

# THE NIGERIAN JURIDICAL REVIEW

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The General Editor,  
Nigerian Juridical Review, Faculty of Law,  
University of Nigeria, Enugu Campus, Enugu, Nigeria.  
[nigeriajuridical@unn.edu.ng](mailto:nigeriajuridical@unn.edu.ng), [nigeriajuridical@yahoo.com](mailto:nigeriajuridical@yahoo.com)

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**JUSTIFYING THE RIGHT TO HEALTHCARE IN NIGERIA: SOME  
COMPARATIVE LESSONS\*\*****Abstract**

*Since the introduction of fundamental rights guarantee in Nigeria's constitutional framework in 1960, doubts have remained whether the clause includes the right to health care. The current Constitution of 1999 does not explicitly provide for such a right. Also, its predecessors of 1960, 1963 and 1979 did not expressly stipulate such provisions. However, starting from the 1979 Constitution, the Fundamental Objective and Directive Principles of State Policy provisions have become part of Nigeria's constitutional framework. These provisions require government to pursue policies geared towards meeting certain economic, social, political and cultural objectives. An important part of this commitment is the requirement to ensure the health, safety and welfare of all persons in employment and provision of adequate medical and health facilities for all persons. This constitutional provision is thought to be unenforceable due to a section of the Constitution which seems to derogate from its judicial enforcement. This paper examines the fundamental rights clause, the full implications of the policy clause and the limit of the derogation provision. It is argued that contrary to the conventional view, the right to health care can be located both in the policy and fundamental rights chapters of the 1999 Constitution. The argument is justified in the context of some comparative lessons which can be drawn from some countries especially India, United Kingdom and United States of America, among others.*

**Keywords:** *Fundamental Right, Healthcare, Judicial Enforcement, Policy.*

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\* **Edoba Bright Omoregie, LL.B., BL, LL.M., PhD**, Associate Professor & Ag. Head, Department of Private and Property Law, Faculty of Law, University of Benin, Benin City; email: edobaomoregie@yahoo.com.

+ **Daud Momodu, LL.B., B.L., LL.M.**, Lecturer, Auchi Polytechnic, Auchi, Edo State, Nigeria; email: imamdaud2000@yahoo.co.uk.

## 1. INTRODUCTION

Despite the very important and strategic nature of health care to human life, it appears that the settled perception in Nigeria confines it to the dictates of policy rather than fundamental right. A perfunctory perusal of the 1999 Constitution of Nigeria (as amended) suggests that the issue of health care and the need to ensure the health and safety as well as provision of “adequate medical and health facilities for all persons” in Nigeria are simply regarded as part of the Fundamental Objective and Directive Principles of State Policy enshrined in Chapter II of the Constitution.<sup>1</sup> This constitutional provision is generally thought to be unenforceable or (to use the more accustomed term) non-justiciable, having regard to the provision of section 6(6)(c) of the same Constitution. The section excludes the judicial powers vested in the Constitution from being extended to “any issue or question as to whether any omission by any authority or person or as to whether any law or any judicial decision is in conformity with” Chapter II of the Constitution.

However, an often ignored part of the provision of section 6(6)(c) is the opening clause which seems to permit judicial power vested in the Constitution to extend to Chapter II clause where this is otherwise provided by the Constitution. Thus, it might appear hasty to conclude that at all times and in all circumstances, the Chapter II clause of the constitution is unenforceable. This paper attempts to clarify this exceptional clause in relation to other portions of the Constitution leading to the plausible conclusion that health care is not invariably a policy question. On the contrary, in certain circumstances it could be considered a right-based imperative in Nigeria. After clarifying the idea of fundamental rights, the paper discusses the nature of fundamental rights guarantee in Nigeria and examines the issue of health care as a policy objective in the country. In light of some comparative contexts, it is argued that beyond being a mere policy aspiration, health care should be an enforceable fundamental right in Nigeria. The paper concludes with some closing remarks.

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<sup>1</sup> See section 17(c) and (d).

