

# LITIGATING THE RIGHT TO HEALTH IN AFRICA

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# Introduction

- In the last two decades or so litigation on the right to health has increased across the globe
- Nearly in every region of the world, cases relating to the violation of the right to health are constantly being brought before the courts
- Most of these cases touch on issues such as denial of emergency medical treatment, denial of access to life-saving medication, denial of access to health goods and services such as contraception, and denial of health care services based on age, sex, HIV status or marital status
- Recent developments and clarifications provided on the right to health at international and regional levels would seem to provide the needed impetus for health rights litigation across Africa

# Sources of the Right to Health

- International and regional human rights instruments notably the ICESCR, CEDAW, CRC, African Charter, African Children Charter and African Women's Protocol
- General Comments by treaty monitoring bodies notably GCs 14, 20 and 22 of CESCR, GRs 14(FGM), 15 HIV/AIDS), 19 (Violence), 24 (Health) of CEDAW Committee, GCs 3,4 and 15 of CRC, GC 6 by Human Rights Committee African Commission GC 1, 2 and 3 and resolutions
- Concluding Observations to reports of states parties
- Reports by UN agencies such as WHO, UNFPA, UN Women, UNICEF and UNAIDS
- Reports by civil society groups such as Amnesty International, Human Rights Watch, Center for Reproductive Rights, Allan Guttmacher Institute, Population Council, IPAS, Gender Links (SADC Barometre)
- Activities of the UN Special Rapporteurs on the right to health, violence against Women and Trafficking in persons e.g Reports on SRHR (2004) Criminalisation of consensual relationship (2011) IPR and Access to medicine (2009)
- Decisions of international, regional and national tribunals/courts- CEDAW, HRC, IACHR, ECHR, South Africa, Kenya, Uganda, Malawi, Namibia

# Sources of the Right to Health cont.

- Arts 55 and 56 of the UN Charter 1945
- Art 25 of Universal Declaration of Rights 1948
- Art 12 of the International Covenant on Economic, Social and Cultural Rights- clarified by CESCR in GC 14
- Art 12 of CEDAW
- Art 25 of Convention on the Rights of Persons with Disabilities
- Art 24 of CRC
- Art 16 of the African Charter on Human and Peoples' Rights
- Art 14 of the African Charter on the Rights and Welfare of the African Child
- Art 14 of the Protocol to the African Charter on the Rights of Women

# Sources of the Right to health

- Non-binding declarations and consensus statements at international or regional meetings
- International Conference on Population and Development
- Fourth World Conference on Women
- International Conference on Human Rights Vienna 1993
- Maputo Plan of Action on SRH
- Abuja Declaration on HIV/AIDS, Malaria and other infectious Diseases
- Millennium Development Goals/ Sustainable Development Goals
- Guidelines from WHO such as on HIV testing, Contraception, abortion etc.

# Clarifications of the Right to Health

- The Committee on CESCR in its General Comment 14 explains that the right to health is not a right to be healthy but rather is an inclusive right which recognises the social determinant of health
- The Committee further notes that the right to health contains freedoms and entitlements
- ‘Freedoms’ refers to the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and health.
- ‘Entitlements’ refers to access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to health
- According to the Committee the essential elements of the right to health include-availability, accessibility (physical, informational, economic and non-discrimination) acceptability and quality
- Although the right is to be realised progressively, however, the core contents of this right are not subject to progressive realisation
- The enjoyment of the right to health is dependent on other rights such as privacy, life, dignity, non-discrimination and liberty
- States have obligations to respect, protect and fulfil the right to health

# Clarifications cont

- In its General Comment 22 the Committee notes that the right to health embraces the right to sexual and reproductive health
- It notes that the right to SRH constitutes both ‘freedoms’ and ‘entitlements’
- The Committee reasons that the right to SRH is dependent on other rights
- In same manner as the right to health, the Committee identifies the elements of the right to SRH to include availability, accessibility, acceptability and quality.
- The Committee identifies obligations of states to include elimination of discrimination in the enjoyment of the right to SRH
- States also have the obligations to respect, protect and fulfil the right to SRH

# Clarifications cont

- Since the appointment of the first UN Special Rapporteur on the Right to health in 2002, this special mechanism has continued to play crucial role in developing norms and standards on the right to health
- Through research reports submitted to the Human Rights Council and UN General Assembly the Special Rapporteur has contributed to a better understanding of the right to health
- Some of the relevant reports include, those of IP and access to medicines (2009), sexual and reproductive health and right (2004), maternal mortality (2008), indicators and the right to health (2006), criminalisation of same sex relationships (2011)

# Clarifications cont

- At regional level, the African Commission on Human and Peoples Rights has continued to play important role in clarifying the content of the right to health under the African Charter and the Protocol to the African Charter on the Rights of Women
- Through its resolutions and General Comments the Commission has addressed key issues relating to the right to health
- Some of these resolutions include those on maternal mortality as human rights, access to medicines and forced sterilisation as a human rights violation
- The Commission has also been developing norms and standards through its Special Mechanisms such as the HIV Committee

