

The right to health in Nigeria and South Africa: the need for effective integration of food safety

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ABSTRACT: Food safety is a public health issue. The World Health Organisation reports that almost 1 in 10 people in the world fall ill after consuming contaminated food and 420,000 die every year. In Africa, more than 91 million people fall ill and 137,000 die each year of foodborne diseases. Several legal instruments recognise the right to health in Nigeria and South Africa. In Nigeria, the right to health is non-justiciable under chapter 2 of the 1999 Constitution. The National Health Act is the main law that regulates, develops and manages the health system. In South Africa, the right to health is recognised as a fundamental right. While these steps are commendable, food safety is yet to be effectively incorporated in these instruments. Nigeria and South Africa are state parties to treaties such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights. However, these treaties fail to accommodate food safety as one of their essential attributes. This article contends that foodborne diseases have a significant impact on the recognition and enforcement of the right to health. Relying primarily on analytical methods of research, the article assesses the efficacy of legal machinery in recognising food safety as a crucial component of the right to health in the jurisdictions under study. It is important for Nigeria and South Africa to achieve effective integration of food safety as an indispensable component of the right to health in Africa.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le droit à la santé au Nigeria et en Afrique du Sud: la nécessité d'une intégration effective de la sécurité alimentaire

RÉSUMÉ: La sécurité alimentaire est une question de santé publique. Selon l'Organisation mondiale de la santé, près d'une personne sur 10 dans le monde tombe malade après avoir consommé des aliments contaminés et 420 000 personnes en meurent chaque année. En Afrique, plus de 91 millions de personnes tombent malades et 137 000 meurent chaque année de maladies d'origine alimentaire. Plusieurs instruments juridiques reconnaissent le droit à la santé au Nigeria et en Afrique du Sud. Au Nigeria, le droit à la santé, contenu dans le chapitre 2 de la Constitution de 1999, n'est pas justiciable. La loi nationale sur la santé publique est la principale législation qui gouverne le système de santé. En Afrique du Sud, le droit à la santé est reconnu comme un droit fondamental. Bien que cette avancée soit louable, la sécurité alimentaire doit encore être effectivement intégrée dans ces instruments. Le Nigeria et l'Afrique du Sud sont des États parties à des traités tels que le Pacte international relatif aux droits économiques, sociaux et culturels et la Charte africaine des droits de l'homme et des peuples. Cependant, ces traités ne font pas de la sécurité alimentaire l'un de leurs attributs essentiels. Cet article soutient que les maladies d'origine

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alimentaire ont un impact significatif sur la reconnaissance et l'application du droit à la santé. S'appuyant principalement sur la dogmatique juridique, cette contribution évalue l'efficacité des mécanismes juridiques à reconnaître la sécurité alimentaire comme une composante essentielle du droit à la santé dans les pays couverts par cette étude. Il est important pour le Nigeria et l'Afrique du Sud de parvenir à une intégration effective de la sécurité alimentaire en tant que composante indispensable du droit à la santé en Afrique.

KEY WORDS: food, food safety, health and law, right to health, Nigeria, South Africa

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1 INTRODUCTION

The World Health Organisation reports that about 600 million; almost 1 in 10 people in the world fall ill after consuming contaminated food and 420,000 die every year.¹ In Africa, 'more than 91 million people fall ill and 137,000 die each year of foodborne diseases'.² Treatment and management of these diseases place pressure on existing health facilities, particularly in developing countries and also affects economic development.³ Today, unsafe food consumption is an issue that appears to be expanding due to consumers' increasing exposure to food safety hazards as a result of changing lifestyles.⁴ Being of significant public health concern, food safety draws a strong linkage with the lives and health of people.⁵ Accordingly, the ability of every person to exercise their rights to life and good health are directly dependent on the level of

- 1 World Health Organisation, 'Food safety' <https://www.who.int/health-topics/food-safety> (accessed 14 July 2022); In Nigeria, the Minister of Health reiterated this position on the World Food Safety Day, 2022 which had the theme: 'Safer food and better health' C Muanya & N Onyedika-Ugoeze '600 Million persons fall ill, 420,000 others die globally from toxic foods' *The Guardian* 8 June 2022.
- 2 World Health Organisation 'WHO's first ever global estimates of foodborne diseases find children under account for almost one third of deaths' <https://www.who.int/news/item/03-12-2015-who-s-first-ever-global-estimates-of-foodborne-diseases-find-children-under-5-account-for-almost-one-third-of-deaths> (accessed 17 July 2022.)
- 3 KL Newman et al 'The impact of socioeconomic status on foodborne illness in high-income countries: a systematic review' (2015) 143(12) *Epidemiology and Infection* 2473.
- 4 Uçar et al 'Food safety – problems and solutions' in H Makun significance, prevention and control of food related diseases (2016).

food safety.⁶ Food safety is one of the main indicators of sustainable food security. At the World Food Summit in 1996, food security was said to exist at all levels when ‘all people, at all times, have physical and economic access to sufficient, *safe* and nutritious food to meet their dietary needs and food preferences for an active and healthy life’.⁷ Unsafe food comprising harmful pathogens or chemical substances causes more than 200 diseases.⁸ Thus, there is a need for food safety control to address related health problems through the lens of the right to health approach.⁹ However, available research suggests that food safety has not been fully incorporated in the right to health in Nigeria and South Africa.

