAJOR U.S. SUPREME COURT RULINGS ON REPRODUCTIVE RIGHTS (2008). *See also*, Adam Easton, *Award for Poland Abortion woman*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/8271895.stm> (accessed on 13 October 2009).

12. UN DEPARTMENT OF PUBLIC INFORMATION, PLATFORM FOR ACTION AND BEIJING DECLARATION (1995), ¶ 94.

13. UNITED NATIONS, REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN [THE BEIJING DECLARATION AND PLATFORM FOR ACTION], U.N. Doc., N.Y, A/Conf. 177/20, 1995.

14. *See*, WORLD HEALTH ORGANIZATION CONSTITUTION, 1988.

violence as expressed in human rights documents.[15]

It bears mentioning that while the Beijing Conference in 1995 gave remarkable attention and significance to reproductive health rights, international appreciation of the right to make reproductive health choices can be traced back to long before the Conference.[16] For instance, in 1968, participants at the First International Conference on Human Rights held in Tehran accepted, among others, that "parents have a basic human right to determine freely and responsibly the number and spacing of their children and a right to adequate education and information to do so."[17] Along similar lines, the Alma Ata Declaration of 1978,[18] in the definition of primary health care encompassed family planning as well as maternal health.

The U.N. Decade for Women (1976–1985) spawned some notable development in the area of reproductive health rights with the adoption of the Convention on the Elimination of All Forms of Discrimination against Women.[19] In one respect, the Women's Convention enjoined State parties to "take appropriate measures to eliminate discrimination against women in the field of health care in order to ensure on a basis of equality of men and women, access to health care services, *including those related*

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15. Para. 95, repeated in large part in para. 223 of the Beijing Platform.

16. In 1968, the First International Conference on Human Rights held in Tehran recognized that "parents have a basic human right to determine freely and responsibly the number and spacing of their children and a right to adequate education and information to do so." The International Conference on Population (ICP) held in Mexico City in 1984 reformulated the right and proclaimed that "all couples and individuals have the basic right to decide freely and responsibly, the number and spacing of their children and to have the information, education and means to do so." CEDAW, which was adopted in 1979 provides in Article 16(1)(e) that "States Parties shall ensure on a basis of equality of men and women … The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." In 1992, the UN Conference on Environment and Development held in Rio de Janeiro in its Agenda reaffirmed the right to decide on the number and spacing of one's children and further affirmed that governments should provide health facilities, including "affordable, accessible services, as appropriate for the responsible planning of family size." In 1993, the World Conference on Human Rights held in Vienna recognized "On the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels."

17. Final Act of the International Conference on Human Rights, Tehran, Iran, 12 May 1968, Res. XVII, U.N. Doc. A/Conf.32/41 (1968), *reproduced in* U.N. Department of Public Information, United Nations and the Advancement of Women 1945–1995, at 167-69, U.N. Doc. DPI/1679, U.N. Series No. E. 95.1.29 (1995).

18. For full text of the Alma Ata Declaration see, *Achieving Reproductive Health for All: The Role of the WHO, in* A.L. Waddell (ed.) WHO /FHE/95, at 2.

19. Adopted by the United Nations General Assembly on 18 December 1979, entered into force on 3 December 1981 (hereinafter the Women's Convention).

to family planning."[20] The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), the United Nations body that monitors compliance with the Women's Convention, in different respects has expatiated on State parties' obligations under the Convention vis-à-vis reproductive health care. In its General Recommendation on Women and Health, the Committee directed States Parties to ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services. Generally, the Women's Convention offers a strong legal support for the right to reproductive health and choice.

The United Nations Conference on Environment and Development held in Rio de Janeiro in 1992, though not specifically on health or reproductive health, still addressed reproductive health rights, urging governments to provide health care facilities, including "affordable and accessible reproductive and sexual health services, as appropriate for the responsible planning of family size."[21] In 1993, at the Vienna World Convention on Human Rights, member states recognized "on the basis of equality between women and men, *a woman's right to accessible and adequate health care and the widest range of family planning services*, as well as equal access to education at all levels."[22]

The Cairo International Conference on Population and Development (ICPD) of 1994 can be described as another landmark in the international attention on reproductive health and its integration in the framework of human rights. Women's reproductive health was given significant attention at the Conference where the globally recognized definition of reproductive health right, as earlier stated in this article, was adopted before it was expanded and amplified at the Beijing Conference in 1995. These earlier foundations set the tone for the declarations and injunctions on reproductive health at the Beijing Conference in 1995.

Beyond Beijing, there have been other international drives to integrate reproductive health and the appurtenant rights. For example, at a regional level, the African Regional Strategy on Reproductive Health was devised in September 1997.[23] In the Strategy, African member countries committed themselves to "implement the reproductive health concept for the next twenty five years."[24] The hope is that within

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20. Art. 16 (1)(e) [emphasis added].

