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Redressing HIV/AIDS Discrimination in Nigeria: The Implications of the Anti-Discrimination Act of 2015

Ngozi Okidegbe

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Introduction

Systemic discrimination continues to be the most pressing issue affecting people living with HIV/AIDS (PLWHAs) in Nigeria. In 2015, the Nigerian government decided to address this problem by enacting the HIV and AIDS (Anti-Discrimination) Act.¹ This act seeks to combat prejudice against PLWHAs by introducing important constitutional, civil, and criminal mechanisms to redress HIV-related discrimination. This article analyzes the potential impact the Anti-Discrimination Act will have on the lives of PLWHAs from both a human rights and public health perspective. It argues that while the act has the potential to be-

come a viable framework for reducing the prevalence of HIV-related discrimination in Nigeria, certain flaws threaten to limit its efficacy if left unaddressed. It calls on the Nigerian government to amend the act so as to correct these issues and give PLWHAs full enjoyment of their constitutional right to equality.

A Brief History

Nigeria holds the second-largest population of PLWHAs in the world.² Today, PLWHAs are a heavily stigmatized group in the country. According to the 2013 Nigeria Demographic and Health Survey conducted by the National Population Commission of the Federal Republic of Nigeria, the majority of Nige-

rians hold discriminatory attitudes towards PLWHAs.³ Such views are strengthened by the perceived association of HIV/AIDS with socially unacceptable behavior such as sex outside of marriage.⁴

The effect of this stigma is twofold. First, it dampens the effectiveness of public health policies aimed at controlling the epidemic by creating an atmosphere of fear that discourages those affected from getting tested or seeking treatment.⁵ Second, it affects the daily realities of PLWHAs, who, as a result, face bigotry.

Discrimination is particularly prevalent in employment and health care settings. Companies routinely require candidates to undergo HIV testing as a precondition for employment.⁶ Those who become HIV-positive during the course of employment may lose their jobs.⁷ In health care settings, medical professionals routinely conduct HIV tests on patients without obtaining informed consent or dispensing HIV-related counseling, as required by Nigerian law.⁸ These test results are often disclosed to third parties without the patient's consent.⁹ In some cases, PLWHAs have been denied treatment and access to medical facilities due to their HIV status.¹⁰ In addition, PLWHAs may also face discrimination in housing, their communities, and their families.¹¹

Despite the widespread prevalence of HIV discrimination, few cases

have made it to court. This may be because victims are afraid of the stigma attached to publicly coming forward as a person with HIV. The result is that HIV-related discrimination thrives, since those engaging in such discriminatory practices face few, if any, legal repercussions.

Prior to the Enactment of the Anti-Discrimination Act

The right to nondiscrimination on the basis of HIV status is longstanding. It is rooted in both the Nigerian Constitution and the African Charter on Human and Peoples' Rights.¹² Section 42 of the Nigerian Constitution guarantees the right to equality, which also prohibits discrimination on the basis of community, ethnic group, place of origin, sex, or religion.¹³ The grounds of discrimination listed in Section 42 are not exhaustive and therefore also include HIV status.¹⁴

The African Charter also provides a comprehensive framework that protects the right to nondiscrimination for all people, including PLWHAs. Article 2 of the African Charter prohibits discrimination on the basis of sex, race, religion, or other status. The phrase "any status" was included to widen the application to statuses not explicitly referred to in the African Charter—statuses such as HIV.¹⁵ Article 2 is reinforced by

Article 18(3), which imposes a duty on the state to eliminate forms of discrimination against women that are prohibited by international declarations and conventions. Article 28 offers further support by bestowing a private law duty on all persons to tolerate others. When read together, these provisions work in tandem to protect rights of PLWHAs against HIV-related discrimination.

Despite being guaranteed by both its national constitution and the African Charter, Nigerian courts have consistently failed to legally support the right to nondiscrimination. One example is *Festus Odafe v. Attorney General of the Federation*.¹⁶ This case concerns four HIV-positive prisoners, who were denied access to HIV treatment while suffering from opportunistic infections. The prisoners brought an action to the High Court of Port Harcourt, alleging the prison's denial violated their fundamental rights, in particular their right to equality under the Nigerian Constitution and their right to health under the African Charter. The High Court made two important findings with its decision. In respect to the discrimination claim, the court held that the plaintiffs' constitutional right to equality was not violated as Section 42 does not protect against HIV-related discrimination. As Judge Nwodo wrote:

