

## TOWARDS THE ENTRENCHMENT OF HEALTH RIGHTS IN NIGERIA\*

**Abstract**

*There is a cheap leverage levied on the provisions of chapter II, specifically section 17 (3) (d) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), that seeks to undermine the 'fundamental objectives and directive principles of State policy', with specific reference to health rights and its justiciability within the Nigerian legal framework. The above constitutional provision is without doubt captured under the socio-economic and cultural rights (a non-justiciable chapter), it however does not by any means restrict the justiciability of health rights or other socio-economic rights under this chapter from further realization, recognition, protection and promotion through legislative enactments or state obligation at the international and regional levels. This article adopts a library-based research (doctrinal research methodology), which seeks to unveil the ingenuity of health right in Nigeria within the scope of existing legal frameworks on human rights in Nigeria. The research found that there is an ingenuity of health rights within the existing legal framework and thus, concluded that health rights are justiciable fundamental human rights within the context of the available legal framework in Nigeria.*

**Keywords:** Nigeria, Health, Health Rights, Constitution, Justiciability.

**1. Introduction**

The most widely accepted view in Nigeria is that health rights are by the consequence of the federal constitution a non-justiciable rights<sup>1</sup>, although accepted as a human rights.<sup>2</sup> What may not have been revealed about the constitutional provision is whether the 'claimed' constitutional restraining provision is self-exhaustive of the overall health rights or capable of restraining other legal frameworks that recognizes, protects and promote health rights in Nigeria. The 1999 Constitution of the Federal Republic of Nigeria (as amended)<sup>3</sup> under its fundamental objectives and directive principles of State policy imposes a duty and responsibility on government at all level and organ<sup>4</sup> to conform and apply the provision of chapter of the Constitution. The wording of the constitution suggests a mandatory duty (when the constitution used the word 'shall') on the three arms and tiers of government. The Supreme Court of Nigeria noted that there is a sacred duty imposed on all arm and level of government by the constitution to protect and promote the provision of chapter II of the constitution.<sup>5</sup> More so, there is no explicit or implicating provision under the forgoing chapter or the Constitution at large that prevents legislations<sup>6</sup> or treaties which recognizes, promote and protect any of the items mentioned under the chapter or with specific reference to health rights, moreover, the constitution envisages the need for domestication of treaties<sup>7</sup> entered in to by the federation as an Act of the National Assembly.<sup>8</sup> Thus, this research is divided into 5 segments; the first which is the introductory part of the research, the second part covers analysis of health rights within the purview of international legal frameworks, the third part deals with regional legal framework, the fourth part deals with domestic law and the last segment is the conclusive part of the research.

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<sup>1</sup> Nwabueze, R., The Legal Protection and Enforcement of Health Rights in Nigeria, in C. Flood & A Gross (Eds.), *The Right to Health and Public/Private Divide: A Global Comparative Study* (Cambridge University Press, Cambridge, 2014) pp 371-393; Femi Falana, Nigeria: Health As Human Right, [www.allafrica.com/stories/201712200373.html](http://www.allafrica.com/stories/201712200373.html) accessed 13/09/2020.

<sup>2</sup> Ibid.

<sup>3</sup> Hereinafter the 1999 Constitution (as amended)

<sup>4</sup> Section 13 of the 1999 Constitution (as amended)

<sup>5</sup> *Attorney General of Ondo State v. Attorney General of the Federation & 35 Ors* (2002) 9 NWLR pt 772 p 222 – 381.

<sup>6</sup> Section 11 (1) of the 1999 Constitution (as amended)

<sup>7</sup> Section 12 (1) of the 1999 Constitution (as amended)

<sup>8</sup> For example, the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap A 9. Laws of the Federation of Nigeria 2004; the Childs Right Act, Cap C50. Laws of the Federation of Nigeria 2010, are good examples of the extant application of section 12 (1) of the 1999 Constitution.