21. The Rio De Janeiro Declaration and Agenda 21, United Nations Conference on Environment and Development, Rio De Janeiro, June 1992.

22. U.N. Doc.A/CONF.157/23 (1993) (emphasis added).

23. African Regional Strategy on Reproductive Health, part 1, 1997.

24. *Id.*

this period, "all people in the region should enjoy an improved quality of life through a significant reduction of maternal and neonatal morbidity, unwanted pregnancy and sexually transmitted infections including HIV/AIDS, and the elimination of harmful practices and sexual violence."[25]

IV. LEGAL FRAMEWORK OF REPRODUCTIVE HEALTH RIGHTS— NIGERIA AS AN ILLUSTRATION

Generally, rights to reproductive health can be set in and would fit into the well established and internationally accepted framework of human rights. Reproductive rights in various respects are off-shoots of broadly established rights, such as the rights to dignity, privacy, health and freedom from discrimination.[26] In light of this, it can be reasonably concluded that reproductive health rights are, by extension, human rights that have been entrenched in human rights instruments and therefore ought to be respected and enforced by state actors.

The legal framework of reproductive health rights can be illustrated with specific reference to the Nigerian legal structure. Having noted earlier that reproductive health is a branch of the broad concept of health, analysis of the legal framework in Nigeria would proceed primarily from the point whether *health* as a whole is an enforceable human right in Nigeria. The centre-point or 'code' of Nigerian human rights law is the Nigerian Constitution, 1999.[27] Chapter IV of the constitution sets out the human rights to which the people are constitutionally entitled. In addition, the people can lay claim to some human rights guarantees under international human rights treaties to which Nigeria is a party, such as the International Covenant on Economic, Social and Cultural Rights,[28] and the African Charter on Human and Peoples' Rights (which Nigeria has domesticated as African Charter on Human and Peoples' Rights Act).[29]

Prima facie, the right to health, and by same token, reproductive health, is not a justiciable fundamental right in Nigeria, as it is not listed among the constitutionally guaranteed rights.[30] The 'right' only finds expression in the constitution as a non-

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25. *Id*., part 2(1) a.

26. N.I. Aniekwu, *Before Beijing and Beyond: A Reflection on the Emergence of Women's Rights as Human Rights*, KNUST L. J. (2005).

27. Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as 'Nigerian Constitution').

28. *Supra* note 5.

29. *Id.*

30. See generally, Chapter IV (sections 33-46) Nigerian Constitution 1999.

justiciable 'fundamental objective and directive principle of state policy'.[31] Along that axis, reproductive health in Nigeria, at best would stand as a fundamental objective and directive principle of state policy that cannot be legally enforced in the country. Inferring from cases such as *Festus Odafe & Ors v. Attorney-General of the Federation & Ors*,[32] there has been tacit judicial endorsement of the non-justiciability of the right to health in Nigeria.

However, the fact that the right to health is not a guaranteed or enforceable right under the Nigerian Constitution does not conclusively establish that the right has absolutely no legal basis in Nigeria. The right to health is guaranteed and can be claimed under pertinent international human rights treaties to which Nigeria is signatory. For example, article 12 of International Covenant on Economic, Social and Cultural Rights provides:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: …
> (3) The prevention, treatment and control of epidemic, endemic, occupational and other diseases…

One limitation to the operation of the Economic Covenant as a basis for the right to health claim in Nigeria is that the treaty is yet to be domesticated in the country.[33] The issue of non-domestication of this covenant therefore raises a potent question of its legal potency as a guarantee of the right to health and reproductive health. Furthermore, based on the doctrine of privity of contract, only parties to a contract or a treaty can legally compel another party to the contract or treaty to perform an obligation arising

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31. See Chapter II, section 17(3) c & d of the 1999 Constitution: "The State shall direct its policy towards ensuring that (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused; (d) there are adequate medical and health facilities for all persons.

32. Suit No. FHC/PH/CS/680/2003

33. That is, it has not been incorporated into Nigerian legal system as a part of the country's domestic laws.

under the contract.[34] In that light, inasmuch as Nigerian citizens in their capacities as individual citizens are not parties to the Economic Covenant, they are hindered from enforcing the treaty obligation of the Nigerian government with regard to the right to health.

While appreciating the above reasoning, the issue of non-domestication of the Economic Covenant does not neutralize the fact that the Nigerian government acquires a legal duty to safeguard citizens' health under that treaty. Legally, the states parties which are co-privies to the treaty with Nigeria can enforce this duty against Nigeria in the interest of Nigerian citizens, the ultimate beneficiaries of the treaty provisions. As Lush L.J stated in the old case of *Lloyds v Harper*,[35] "it is an established rule that, where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself." Along that line, the Economic Covenant still offers a strong legal footing for a right to [reproductive] health claim in Nigeria.