[T]he right to freedom from discrimination as enshrined in

Section 42(1) of the constitution did not cover discrimination by reason of illness, virus or disease. . . . Therefore from the above category specified, applicants cannot invoke section 42(1) on the contention that they have a right to exercise under that section.¹⁷

Regarding the right to health claim, Nwodo ruled the denial of medical treatment violated the African Charter. This was, in part, due to the fact the Nigerian government is obligated to provide medical treatment to prisoners in Sections 3 and 8 of the Federal Prison Act.¹⁸ Nwodo noted that "statutes have to be complied with and the state has a responsibility to all the inmates in prison, regardless of the offence involved."¹⁹ As a result, the court upheld the prisoners' claim in part, finding only their right to health had been violated.

The *Festus Odafe* decision had two implications. First, its holding that Section 42 does not protect against HIV-related discrimination forecloses on the ability of PLWHAs to contest unfair treatment on the basis of HIV status. The decision also introduced uncertainty about the enforceability of the right to health guaranteed in the African Charter in Nigeria. As a result, the case prompted two divergent views. One view is that *Festus Odafe* stands for the proposition that the right to health guarantee in the African Charter is

enforceable in Nigeria.²⁰ The other view is that *Festus Odafe's* holding is enforceable only where existing statutes demonstrate Nigeria has taken steps to protect this right. The uncertainty leaves PLWHAs without a concrete mechanism to combat HIV-related discrimination resulting from their denial of essential health care services.²¹

Another important case to examine is *Georgina Ahamefule v. Imperial Medical Centre and Dr. Molokwu*.²² This case concerns Ahamefule, who sued her former employer Dr. Molokwu, chief medical director at Imperial Medical Centre, for HIV-related discrimination. Molokwu tested Ahamefule for HIV without her consent and failed to provide requisite counseling. Ahamefule was fired on the basis of her HIV-positive status and subsequently refused access to medical treatment. In 2002, Ahamefule brought an action to the High Court of Lagos against both Molokwu and Imperial Medical Centre claiming: (1) that the termination of her employment due to her HIV-positive status was illegal, in bad faith, and in violation of her right to nondiscrimination under Articles 2, 18(3), and 28 of the African Charter; (2) that being denied medical treatment based on her HIV-positive status violated her right to health pursuant to Article 16 of the African Charter and Article 12 of the International

Covenant on Economic, Social and Cultural Rights (ICESCR); (3) that the initial HIV test conducted by Molokwu was not consensual and therefore constituted unlawful battery on her person; and (4) that Molokwu's failure to provide her with both pre- and post-HIV-test counseling constituted unlawful negligence on his part.²³ For these claims, she sought five million naira for wrongful termination, three million naira for unlawful and negligent HIV testing, and two million naira in punitive damages. The defendants admitted to the alleged conduct. The defense also argued Ahamefule had to be fired because the hospital had an "obligation to protect the public at large from being infected by HIV or similar diseases."²⁴ The Imperial Medical Centre further contended they had "no regrets for terminating the Claimant's appointment upon it being confirmed of her danger to the entire community."²⁵

In reaching its decision, the court chose not to rule on the merits of Ahamefule's discrimination claim. Instead, it found her termination due to her HIV-positive status to be unlawful, since the defendants had failed to prove her employment would have posed a direct threat to the health and safety of hospital staff and patients. Judge Idowu noted there was insufficient evidence demonstrating Ahamefule's position as an auxiliary nurse who

never handled “blood and sharp objects such as needles, knives, and others serve[d] as a risk to the staff and patients of the hospital.”²⁶ Second, the court held that denying Ahamefule medical care amounted to a flagrant violation of her right to health guaranteed under Article 16 of the African Charter and Article 12 of the ICESCR. Third, the court held that carrying out an HIV test without first obtaining Ahamefule’s informed consent constituted unlawful battery on her person. Finally, Idowu held that Molokwu was negligent by breaching his professional duty to afford Ahamefule HIV-related counseling services before and after the HIV test. Idowu found the hospital and Molokwu were jointly liable and ordered them to pay seven million naira in monetary compensation to Ahamefule.