## 2. International Legal Framework on Health Rights

Nigeria is a member of the United Nations (UN), the World Health Organization (WHO) and several international regional bodies that seek to promote world peace, while harmonizing the standards for human rights.<sup>9</sup> Nigeria in the quest to promote human rights and meet the global needs of human dignity has entered into and as well several treaties, covenant and conventions at the international level, among which are;

- i. The Universal Declaration of Human Rights (1948)
- ii. Convention on the Elimination of all Forms of Racial Discrimination (1965)
- iii. International Covenant on Economic, Social and Cultural Rights (1966).
- iv. Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- v. Convention on the Rights of the Child (1989)
- vi. Convention on the Rights of Persons with Disabilities (2006)

The above are some of the international instruments in which Nigeria is a voluntary signatory to, which seeks to promote health rights. The Universal Declaration of Human Rights which is the basic international human rights instrument that seeks the promotion of world peace recognizes the right to health and medical care. The Declaration puts it that ‘everyone has a right to a standard of living adequate for the health of himself and his family, including food, clothing, housing, and medical care and necessary social services’<sup>10</sup> This provision enjoys states to enhance the living standard of individuals through the provision of such basic need and infrastructures that uplifts the standard of living and availability of health care services. Though the Universal Declaration of Human Rights at its onset was not a binding instrument within the purview of international law, most of its provisions have gained the status of international customary law<sup>11</sup>. Furthermore, the UDHR may have placed health rights under the socio-economic rights,<sup>12</sup> it is however intuitive to maintain that Nigeria has an obligation under international customary law to fulfil the mandates therein.<sup>13</sup> The 1965 Convention on the Elimination of all Forms of Racial Discrimination also articulated an obligation<sup>14</sup> on state parties to guarantee both civil and political rights and the Economic, Social and Cultural rights. It provided for the guaranteeing of health rights under Economic, Social and Cultural Rights, when it maintained that ‘in compliance with the fundamental obligations laid down in article 2 of this Convention ...notably the enjoyment of the following rights’,<sup>15</sup> ‘(e) Economic, social and cultural rights, in particular’<sup>16</sup>, ‘(iv) The right to public health, medical care, social security and services’.<sup>17</sup> The above provision also suggests that there is an obligation placed on state parties to the convention to guarantee health rights with the domain of the state without any form of discrimination. It is however pertinent to mention that just like the Universal Declaration of Human Rights instrument, the CERD also placed health rights under the Social, Economic and Cultural rights provision, a second-generation rights which is mostly relegated to an unenforceable right.

On the part of the International Covenant on Economic, Social and Cultural Rights, which has a ratification of over 145 countries including Nigeria, the CESCR recognises and guarantees the to the enjoyment of the highest attainable standard of health (physical and mental) for everyone.<sup>18</sup> The CESCR further elaborated on the steps to be taken by state parties to the covenant towards achieving the full realisation of health rights.<sup>19</sup> The unique and reoccurring feature of the forgoing international legal

<sup>9</sup> Universal Human Rights Declaration

<sup>10</sup> Article 25 (1), Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 76 (1948).

<sup>11</sup> Riedel E., ‘The Human Right to Health: Conceptual Foundations’ in A. Clapham and M. Robinson (eds) *Realizing the Right to Health* (Ruffer & Rub, 2009) p21- 22.

<sup>12</sup> Paulius Colkis, Egle Venckiene, ‘Concept of the Right to Health Care’ (2011) 18 (1) *Jurisprudencija*. P. 276

<sup>13</sup> Ibid.

<sup>14</sup> Article 2, Convention on the Elimination of all Forms of Racial Discrimination (1965).

<sup>15</sup> Article 5, *ibid*

<sup>16</sup> Article 5 (e), *ibid*.

<sup>17</sup> Article 5 (e) (iv), *ibid*.

<sup>18</sup> Article 12 (1), International Covenant on Economic, Social and Cultural Rights (1966)

<sup>19</sup> Article 12 (2), *ibid*.

frameworks is that the instruments have consistently captured health rights as a positive right (socio-economic rights) which is a second generation human right. Thus, the progressive realisation of state obligation with respect to health rights under these instruments may turnout difficult, especially where there are legal constrains poised by local legislation.<sup>20</sup>

The Convention on the Elimination of all Forms of Discrimination Against Women also recognises and articulated the protection against discrimination of health rights of women and childcare including reproductive right.<sup>21</sup> The convention stresses the need of the women's right of access to adequate care while pregnant. The Convention on the Rights of the Child<sup>22</sup> also underscores the right of a child to the highest attainable standard of health, treatment of illness and health rehabilitation. The convention also places an obligation on state parties to deploy state resources towards the realization of the rights of a child. The Convention on the Rights of Persons with Disability also recognises and guarantees the individuals health rights<sup>23</sup> and as well places an obligation on state parties to the convention to protect and promote such rights.