Apart from the Economic Covenant, Nigerians can also assert the right to health under the African Charter on Human and Peoples' Rights. This Charter, as earlier noted, has been domesticated as a Nigerian legislation by means of the African Charter Act.[36] The African Charter Act stands on a level higher and above other statutes in the Nigerian legal system, being subject to only the constitution.[37] This legal arrangement puts the right to health on a formidable legal footing in Nigeria and creates a legitimate pedestal to assert a claim to reproductive health rights in Nigeria. The relationship between the African Charter Act and the Nigerian Constitution raises a fundamental legal issue that needs to be flagged. Being an Act of the legislature, the African Charter Act remains subordinate to the Nigerian Constitution. The Nigerian Constitution is supreme and if any other law including an Act of the National Assembly is inconsistent with the constitution, the constitution would prevail and the other law shall be void to the extent of the inconsistency.[38]

Applying this principle to the context of discourse, in situations of conflict between the African Charter Act and the Constitution vis-à-vis the justiciabilty of the

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34. In simple terms, the doctrine of privity of contract connotes that generally no one would be entitled to or be bound by the terms of a contract to which he is not a party. *See, Price v. Easton* (1833) 4B & Ad. 433, and *Tweedle v. Atkinson* (1861) 1B&S 393. For a further reading on the doctrine of privity of contract, see M. FURMSTON, CHESHIRE AND FIFOOT'S LAW OF CONTRACT (1981), at 404-420.

35. (1880) 16 Ch.D 290.

36. *See supra* note 5.

37. *See generally, Abaribe v. Abia state House of Assembly* [2000] 9 W.R.N 1 together with *Abacha v. Fawehinmi*, 2 SCQR 489.

38. NIGERIA CONST., *supra* note 5, § 1(1) & (3).

right to health, the Constitution would prevail over the African Charter Act. Put simply, the Constitution can override or neutralize the right to health guaranteed under the African Charter Act. This suggests that the government may legitimately escape the burden to protect, respect and fulfill the right to health or reproductive health of the people. However, the issue of right to health in Nigeria cannot be summarily foreclosed on the jurisprudential ground of supremacy of the constitution without careful scrutiny of some other facts. Primarily, it needs to be considered whether there is even a conflict between the Nigerian Constitution and the African Charter Act on the issue of right to health. It is the view of these writers that there is no conflict. Rather, there is a case of complementarity between the Act and the Constitution with regard to health rights. This issue is further addressed below.

In the 'fundamental objective' provisions, the Nigerian Constitution has expressed a strong intent to ensure the overall good health of citizens with an aspiration that "there are adequate medical and health facilities for all persons." Through policy declarations, the Nigerian government has reaffirmed the desire to facilitate this intention. For example, the Nigerian HIV/AIDS Policy (2003) declares: "Nigeria recognizes its responsibility to provide access to health care for all its citizens."[39] Along this axis, the domestication of the African Charter in Nigeria without removal or curtailing of the health right provision in it must be perceived as a statutory affirmation of Nigeria's aspiration to make access to healthcare a right instead of a mere privilege. Therefore, the African Charter Act provision on health is simply putting in statutorily enforceable terms an aspiration that has been expressed in the Constitution. In this light, the issue of conflict cannot arise. Put simply, the Act and the Constitution share and complement each other on a common positive ground that the health of the people is of utmost importance.

Summing up, there is ample legal ground to support the validity of the right to health including reproductive health in Nigeria. Apart from the foregoing, the right to reproductive health in Nigeria can be further sustained by placing the right in the structure of some basic rights that are constitutionally guaranteed and therefore justiciable in Nigeria. Analysis of reproductive health in the context of some established rights is undertaken in the following section.

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39. NIGERIAN HIV/AIDS POLICY (2003), at 19.

V. REPRODUCTIVE HEALTH RIGHTS IN THE SCOPE OF ESTABLISHED CONSTITUTIONAL RIGHTS IN NIGERIA

To recap briefly, reproductive health encompasses all measures relating to the mental, physical and social well-being of persons in matters connected with reproduction. Reproductive health rights can be set in the sphere of some rights that have been guaranteed as justiciable rights under the Nigerian Constitution. Such rights include the right to receive and impart information, the right not to be subjected to inhuman and degrading treatment and the right to life. The discourse on this point shall be undertaken with reference to advertisements of condoms and abortion of unwanted pregnancies.

It is widely accepted that condoms are among, if not the least complicated means of preventing unwanted pregnancies and sex-related diseases and infections. The prevention of unwanted pregnancies manifestly falls within the purview of reproductive health. Access to information pertaining to use of condoms thus constitutes a component of reproductive health. Flowing from this, any attack on advertisements of condoms or any other measure that can affect access to condoms as a preventive measure, though a reproductive issue can be challenged as a transgression of the right to receive or impart information relating to preventive devices.