Generally, in Africa, many food producers are unable to guarantee food safety.¹⁰ Governments are responsible to ensure safe food, not only through effective food safety laws, but also recognition of the right to health. South Africa has taken a bold step by ensuring that the right to health is enshrined and justiciable under its Constitution. In Nigeria, the right to health is non-justiciable. Notwithstanding, the right to health may be enforced through the provisions of the African Charter on Human and Peoples’ Rights¹¹ and the National Health Insurance Act, 2014, which are laws in Nigeria. While these measures are commendable, this paper explores the perspective of enhancing food safety through the right to health in Nigeria and South Africa. This article is divided into six parts. The first is this introduction. The second part is the conceptualisation of key terms such as Food, Food Safety and Right to Health. The third part delves into the legal framework on food safety in Nigeria and South Africa. The fourth part draws a link between food safety and the right to health in Nigeria and South Africa. The fifth part deals with resolving health implications of food safety through a human rights-based approach. The final segment is recommendations and conclusion.

- 5 A Okoruwa et al ‘Overview of Nigerian food safety legislation’ (2022) *Advances in Nutrition and Food Science* 2.
- 6 TV Kurman, OV Kurman & OM Tuieva ‘The legal foundations of food safety as a means of providing public health in globalization’ <https://pubmed.ncbi.nlm.nih.gov/32124797/> (accessed 27 August 2022).
- 7 Cited in W Peng & EM Berry *The concept of food security* (2018); see also Mark Gibson ‘Food security- a commentary: what is it and why is it so complicated?’ (2012) 1 *National Institutes of Health* 18–27.
- 8 WHO: Food safety <https://www.who.int/news-room/fact-sheets/detail/food-safety> (accessed 14 July 2022).
- 9 Food safety in the protection of the right to health F N Damayantil & E Wahyati ‘International conference on food science & technology Series’ (2019) 292 *Earth and Environmental Science* 012047.
- 10 ‘Food safety status in African countries’ <https://www.qassurance.com/food-safety-in-africa/> (accessed 16 July 2022).
- 11 African Charter on Human and Peoples’ Rights (1981 OAU CAB/LEG/67/3/ rev 5, 21 ILM 58 (1982) African Charter) adopted on 27 June 1981 and entered into force on 21 October 1986

2 CONCEPTUAL CLARIFICATION OF KEY TERMS

In this segment, key terms shall be defined: food, food safety and the right to health.

2.1 Meaning of food

Several authorities have defined food safety. The term 'food' is perceived as 'any nutritious substance that people or animals eat or drink or plants absorb in order to maintain life and growth'.¹² According to the Black's Law Dictionary,¹³ 'food is a substance that is edible and has nutrition in it to sustain life and make energy ... It helps promote health.' In Nigeria, The Food and Drug Act defines food as 'any article manufactured, processed, packaged, sold or advertised for use as food or drink for human consumption; chewing gum and any ingredient that may be mixed with food for any purpose whatever ...'.¹⁴ This definition excludes live animals, birds, fish, and articles or substances used as drugs. The National Agency for Food, Drug Administration and Control Act extends the above definition to 'include drinking water and supplements for the survival of all persons and animals'.¹⁵ This definition does not seem helpful in providing an apt, yet inclusive meaning of food because it is designed for a highly contextual situation. This is in view of the fact that the definition of food for the purpose of regulation is different from the definition of food ordinarily.

Ezerigwe argues that the definition of 'food' given by the food laws in Nigeria restricts the regime of food safety.¹⁶ For instance, the provision of the Food and Drug Act, which excludes raw food like plants, live animals and poultry, presents a conceptual problem that impacts heavily on the food safety system. By excluding unprocessed food, effective regulation of the whole gamut of the food chain becomes difficult to achieve. This is because it is essential to regulate practices such as indiscriminate application of pesticides, herbicides and fertilisers to plants and drugs to animals since they can affect human health when consumed. In the light of the foregoing, the definition of food given by the Food Safety Standards Act of India is worthy of emulation,¹⁷ since it captures food as 'any substance, whether processed, partially processed or unprocessed, which is intended for human consumption'.¹⁸ This is broad enough to cover primary food,

12 Lexico UK Dictionary <https://www.lexico.com/definition/food> (accessed 14 September 2022).

13 Black's Law Dictionary, 10th edition.

14 Sec 20, 1974.

15 Sec 22(f), 1993.

16 J Ezerigwe 'Much ado about food safety regulation in Nigeria' (2018) 9(1) *Journal of Sustainable Development Law and Policy* 16.

17 Sec 3(1)(j) Food Safety and Standards Act of India 2006.

genetically modified or engineered food or food 'containing ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance'.¹⁹

This article agrees with Uzoamaka who gives a nod to the above definition.²⁰ The definition settles the issue of whether the perception of food should extend to unprocessed foods. The Indian provision captures technologically innovative foods like genetically modified foods unlike the laws under the legal framework in Nigeria.²¹ Consequently, in the light of various definitions proffered by different authorities, this article proposes the adoption of a comprehensive definition that embraces the entire food chain. Food, therefore, is any edible substance, processed or unprocessed which is scientifically proven to contain required nutrients needed for the survival and sustenance of human life.