The *Georgina* decision has important implications on the rights of PLWHAs. By holding the plaintiffs’ right to health had been violated it endorses the proposition that the right to health guarantee in the African Charter is enforceable in Nigeria.²⁷ In this respect, the decision removed the prior uncertainty created by *Festus Odafe* and enabled PLWHAs to rely on the African Charter to contest unfair treatment in health care settings. Second, the decision states that dismissing an employee solely due to HIV status is illegal, which provides a strong

basis for HIV-positive employees to contest their exclusion in the workplace. The decision also recognizes the right to informed consent for HIV testing. By ruling that carrying out an HIV test without consent constituted unlawful battery, the court provides PLWHAs with an important tool to redress a common HIV-related discriminatory practice in hospitals. Fourth, the decision has important implications on medical professionals, citing their duty to both obtain informed consent prior to carrying out an HIV test and provide HIV-related counseling services. Breaching this duty amounts to medical negligence. The ruling warrants a level of medical care in the context of HIV testing that conforms to international human rights guarantees.²⁸ It further affirms the ability of a plaintiff to successfully bring an action in negligence where this level of medical care has not been provided.

Despite the positives of the decision, *Georgina* also had an important shortcoming in the failure of the court to consider the merits of Ahamefule’s discrimination claim. As a result, the decision does not give effect to PLWHAs’ right to nondiscrimination. This means PLWHAs have continued to lack an equality framework in which they can contest and challenge the totality of discrimination they face daily. This omission means PLWHAs can only

rely on *Georgina* decision's to redress a specific set of discriminatory practices occurring in employment and health care settings. This severely limits its ability to fully address the problem of HIV-related discrimination in Nigeria.

It is important to note this judicial failure is inconsistent with judicial trends in other African countries. One example is the South African Constitutional Court's decision in *Hoffmann v. South African Airways*.²⁹ This case concerns a plaintiff who had been refused employment as a cabin attendant by South African Airways (SAA) because he was HIV-positive. The Court held that SAA's refusal to employ Hoffmann had violated his constitutional rights to equality and dignity.

At the time of the decision, the South African Constitutional Court was grappling with the same challenges and pressures before Nigerian courts. South Africa had a significant population of PLWHAs who were being subjected to systematic and widespread discrimination. In rendering its decision, the Court was empathetic to this fact. It considered the implications of the then rampant HIV-related discrimination in employment in South Africa, noting "the impact of discrimination on HIV positive people is devastating . . . It denies them the right to earn a living."³⁰ The Court's recognition of the social context is the

primary reason it was able to rule the refusal of employment of the plaintiff as discriminatory and therefore prohibited under the South African Constitution. Had Nigerian courts considered the social context of HIV discrimination with the same attention and depth as the *Hoffmann* court they might have been better prepared to address the discrimination claims brought forth by the plaintiffs in *Festus Odafe* and *Georgina*.

The Importance of the Anti-Discrimination Act

The strength of the Anti-Discrimination Act resides in three important features of its framework: the protection it affords PLWHAs against discrimination, the duty it imposes on individuals to eliminate HIV discrimination, and the mechanisms provided to redress HIV discrimination.

Protection Against HIV Discrimination

The act provides a comprehensive framework to protect against HIV discrimination. Section 3 states that PLWHAs have a right to be free from discrimination in employment, health care, education, public places, government, or any other establishment. This protection is reinforced by Section 6, which makes it an offense to discriminate on the basis of HIV status. The section also outlaws

the following practices in respect to PLWHAs:

- (a) Denial of medical treatment;³¹
- (b) Denial of credit, loans, insurance benefits;³²
- (c) Denial of the right to marry;³³
- (d) Refusal of access to religious, residential, communal places, or other places of human endeavor;³⁴
- (e) Removal from medical facilities;³⁵
- (f) Deprivation of the right to vote;³⁶
- (g) Denial of admission to a private or public function; and³⁷
- (h) Refusal to reasonably accommodate PLWHAs.³⁸

By prohibiting these practices, Section 6 affords PLWHAs significant protection against the most common forms of HIV-related discrimination. This should, in turn, enable the act to have a meaningful impact on the daily lives of PLWHAs.