## 2. FUNDAMENTAL RIGHTS: CONCEPTUAL CLARIFICATION

What constitutes fundamental rights can be understood within the meaning of human rights. Human rights are rights which human beings are entitled to as a result of their being humans and are essential to their existence as living entities.<sup>2</sup> Fundamental Rights, on the other hand, are those set of human rights which have received institutional recognition and are guaranteed to be enjoyed by human beings through the instrumentality of the law. The distinction between human rights as a concept and fundamental right as an imperative is fairly clear: whereas human rights are abstract values, fundamental rights are human rights which have received normative recognition for the purpose of being enforced.<sup>3</sup>

Universality is one of the essential characteristics of human rights.<sup>4</sup> This means that all human beings are holders of human rights irrespective of their station in life, their residence, origin, community or nationality.<sup>5</sup> Thus, human rights are, among others, fundamental to the extent that they are protected and accorded normative and universal recognition because they are considered as essential to human existence.<sup>6</sup> The categories of recognized fundamental rights are numerous and constantly evolving.<sup>7</sup> Nonetheless, the following fundamental rights are reflected in most national constitutions namely: the right to life and dignity; the right to fair hearing; the right to freedom of conscience and to practice one's religious beliefs; the right to freedom of movement and association; the right to privacy and family; the right to own property and not to be deprived of it without just compensation; the

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<sup>2</sup> See Emilio Garcia Mendez "Origin, Meaning and Future of Human Rights: Reflections for a New Agenda" (2004) 1 *International Journal on Human Rights* 7-20.

<sup>3</sup> See Gianluigi Palombella "From Human Rights to Fundamental Rights: Consequences of a Conceptual Distinction" (2006), European University working paper LAW No. 2006/34 available at <http://cadmus.iue.it/dspace/index.jsp> accessed June 11, 2013.

<sup>4</sup> See Bertrand G. Ramcharan "How Universal are Human Rights?" available at [www.library.fes.de/pdf-files/ipg-1998-4/debate.pdf](http://www.library.fes.de/pdf-files/ipg-1998-4/debate.pdf) accessed June 11 2013.

<sup>5</sup> See Jack Donnelly "The Relative Universality of Human Rights" (2007) Vol. 29, No. 2 *Human Rights Quarterly*, 281-306.

<sup>6</sup> *Ibid* at 282-283.

<sup>7</sup> Zehra F. Kabasakal Arat "Human Rights and Globalization: Is the Shrinking World Expanding Rights? (2005) 5 *Human Rights and Human Welfare* 137-146.

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right to freedom of expression; the right to freedom from discrimination and the right to a clean and healthy environment among many others.<sup>8</sup>

The idea of fundamental rights is said to date back to early civilization through the action of the first King of ancient Persia after conquering the city of Babylon in 539 BC. It is recorded that after triumphing over the city, King Cyrus The Great freed all the captured slaves and declared, rather usually for the time, that all people have the right to choose their own religion and be generally free from restrictions in their way of life including the language they speak. This declaration which is considered the first charter of human rights was etched on a clay cylinder and known to the entire people. This made Cyrus a very popular ruler and enabled him to create a stable, peaceful and powerful empire.<sup>9</sup> The idea of human rights and the need for their conscious protection soon spread to other parts of the ancient world including Greece, the Roman Empire and India.<sup>10</sup>

The idea of human rights has since received significant boost in historic and normative documents such as the *Magna Carta* 1215, the Petition of Rights 1628, the American Declaration of Independence 1776, the French Declaration of the Rights of Man of 1789 and the first ten amendments to the Constitution of the United States of America collectively passed in 1789 now popularly referred to as the Bill of Rights; the Universal Declaration of Human Rights of

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<sup>8</sup> See Chapter IV, sections 33-46, 1999 Constitution of Nigeria, Chapter Four, sections 20-45, 1995 Constitution of Uganda (as amended) and Chapter 2, sections 7-39, 1996 Constitution of South Africa (as amended), among several others. Notably, the last two constitutions provide more lists of fundamental rights than that of Nigeria. For instance, while Nigeria's Constitution does not explicitly declare a right to a clean and healthy environment, that of Uganda does (section 39) and also explicitly declares a right to economic rights (including the right to safe and healthy condition (section 40)) just as the South African Constitution recognizes both rights (see section 24 which recognize the right a healthy environment and section 27 which recognizes the right to health care services).

<sup>9</sup> See: Kaveh Farrokh "Cyrus the Great: History's Step Forward in Citizen's Rights" (2013) Vol. 27, No. 2 *Fezana Journal*, 30-31. See also Marc Gopin "Cyrus the Great and Freedom of Religion" (2013) Vol. 27 No. 2 *Fezana Journal*, 32 - 33.

<sup>10</sup> Paul Gordon Lauren "The Foundations of Justice and Human Rights in Early Legal Texts and Thoughts" in Dinah Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) 163 - 193.