2.2 Meaning of food safety

There is no universally accepted definition of food safety. Several authors have advocated for enhanced food safety, yet none of them provides a concise definition of the term.²² This obvious conceptual deficiency leaves one in doubt as to what constitutes food safety and the specific measures that would guarantee food safety at all levels of the food chain. Hassauer and Roosen hold the opinion that food safety is a 'complex social issue'.²³ The concept, though intensively used, yet scientific literature in natural sciences and consumer research and even regulators do not define it. This makes it quite challenging for regulators to determine food safety because different societal groups appear to have a different understanding of what is meant by safety.²⁴

18 As above.

19 As above.

20 G Uzoamaka 'A survey of the criminal jurisprudence for combating food adulteration in Nigeria and India' (2019) 4 *African Journal of Criminal Law and Jurisprudence* 55.

21 The World Health Organisation defines genetically modified food as 'food derived from organisms whose genetic material (DNA) has been modified in a way that does not occur naturally, e.g. through the introduction of a gene from a different organism. which contains artificially altered genes, removed from any other organism (animals, plants, viruses, bacteria) in order to give it new characteristics, ...' WHO https://www.who.int/health-topics/food-genetically-modified#tab=tab_1 (accessed 10 May 2022).

22 For instance, FJ Critzer wrote about reducing the contamination of food through proactive adoption of management practices that are based upon scientifically valid food safety principles: FJ Critzer 'An introduction to microorganisms that can impact products sold at farmers markets' in J Harrison (ed) *Food safety for farmers markets: a guide to enhancing safety of local foods* (2017) 201; E Eghosa 'Legal and theoretical assessment of the right to food in Nigeria' in RT Ako & D Olawuyi (eds) *Food and agricultural law: readings on sustainable agriculture and the law in Nigeria* (2015) 122-139.

23 C Hassauer & J Roosen 'Towards a conceptual framework for food safety criteria: analysing evidence practices using the case of plant protection products' (2020) 127 *Safety Science* 1046.

24 As above.

According to Khalid, food safety relates to prevention, reduction or elimination of the risk of ill health, or death as a result of consumption of foods, whether fresh or processed, obtained through domestic market, or by international trade.²⁵ It is contended that food safety is not a legal terminology. Indeed, most of the existing statutes related to food safety do not define the term. The only legal instrument that defines food safety in Nigeria is the Food Safety Bill.²⁶ This bill defines food safety as ‘all measures to ensure that food does not cause harm to the consumer when it is prepared’. This definition is too fleeting. It does not say anything about specific measures that ensure safety of food. The phrase ‘when it is prepared’ shows that the intention of the legislature is to focus on processing and preparing food thus ignoring the safety measures in the farm. This definition has the tendency of affecting effective regulation of food in the entire food chain continuum.

Food safety has been referred to as a ‘scientific discipline describing the handling, preparation and storage of food in ways that prevent food borne illness’.²⁷ Chishti also adopted this line of thought but added that reducing foodborne illness can be achieved through a number of routines that should be followed to avoid potentially severe health hazards.²⁸ Following this reasoning, Sadiku et al opined that food safety involves the concept that food will not cause harm to the consumer when it is eaten according to the intended use.²⁹ However, these definitions do not answer the question of how one can handle or store food to avoid illness through legal measures.

Uyttendaele et al perceived food safety as ‘safeguarding the national food supply chain from the introduction, growth or survival of hazardous microbial and chemical agents’.³⁰ Different shades of consumers often hold that ‘descriptions of safe food are generally practical and simple’.³¹ Ugland and Veggeland³² contended that food safety refers to potential risks to human health associated with the consumption of domestic and foreign food products. It is a key aspect of public health, and failure to adequately address this issue can result in food-borne illnesses, long-term disabilities, and even deaths. To Gizaw,³³ food safety deals with safeguarding the food supply chain

25 SMN Khalid ‘Assessment of the current food safety regulatory system in Afghanistan and its future with a new independent regulatory structure’ (2015) 5(2) *International Journal of Development Research* 3390.

26 National Food Safety and Quality Bill 2019.

27 <https://www.definitions.net/definition/food+safety> (accessed 12 July 2022).

28 M Zubair Chishti *Food safety: its problems and remedies* MSc thesis, University of Sargodha 2014.

29 MNO Sadiku and others ‘Food Law’ (2019) 3(2) *International Journal of Trend in Scientific Research and Development* 1.

30 M Uyttendaele E Franzand & O Schulten ‘Food safety, a global challenge’ (2015) *International Journal for Environmental Research and Public Health* 4.

31 M Elimi ‘Food safety: current situation, unaddressed issues and the emerging priorities’ (2004) 10(6) *Eastern Mediterranean Health Journal* 1.

32 T Ugland & F Veggeland ‘Policy integration: food inspection reforms in Canada and the European Union’, being a paper prepared for presentation at the Canadian Political Science Association Annual Conference, University of Western Ontario London 2-4 June 2005.

from the introduction, growth, or survival of hazardous microbial and chemical agents. In more specific terms, Fahmi Abu Al-Rub *et al* defined food safety as ‘strategies and activities aimed to protect foods from biological, chemical, physical, and allergenic hazards that may occur during all stages of production, distribution, and consumption’.³⁴ From a strict consumer perspective, safe food should not be harmful. It refers to unadulterated food with a subsisting shelf life; food that does not contain deleterious substances.³⁵

The above definitions deal with general measures that are channeled towards making food safe for consumption. However, these definitions do not address safety measures that should be taken on the farm since activities to protect food supply from hazards that may occur at any stage of the food chain.³⁶ For example, the application of fertilisers and pesticides in excessive doses may have grave implications on human health when consumed in food. In sum, a definition of food safety must capture food safety measures at all levels of the food chain.