The bulk of the forgoing international legal frameworks are quit promising as far as health rights recognition, protection and promotion is concerned. It however slips off its grasps as far as conformity and realisation of the obligations placed on states to progressively realize such obligation. This could be argued based on the fact that the nature of obligations placed on the state parties does not suggest progressive means, especially when there is no political will to discharge such obligation, and more so, where there are constrains placed by local legislation as mentioned previously. Thus, the scenario would have been a bit different, especially where the political will is not in place, if the obligation of the use of state resources where to be borne out of a mandatory legislative (with financial implication) backing at the domain of the state.

Furthermore, the WHO proposed recommendation of budgetary expenditure of 5% of GDP on health<sup>24</sup> or a percentage of states annual budgetary allocation may not be a welcome step towards the realization of health rights obligation by state parties, this is so because the budgetary need of the health care sector of the may be under-allocated of the needed resources or over-allocated with needed and necessary resources, which in turn may likely contribute to mismanagement of public fund and even inflation. State parties often seek refuge with the language of scarce or limited resources at the disposal of the state in realizing health rights obligation to progressively promote the health needs of their state, it is evident that the covid19 pandemic reveals otherwise, as the continuous failure of state powers to channel the needed resources of the state towards realizing health right obligation is based on lack of political will to so do.

Furthermore, Nigeria though a signatory to all of the forging international law instrument, its membership and signatory to the organization and instruments respectively, does not translate health rights within the contemplation of the forging international law instrument as justified rights or guarantee any form of remedy in the case of breach either by the state or a third party. This is due to the domestic legislative constraints imposed under the 1999 Constitution. Thus, these constraints render any international treaty entered into by Nigeria as unenforceable subject to its domestication by the National Assembly.<sup>25</sup>

The crux of the foregoing is that none of the above-mentioned international law instruments have a clinch of the force of law in Nigeria unless it is domesticated as a National legislation by the national legislature.

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<sup>20</sup> Sec 12 of the 1999 Constitution that places restriction on international treaties and the like; Oba A. A. The African Charter on Human and Peoples' Rights and Ouster lauses under the Military Regime in Nigeria: Before and After September 11, (2004) 4 African Human Rights Law Journal, p 279-280

<sup>21</sup> Article 11 (1) (f), 12 and 14 (2) (b), Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

<sup>22</sup> Article 24, the Convention on the Rights of the Child (1989).

<sup>23</sup> Article 25, Convention on the Rights of Persons with Disability (2006)

<sup>24</sup> William S., *How Much Should Countries Spend on Health?* (World Health Organization, Geneva 2003) p 9-10

<sup>25</sup> Sec 12 (1), 1999 Constitution.

The above submission is a core position of the 1999 Constitution, which provide that ‘This Constitution is supreme and its provision shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria’,<sup>26</sup> ‘if any law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of its inconsistency, be void’<sup>27</sup>. This inconsistency rule alongside the supremacy clause of the Constitution strips off the forgoing international law instruments the force of law. The Supreme Court of Nigeria has upheld the supremacy clause and inconsistency rule in a plethora of cases.<sup>28</sup>

### 3. Regional Legal Framework on Health Rights

On the regional aspect of the legal framework, Nigeria is a state party to the Organization of African Unity (now African Union, AU) and a front liner of Economic Community of West African States (ECOWAS). However, ECOWAS is a trade zone organization and its instrument will not be countenanced for the purpose of this article. The African Union is a regional body put in place by African State leader to promote Africa. Thus, the AU through her general assembly passed and adopted the resolution that brought in to force the African Charter of Human and Peoples Rights<sup>29</sup> (ACHPR) and the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>30</sup>. The ACHPR and the ACRWC are both regional instruments that seek to promote the dignity of the African People and children. The ACHPR unlike the forgoing international instruments, has a unique feature that keys in both civil and political rights and the economic, social and cultural rights as a one and holistic right, or at the minimal places no distinction between the classes of rights.<sup>31</sup> Thus, the unnecessary argument of positive, negative, justiciable and non-justiciable right will not arise in the implementation and realisation of the rights recognised and guaranteed therein. Furthermore, and just as suggested previously, the ACHPR places a duty on parties of the AU to undertake and adopt ‘legislative or other measures’<sup>32</sup> to give effect on the rights, duties, obligation and freedoms recognize therein.