1948 as well as the two Human Rights Covenants of 1966 and their several protocols. These documents constitute the precursors to most of today's human rights instrument the world over.<sup>11</sup>

Yet, the idea of enshrining fundamental rights in a formal document was not a fully acceptable idea in the contemporary world. The earliest and perhaps most articulate criticism against formal recognition of a set of rights as human rights or fundamental rights, were the views of Jeremy Bentham, the English polemicist and publicist of the 19<sup>th</sup> century. In his criticism of the French Declaration of the Rights of Man, Bentham dismissed the formalization as "rhetorical nonsense, nonsense upon stilts", and "mischievous nonsense". For him, reducing fundamental rights to the level of prescriptive rights is pretentious and unworkable.<sup>12</sup> Bentham was not alone in his criticism. His fellow Briton, Sir Ivor Jennings adversely viewed the idea of normative characterization of human or fundamental rights. According to him, in "Britain, we have no Bill of Rights; we merely have liberty according to law; and we think – truly, I believe that we do the job better than any country which has a Bill of Rights or Declaration of the Rights of Man".<sup>13</sup>

Despite these reservations, it is probably without doubt that no real harm is done in identifying certain rights as inalienable in a written document for otherwise, the temptation to trample on the rights of individual may not be overcome merely by the expectation

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<sup>11</sup> See for example the American Convention of Human Rights (1969), Lawasia Statement of Basic Principles of Human Rights (1980), African Charter on Human and Peoples' Rights (1981), Cairo Declaration of Human Rights in Islam (1990) and Arab Charter on Human Rights (1994) among others.

<sup>12</sup> Bentham preferred the formalization of what he termed "securities against misrule". According to him, misrule is bad government. It includes whatever is opposite to good government. A government is good in proportion to how it contributes to the greatest happiness of the greatest number. Thus for Bentham, "rights" is always linked to law as it is the lawmaker that formulates laws. The subject or the ruled cannot author law. Consequently, the term "right" does not need to be put in connection to the ruled. Yet the ruled can have security against the ruler. The idea of security against misrule is thus more apt and appropriate and unambiguous. See: Phillip Schofield "Jeremy Bentham's nonsense upon stilts" (2003) Vol. 15, No.1 *Utilitas* 1-26.

<sup>13</sup> See Ivor Jennings *The Approach to Self – Government* (Cambridge: Cambridge University Press, 1956) 20. Elsewhere, Jennings expressed worry that formalization of fundamental rights in the constitution may have the unintended consequence of limiting the protection of emerging rights. See Ivor Jennings *Some Characteristics of the Indian Constitution* (Madras: Oxford University Press, 1953) 34.

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that those in authority would be warned off simply by the intrinsic nature of human beings to abhor violations of such right. What the British have by way of years of civilized government which is likely to respect the values enshrined in such rights in Acts of Parliament is probably not sufficient to dismiss the need to enshrine the rights in constitutional documents.<sup>14</sup> Perhaps it is in recognition of the invariable possibility of violation of human rights not constitutionally guaranteed that the Willink Minorities Commission Report of 1958 which recommended the inclusion of fundamental rights in Nigeria's Constitution, remarked that without constitutional guarantee of fundamental rights a government determined to abandon democratic courses "will find ways of avoiding them, but they are of great value in preventing a steady deterioration in standards of freedom and the obstructive encroachment of a government on individual rights".<sup>15</sup>

### **3. FUNDAMENTAL RIGHTS IN NIGERIA AND THE RIGHT TO HEALTH CARE**

Following the recommendation of the Sir Henry Willink Minorities Commission in its report submitted in 1958, the colonial government and the leading Nigerian political figures of the time agreed to have fundamental rights provisions enshrined in the 1960 Constitution. Chapter III, sections 17 – 32 specify certain fundamental rights which are guaranteed by the Constitution; the special jurisdiction of the High Court in relation to the chapter; and an interpretation clause. In particular, the chapter lists certain fundamental rights and freedoms as protected in sections 17 – 28: the right to life, freedom from inhuman treatment, freedom from slavery and forced labour, freedom from deprivation of personal liberty, right to fair hearing, right to private and family life, freedom of conscience, freedom of

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<sup>14</sup> Indeed according to Prof. Benjamin Nwabueze, except fundamental rights are formally guaranteed in a constitution, the likelihood remains for tyrants to seek to trample on them. For him, such guarantee constitutes a formidable outer bulwark of defense against the likelihood of such rights being undermined. See: Benjamin Nwabueze, *Constitutionalism in the Emergent States* (London: C. Hurst & Co., 1973) 39 – 40.