2.3 Meaning of the right to health

Health is a fundamental human right which is crucial to the exercise of other human rights,³⁷ including the right to food.³⁸ Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.³⁹ It should be noted that the right to health is not equivalent to the right to remain healthy since a person may have access to the best health facilities in the world and may still remain unhealthy.⁴⁰ The right to health ‘refers to entitlement to the

33 Z Gizaw ‘Public health risks related to food safety issues in the food market: a systematic literature review’ (2019) 24 *Environmental Health and Preventive Medicine* 68.

34 FA Al-Rub *et al* *Food Safety Hazards* (2020).

35 T I Akomolede & P O Oladele ‘Consumer protection in a deregulated economy: the Nigerian experience’ (2006) 1(3) *Research Journal of International Studies* 13-23; See also, NA Inegbedion ‘Consumerism, merchantability and Standard Organization of Nigeria’ (1993) 2 *Edo State University Law Journal* 2; L Kwarghake ‘Adulteration and faking of goods in a globalized economy: emerging issues for consumer redress in Nigeria’ (2005) 4 *Benue State University Law Journal* 95.

36 Glossary of food safety related terms <https://www1.agric.gov.ab.ca> (accessed 18 September 2022).

37 Z Nampewo and others ‘Respecting, protecting and fulfilling the human right to health’ (2022) 21 *International Journal for Equity in Health* 36.

38 Icelandic Human Rights Centre ‘What is right to health’ <https://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-health/what-is-the-right-to-health> (accessed on 18 July, 2022).

39 CESCR General Comment 14: The right to the highest attainable standard of health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 <https://www.refworld.org/pdfid/4538838do.pdf> (accessed 14 July 2022).

40 O Nnamuchi ‘Securing the right to health in Nigeria under the framework of the National Health Act’ (2018) 37(3) *Medical Law* 477-532.

enjoyment of a variety of goods, facilities, services and conditions which are necessary to maintain or restore health'.⁴¹ The phrase, 'variety of goods' as used in this context may cover food, but does not explicitly cover food safety. This paper maintains that the government owes an obligation to ensure that the entire food chain is safe for consumption as a measure of protecting citizens' right to health. The right to health may be realised through measures such as formulation of health policies, implementation of health programmes in line with international standards or through adoption of specific legal instruments.

3 LEGAL FRAMEWORK ON FOOD SAFETY IN NIGERIA AND SOUTH AFRICA

3.1 Nigeria

Food safety legislation is an important aspect of a national food control system that strives to ensure effective protection of consumers' health. Accordingly, national governments are vested with the task of developing, implementing and enforcing sound food safety legislation to protect public health and facilitate food trade within territorial boundaries. There are several laws geared towards enhancing food safety in the country. Okoruwa observes that there are some gaps in these laws.⁴² These include lack of stiff penalties and poor enforcement provisions in the existing laws on food safety.⁴³ Apart from these challenges, one major issue which connects to the hub of this paper is that food safety laws in Nigeria are not directly in tandem with the right to health. They carry mainly criminal sanctions. It is important for food safety to be clearly embedded in every person's right to health. This would make the government and all actors in the food chain continuum to ensure that the food that gets to the consumer is safe for consumption. For the sake of space, only key of these legislations shall be discussed.

Nigeria operates a multiple agency food safety control system.⁴⁴ This implies that the existing laws are shared amongst the three tiers of government:⁴⁵ federal, state and local government area councils. The Criminal Code is the key penal statute in the southern part of the country. It criminalises the act of selling or being in possession or having intent to sell as food or drink articles which are noxious or unfit for food or drink.⁴⁶ It also punishes the act of selling adulterated food

41 As above.

42 A Okoruwa and others 'Overview of Nigerian food safety legislation' (2022) 2 *Advances in Nutrition and Food Science* 1.

43 As above.

44 J Omojokun 'Regulation and enforcement of legislation on food safety in Nigeria', <https://www.intechopen.com/chapters/44083> (accessed 12 August 2022).

45 As above.

46 Sec 243(1).

or drinks or adulterating food and drinks with intent to sell noxious food or drinks.⁴⁷ It provides that any person who violates any of these provisions is liable to a term of imprisonment for one year. These provisions, though geared towards protecting human health, are not stiff enough to deter offenders. This justifies the need for food safety to be perceived using the lens of the right to health. The Penal Code is the criminal law applicable to the northern part of the country. It provides that any person who sells or is in possession with intent to sell as food or drink articles which are noxious or unfit for food or drink;⁴⁸ sells adulterated food or drinks, or adulterates with intent to sell noxious food or drinks;⁴⁹ shall be liable to imprisonment for two years or one year as the case may be.