The ACHPR in a bid to drive its implementation and enforcement, the ACHPR established a Commission<sup>33</sup> to protect and promote human and peoples right in Africa and even investigate<sup>34</sup> and entertain complains against a state party that violates the provision of the ACHPR.<sup>35</sup> Thus, the ACHPR gave the appropriate and comprehensive position for the needed understanding of the interrelationship and interdependence of the two generation of rights (first and second). The ACHPR which places no distinction between civil and political rights and the economic, social and cultural rights, articulated thus;

Every individual shall have the right to enjoy the best attainable state of physical and mental health<sup>36</sup>  
States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick<sup>37</sup>

The above provision of the ACHPR underscores the right to health as fundamental human right and places an obligation on states to take adequate measures at ensuring the sustainable realisation of same.

<sup>26</sup> Sec 1 (1), *ibid.*

<sup>27</sup> Sec 1 (3), *ibid.*

<sup>28</sup> *Nura Ochala v. Federal Republic of Nigeria*, Appeal No. SC. 728/2013 (judgment delivered by the Supreme Court in January, 2016) (Court of Appeal citation: *Nura Ochala v F. R. N.* (2014) All FWLR [pt. 758] 869).

<sup>29</sup> OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982), adopted 27 June, 1981 and came into force 21 October 1986.

<sup>30</sup> African Charter on the Rights and Welfare of the Child (ACRWC) AHG-RES- 197-XXVI-e. was adopted in 1990 by the Organization of African Unity (OAU), which legally became the African Union (AU) in 2001. Available at <https://www.acerwc.africa/about-the-charter/> accessed 18<sup>th</sup> October, 2020.

<sup>31</sup> Preamble, *ibid.*

<sup>32</sup> Article 1, *ibid.*

<sup>33</sup> Article 30, *ibid.*

<sup>34</sup> Article 46, *ibid.*

<sup>35</sup> Articles 45, 47, 48, 49, 50, 51, 52, 53, & 54, *ibid.*

<sup>36</sup> Article 16 (1), *ibid.*

<sup>37</sup> Article 16 (2), *ibid.*

The ACRWC also recognises the unique position of the African child and the need for special attention, love, protection and care for the child due to their moral and mental immaturity, embarrassed the fact that to realize the desired goal in protecting the rights and interests of the child in Africa, such could best be achieved through a legal protection (legal instrument). The ACRWC just like other international and regional instruments; recognises that health is a necessary component in the development of the child. The ACRWC thus comprehensively puts and guarantees the health rights of a child as follows:

Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

State Parties to the present Charter shall undertake to pursue the full implementation of these rights...<sup>38</sup>

The above provision further underscores an entrenched health right (for the child) with an obligation on the State (Nigeria) to take measures at fully implementing the health rights of the child, to wit the State has an obligation to minimize infant and child mortality; provision of necessary medical and health care assistance to the child, through the development of primary health care centers; provision and access to nutrition food and clean and safe drinking water; prevent disease; develop preventive health care services; design programmes on basic health in the States developmental plans; etc. these obligations on the part of the government are of immediate and necessary actions for their sustainable realization. However, the challenges faced in the realisation of governments obligations towards the health rights of its people is lack of political will to act or take positive steps through proper provision of needed resources for the realization of their obligations under the various international and regional human rights instrument that guarantees health rights. Thus, arguments are often put forward to justify the ill-informed position of government, that available resources at the disposal of government are limited and that governments obligations on international and regional instruments (treaties) are not binding or rather restricted by constitutional caveats, hence, the individuals or group of individuals cannot approach the courts to enforce these treaties.<sup>39</sup> The above impediments will be discussed below.