<sup>15</sup> See John H. Enemugwem "The Development of the Niger Delta of Nigeria, 1900 – 1966" (2009) Vol. 10, No. 4, *Journal of Sustainable Development in Africa*, 162-178 at 167.

expression, right to peaceful assembly and association, freedom of movement, and freedom from discrimination. These rights were reproduced in the 1963, 1979 and 1999 Constitutions.<sup>16</sup> To underscore the imperative nature of fundamental rights protection in Nigeria, Justice Kayode Eso of the Supreme Court of Nigeria expressed the view that fundamental right “is a right which stands above the ordinary laws and which in fact is antecedent to political society itself.”<sup>17</sup> According to his lordship, fundamental rights are primary condition to civilized existence and what has been done in Nigeria is to have them “enshrined in the Constitution so that the rights could be immutable to the extent of the immutability of the Constitution itself”.<sup>18</sup>

Despite the elaborate guarantee of fundamental rights in Nigeria, it is not entirely clear if the right to health care forms a part of the guaranteed rights in the Constitution. A strict textual construction of the Constitution suggests that the right is not explicitly guaranteed. Instead, the issue of health is thought to be restricted to the social and economic policy objectives of the country under Chapter II of the Constitution.<sup>19</sup> In support of this, reference is often made to section 6(6)(c) of the Constitution which limits the judicial powers conferred under the Constitution to exclude any action instituted in respect of Chapter II clause from judicial determination.<sup>20</sup> It is believed that the matter of health care in all its ramifications is a matter of policy aspiration or objective of the country following the provisions of Chapter II, section 17(3)(c) and (d) of the Constitution which requires the state to direct its policy towards ensuring that “the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused” and that “there are adequate medical and health facilities for all persons”.

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<sup>16</sup> See Chapter III, sections 18-28; 1963 Constitution, Chapter IV, sections 30-40, 1979 Constitution as well as Chapter IV, sections 33 – 44, 1999 Constitution.

<sup>17</sup> See *Ransome-Kuti v. Attorney General, Federation* [1985] 2 NWLR (Pt. 6) 211, at 230.

<sup>18</sup> *Ibid.*

<sup>19</sup> This chapter was introduced for the first time in the 1979 Constitution and reproduced in the 1999 version.

<sup>20</sup> See Ajepe Taiwo Shehu “The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience” (2013) Vol. 2, No. 1, *Journal of Sustainable Development Law and Policy* 101-120.

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Similar attitude can be found in the views of the Report of Constitution Drafting Committee of 1976 which joined to midwife the 1979 Constitution. According to the Report, economic and social rights must be contrasted with fundamental rights as, unlike the latter, social and economic rights do not impose any limitation on governmental powers but merely impose obligations which are not judicially enforceable. Otherwise, “to insist that the right to freedom of expression is the same kind of ‘right’ as the ‘right’ to free medical facilities and can be treated alike in a constitutional document is in the least basically unsound...”<sup>21</sup> One scholar attempts to justify this view by suggesting that the reason for the marked absence of social-economic rights in constitutions of many African countries “is often based on the fact that unlike political and civil rights which attempt to limit the encroachment of state and its instrument on human rights they require states to provide material means for their enjoyment.”<sup>22</sup> Therefore, “since African countries are underdeveloped, it would be futile to encourage litigation based on infringement of social-economic rights”.<sup>23</sup>

#### **4. JUSTIFYING THE RIGHT TO HEALTH CARE IN NIGERIA**

These conventional views appear unsustainable on a number of grounds. First, the express constitutional guarantee of fundamental rights in Chapter IV of the 1999 Constitution of Nigeria could be expounded to include the right to health care through purposive judicial interpretation similar to the progressive approach of the Indian Supreme Court. Second, the Chapter II provision in section 17(3)(c) and (d) could be interpreted to create legal obligation on the state to guarantee the right to health care for all Nigerians having regard to other provisions of the Constitution and lessons obtainable from recent development especially in the United States of America. However, before proceeding further, it is important to lay a theoretical foundation for our argument by explicating the meaning and centrality of health care.

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<sup>21</sup> See the Constitution Drafting Committee Report, 1976, Vol. 1 (Lagos: Federal Ministry of Information, 1976).

<sup>22</sup> Osita Eze, *Human Rights in Africa* (Lagos: Macmillan Nigerian Publishers, 1984) 31.