The Food and Drugs Act is the chief law on food and drugs in Nigeria. It regulates the manufacture, importation, distribution, sale and advertisement of processed or packaged food, drugs, cosmetics and medical devices. The Act prohibits the sale, importation, manufacture or storage of articles of food which contain poisonous or harmful substance, or is 'unfit for human consumption or consists in whole or in part of any filthy, disgusting, rotten or diseased substance'.⁵⁰ It also prohibits the same acts with respect to any food which is adulterated as well as the manufacturing, storage or sale of food under insanitary conditions.⁵¹ In addition, the Act prohibits various misleading practices relating to packaging, labeling, treatment, processing and advertisement of food and other regulated products.⁵² Although the penalty for the breach of these provisions is a fine of not less than fifty thousand Naira or imprisonment for a term not exceeding two years or both,⁵³ the Act stands as an ineffective tool in enhancing food safety. The reality is that punishment of the offender who has sold unsafe food to the consumer threatens the health and life of citizens.

Another important legislation is the National Agency for Food and Drug Administration and Control Act.⁵⁴ This Act establishes the National Agency for Food and Drug Administration and Control which is vested with the task of 'regulating the manufacture, importation, advertisement, distribution and sale of food and other regulated products'.⁵⁵ The Act provides that any person who contravenes the provisions of any regulation made under the Act is guilty of an offence and liable on conviction to the penalties specified in the regulations. Where no penalty has been specified, the offender shall be liable to a fine of N50,000.00 or imprisonment for a term of one year or both.⁵⁶

47 Sec 243(2).

48 Sec 187(1).

49 Sec 184(1).

50 Sec 1.

51 Sec 6.

52 Sec 5.

53 Sec 17(1).

54 1993 as Amended by Decree 1999 and now known as Act CAP N1 LFN 2004.

55 Sec 30 NAFDAC Act.

56 Sec 25(2) NAFDAC Act.

How then has this Act as an instrument of enhancing food safety helped to protect the right to health? Apart from prescribing penalties for offenders who produce and sell unsafe food remedies, the Act has not made specific provisions to protect the right to health.

The Standard Organisation Act⁵⁷ is yet another legislation on food safety. It establishes the organisation the Standards Council of Nigeria.⁵⁸ The Act is empowered with the task of prescribing and maintaining standards in quality and measurements of both locally manufactured and imported goods, including food products.⁵⁹ Despite the efforts of the Act in establishing compliance assessment programmes, an appraisal of the Act shows that it only regulates finished food products. Thus, it does not cover unprocessed food products. Other statutes include the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act,⁶⁰ Food and Drug Related Products (Registration, etc.) Act,⁶¹ Animal Diseases (Control) Act,⁶² Nigeria Agricultural Quarantine Service Establishment Act,⁶³ National Environmental Standards and Regulations Enforcement Act,⁶⁴ Federal Competition and Consumer Protection Act (FCCPA),⁶⁵ and National Biosafety Management Act.⁶⁶ These laws have several provisions that are geared towards enhancing food safety. However, they are imbued with pockets of defects which make implementation cumbersome. In addition, some laws overlap and this often creates confusion and difficulty in enforcement. What is more, they are not tied to the right to health of citizens.

The most recent attempted legislation in Nigeria is the National Food Safety and Quality Bill.⁶⁷ Its primary objective is to provide the regulatory framework to protect consumers from hazards which may be present in food and animal feed.⁶⁸ One of the innovations in the Bill is that it provides bedrock for effective food control through the integration of regulatory agencies. However, the Bill does not make provision for regulation of foods in farms, especially as it relates to the use of pesticides.⁶⁹

57 Standard Organisation of Nigeria Act 2015.

58 Sec 3(1).

59 Sec 5(1).

60 No 17 of 1989, now Act 25 of 1999 now Act C 34 LFN 2004

61 1993 now known as Act CAP F33 LFN 2004.

62 Food and Drug Related Products Act 1988.

63 Nigeria Agricultural Quarantine Service Establishment Act 2018.

64 National Environmental Standards and Regulations Enforcement Act 2007.

65 Federal Competition and Consumer Protection Act 2018.

66 2015 as amended in 2019.

67 National Food Safety and Quality Bill 2019.

68 Sec 1(a).

69 A Okoruwa et al 'Overview of Nigerian Food Safety Legislation' available at <https://kosmospublishers.com/wp-content/uploads/2022/07/Overview-of-Nigerian-Food-Safety-Legislation.pdf> (accessed 24 January 2023).

3.2 South Africa

The importance of food safety in South Africa was highlighted by the listeriosis outbreak of 2018. President Cyril Ramaphosa disclosed the proposed plans to create a food safety agency or regulatory authority. Its chief mandate would be to ensure the highest levels of health and safety to protect consumers.⁷⁰ At present, South Africa's regulatory environment on food safety is fragmented. South Africa operates a multiple agency system of food control, just like Nigeria. The national departments responsible for food safety legislation are the Department of Agriculture, Forestry and Fisheries, the National Department of Health and the Department of Trade and Industry. There are several laws that deal with food safety in South Africa.

These are Agricultural Product Standards Act,⁷¹ Animal Diseases Act,⁷² Animal identification Act,⁷³ Animal Improvement Act,⁷⁴ Animals Protection Act,⁷⁵ Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act,⁷⁶ Meat Safety Act,⁷⁷ Performing Animals Protection Act,⁷⁸ and Veterinary and Para-Veterinary Professions Act.⁷⁹ The Meat Safety Act of 2000 seeks to reduce foodborne diseases from animal-sourced foods. The South African Department of Health imposes hygiene requirements for food premises and transport, with the focus on reducing food safety risks. Nevertheless, the government of South Africa places emphasis on food safety, with increased regulation of food handling and processing, sales, and food exports.