#### **Scares resources:**

The arguments of scares resources at the disposal of government for the progressive realisation of health rights obligation have often been put forward to justify the lack of political will on the part of government to channel the needed resource for the realisation of health rights in general.<sup>40</sup> Interestingly, the essence of modern states and governments is for the enhancement of the welfare of the people it governs, thus, if all the resource available at the disposal of the government is channeled towards the welfare of her people, it cannot be underscored as an unrealistic and unsustainable pursuit as suggested by Loefer.<sup>41</sup> Surprisingly, the Constitution underscores the position that the essence and constitutional duty of the government is for the good government<sup>42</sup> and welfare<sup>43</sup> of the people of Nigeria. Hence, no nation of unhealthy people can progress, politically, economically or culturally. Indeed, when the necessary and adequate attention and resources are channeled towards attaining the highest attainable standard of medical and health care facilities and commodities in a State, the implicating outcome is that economic development and productivity in terms of the human resources is guaranteed at a premium output.

#### **Constitutional restriction:**

The second and of ought most importance for discussion, the impediment created under the supreme legal instrument in Nigeria. Thus, the ACHPR and the ACRWC just like other international instruments (treaties) lacks legal recognition and has no force of law in Nigeria. This is owing to the restriction

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<sup>38</sup> Article 14 (1 & 2) of the ACRWC.

<sup>39</sup> Section 6 (6) (c) of the 1999 Constitution (as amended), *ibid*.

<sup>40</sup> Loefer, I. J. P., 'Health Care is Human Right' is a meaningless and devastating manifesto' (1999) 318; Bole, T. J., 'The Rhetoric of Rights and Justice in Health Care' in T. J. Bole & W. B. Bondeson (eds), *Right to Health Care* (Kluwer, London 1991). 1-16.

<sup>41</sup> Loefer, I. J. P., (n 40 above).

<sup>42</sup> Sections 4 (2) & 5 (1) (a & b) of the 1999 Constitution (as amended), *ibid*.

<sup>43</sup> Section 14 (2) (b) of the 1999 Constitution (as amended), *ibid*.

placed thereon by the Constitution.<sup>44</sup> Going by the aforementioned provision of the 1999 Constitution, the specific provision of section 12 (2) of the Constitution provides thus: ‘No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.’ This provision is the basis for the existence of any foreign/international instrument that has a flavor of law in it or of any legal status that requires judicial reliance to enforce any legal right, duty or obligation therein. Thus, when the Federation enters into any international treaty or signs any international customary law instrument, such an instrument shall not be enforceable in Nigeria to the extent of its non-domestication by the National Assembly. However, and in reality, contravention of the provisions of the ACHPR by a state party can be entertained by the African Commission on Human and Peoples Rights<sup>45</sup> and the African Court on Human and Peoples’ Rights.<sup>46</sup>

In *The Social and Economic Rights Action Centre (SERAC) & the Centre for Economic and Social Rights (CESR) v. Nigeria*<sup>47</sup>, although crux of the suit was not on health rights, the Court however stressed the fundamental nature of health rights. The drive here is that the Court has, irrespective of the constitutional restraints, jurisdiction over Nigeria and has exercised same in the above case. In other words, while the domestic courts in Nigeria may refrain or decline to give effect to the ACHPR in Nigeria, the regional court is adequately equipped to distill matters emanating from the contravention of the Charter by a state party including Nigeria<sup>48</sup>.