The right to terminate unwanted pregnancies remains a controversial issue in reproductive health right discourse, even in places like the United States of America where, many years back, the popular case of *R v. Wade*[40] has held that the right to abort falls within the frame of a woman's right to privacy.[41] The 'Right to abort' in Nigeria remains within the restricted scope of *R v. Edgal*,[42] which followed on the heel of then binding[43] English case of *R v. Bourne.*[44] In that vein, the relevance of *R v. Wade*'s perception of reproductive right to Nigeria may appear debateable. Moreover, the Nigerian constitutional provision on the right to privacy does not seem to have the elastic ability to accommodate the revolutionary dimension of *R v. Wade*. This is because the constitution sets out in itemized form the situations in which the right to privacy is constitutionally guaranteed.[45] Notwithstanding, the claim to reproductive

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40. (1973) 410 US 113.

41. *See*, LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *supra* note 11, at 1.

42. (1938) 4 WACA 133.

43. The case of *R v. Edgal* was decided when Nigeria was still a colony of Britain. Cases decided in English Courts then applied as *binding precedents* as against *persuasive precedents* in Nigeria.

44. [1938] 3 All E.R 195.

45. *See*, NIGERIAN CONST., *supra* note 5, ss. 33 on the Right to Life and 37 on Privacy and Family Life.

health rights to terminate an unwanted pregnancy can be set within the structure of some other constitutional rights. Pertinent in this respect are the right to life and the right not to be subjected to inhuman and degrading treatment.[46]

Despite the criminalization of abortion by the Nigerian Criminal Code,[47] abortions occur on a large scale. However, due to the criminal law barrier, people are compelled to recourse to unsafe abortion with dire consequences in terms of huge losses of human life and horrendous injuries and trauma that usually accompany unsafe abortion procedures.[48] It is arguable that erection of criminal law barrier which impedes access to safe abortion in Nigeria creates a situation where women who inevitably seek abortion are railroaded to loss or deprivation of their lives or subjected to inhuman and degrading treatment due to injuries resulting from unsafe abortions. Put differently, the criminal law provisions criminalizing abortion indirectly infringe on (or cause to be created a situation where) the constitutional rights to preservation of lives and non-subjection to inhuman and degrading treatment.

VI. THE COURTS AND REPRODUCTIVE HEALTH RIGHTS AT NATIONAL LEVELS

To reiterate, there is a strong body of legal instruments to sustain the protection, fulfillment and respect of reproductive health rights across the world. This consists mainly of international human rights treaties reinforced with consensus decisions of various international conferences and other assemblies.[49] The international human rights instruments constitute very useful resources of advocacy by activists and basis for adjudication of reproductive health issues by the courts.[50] However, the impact of these international human rights laws on the promotion of reproductive health rights, especially in the developing countries of Africa, is debatable. One can therefore reasonably question the manifest inertia of these laws vis-à-vis the roles of courts in promoting reproductive health rights.

One reason that can be adduced for the inertia is that courts are creations of laws and hence have to operate within defined scope of powers granted by the enabling laws. Flowing from this is that the courts can only apply 'valid laws' that constitute

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46. *Id.*, s. 34 relating to the Right to Dignity of Human Person.

47. Criminal Code Act Cap. C38, Laws of the Federation of Nigeria 2004, ss. 227-230.

48. *See*, W.O. Chukudebelu & P.C. Nweke, *Abortion and the Law*, *in* MEDICAL PRACTICE AND THE LAW IN NIGERIA (B.B. Umerah ed., 1989), at 62-63.

49. UNFPA, STATE OF THE WORLD POPULATION 2 (1997).

50. *Id*. *See also*, Easton, *supra* note 11.

parts of the country's legal system, having been made by the designated legislative bodies. It needs to be remembered too that it is not the primary duty of the courts to make or reform laws[51] but to apply valid and subsisting laws. With undomesticated treaty-based international human rights law being 'soft laws,' the courts may lack a basis to apply them in adjudication of reproductive health rights disputes, even if cited by litigants.

Another factor that may account for the lethargy of the international human rights laws in domestic courts is that aggrieved or affected persons lack the basic legal capacity to litigate on account of the laws. As noted earlier, international treaties operate between State parties. It is only such State parties that can take legal measures to enforce obligations under such treaties or to hold non-compliant parties accountable for breaches on behalf of citizen-beneficiaries. However, due to various factors, there may not be any zeal on the part of the State parties to enforce compliance with international human rights treaties or redress for breaches.[52] In light of the above factors, it becomes difficult for the courts to uphold the tenets of international reproductive health law at domestic court forums.

While the above noted constraints on the part of the courts are germane concerning upholding of international human rights law, they do not connote that the courts can maintain a hands-off attitude on the promotion of reproductive health rights. Apart from the 'soft' treaty-based international human rights, reproductive health rights can be enforced in the framework of domesticated international human rights law such as the African Charter Act which offers a statutory guarantee of the right to health and by extension the right to reproductive health. Similarly, as equally shown, reproductive health rights can be grounded in well established constitutional human rights based on the interconnection of reproductive health with such rights. To put in a nutshell, there are pertinent 'hard laws' in whose structures the courts can judicially uphold a claim to reproductive health rights at the national level.