<sup>23</sup> *Ibid.*

### a. Understanding the Right to Health Care

It is important to draw a line of distinction between the right to health and the right to health care.<sup>24</sup> According to the World Health Organization, health is “a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity”.<sup>25</sup> Health care relates to the means to attain health in the context of the “care, services or supplies related to the health of an individual”.<sup>26</sup> The right to health care is different from the right to health because the latter is more expansive in scope “and includes social predictors of health such as level of education and income; and is influenced by a variety of factors, including lifestyle choices and behaviours” which are difficult to track.<sup>27</sup>

The idea of right to health care is said to be founded on two main principles.<sup>28</sup> The first principle which is based on the notion of social justice believes that a just society should guarantee personal freedoms as long as they do not impede the freedom of others and would promote equality of opportunity. By this principle, benefit is likely to inure to the least disadvantaged in society because it ensures that people get to have a “fair share” of goods and services in the public domain. Viewed from this perspective, access to health care as of right preserves for people the ability to participate in the political, social and economic life of society.<sup>29</sup> The second principle is based on the utilitarian ethical doctrine which posits that certain positive values in society such as health care should be guaranteed because they increase the welfare of the greatest number of

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<sup>24</sup> See Kathleen S. Swendiman “Health Care: Constitutional Rights and Legislative Powers” (2012) *Congressional Research Services* 1-20 at 1. See also Lawrence O. Gostin “Securing Health or Just Health Care? The Effect of Health Care System on the Health of America” (1994) 39 *St. Louis University Law Journal* 7.

<sup>25</sup> Constitution of the World Health Organization (2005) first adopted on 22 July 1946 and last amended and adopted on 15 September 2005 available at [www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf) accessed on 7 October 2014.

<sup>26</sup> Swendiman, note 24.

<sup>27</sup> Carolyn L. Engelhard and Arthur Garson “The Right to Health Care and the Role of Government in Health Policy” (2009) Miller Center of Public Affairs (University of Virginia) White Paper available at [www.medicine.virginia.edu/clinical/departments/.../mcbriefingfinal.pdf](http://www.medicine.virginia.edu/clinical/departments/.../mcbriefingfinal.pdf) (accessed 7 October 2014).

<sup>28</sup> *Ibid* at 2.

<sup>29</sup> See Norman Daniels “Justice, Health and Health Care” (2001) vol. 1, no. 2 *The American Journal of Ethics* 2-16.

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people.<sup>30</sup> Thus, while the social justice principle supports individual health in order to promote the normal functioning of the individual in society, the utilitarian principle promotes the aggregate welfare of the larger society. The right to health care therefore encompasses these two principles by guaranteeing entitlement to basic health services within affordable limits.<sup>31</sup>

It is in this context that many countries have included the right to health or health care in their constitutions.<sup>32</sup> Even countries without such explicit provisions have included it in their legislative framework.<sup>33</sup> For instance, section 27(1)(a) of the Constitution of the Republic of South Africa, 1996 (as amended) provides that “everyone has the right to have health care services including reproductive health care”; while section 7, article 32 of the Constitution of Ecuador provides that “health is a right guaranteed by the state and whose fulfilment is linked to the exercise of other rights, among which the right to water, food, education, sports, work, social security, healthy environments and others that support the good way of living.” A number of national legislation also aims at attaining the goal of providing health care for citizens virtually as of right. For instance, in the United States of America, two programmes – the Medicare and Medicaid seek to provide health care coverage for certain categories of Americans.<sup>34</sup> The Patient Protection and Affordable Care Act of the United States of America also provide health care coverage for many Americans who are not otherwise covered by the two programs.<sup>35</sup> In the United Kingdom, the popular National Health Service (NHS) provides universal health care

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<sup>30</sup> *Ibid.* For a detailed analysis of the utilitarian principle of health care see T. Beauchamp and J. Childress *Principles of Biomedical Ethics*, 4th ed. (New York: Oxford University Press, 1994).

<sup>31</sup> See Daniel Callahan “Symbols, Rationality and Justice: Rationing Health Care” (1992) Vol. xviii (1-2) *American Journal of Law and Medicine* 1-13.

<sup>32</sup> See the Constitution of the Republic of South Africa, 1996 (as amended) and the Constitution of Ecuador, 2008.

<sup>33</sup> See Medicare Prescription Drug, Improvement and Modernization Act, 2003; the Social Security Act of 1965 both of the United States of America and National Health Service Act of 2006 of the United Kingdom.