#### 4. National Legal Framework on Health Rights in Nigeria

In Nigeria, the supreme law is the constitution and every other legislation, treaties or other instrument that has the flavor of law and operational in Nigeria, must have a link of its existence traceable to the constitution.<sup>49</sup> In the event that such law or instrument (be it national, state, regional or international instrument) fails to have the support of the constitution or contravene any of the provisions of the constitution, such law, instrument or otherwise, by its inconsistency with the provisions of the constitution, is deemed void *a ab initio* and of no legal effect by any form of necessity or implication.<sup>50</sup> The Constitution of the Federal Republic of Nigeria, only took cognizance of health when it stated that ‘the state shall direct its policy towards ensuring that - ... (c) the health, safety and welfare of all persons is safeguarded... (d) there are adequate medical and health facilities for all persons’<sup>51</sup>. This constitutional provision is the most referred to and only constitutional legal framework on health. While this may have translated to relegating some position of health rights to a non-justiciable rights, it is however pertinent to state that there is no constitutional provision that prohibits the legislative arms of government from enacting law (be it an Act by the National Assembly or a Law by any of the federating States) that gives legal status (justiciable status) to those components mentioned under section 17 (3) (c) & (d) of the 1999 Constitution or any other aspect of health rights. In fact, section 45 (1) (a) of the same constitution permits for the derogation of any or all of the guaranteed fundamental human rights under chapter IV of the constitution in the interest of public health. The above is evident during the Covid19 pandemic when the government at the national level declared a lockdown of the whole nation without access to court, means of livelihood, freedom association and movement, etc., in the interest of public health. This shoulders high the fact that health is key in the face of all other fundamental right and that protecting the public health right of the citizens is crucial and core for the human dignity.

Coming back to the national legal frameworks on health rights in Nigeria, it will interest us to know that there is or are no specific or particular homemade legal framework on health rights in Nigeria. Thus, the existing legal frameworks on health rights in Nigeria are all of domesticated international and

<sup>44</sup> Section 12 (1) of the 1999 Constitution (as amended), *ibid*.

<sup>45</sup> Article 21, 45, 46 – 53 of the ACHPR, *ibid*.

<sup>46</sup> Article 1 of the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples’ Rights.

<sup>47</sup> Communication 155/96, in Fifteenth Report of the African Commission on Human and Peoples’ Rights 2001, 259, 287.

<sup>48</sup> Article 3 of the Establishing Protocol, *ibid*; *Purohit and Moore v. The Gambia*, Communication 241/2001, para 80; *Free Legal Assistance Group and Others v. Zaire*, Communication No. 25/89, 47/90, 56/91, 100/93.

<sup>49</sup> *Nura Ochala v. Federal Republic of Nigeria* (n 28 above).

<sup>50</sup> Section 1 (3) of the 1999 Constitution (as amended), *ibid*.

<sup>51</sup> Sec 17 (3) of the 1999 Constitution (as amended), *ibid*.

regional legislation, thus, the ingenuity of health rights in Nigeria are of international and regional instrument domesticated in conformity with the 1999 Constitution.<sup>52</sup> In essence, the existing legal frameworks are drawn from the following:

### **African Charter on Human and Peoples Rights (Enforcement and Ratification) Act<sup>53</sup>**

The African Charter Act is a federal legislation in Nigeria that domesticated<sup>54</sup> the convention (African Charter on Human and Peoples' Rights) of the then Organization of African Unity, now known as the African Union (AU), as a national legislation whose provision have the force of law and recognized in Nigeria as such by all persons and authorities (legislative, executive and judicial authorities). The unique feature of this piece of legislation is that the legislation underscores no dichotomy on the classes of rights (i.e., civil and political rights; social, economic and cultural rights; or that of common heritage). The legislation affirms that there are no distinctions between civil and political rights and the social, economic and cultural rights. Thus, its preamble suggested that for the enjoyment of civil and political rights, the satisfaction of socio-economic rights are guaranteed and same cannot be disassociated from that of civil and political rights. This indeed sets the pace for a harmonized human rights regime (though only few of its provisions are readily acquainted to the public) in Nigeria. The African Charter Act among other rights articulated and guaranteed the health rights of the Nigerian people and as well setting an obligation on the part of the government at all level to take steps, including legislative measures, for the recognition, protection and realisation of the rights thereunder. The African Charter Act articulated for health rights as follows: 'Every individual shall have the right to enjoy the best attainable state of physical and mental health'<sup>55</sup> 'States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'<sup>56</sup>