Through systematic and pragmatic utilization of these resources by the courts, a strong jurisprudential basis for enforcing reproductive health rights can evolve or be entrenched. In one respect, by pragmatic application and interpretation of pertinent laws, rights to [reproductive] health in Nigeria can be firmly created based on settled

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51. Through the application and interpretation of existing laws which at times define the exact scope of the laws (which may even be different from the anticipation of the lawmakers) courts are said to make laws through the process of 'judicial lawmaking.' This is however within very narrow limits and does not amount to vesting legislative functions in the courts.

52. *See* A. An-Naim, *State Responsibility Under international Human Rights Law to Change Religious and Customary Laws, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (R. J. Cook ed., 1994).

human rights principles. To sum up, the courts can create an infallible body of reproductive health rights laws from the 'hard laws' enshrined in the Constitution and the African Charter. In the course of this, the seemingly inconsistent positions of the Constitution and the African Charter Act with regard to health rights can be resolved. It is very much within the powers of the courts to expand the frontiers of law in Nigeria by the application of relevant established rules to the nascent issues of reproductive health rights. As Lord Lloyd of Hampstead noted,

> [T]he general consensus of opinion at the present day is that, within certain narrow and clearly defined limits, new law is created by the judiciary…Thus it is realized that in a sense whenever a court applies an established rule or principle to a new situation or set of facts (or withholds it from these new facts) new law is being created.[53]

As illustrated in some cases considered above, it is along this line that courts in some countries have played prominent and historic roles in making legal reforms that facilitated the transformation of reproductive health rights into enforceable human rights.[54]

VII. COURTS AND REPRODUCTIVE HEALTH RIGHTS REFORMS: A GLANCE AT LEGAL HISTORY

The promotion of reproductive health rights requires a firm legal foundation on which the people can proceed to make the government or any other transgressor accountable. However, in many respects, the required firm legal foundation may be lacking due to factors that include existence of laws that do not support the promotion of reproductive health rights or laws that are uncertain in content and thus relatively unhelpful.

Over time, in exercise of their limited but potent law-making powers, courts have intervened in creating the desired legal environment that is conducive for the promotion of reproductive health rights. Quite remarkably, the courts have done this by the vibrant adaptation of established laws as contained in constitutions and statutes. The judicial approach will be illustrated by some prominent judicial decisions relating to abortion in Nigeria and elsewhere. Abortion is chosen as a reference point because

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53. Lord Lloyd of Hampstead, Introduction to Jurisprudence (4th ed., 1979), at 850.

54. *See generally*, Sanda Rodgers, *The Legal Regulation of Women's Reproductive Capacity in Canada, in* CANADIAN HEALTH LAW AND POLICY (Jocelyn Downie, Timothy Caulfield & Colleen Flood eds, 2002), at 331-365.

it is one reproductive health issue that has attracted continual agitation for reforms in Nigeria[55] while also remaining an emotive and contentious issue in other countries judging by the spate of litigations.[56] All the same, other reproductive health issues such as access to contraception, artificial reproductive technologies are also important and there have also been significant judicial intervention in those areas too.[57]

Leaving aside the conflicting moral positions on the practice, abortion is essentially a family planning or population control option and is readily resorted to in situations where people are confronted with unwanted pregnancies due to failure of preventive measures or other factors. In the context of reproductive health rights, abortion amounts to an exercise of the "freedom to decide if, when and how often" to reproduce.[58] However in Nigeria and other places, access to abortion has been made unlawful by operation of the criminal laws.[59] An inferable effect of criminal law prohibition is that people faced with unwanted pregnancies are compelled by threat of sanctions to carry such pregnancies to term against their will. The criminalization thus amounts to an infringement on the rights of such people to decide whether or not to reproduce. In different parts of the world the courts have courageously intervened to strike down such anti-reproductive right abortion laws thereby creating conducive legal atmosphere for interested persons to exercise their reproductive rights by means of voluntary option of abortion. One case that has resonated round the world and remains the hallmark in the judicial sanctification of reproductive right to abort an unwanted pregnancy is the American case of *Roe v. Wade*[60] which was decided by the U.S. Supreme Court on January 22, 1973.

Roe v. Wade is the historic Supreme Court decision which overturned Texas state abortion law thereby making abortion legal in the United States. The alias "Jane Roe" was used for Norma McCorvey on whose behalf the suit was originally filed, contending that the abortion law in Texas (which proscribed procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life) violated her constitutional rights and the rights of other women. The defendant was the District Attorney of Dallas County, Texas, Henry B. Wade. The U.S Supreme Court held among others, in the case that a woman with her doctor could choose abortion in

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55. Chukudebelu & Nweke, *supra* note 48, at 67; Sonnie Ekwowusi, *Nigeria: The Defeat of Imo Abortion Bill*, THIS DAY, June 9, 2009.