It is important to highlight that the act allows PLWHAs specific protections in the workplace and in health care settings. Employers can no longer hire or fire employees due to HIV status.³⁹ Employers are even prohibited from requiring HIV tests as a precondition to employment.⁴⁰ Where an employer does provide HIV testing, it must be in compliance with the National HIV Counselling and Testing Guidelines,

which require informed consent and pre- and- post-HIV test counseling services.⁴¹ The information obtained through such tests must be kept confidential.⁴² Disclosure also requires the written consent of the individual to whom the information pertains.⁴³ Not following these procedures renders an employer liable to criminal sanctions.⁴⁴ These provisions will prevent employers from carrying out HIV tests in contravention of the National HIV Counselling and Testing Guidelines. Other important workplace protections include the requirement that employers must: (1) reasonably accommodate PLWHAs, (2) set a workplace policy on HIV in accordance with the National HIV and AIDS workplace policy, and (3) incorporate remedies for HIV-related discrimination into workplace grievance procedures.⁴⁵ These protections should ease the barriers excluding PLWHAs from the workplace.

In addition to the workplace, the Act also provides PLWHAs with key protections in health care settings. The most significant protection concerns HIV testing. Where testing is conducted, medical professionals have an obligation to conduct the test with informed consent and in accordance with the national guidelines on confidentiality and counseling.⁴⁶ Information related to HIV testing and HIV status is private.⁴⁷

Test results cannot be disclosed without written consent.⁴⁸ Medical professionals who breach this requirement are liable to face criminal sanctions.⁴⁹ Furthermore, medical professionals can no longer use a patient's HIV status as a basis to refuse or deny treatment.⁵⁰ In this respect, the Act guarantees a stronger level of protection than that afforded by the *Georgina* decision.

Imposition of a Duty on the State and Individuals to Eliminate HIV Discrimination

The Act imposes a generalized duty on individuals to prevent discrimination. Section 4 states that every individual and institution has a duty to eliminate HIV-related discrimination in all settings. This duty gives meaning to the existing obligation under Article 28 of the African Charter for individuals to eliminate discrimination.⁵¹ The section also reflects the understanding that all individuals have a role to play in combating HIV-related discrimination. This may mean the Nigerian government has finally recognized the link between HIV-related discrimination and the HIV epidemic—namely that policies addressing HIV discrimination also decrease HIV transmission by encouraging those at risk to get tested, and those who are infected to seek treatment.⁵² Perhaps this is what the Nigerian gov-

ernment hopes to achieve through these provisions.

Mechanisms to Redress HIV Discrimination

The final and most promising feature of the Act is its enforcement mechanisms. The first concerns the constitution. The act gives PLWHAs a constitutional right to redress HIV discrimination under Section 42 of the Nigerian Constitution.⁵³ By affording this right, the Act rejects the *Festus Odafe* ruling, and instead affirms PLWHAs' constitutional right to nondiscrimination.

The second mechanism is civil remedies. The Act affirms that any individual or group directly affected by HIV-related discrimination may commence a civil action to redress noncompliance with the Act.⁵⁴ Actions can be taken against both natural and legal persons.⁵⁵ In order to exercise this right, the concerned individual or group must first notify the Minister of Justice.⁵⁶ Where a court finds the concerned party has been unfairly discriminated against it has the discretion to make any appropriate order that is just and equitable in the circumstances. This discretion enables a court to order compensation, damages, specific performance, deregistration of a corporate body, or withdrawal of an individual's professional license.⁵⁷ Providing these legal remedies and

sanctions should have both a practical and deterrent effect on perpetrators of HIV discrimination.

The third mechanism deals with the Minister of Justice. The minister is granted wide-ranging powers to monitor and to enforce the provisions of the Act. First, the Minister of Justice has the power to conduct an inquiry into any alleged contravention of the Act. Section 24(2) affords any individual the right to petition the Minister of Justice concerning a contravention of the Act.⁵⁸ Where an inquiry has been conducted, the minister can make recommendations about how to redress the infringement on the individual or institution concerned. The minister may recommend the person adversely affected be hired, admitted, reinstated, or paid compensation for damages.⁵⁹ The minister can also specify the timeframe in which the contravention must be rectified, as well as potential sanctions for non-compliance with the recommendation.⁶⁰ The minister further has the right to bring criminal proceedings against anyone in a court of competent jurisdiction for noncompliance. Sanctions range from a fine to imprisonment.⁶¹ The state also retains the right to criminally prosecute any individual or institution that discriminates against or threatens a person for exercising a right under the Act.⁶²

Flaws and Potential Solutions

The Anti-Discrimination Act has several shortcomings that threaten to limit its ability to fully tackle the problem of HIV-related discrimination in Nigeria. First, there are concerns as to the limits of its applicability. Second, certain persons do have a right to discriminate against PLWHAs in specific instances. Finally, the Act allows for a spouse or cohabiting partner to obtain information relating to the HIV status of a person without that person's consent.