In 2014, the Department of Agriculture, Forestry and Fisheries gave special attention to food and nutrition security risk management. This department covers stability of the food supply and general food safety. The Director of Veterinary Services of South Africa presently controls the importation of meat products in line with the Meat Safety Act of 2000, but only approves meats processed in abattoirs approved by the Directorate.⁸⁰ In addition, the South African Bureau of Standards, the statutory body established in 1945, is regulated by the Standards Act 8 of 2008. The SABS is empowered to develop, promote and maintain

70 B Versfeld & ZN Webber Wentzel South Africa: Food safety in South Africa and the need for an appointed regulator 14 September 2021.

71 Act 119 of 1990.

72 Act 35 of 1984.

73 Act 6 of 2002.

74 Act 62 of 1998.

75 Act 71 of 1962.

76 Act 36 of 1984.

77 Act 40 of 2000.

78 Act 24 of 1935.

79 Act 19 of 1982.

80 Y Arias-Granada 'Foodborne diseases and food safety in Sub-Saharan Africa: current situation of three representative countries and policy recommendations for the region' (2021) 16(2) *African Journal of Agricultural and Resource Economics* 169-179.

South African National Standards, protecting the quality of commodities, products and services and rendering conformity assessment services.

4 FOOD SAFETY AND RIGHT TO HEALTH IN NIGERIA AND SOUTH AFRICA

Food safety relates to health because it deals with production, proper processing and handling of food in such a manner as to prevent foodborne diseases. The right to health covers different social-economy factors which promote people's healthy life and extends to the other health determinant factors such as food and nutrition, healthy workplace and healthy environment, housing and access to clean and adequate water, sanitation.⁸¹ In Nigeria, the right to health is embedded in the Constitution which provides that the 'state shall direct its policy towards ensuring that there are adequate medical and health facilities for all persons'.⁸² The use of the words 'shall' in this context suggests that it is mandatory for the state to provide health facilities for all persons. Despite the fact that this provision is couched in mandatory terms, they are non-justiciable rights or 'expressions of normative moral imperative'.⁸³ This is because the constitution provides that the courts shall not exercise jurisdiction in entertaining matters that are encapsulated in Chapter II of the constitution because they deal with socio-economic rights that are non-justiciable.⁸⁴

Notwithstanding, the Constitution empowers the National Assembly with the task of making laws 'for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List, Part I of the Second Schedule'. Precisely, by Part I of the Second Schedule to the Constitution which is the Exclusive Legislative List, item 60(a), the National Assembly is vested with the power, among others, to establish and regulate authorities for the Federation or any part thereof for the purpose of promoting and enforcing the observance of Fundamental Objectives and Directive Principles enshrined in the Constitution. Armed with this breath of power, the National Assembly enacted the National Health Act which is the key legislation that guarantees the rights of all persons to health. Accordingly, the right to health in Nigeria can be enforced by the enactment of legislation by the National

81 Healthy people' determinants of health' <https://www.healthypeople.gov/2020/about/foundation-health-measures/Determinants-of-Health> (accessed 12 June 2022).

82 O Nnamuchi 'Securing the right to health in Nigeria under the framework of the National Health Act' (2018) 37(3) *Medicine and Law* 477-532 at 482 (citing art 17(3)(b)).

83 A Le Roux-Kemp 'The recognition of health rights in constitutions on the African continent: a systematic review' (2016) 24(1) *African Journal of International and Comparative Law* 142-157.

84 Sec 6(6)(c) 1999 Constitution.

Assembly or the domestication of existing treaties.⁸⁵ Judicial Credence has been given to the right to health in *Odafe & Others v Attorney-General and Others*.⁸⁶ In this case, the Court recognised the right to health in Nigeria. It held that prisoners who tested positive to HIV have the right to access medical care and that the breach of this right is a violation of article 16 of the African Charter.

In South Africa, unlike Nigeria, the right to health is guaranteed in the Constitution.⁸⁷ The Constitution provides that ‘everyone has the right to have access to health care services including reproductive health care’,⁸⁸ sufficient food and water,⁸⁹ and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.⁹⁰ It further provides that no one can be denied emergency medical treatment.⁹¹ Also, it makes provision for ‘basic health care services’ for children.⁹² Therefore, the right to health is a justiciable right in South Africa.⁹³ These provisions are commendable because they show the crucial place of right to health in the country’s fundamental law. More importantly, the right to health is perceived from a broad perspective; it encapsulates access to sufficient food and water and even in instances where persons do not have the means to do so. Elaborate as this provision is, it does not cover food safety; it merely mentions ‘sufficient food.’ The need for food safety to be subsumed as the right to health is justified on the ground that ‘sufficient food’ may be unsafe.