# Clarifications cont

- So far the Commission has issued two important General Comments explaining the nature and scope of states' obligations under article 14 of the African Women's Protocol.
- In General Comment 1, the Commission explains that while the African Women's Protocol distinguishes between 'the right to self-protection and the right to be protected from HIV in Article 14 (1) (d), this provision is interpreted to refer to 'states' overall obligation to create an enabling, supportive, legal and social environment that empowers women to be in a position to fully and freely realise their right to self-protection and to be protected', an enabling environment must respect women's sexual autonomy and discourage coercive testing or treatment in general
- The Commission explains that article 14 (1) (d) and (e) must be read together with other provisions of the Protocol
- It notes that HIV testing must be conducted with the informed consent of individuals and disclosure of status can only be made in compliance with international rules and standards such as the International Guidelines on HIV

# Clarifications cont.

- In General Comment 2 the Commission notes that states must ensure access to health services on a non-discriminatory basis and in ways that are physically accessible, economically accessible, and in which information is accessible to women and girls
- It urges states to remove barriers to SRH services including abortion, family planning maternal health and HI/AIDS services
- The Commission urges states to adopt relevant laws, policies and programs that ensure the fulfilment *de jure* and *de facto* of women's sexual and reproductive rights, including the allocation of sufficient and available resources for the full realization of those rights

# Relevance of Social Rights Litigation

- It provides avenues to redress violations of socioeconomic rights including the right to health
- It serves as a potential tool for achieving change in society
- Litigation provides a catalyst for change in law such that its application can reach beyond the individual case and affect a large number of people (*Brown v Board of Education of Topeka*)
- It helps in creating awareness or drawing public attention to hitherto unnoticed or neglected issues
- It remains one of the potent means of holding state accountable for failure to meet its obligation under international and national law (*Treatment Action Campaign*)
- It can facilitate access to health goods and services
- It can create standard and norms on specific issues (especially litigation before regional human rights bodies such as the African Commission/Court)
- It can be empowering in the sense that it gives vulnerable and marginalised groups the hope to assert their right

# Some Concerns about Social Rights Litigation

- Too costly and time consuming
- Victory in court may not necessarily translate to a better living conditions for the plaintiffs/applicants
- Rather than advancing the right of the poor, it may be harmful for the poor and vulnerable in society (Farraz citing the example of Brazil)
- It is sometimes contended that the court is not the best place to address public policy issues involving allocation of resources
- Litigation may undermine the opportunity for parties to engage in meaningful discussion towards amicable resolution of issues

# Barriers to Health Rights Litigation in Africa

- **Regional Human Rights bodies**
- The need to exhaust local remedies art 56 of the African Charter
- Lack of understanding of the procedure for bringing cases before regional human rights bodies
- Lack of expertise on the part of lawyers
- Cost of litigating before regional human rights bodies
- Duration of the process

# Barriers to Health rights litigation cont

## **National Court**

- In many parts of Africa the right to health is still not recognised as a legally enforceable right
- Dearth of skilled lawyers on issues relating to the right to health
- Conservative attitudes of judges in some African countries
- Ignorance among vulnerable and marginalised groups as well as among community based organizations
- High cost of litigation
- Delay in the judicial system

# Some examples of cases on Health Rights

- African Commission
- *Purohit and other v The Gambia*
- *Pen International (On behalf of Ken Sarowiwa) v Nigeria*
- *Free Legal Services case*
- *SERAC and other v Nigeria*

# Examples of cases on Health Rights

- **Testing without informed consent**
- *Government of Namibia v LM and others*-forcible sterilisation without informed consent
- *Georgina Ahamefule v Imperial Hospital and other*-testing for HIV without consent and termination of employment due to IV status
- *Sex workers case in Malawi*-forcibly testing for HIV without informed consent
- *Kingaipe and Another v the Attorney General*-forcible testing for HIV of military personnel in Zambia

- *Denial of access to medicines*
- *Treatment Action Campaign case*
- *Festus Odafe and others v AG Federation and others-denial of treatment for HIV positive prisoners*
- *Prisoners' access to treatment in Botswana – Tapela and Others v the Attorney General and Others-limiting access to HIV treatment to foreign prisoners*
- *P.A.O and others v Attorney-General and another-*  
A challenge to anti-counterfeit law which potentially limit access to antiretroviral drugs

# Examples of cases continue

- Maternal Health care services
- *Center for Health Human Rights and Development and others v Nakaseke District Local – denial of emergency obstetric care constitutes a violation of human right*
- *Millicent Omuya and others v AG Federation and others illegal detention after birth constitutes a violation of the rights to liberty and dignity*

# Recommendations

- There is need for more training of judges on issues relating to human rights in general and health rights in particular
- We need to continue to train new generation of lawyers that will engage in health rights litigation
- There is need for law reforms across the region
- Test cases need to be filed at national and regional levels
- Need for creativity in filing and framing of cases
- More financial support for organizations working on strategic litigation