What the above provisions means are that health rights is a guaranteed, justiciable and enforceable right in Nigeria; that government at all level and tier have a statutory obligation under the African Charter Act, to recognize, protect and promote the health rights of the people in Nigeria; that in the quest of realizing these rights and the obligations created thereunder, government are to progressive steps at fulfilling the health needs of the people of Nigeria, which entails the provision of accessibility to medical and health care facilities without any form of discrimination; access to nutritious food, clean water and environment; healthy working condition; develop guidelines, protocols, action plan and map for their programmes; put in place regulatory mechanisms and institutional machineries to regulate the training and re-training of health care workers, etc. Unlike in the area of rights to life, fair hearing,<sup>57</sup> personal liberty, education, freedom of movement; health rights under the African Charter Act is yet to be explored by the people of Nigeria through judicial litigation as done in the sphere of other rights therein, indeed the ACA is one of the most litigated human of legislation in Nigeria for the enforcement of human rights.<sup>58</sup>

### **Child's Rights Act 2003<sup>59</sup>**

The Childs Rights Act was enacted into law by the National Assemble in 2003 in an effort to fulfill Nigeria's obligation (as part of the measures taken to fulfill the rights of the child) to domesticate the UNs' CRC and AUs' ACRWC.<sup>60</sup> The Childs Right Act is an elaborate and far reaching legislation on the rights and welfare of the Nigerian child. The CRA underscores a child as a person under the age of 18 years.<sup>61</sup> The CRA among the various rights and welfare packages recognised as essential and

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<sup>52</sup> See sec 4 and 12 of the 1999 Constitution (as amended).

<sup>53</sup> Cap A9 Laws of the Federation of Nigeria, 2004 (hereinafter the African Charter Act).

<sup>54</sup> Domesticated in accordance with section 12 (1) of the 1979 Constitution of the Federal Republic of Nigeria.

<sup>55</sup> Part 2 Article 16 (1) of The African Charter Act, *ibid*.

<sup>56</sup> Part 2 Article 16 (2) of The African Charter Act, *ibid*.

<sup>57</sup> *General Sani Abacha and Others v. Chief Gani Fawehinmi* [2004] 4 SCNJ 401.

<sup>58</sup> C. D. LongJohn, *Implementation and Application of Treaty in Nigeria* [www.nails-nigeria.org/projects/IMPLEMENTATION\\_PROJECT.pdf](http://www.nails-nigeria.org/projects/IMPLEMENTATION_PROJECT.pdf) 16 October, 2018.

<sup>59</sup> Cap C38, Laws of the Federation of Nigeria, 2010. (Hereinafter the 'CRA').

<sup>60</sup> Anushiem. M. I., & Ehujuo C. Kingsley., 'Implementation of Treaty as Basis for Regional Cooperation Vis-à-vis Absolute Sovereignty: Nigeria in Perspective' (2017) 8 (1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 168.

<sup>61</sup> Section 21 of the CRA,

fundamentally guaranteed for the benefit of the child, acknowledges that the child is entitled to enjoy the best attainable mental, spiritual and physical state of health, this includes the right to vaccination at birth and as well places an obligation on government at all level, parents and guardian of the child to provide the child with the best attainable state of health.<sup>62</sup> The above provision boldly showcases an entrenched health right of the Nigerian child with an obligation on the part of the government to protect such right. Hence, where the government fails to fulfill the duties and obligations created under this legislation, a child through his/her guardian may seek judicial pronouncement to enforce the right of the child under the CRA.

### **Discrimination Against Persons with Disabilities (Prohibition) Act<sup>63</sup>**

Just like the ACHPR, CRC and ACRWC, the Discrimination Against Persons with Disabilities (Prohibitions) Act, was also domesticated as a national legislation as part of the measures (legislative measures) put in place towards achieving the obligations set out under the UNs' CRPD. The DPDA is a special legislation put in place to protect the rights of those with special needs. The DPDA unlike the other human rights legislations that recognises and guarantees health rights, its provision has a unique capturing of the health rights of these special people. The DPDA provides as follows: 'Government shall guarantee that persons with disabilities have unfettered access to adequate health care without discrimination on the basis of disability'.<sup>64</sup> 'A person with mental disability shall be entitled to free medical and health services in all public institutions'.<sup>65</sup> 'A public hospital where a person with communicational disabilities is medically attended to shall make provision for special communication'.<sup>66</sup> The wordings of the above provisions laid emphasis on the health rights of persons with disabilities in Nigeria (when it said 'shall guarantee'). The DPDA as reproduced above did not only guarantee health rights, but also made provision for free medical and health care services for those with mental disability in public health care institutions in Nigeria. This further confirms the ingenuity of health rights (for persons with special needs) in Nigeria through national legal frameworks.