Limitations on the Act's Applicability

A major problem with the Act is that its applicability is severely limited. As Section 2 states,

1. This Act applies to all persons living with and affected by HIV/AIDS in Nigeria.
2. This Act applies to all employers of labor and employees in the public and private sectors including the Nigerian Armed Forces, Nigeria Police State Security Services, other Para-Military Organizations, Schools, Hospitals, and places of worship.

The effect of Section 2 is that the act is not applicable to all persons in Nigeria. For instance, a private

property owner selling his house on the market would not be subject as he or she would constitute neither an employer nor an employee, and could freely discriminate against HIV-positive individuals interested in the home. A significant class of persons remain able to continue to discriminate against PLWHAs without facing any of the repercussions specified in the Act.

A Right to Discriminate

Where the act does apply, it contains a provision, Section 6, enabling individuals to continue to perpetrate HIV-related discrimination. Section 6 allows discrimination on the basis of HIV status in cases where the status of the individual concerned is of such a nature that it “may expose other persons to the danger of con-

Section 6 allows discrimination on the basis of HIV status in cases where the status of the individual concerned is of such a nature that it “may expose other persons to the danger of contracting the virus.” This exemption is important, as it does not require the risk of exposure to be probable.

To address this problem, the Nigerian government must amend Section 2 of the Act to state that it applies to all persons in Nigeria. This change would bring coherency, since many of its provisions were clearly meant to apply to all. For instance, Section 4 states all individuals shall take steps to protect the human rights of PLWHAs, which includes those not in an employer–employee relationship. Furthermore, it would increase the effectiveness of the Act by enabling PLWHAs and the Minister of Justice to bring actions against any person who discriminates on the basis of HIV status.

tracting the virus.” This exemption is important, as it does not require the risk of exposure to be probable. This means that individuals will be able to discriminate in cases where HIV exposure is possible—even if it is not probable. The effect of this exemption cannot be overstated. It raises the question of whether a defendant such as in the *Georgina* decision would have been able to rely on this exemption to escape liability. In other words, does the inclusion of this exemption dilute the rights that *Georgina* affords for PLWHAs? Furthermore, this exemption renders the key protections afforded by the Act meaningless, since each of them

can be displaced by a defendant who provides proof that HIV exposure was a possibility. The Act is inefficient at protecting the very rights that it creates.

To redress this problem, the exemption in Section 6 should be repealed or, at the very least, amended to include a further qualification on the right to discriminate. This qualification would have to specify the individual relying on this exemption must demonstrate that there exists a logical and well-founded chance of HIV exposure. This would foreclose the possibility of employers and medical professionals utilizing this exemption to perpetrate HIV-related stigma, and would also balance the rights of PLWHAs with the greater public.

Disclosure to a Spouse or Cohabiting Partner

The third shortcoming of the Act is its provisions on disclosure. The Act affords a person the right to know the HIV status of his or her spouse or cohabiting partner in situations where that person considers himself or herself at risk of being infected. This has two implications. First, an individual does not have a right to keep his or her HIV status from a spouse or cohabiting partner. Employers and medical professionals are also allowed to give spouses and cohabiting partners such information without consent. Spouses and co-

habiting partners may even be able to request this information outright.

This shortcoming is further entrenched by Section 6(j), which allows the state to deny a marriage license where one of the partners has not been informed of the HIV status of the other. With these provisions, the Act significantly limits the confidentiality and privacy that PLWHAs will be afforded in regard to their HIV status. In addition, the provisions are unconstitutional, as they interfere with PLWHAs' rights to privacy, confidentiality, and equality.⁶³ It is likely that this will have a chilling effect on HIV testing, as those who are married or in cohabiting relationships may not want to undergo testing and risk the results being disclosed to their significant others. These two problems will significantly reduce the effectiveness of the Act to combat HIV-related discrimination.

The only solution to these shortcomings is for the Nigerian government to repeal Sections 8(2) and 6(j). In addition to being unconstitutional, these provisions also have the potential to undermine one of the key purposes of the Act, which is to create a supportive environment for PLWHAs. These sections also risk counteracting the Act's stated objective to give effect to the human rights guaranteed in Chapter 4 of the Nigerian Constitution. By repealing these sections, the act will be better

able to ensure PLWHAs' constitutional guarantees.