It is important to briefly examine the attitude of the court in enforcement of the right to health in South Africa. In *Soobramoney v Minister of Health*⁹⁴ the Constitutional Court had to examine the right to have access to health care services in emergency situations. The facts of the case are that the appellant, an old unemployed man, had suffered from heart disease, diabetes and cerebrovascular disease. He subsequently had a stroke due to his health complications. In 1996, the conditions of his kidney deteriorated and later failed hence the need for survival through regular renal dialysis. He had sought treatment from the renal unit of the Addington State Hospital in Durban, but due to limited health infrastructure, the hospital was unable to meet his demands. Aggrieved, the appellant instituted an action against the

85 Nnamuchi (n 82) at 483.

86 (2004) AHRLR 205, <http://www.chr.up.ac.za/index.php/browseby-subject/419-nigeria-odafe-and-others-v-attorney-general-and-others-2004-ahrlr-205-nghc-2004.html> (accessed 16 July 2022).

87 P Roger ‘South Africa’s right to health care: international and constitutional duties in relation to HIV/AIDS epidemic’ (2004) 11(2) *Human Rights Brief* 9-12.

88 Sec 27(1)(a).

89 Sec 27(1)(b).

90 Sec 27(1)(c).

91 Sec 27(3).

92 Sec 28(1)(c).

93 L Forman ‘Justice and justiciability: advancing solidarity and justice through South Africans’ right to health jurisprudence’ (2008) 27(3) *Medicine and Law* 661-83.

94 (Kwazulu-Natal) (CCT32/97)[1997] 17.

hospital for breach of his right to health. Justice Chaskalson held that the appellant's right had not been violated because the state had limited resources to provide a renal machine for his dialysis treatment.

In the light of the above decision, one wonders whether the right to health is enforceable in South Africa. An appraisal of this decision shows that the Court was careful in acknowledging the enforceability of the right to health, but remarked that the enjoyment of the right is subject to the availability of medical facilities. This rationale, though sound, is capable of providing shields for the state in instances where resources designed for purchase of health facilities may have been embezzled. Therefore, before the right to health can be limited, the right to accurate information on state resources should be respected.

At the regional level, Nigeria and South Africa are state parties to the African Charter on Human and Peoples' Rights, 1981,⁹⁵ Today, the Charter has been incorporated as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act under the Nigerian laws.⁹⁶ The Act provides that provisions of the Charter shall 'have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'.⁹⁷ Interestingly, the African Commission on Human and Peoples' Right is the body vested with the power to interpret the African Charter and ensure that member states conform to their obligations enshrined in the Charter. Accordingly, in the famous case of *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*,⁹⁸ the African Commission charged the Nigerian government to ensure protection of the environment including health and livelihood of the people. To do otherwise amounted to a violation of article 16 of the Charter. Other regional treaties are the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Also, the enforcement of fundamental human rights, including the right to health is vested in the Community Court of Justice (ECOWAS) Court.⁹⁹ The Court is empowered to determine cases of violation of rights that may occur in any member state. The power of the Court is premised on the provisions of article 9(4) of the Supplementary Protocol 2005 of the Court which amended Protocol (A/P17/91).

At the international level, Nigeria and South Africa are signatories to the United Nations Charter, 1945. The Charter provides that the

95 African Charter on Human and Peoples' Rights: ratification table <https://www.achpr.org/ratificationtable?id=49> (accessed 3 July 2022).

96 Cap A1 Laws of the Federation of Nigeria 2004.

97 Sec 1(1).

98 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001).

99 FC Nwoke Alternative platform for the protection of Human Rights in the West African Sub-Region: ECOWAS Court in perspective, being a lecture delivered at the 17TH Justice Idigbe memorial lecture held on 18 June, 2019 at the Akin Deko Main Auditorium, University of Benin, Benin-City.

United Nations shall promote 'solutions of international economic, social, health, and related problems; and international, cultural and educational cooperation'.¹⁰⁰ Another international instrument, binding on Nigeria and South Africa as state parties, that promotes the recognition and enforcement of the right to health is the Convention on the Rights of the Child. This Convention provides that state parties shall recognise the child's right to the enjoyment of the highest attainable standard of health. The Convention also provides that the child shall be entitled to facilities for treatment of illness and health rehabilitation. State parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.¹⁰¹ The Convention places an obligation on state parties to 'combat disease and malnutrition, including within the framework of primary health care', through the application of technology provision of 'adequate nutritious food' and clean drinking-water, taking into consideration risks of environmental pollution. This provision captures the provision of adequate nutritious food, but this does not translate to incorporating food safety in right to health.

Nigeria is a state party to this Convention. Rose Nathan¹⁰² strongly advocates for protection of the child's right to food but did not address the kind of food – whether safe, adequate or nutritious. The need for expansion of the literature on the right to health to accommodate food safety is imperative. It is important to provide adequate and safe nutrition early in life to avert irreparable damage to the developing brain and body. Again, food safety is of immense importance because unsafe food might impact a child's ability to learn.¹⁰³ In Nigeria, the government has taken steps to improve the health status of school children by providing at least one meal for them.¹⁰⁴ However, there appears to be a dearth of empirical evidence on the safety and quality of food consumed in school. There is a need for further research because foodborne illness may even lead to missed days of school.¹⁰⁵ True, providing at least one meal per day might not improve health status unless the meals are safe and sufficient in macro and micronutrients needed for a healthy and active life. In addition, there has been little evidence linking children's improved nutrition and health outcomes to school meals. Still, others are of the view that the main goal of many such programmes is to improve school attendance rates.

100 Art 55(b).

101 Art 24.

102 R Nathan 'Realising Children's rights to adequate nutrition through National legislative reform' https://www.unicef.org/policyanalysis/files/Realising_Children_Rights_to_Adequate_Nutrition_through_National_Legislative_Reform.pdf (accessed 27 August 2020).