56. *See e.g.*, LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *supra* note 11, at 1-8.

57. *See*, Roxanne Mykitiuk & Albert Wallrap, *Regulating Reproductive Technologies in Canada, in* Downie, Caulfield & Flood eds, *supra* note 54; and ACLU, *supra* note 1.

58. *See supra* note 15.

59. *See*, Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria 2004, ss. 227-230.

60. *See supra* note 40.

earlier months of pregnancy without any restriction. The decision was based on the long-recognized constitutional right to privacy enshrined in the Ninth Amendment to the United States Constitution, a part of the Bill of Rights.

The major impact of the case was that all state laws in the U.S limiting women's access to abortions during the first trimester of pregnancy were invalidated and a new legal ground was created permitting abortion. Through *Roe v. Wade*, the U.S Supreme Court legalized abortion in the United States which was not legal at all in many states and was limited by law in others prior to the decision. With the revolutionary *R v. Wade* decision, U.S courts set a strong legal platform on which stakeholders have stood to safeguard reproductive health rights in different ramifications over the ages.[61]

Another significant and ground-breaking case which was decided on grounds of constitutional rights just like *Roe v. Wade* was the Canadian case of *R. v. Morgentaler*[62] which was decided on January 28, 1988 by the Supreme Court of Canada. In the case, the abortion provision in the Criminal Code of Canada was found to be unconstitutional, as it violated a woman's right to "security of person" under section 7 of the Canadian Charter of Rights and Freedoms. Ever since this ruling, there have been no laws regulating abortion in Canada.[63]

Prior to this ruling, section 251 of the Canadian Criminal Code allowed for abortions to be performed at only accredited hospitals with the proper certification of approval from the hospital's Therapeutic Abortion Committee. This made it possible to indict a physician providing abortion services, or a woman seeking an abortion without complying with the provision of the Code. Three doctors, Henry Morgentaler, Leslie Frank Smoling and Robert Scott set up an abortion clinic in Toronto for the purpose of performing abortions on women who had not received certification from the Therapeutic Abortion Committee as required under subsection 251(4) of the Criminal Code. In so doing, they were creating a basis to challenge the constitutionality of section 251 of the Criminal Code being convinced that a woman should have complete control over the decision on whether to have an abortion. Following a conviction for violating the Criminal Code provision pertaining to unlawful abortion, an appeal was lodged. The Court of Appeal for Ontario found in favour of the government. On further appeal to the Canadian Supreme Court, the main issue for resolution was whether section 251 of the Criminal Code violated section 7 of the Charter relating to

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61. *See*, ACLU, *supra* note 1; LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *supra* note 11, at 1-8.

62. [1988] 1 S.C.R. 30.

63. *R. v. Morgentaler*, available online at <http://en.wikipedia.org.wiki/R._v._Morgentaler> (accessed 19 October 2009).

right to security of the person. The Court ruled 5 to 2 that the law violated section 7. The law was struck down as unconstitutional and Morgentaler's conviction was overturned.

The case of *R v. Edgal*,[64] offers an insight into the role which Nigerian courts can also play in the promotion of reproductive health rights in Nigeria especially with regard to reforming the country's restrictive abortion laws. It was courtesy of *R v. Edgal* that it became legal to commit abortion where the pregnancy poses a threat to the health or life of the mother. Prior to the case, abortion was absolutely unlawful and not permissible on any ground whatsoever. In the case some people were charged with conspiracy to commit abortion under the Nigerian Criminal Code Nigeria. Their contention was that the attempted abortion was undertaken to preserve the life of the mother. Following the English case of *R v. Bourne*,[65] the West African Court of Appeal held that it was permissible to carry out abortion for the preservation of life or health of the mother. In that vein, WACA whittled down the strict provisions of the Nigerian Criminal Code and created an exception for abortion done for the preservation of life or health. To put *R v. Edgal* in reproductive health context, a woman who wishes to terminate a pregnancy for the reason of her health can legitimately do so instead of being forced to keep the pregnancy because of the previous criminal law position.

R v. Edgal and the other abortion law reforming cases are instructive to reproductive health right activists and other groups in Nigeria and elsewhere who have continually agitated for the liberalization of restrictive abortion laws. The typical approach of the protagonists of liberalization is pursuit of direct amendment of the Criminal Code provisions on abortion[66] or the enactment of a counter-statute that would indirectly amend or circumvent the provisions of the Criminal Code on abortion.[67] *R v. Edgal* and the other cases should strike a chord that the courts, perhaps better than the legislature offer a more plausible hope of striking down Nigeria's restrictive abortion laws. It is the courts that brought about liberalization of abortion in the USA and Canada while the only abortion law reform so far made in Nigeria was fashioned by the courts via *R v. Edgal*. Furthermore, efforts over the ages to attain reform in Nigeria through legislative intervention have not been fruitful. Along this line, it is advisable that protagonists of abortion law reforms explore the judicial avenue through constitutional challenge of Nigeria's abortion laws. The hope of liberalization that has so far remained unfulfilled at the legislative realm may be realized through the courts.