Conclusion

We must wait to see what effect the Anti-Discrimination Act will have on HIV-related discrimination in Nigeria, but it holds significant promise. The fact that it outlaws many of the common HIV-related discriminatory practices means it will likely have a positive and meaningful impact on PLWHAs. The strong protections should provide PLWHAs and the Minister of Justice with crucial tools to contest and redress discrimination when in violation. Nonetheless, significant revisions must be made to the Act so as to strengthen its effectiveness. The Nigerian government must pass proposed amendments to the Act, as this is the only way to bring PLWHAs within the full protection of their right to nondiscrimination. Until the Nigerian Government does so, PLWHAs will continue to be discriminated against, and the Act will be too weak to prevent it.

Endnotes

1. "HIV and AIDS (Anti-Discrimination) Act." 2014. Federal Republic of Nigeria Official Gazette 101, vol. 125 (28 November).
2. United Nations Program on HIV/AIDS. 2012. "UNAIDS World AIDS Day Report."
3. Nigeria National Population Commission and ICF International. 2014. "Nigeria

Demographic and Health Survey."

4. Laura Nyblade et al. 2009. "Combating HIV Stigma in Health Care Settings: What Works?" *Journal of the International AIDS Society* 12: 2.
5. Ogunniyi, Olayemi Jacob, and Dosunmu Akinola George. 2014. "Historical and Cultural Implications of Human Immunodeficiency Virus (HIV) and Women's Rights in Nigeria: A Contextual Clarification." *European Scientific Journal special edition*: 321-326.
6. Centre for the Right to Health Project. "HIV/AIDS and Human Rights in Nigeria Background Paper for HIV/AIDS Policy Review in Nigeria Policy" (working paper no. 5907-413-CRH-01, Nigeria, September 2003).
7. Network of People Living with HIV and AIDS in Nigeria, 2011. "The People Living with HIV Stigma Index."
8. Chen Reis et al. 2005. "Discriminatory Attitudes and Practices by Health Workers Toward Patients with HIV/AIDS in Nigeria." *PLoS Medicine* 2 (8): 743-752..
9. *Ibid.*
10. Centre for the Right to Health Project. "HIV/AIDS and Human Rights in Nigeria Background Paper for HIV/AIDS Policy Review in Nigeria Policy" (working paper no. 5907-413-CRH-01, Nigeria, September 2003).
11. *Ibid.*
12. 1999 Constitution of Federal Republic of Nigeria, decree no. 24; African (Banjul) Charter on Human and Peoples Rights Act 1990, cap. 10. Nigeria.
13. Article 42 reads as follows:
 - (a) 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:
 - (b) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities

or restrictions to which citizens of Nigeria or other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(c) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria or other communities, ethnic groups, places of origin, sex, religions or political opinions.

(d) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(e) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

14. One case that illustrates how the grounds of discrimination listed in Section 42 are not exhaustive is *Mrs Folarin Oreka Maiya v. The Incorporated Trustees of Clinton Health Access Initiative Nigeria* in 2011. The ruling held that pregnancy was a protected status under Section 42. Prior to the Anti-Discrimination Act, several scholars contended that Section 42 prohibited discrimination on the basis of HIV status. See also: Durojaye, Ebenezer 2010. "Litigating the Right to Health in Nigeria: Challenges and Prospects." *Law and Domestic Human Rights Litigation in Africa*. Edited by Mangus Killander. Cape Town: University of Pretoria. This is now affirmed in Section 28 of the Anti-Discrimination Act, which holds:

Nothing in this Act shall preclude a person living with HIV or affected by AIDS from seeking redress against any person or institution for any breach of his or her constitutional rights in accordance with the provisions of Section 42 of the 1999 Con-

stitution of the Federal Republic of Nigeria as amended.

15. The African Charter's prohibition of HIV discrimination was also expressed by the South African Constitutional Court in *Hoffmann v. South African Airways* in 2001. This case concerned the constitutionality of South African Airways' refusal to hire the plaintiff on the basis of his HIV status. In reaching its decision, the court noted its obligation to redress the HIV-related discrimination committed against the plaintiff arose in part from the equality guarantee in the African Charter.

16. *Festus Odafe v. Attorney-General of the Federation*, 205.FHC 608 (2004). Federal High Court of Nigeria.

17. *Ibid.*, paras. 30-31

18. *Ibid.*, paras. 36-37.