103 UC DAVIS Centre for Nutrition in Schools *Food safety for school nutrition programs participant manual* (Cal-Pro-NET Center, University of California, Davis In association with the California Department of Education, Nutrition Services Division, 2017), https://cns.ucdavis.edu/sites/g/files/dgvnksk416/files/inline-files/food_safety_participant.pdf (accessed 2 March 2022).

104 OS Falade 'School feeding programme in Nigeria: the nutritional status of pupils in a Public Primary School in Ile-Ife, Osun State, Nigeria(2012) 3 *Food and Nutrition Sciences* 596-605.

105 UC DAVIS (n 103).

5 RESOLVING HEALTH IMPLICATIONS OF FOOD SAFETY THROUGH HUMAN RIGHTS APPROACH

As earlier noted in this article, there are health implications of food safety. The presence of pathogens such as Salmonella, Campylobacter in food often causes Foodborne illnesses which may be large and can be a serious public health issue.¹⁰⁶

WHO Constitution provides that ‘... the highest attainable standard of health as a fundamental right of every human being’.¹⁰⁷ This suggests that health should be incorporated as a fundamental right places an obligation ‘on states to ensure access to timely, acceptable, and affordable health care of appropriate quality as well as to providing for the underlying determinants of health’.¹⁰⁸ A state’s obligation to support the right to health – including through the allocation of ‘maximum available resources’ to progressively realise this goal – is reviewed through various international human rights mechanisms including the Committee on Economic, Social and Cultural Rights.

The right to health includes some core components.¹⁰⁹ The first is availability. This refers to the need for a sufficient quantity of functioning public health and health care facilities, goods and services, as well as programmes for all. Accessibility requires that health facilities, goods, and services must be accessible to everyone. This covers non-discrimination, physical accessibility, economical accessibility and information accessibility. The third component is acceptability which deals with respect for medical ethics, culturally appropriate, and sensitivity to gender. Acceptability requires that health facilities, goods, services and programmes are people-centred and cater for the specific needs of diverse population groups in accordance with international standards of medical ethics for confidentiality and informed consent. The final component is quality which stipulates that facilities, goods, and services must be scientifically and medically approved. They must be safe, timely, effective and people-centred.¹¹⁰ Having elucidated the components of the right to health, there is also a need for food safety to be clearly integrated in the right to health.

106 World Health Organization. WHO Global Strategy for Food Safety : Safer Food for Better Health (2002) <https://apps.who.int/iris/bitstream/handle/10665/42559/9241545747.pdf> (accessed 16 June 2022).

107 Constitution of the World Health Organisation 1946.

108 Sec 17(3)(d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011).

109 WHO: ‘Human rights and health’ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> (assessed 14 July 2022)

110 As above.

6 RECOMMENDATIONS AND CONCLUSION

6.1 Recommendations

6.1.1 Need for advancing the right to health

It has been noted that the right to health in South Africa is justiciable. This constitutional provision is commendable because it does not give room for ambiguity as to the enforceability of the right to health. However, it is desirable that the scope of the provisions be widened to embrace food safety. This would stimulate the government to ensure that the whole gamut of the food chain is safe for the consumer. In Nigeria, as earlier mentioned, the right to health, though non-justiciable, can be enforced through National Health Act 2014 and African Charter on Human and Peoples' Rights. This position paves way for escaping the consequences of violating the right to health. Indispensable as the right to health is, especially in its correlation with other rights, it should be embedded in the constitution as a fundamental right. Also, food safety should be included as its core ingredient.

6.1.2 Need for intersection of right to health and food safety law

If the right to health is entrenched in the Constitution in both jurisdictions, then it follows that all other laws must bow to it. Against this backdrop, it is suggested that the existing food safety laws in both jurisdictions recognise the right to health. In South Africa, the Constitution provides that 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'. By implication, human rights embodied in the Constitution must guide every law in South Africa.¹¹¹ Therefore, food safety laws must reflect the right to health under the Constitution. Other recommendations are that governments in both jurisdictions should provide food testing laboratories in line with international standards to check cases of unsafe food in fulfillment of the right to health. At the regional level, Africa should develop a unifying and concise framework that would cater for enhancing food safety through the eyes of the right to health.

6.2 Conclusion

Unsafe food continues to pose a serious global challenge. Nigeria and South Africa are not left out as the media is often awash with cases of foodborne diseases. This reflects government shortcomings in meeting

¹¹¹ A background to health law and human rights in South Africa' <https://section27.org.za/wp-content/uploads/2010/04/Chapter1.pdf> (accessed 19 July 2022).

international obligations to ensure that food that gets to the table of all citizens, from the farm through production, processing, transportation, storage and sale is safe for human consumption. The close interconnection between food safety and human health was established thus illustrating the need for the right to health to be expanded to clearly encompass food safety. It is not sufficient for the right to health to embrace normative attributes such as clean water, and safe food, it must extend to holding the government accountable for health issues that often arise due to its failure to effectively regulate the whole gamut of the food chain. Commendably, the right to health is unequivocally recognised as a fundamental right in South Africa, as opposed to what is obtainable in Nigeria where the right to health is non-justiciable. However, this is not enough; the components of the right to health must be clearly articulated to embrace food safety.