<sup>34</sup> The Medicare program requires that every older American shall have access to the “best” medical care available without regard to his or her ability to pay; while the Medicaid program eliminates any barrier to access quality health care in the United States of America by providing financial support for the health care needs of certain categories of citizens not covered by the Medicare program.

<sup>35</sup> The Act was passed in 2010 and was immediately challenged on federalism grounds. However, The United States Supreme Court validated the Act on the primary ground that it was justified by the constitutional power of the Federal Government to levy tax. See *National Federation of Independent Business v. Sebelius* No. 11-393, 567 U.S. (2012).

coverage for every citizen and even certain categories of non-citizens who are visitors to the country regardless of cost implication.<sup>36</sup>

In 2005, the Federal Government of Nigeria established the National Health Insurance Scheme under the National Health Insurance Scheme Act. The basic aim of the scheme is to provide health insurance to insured persons and their dependants in order to secure the “benefit of prescribed good quality and cost effective health service”.<sup>37</sup> It is arguable if the scheme is meeting its aim about a decade after the Act was passed.<sup>38</sup> We shall now examine how this objective could be achieved within the extant normative framework of Nigerian’s Constitution.

#### **b. Locating the Right to Health Care in Chapter IV Clause: Lessons from India**

It is conceded that Nigeria’s Constitution of 1999 does not make explicit provision guaranteeing a right to health care. However, it is possible to locate this right within the provision of section 33(1) of the Constitution whose opening clause declares that “Every person has a right to life...” The tendency has been to confine this very fundamental provision which is the very first guarantee of right in Nigeria to the bare fact of having the right to be alive, except under certain conditions of derogation stated in section 33(2)(a)(b) and(c).<sup>39</sup> Viewed from all its ramifications, this restrictive perception of the right to life appears untenable and unsustainable. The right

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<sup>36</sup> See the National Health Service Act, cap 41, 2006.

<sup>37</sup> See section 1(1) of the National Health Insurance Scheme Act of 2005.

<sup>38</sup> See section 5, *ibid* which sets out the specific aim of the scheme. The main criticism against the scheme, however is that it does not articulate modalities to meet its aim of ensuring that every Nigerian gains access to good health care services; protect families from financial hardship brought about by huge medical bills and limit the rise in cost of health services, among others. Thus, nearly 10 years since coming into effect the scheme does not serve a broad spectrum of Nigerians because it is almost entirely limited to public institution employees. Besides, those covered under the scheme are not supplied with sufficient drugs and medicaments. Consequently, a more robust system of right-based health care service scheme is called for with opportunity for universal coverage for all Nigerians, especially those in dire need as result of poverty, age or emergency. See generally, Hodo Basse Rimam and Emmanuel Sebastian Akpan “Healthcare Financing and Health outcomes in Nigeria: A State Level Study using Multivariate Analysis” (2012) Vol. 12, No. 15 *International Journal of Humanities and Social Science* 296-309.

<sup>39</sup> Under the subsections the right to life may be compromised where death occurs by use of force permitted by law as is reasonably necessary for defense of any person or property; in the course of lawful arrest or to prevent escape of a person under lawful detention; or for the purpose of suppressing a riot, insurrection or mutiny.

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seems to be meaningless if it is not coupled with the right to have the necessary means of survival including food and health care. Perhaps it is the problem of health care that poses the greatest challenge because of its impact. This is not to denude the importance of food, which is probably as important. However, whereas a person could overcome the challenge of finding food to eat in order to stay alive, a person confronted with a health challenge may be entirely helpless in dealing with the situation especially when in the state of ill-health. If indeed the primary purpose of government is the security and welfare of the people, then this must be reflected practically in the lives of citizens.

Purposive judicial interpretation of the right to life beyond the narrow limit which it appears to be confined would increase the obligation of government to meet health care needs of Nigerian citizens as of right. A normative way to enforce this obligation is to hold government accountable to its international obligations to respect, protect and fulfil the Right to Health provisions of the International Covenant on Economic and Social Rights (ICESCR).<sup>40</sup> The obligation to respect requires a signatory country to avoid measures that could prevent the enjoyment of the right to health by refraining from denying or limiting access for all to preventive, curative and palliative health services among other important measures. The obligation to protect requires a signatory country to take measures to enforce the right to health including passing legislation which ensure equal access to health care and related services and ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services. The obligation to fulfil requires a signatory country to take positive measures that enable individuals and groups to enjoy the right to health by according sufficient recognition to the right to health in the nation's political and legal system, especially by legislative intervention and policy