19. *Ibid.*, para. 38

20. This is the view taken by Durojaye, *supra* note 14.

21. The second view was supported by the fact that the court heavily based its decision on Nigeria being statutorily obligated to treat prisoners as a result of Sections 3 and 8 of the Federal Prison Act.

22. *Georgina Ahamefule v. Imperial Medical Centre and Dr. Alex K. Molokwu*, ID.1627.2000 (2012). High Court of Lagos State.

23. The International Covenant on Economic, Social and Cultural Rights. 16 December 1966, Nigeria.

24. *Georgina*, *supra* note 22 at 5.

25. *Ibid.*

26. *Georgina*, *supra* note 22 at 21.

27. The court held that the plaintiff's right to health was violated, however the court failed to provide its reasoning for this holding,

28. For example, the International Guidelines on HIV/AIDS and Human Rights, promulgated by the Office of the United Nations High Commissioner for Human

- Rights (OHCHR) and the Joint United Nations Programme on HIV and AIDS (UNAIDS); ILO Code of Practice on HIV/AIDS and the World of Work; and ILO Recommendation Concerning HIV and AIDS and the World of Work. See also: Office of the High Commissioner for Human Rights. 1998. "OHCHR/UNAIDS: HIV/AIDS and Human Rights: International Guidelines." New York and Geneva.
29. Hoffmann, supra note 15.
 30. Hoffmann, supra note 15 at para. 28.
 31. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(a).
 32. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 and Section 6(h). It is important to note that a person can be denied credit, loans, and insurance benefits if that person has failed to disclose their HIV status.
 33. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(j). It is important to note that a person cannot be denied the right to marry if that person's soon-to-be spouse is unaware of the person's HIV-status.
 34. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Sections 6(d), (e), (f), and (i).
 35. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(i).
 36. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(g).
 37. Ibid.
 38. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(c).
 39. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 2.
 40. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 9. This protection is not absolute, as Section 9 states an employer can require an HIV test in accordance with the circumstances set out in other Nigerian laws..
 41. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 10.
 42. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 13.
 43. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 11.
 44. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 10(3); Section 12.
 45. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 7; Section 21; Section 20..
 46. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 9(4).
 47. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 13.
 48. Ibid.
 49. Ibid.
 50. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6.
 51. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Article 28.
 52. See also: UNAIDS Joint United Nations Programme on HIV/AIDS. 2006. International Guidelines on HIV/AIDS and Human Rights consolidated version. Geneva: UNAIDS.
 53. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 28.
 54. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 26.
 55. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 29.
 56. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 26(2).. This notification is required in order to avoid duplication of efforts, as the Minister of Justice has the power to investigate and redress any act of HIV-related discrimination that comes to his or her attention under Sections 24 and 25.
 57. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 27.
 58. It is important to note that the procedure for this inquiry is to be specified in future regulation. See also: "HIV and AIDS

(Anti-Discrimination) Act,” supra note 1 at Section 24(4).

59. “HIV and AIDS (Anti-Discrimination) Act,” supra note 1 at Section 25.

60. *Ibid.*

61. “HIV and AIDS (Anti-Discrimination) Act,” supra note 1 at Section 23.

62. “HIV and AIDS (Anti-Discrimination) Act,” supra note 1 at Section 22. The term “the state” is intended to refer to a law officer. Under the Criminal Code Act, criminal proceedings are brought forth by law officers, which include “the Attorney-General and the Solicitor-General of the Federation, and includes the Director of Public Prosecutions and such other qualified officers, by whatever names designated, to whom any of the powers of a law officer are delegated by law or necessary intendment.” Section 22 does not mention whether the bringing criminal charges under this section would be within the purview of the Minister of Justice or a law officer. As the Minister of Justice is not explicitly referenced in section 22, it is reasonable to assume that the law officer would be the party to bring the criminal sanction.

63. “HIV and AIDS (Anti-Discrimination) Act,” supra note 1 at Section 37; Section 42. The reason why Sections 8(2) and 6(j) may violate the right to equality is because this caveat does not apply to other chronic infections or illnesses. It is important to note that these provisions are *prima facie* in contravention of Section 37, since Section 45 of the Nigerian constitution states nothing in Section 37 shall invalidate any law that is reasonably justifiable in a democratic society as it is in the interest of defense, public safety, public order, public morality, or public health. While these provisions cannot be justified on any of these grounds, the government may argue so and thus its constitutionality will be up to a court to determine.