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64. (1938) 4 WACA 133.
65. [1938] 3 All E.R 195.
66. Chukudebelu & Nweke, *supra* note 48, at 67.
67. Ekwowusi, *supra* note 55.

VIII. THE PROMOTION OF REPRODUCTIVE HEALTH RIGHTS WITHIN AND BEYOND THE COURTS

Courts, no doubt have crucial roles to play in the promotion of reproductive health rights by dynamic application and adaptation of relevant domestic and international human rights laws, as this article has strived to show. But before the courts can productively perform their roles, some structures must exist. Reproductive health rights cannot be enjoyed or effectively enforced in an environment where there is lack of other basic economic and social rights and facilities that are important in the lives of the people. Of particular importance in the promotion drive is the right of access to court[68] by citizens to enforce reproductive health rights. Where people do not have access to the courts for enforcement of reproductive rights, the courts would not have the opportunity of performing their roles in facilitating changes.[69] As a prominent Nigerian Jurist, Hon. Justice Oputa put it, "he who cannot even reach the courts cannot talk of justice from the courts."[70]

Section 36 of the Nigerian Constitution guarantees access to court for citizens. But the issue of access to court goes beyond the theoretical constitutional guarantee. There must be practical access to court backed-up with assurance of fair-hearing. There are various factors that militate against practical access to court and chances of fair hearing. These include financial incapacity in meeting legal expenses, corrupt justice system, insensitivity of the government and so on.[71] For the courts to be empowered to perform their roles in the promotion of reproductive health rights, all the non-legal factors that militate against realistic access to courts by aggrieved persons must be addressed.

To sum up the foregoing analysis, for the courts to effectively assist the promotion of reproductive health rights, there must be realistic access to and unassailable fair-hearing in courts. Along this line, reproductive health activists and other stakeholders must intensify efforts to assist aggrieved parties who are handicapped by factors such as financial constraints in seeking redress in court. Particularly, lawyers must be willing to act pro bono on behalf of deserving people and as friends of the courts to facilitate adjudication of reproductive health rights issues.

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68. For a discussion of 'right of access to court' see Babafemi Odunsi, *Unfair Fair Hearing and Unequal Religious Equality: The Facts and Fictions of Constitutional Guarantee of Equality in Nigeria,* 35 INDIAN SOCIO-LEGAL J. (2009).

69. D.A. Ijalaye, Justice as Administered by the Nigerian Courts (Justice Idigbe Memorial Lecture Series Five, University of Benin, 1992), at 9.

70. *Attorney General of Kaduna State v. Hassan* (1985) 2 N.W.L.R 483, at 522.

71. *See*, Ijalaye, *supra* note 69, at 9-10. *See also*, Odunsi, *supra* note 68, at 61-66.

Judicial officials too should strive to be above board in adjudication of reproductive health matters. Principally, judicial officers must exercise restraint and tolerance to advocates of reproductive health rights issues in courts. True, reproductive health rights cases, due to the nature of issues involved may be dramatic, emotive, unusual and may even seem to be an affront to the religious and socio-cultural leanings of judicial officers; yet, they must still be dispassionate in addressing and adjudicating the legal issues without prejudices. In essence, the courts would only be able to effectively perform their roles in promoting reproductive health rights when personal biases of judicial officers do not supplant societal expectation and trust in them as unbiased arbiters. If this scenario does not subsist, then litigants would not be having practical access to court or fair hearing therein.

Generally, judicial officers can play positive as well as negative roles in the promotion of reproductive health rights or other rights. The negative roles naturally would frustrate safeguarding of rights, and in addition impose extra burden on aggrieved persons. The case of *Ahamefule v Imperial Medical Centre and Molokwu*[72] illustrates how the negative roles of a court can compound the woes of aggrieved persons whose rights have been transgressed.

In the case, the plaintiff, Georgina Ahamefule, an HIV positive person had instituted action against the defendants for the termination of her employment on grounds of her HIV status. Before trial in the case commenced, lawyer for the defendants asked for assurances that other persons in court would not be infected with HIV if the plaintiff was allowed to come into the court room to give evidence. The defendants' lawyer further urged the court to require the plaintiff to produce a medical expert who would testify on oath that other occupants of the court would not be infected with HIV if the appellant was allowed in. The learned trial judge immediately ordered that an expert opinion be heard on the Subject-matter either from Nigeria or from abroad. For clarity the short ruling of the judge is reproduced below:

> Having listened to the arguments of both counsel on the issue of the risk of an H.I.V. patient-plaintiff giving evidence in court.… I am of the opinion that the view of the learned counsel for the defendants should be respected in law in view of the fact that life has no duplicate and must be guaranteed jealously. It is hereby ordered that an expert opinion be heard on the subject-matter either from an expert in Nigeria or from any other part of the world where research had been fully

72. Suit No. ID/1627/2000 (Ikeja Judicial Division of the Lagos High Court, Nigeria).

carried out.[73]

One impact of the judicial position in *Ahamefule* is that the aggrieved person who had faced one level of discrimination in being dismissed from work due to her health status was again judicially subjected to another level of discrimination in terms of being deprived of unencumbered access to court.