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<sup>40</sup> This Covenant was adopted by the United Nations on 16<sup>th</sup> December, 1966 and came into force on 3<sup>rd</sup> January 1976. Nigeria is a signatory to the Covenant and is bound by it as part of its treaty obligations. See generally, Stanley Ibe "Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities" (2010) 10 *African Human Rights Journal* 197-211.

measures which have the capacity to overcome the underlining impediments to good health.<sup>41</sup>

Nigerian courts have begun to adopt a more nuanced approach in their judicial interpretation by looking beyond the adverse municipal attitude of government by upholding the country's obligations on the right to life in international statutes. Although these decisions do not yet expound the right to life in Nigeria to include the right to health care, the approach adopted by the courts could serve as useful precedent to improve the current municipal perception of the right to health care as outside the ambit of the fundamental rights guaranteed in Nigeria. Thus, in *Gbemre v. Shell Petroleum Development Company Nigeria Limited and others*,<sup>42</sup> in an action filed to challenge the continuous gas flaring activities of the defendant in the course of its oil and gas exploration and production in the Niger Delta area of Nigeria, the court held that the constitutionally guaranteed right to life and dignity of human person inevitably include the right to clean, poison free, pollution-free and healthy environment. In arriving at this decision the court not only relied on the constitutional provisions guaranteeing the right to life and dignity of the person but also on the international obligation undertaken by Nigeria under articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights which has been ratified as part of the country's municipal law.<sup>43</sup>

In *Social Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*,<sup>44</sup> the plaintiff argued that the country's international obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring activities and that the failure of government to take the concerns of the oil bearing community seriously and take steps to ensure independent investigation of the impact of the activities is in breach of its international obligation to ensure adequate living standard,

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<sup>41</sup> See *Right to Health Fact Sheet no. 31* (published by Office of the United Nations High Commissioner on Human Rights and the World Health Organization) available at [www.ohchr.org/documents/publications/factsheet31.pdf](http://www.ohchr.org/documents/publications/factsheet31.pdf) accessed on 2 October 2014.

<sup>42</sup> (Unreported) Suit No. FHC/B/SC/53/05.

<sup>43</sup> *Ibid.* See section 12 of the 1999 Constitution (as amended). See also *Fawehinmi v. Abacha* (2000) 6 NWLR (Pt. 660) 228.

<sup>44</sup> (Unreported) Suit No. ECW/CCJ/JUD/18/12.

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access to health care and a healthy environment for citizens. The court upheld the plaintiff's case citing articles 1 and 24 of the African Charter on Human and Peoples' Rights. The courts gave similar decisions in *Social Economic Rights Action Centre v. Nigeria*,<sup>45</sup> *Odefe v. Attorney General of Nigeria*<sup>46</sup> and *Ahamefule v. Imperial Medical Centre*<sup>47</sup> demonstrating a very progressive tendency of the court which could serve to sustain the view that the right to health should be seen not merely as an international right but a municipal right as well which can be given practical expression in Nigeria.

India appears to be one of the most active jurisdictions in terms of response to the international trend on protection of health right. Although the right to health is a mere directive principle of state policy under the Indian Constitution just as is the case in Nigeria, there appears to be a robust judicial intervention in India in this respect, elevating the health obligation to the level of a fundamental human right. Thus, in one of the earliest cases decided on the point in 1991 the Supreme Court of India, in *CESC Ltd v. Subash Chandra Bose*<sup>48</sup> relied on international instruments ratified by India and concluded that the right to health is a fundamental right and must be made a state's priority. It went further and observed that health is not merely absence of sickness; "The term health implies more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development."

In *Mahendra Pratap Singh v. Orissa State*,<sup>49</sup> a case which concerned failure of government to provide a primary health centre in a village, the Supreme Court of India held that in India, it may not be possible to have sophisticated hospitals but definitely, villages within their limitation can aspire to have primary health centres. Therefore, technical fetters cannot be introduced as subterfuges to hinder the establishment of such centres. The court further held that great achievements and accomplishments in life are possible if one is permitted to lead an acceptably healthy life. The court concluded

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<sup>45</sup> (Unreported) Suit No. 155/96/2001.

<sup>46</sup> (Unreported) FHC/PH/CS/680/2003.

<sup>47</sup> (Unreported) ID/1627/2000.

<sup>48</sup> (1980) Cri LJ 1075.

<sup>49</sup> AIR 1997 Ori 37.

that enforcing the right to life is a duty of the state which duty covers providing primary health care as of right to citizens.