### **Enforceability of the National Legal Frameworks**

Haven introduced the forgoing national legal frameworks as emanating from international and regional legal instruments, the question that may need clarification is whether the domestication of the above international and regional instruments can be enforced owing to the fact that most of the rights contained in these provisions are socio-economic rights which are non-justiciable rights in Nigeria?<sup>67</sup> The Supreme Court of Nigeria held the position that section 4 (2) of the Constitution empowers the National Assembly to make laws for the peace and good government of the federation or any part thereof. Furthermore, it also reiterated that the provisions of section 13 of the Constitution apply to 'all organs of government, and all authorities and persons exercising legislative, executive or judicial powers'.<sup>68</sup> The Federal High Court of Nigeria<sup>69</sup> following the above position of the Supreme Court in its pronouncement on an originating summons which seeks a declaration to enforce a constitutional provision for 'free, compulsory and universal primary education'<sup>70</sup> (though a non-justiciable provision), through the provisions of the Compulsory, Free Universal Basic Education Act of 2004, held that though the constitutional provisions contained under Chapter II of the 1999 Constitution are not enforceable by virtue of the provisions of section 6 sub-section 6 (b) of the same Constitution, it may however become justiciable and enforceable in the courts of law by means of legislative enactment. What this landmark declaration clarifies is that the rights under the provisions of Chapter II of the 1999 Constitution (as amended) could be turned into justiciable and enforceable rights through legislative enactment. That is to say that once the legislative arm of government pass into law any piece of legislation that seeks to give full legal status to any of the provisions of Chapter II of the 1999

<sup>62</sup> Section 13 of the CRA.

<sup>63</sup> 2018, Laws of the Federation of Nigeria (hereinafter Persons with Disabilities Act).

<sup>64</sup> Section 26 (1), Persons with Discrimination Act, *ibid.*

<sup>65</sup> Section 26 (2), *ibid.*

<sup>66</sup> Section 24, *ibid.*

<sup>67</sup> Section 6 (6) (b), 1999 Constitution (as amended).

<sup>68</sup> *A.G. of Ondo State and Others v. A.G. of the Federation* (2002) 9 NWLR (Pt. 722) 222.

<sup>69</sup> *LEDAP (GTE & LTD) v. F.M.E & Another* (2015) Suit No.: FHC/ABJ/CS/978/15.

<sup>70</sup> Section 18 (3) (a) of the 1999 Constitution (as amended).



Constitution, such provision become enforceable and justiciable in accordance with the legislative powers granted under section 4 of the Constitution.

### **5. Conclusion**

In conclusion, it is of no gain to say that health rights are non-justiciable rights within the realm of section 17 of the Constitution when there exist several legislations that recognise, guarantee, protect and promote health rights in Nigeria as legal, justiciable and enforceable rights. It is however necessary to state that while lack of political will remains the biggest obstruction for the realisation of governmental obligations on health rights, it is pertinent that individuals and non-governmental organizations step-up their game through litigation for the entrenchment of health rights in Nigeria. It should further be understood that the fact that an individual has health right does not mean that the government has the duty of making him healthy or provide him with free health care services.<sup>71</sup> He may however claim that the government must put in place the needful things to make him healthy.<sup>72</sup> Thus, government at all level should take a good lesson from the present coronavirus pandemic and strive to make amends to the health care sector through provision of the needed resources for the people of Nigeria to enjoy the best and highest attainable physical and mental state of health.

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<sup>71</sup> Jamar S. D. 'The International Human Right to Health' (1994) 22 *Southern University Law Review*. 13.

<sup>72</sup> *Ibid*. See the recommendations in Ikenga K. E. Oraegbunam, 'Towards Enforcement of Rights to Adequate Health-care in Nigeria Today', *University of Jos Law Journal*, Vol. 10, No. 1, January 2015, pp.263-279. This paper was also published under the same title in *Kogi State University Commercial and Industrial Law Journal*, Vol. 2 No., 2011, pp.80-92.