The first Nigerian incident of HIV infection was officially recognized in 1986.[74] In 2000 (about 14 years after), when the *Ahamefule* case came up, through public awareness campaigns and government policies, there was sufficient information on the modes of transmission of HIV. Someone of the calibre of a High Court Judge can thus be reasonably presumed to have rudimentary information on the modes of transmission as to be able to conclude that HIV could not summarily "jump at" people in the courtroom. It is thus arguable that the position of the court was motivated more by personal prejudices than empirical knowledge.

Unfortunately, the unwarranted judicial emasculation of rights displayed at the High Court was not redressed, but rather tacitly approved at the Court of Appeal which elected to scuttle the matter by means of forensic technicality. *Ahamefule* remains an uncomfortable reminder that the courts can take positions that have adverse effects on the promotion of human rights, including reproductive health rights.

HIV positive status touches on reproductive and sexual rights. An area where HIV positive status touches on reproductive health rights is the increasingly controversial issue of the right of HIV positive women to bear children.[75] In the shadow of *Ahamefule*, if a HIV positive woman's right to bear children is transgressed by forceful sterilization or a prohibitive legislation, there is the possibility that such a woman may still have to confront other burdens at the court level. Happily, many courts in different parts of the world have not taken the *Ahamefule* route. In cases of similar nature, the courts have taken stances beneficial to the promotion of

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73. Adapted from the Court of Appeal Ruling in *Ahamefule v. Imperial Medical Centre & Molokwu*, CA/L/514/2001 *delivered on* 21 April, 2004.

74. UNGASS, NIGERIA: PROGRESS REPORT (January 31, 2008), at 15-16; FEDERAL GOVERNMENT OF NIGERIA, NATIONAL HIV/AIDS POLICY (2003), at 1-5 (hereinafter Nigeria's HIV/AIDS Policy).

75. *See*, David Smith, *African Women with HIV 'Coerced into Sterilisation,'* THE GUARDIAN, Monday 22 June 2009, online at <htpp://www..guardian.co.uk/world/2009/jun/22/Africa-hiv-positive-women-sterilisation>, at 1-2 (accessed 15 October 2009).

reproductive, sexual and other rights of people living with HIV.[76] Hopefully, Nigerian courts will associate with the rights-friendly dispositions of these courts in the event of another case similar to *Ahamefule.*

IX. CONCLUSION

Realization of reproductive health rights remains a continuous struggle across the world. There are many fronts to prosecution of the struggle with different stakeholders having roles to play. This article has attempted to show the judicial front in the struggle, identifying the vanguard position of courts in the promotion of rights equation. Courts generally have played and will always have crucial roles to play in the promotion of reproductive health rights. Equally, as shown by *Ahamefule*, courts can complicate or frustrate the drive to promote reproductive health rights through unfavourable decisions.

There are various legal instruments by which courts can carry out their tasks. Also, through policy declarations[77] and the ratification of international human rights instruments Nigeria and other countries have shown increasing willingness to promote reproductive health rights. In light of this development, it should be relatively easy for the courts to perform their roles. All the same, there is the requirement of the will power to perform the required roles. Remarkably, various court decisions in different parts of the world indicate that courts are more willing to stand on the side of protection, fulfillment and respect of human rights, including reproductive health rights. This poignantly explains why the court remains an attractive avenue for agitators of reproductive health rights in different parts of the world.

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76. *See .e.g., Diau v. Botswana Building Society (BBS),* Case No. IC 50/2003 (Industrial Court of Botswana, 2003); *Hoffmann v. South African Airways* (2000) 11 BCLR 1235 (CC); *Nymbani Children's Home v. The Ministry for Education and The Attorney General*, Kenya High Court at Nairobi, Application No. 1521 of 2003 (OS); *Van Biljon & Ors v. Minister of Correctional Services & Ors* (1997) 50 BMLR 206, High Court of Cape of Good Hope Provincial Division, para 51.

77. Some examples of such policies in Nigeria are the Nigerian National Health Policy and Strategy 1988, 1998, the Nigerian National Reproductive Health Policy and Strategy 2001, and the Maternal and Child Health Policy 1994. Other Federal Agencies and parastatals associated with strengthening reproductive health are the National Primary Health Care Development Agency (NPHCDA) Act 1992 , the Population Activities Fund Agency (PAFA), the Department of Community Development and Activities (DCDPA), and the National Health Insurance Scheme Act 1991.