Similarly in *Consumer Education and Resources Centre v. Union of India*<sup>50</sup> the Supreme Court held that the right to health and medical care are fundamental rights under article 21 of the Indian Constitution as these are essential to make the life of workmen meaningful and purposeful. Also, in *State of Punjab v. Mohinder Singh Chawala*,<sup>51</sup> the court held that the right to health is integral to right to life and that the government has a constitutional obligation to provide and maintain health facilities as well as health services for citizens of India. The same reasons were adduced by the court in deciding *Panikulangara v. Union of India*,<sup>52</sup> *Kirloskar Brothers Limited v. Employees' State Insurance Corporation*,<sup>53</sup> and *State of Karnataka v. Manjanna*<sup>54</sup> among others decided in the past few years.<sup>55</sup>

### c. Locating the Right to Health in Chapter II Clause

The Chapter II, sections 13-32 clause of Nigeria's Constitution was introduced for the first time in the 1979 Constitution and reproduced in the 1999 Constitution. It was not included in the 1960 and the 1963 Constitutions. The clause set out certain policy obligations of government described as Fundamental Objectives and Directive Principles of State Policy. Section 17(3)(c)(d) thereof requires that the country shall direct its policy towards ensuring that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused; and that there are adequate medical and health facilities for all persons. These directives are said to be unenforceable or non-justiciable obligations imposed on government in view of the derogative provisions of section 6(6)(c) of the same Constitution which essentially excludes

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<sup>50</sup> (1995) 3SCC 42.

<sup>51</sup> (1997) 2 SCC 83.

<sup>52</sup> AIR 1987 990 at 995.

<sup>53</sup> (1996) 2 SCC 682.

<sup>54</sup> (2000) 6 SCC 188.

<sup>55</sup> See for a thoughtful comparative evaluation of some of the cases and developments in Bangladesh and South Africa: Reajul Hasan Sholag and A.B.M. Asrafuzzaman "Enforcing Social-Economic Rights Judicially: Experiments in Bangladesh, India and South Africa (2012) Vol. III *Northern University Journal of Law*, 87-115.

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the power of judicial determination from the ambit of the Chapter II clause.

In a number of cases, the Supreme Court has held the clause not to be justiciable<sup>56</sup> and to be mere declarations.<sup>57</sup> However, in *Federal Republic of Nigeria v. Aneche*, Justice Niki Tobi of the Supreme Court of Nigeria observed correctly that section 6(6)(c) provides a leeway which could make the clause justiciable as the opening portion of the subsection says the powers of judicial determination is limited “except as otherwise provided by the Constitution”.<sup>58</sup> Thus, if the Constitution provides otherwise, then the clause could be enforced. One way by which this could happen in respect of health care is if a body is established by law to provide for or ensure provision of health care services for all Nigerians as of right. In such a case, a citizen can actually seek enforcement of his right to health within the provisions of the legislation establishing the body without the stricture of the general provision of section 6(6)(c).<sup>59</sup> Justice Mohammed Lawal Uwais made this point quite pungently when he said:

Item 60 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria specifically empowers the National Assembly to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles, and to prescribe minimum standards of education at all levels, amongst others. The breath-taking possibilities created by this provision have sadly been obscured and negated by non-observance. This is definitely one avenue that could be meaningfully exploited by our legislature to assure the betterment of the lives of the masses of Nigerians,

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<sup>56</sup> See for example, *Okogie v. Attorney General of Lagos State* (1981) 2 NCLR 337.

<sup>57</sup> See *Attorney General, Ondo State v. Attorney General, Federation* [2002] 9 NWLR (Pt. 772) 22.

<sup>58</sup> [2004] 1 SCM 36 at 78.

<sup>59</sup> This is possible because item 60(a) of the Second Schedule, Part I (the Exclusive Legislative List) of the constitution permits the “establishment and regulation of authorities for the Federation or any part thereof to promote and enforce the observance of the” clause. See *Attorney General, Ondo State v. Attorney General, Federation* [2002] 9 NWLR (Pt. 772) 222, where the Supreme Court validated the Independent Corrupt Practices Commission Act, 2002 on the basis of this item of the constitution which, according to the court, is in pursuance of the provision of section 15(5) of the constitution directing the abolishing of corrupt practices and abuse of power.

whose hope for survival and development in today's Nigeria have remained bleak, and is continuously diminishing. The utilization of this power would ensure the creation of requisite bodies to oversee the needs of the weak and often overlooked and neglected in our society. It would also provide a unique and potent opportunity to our legislators to monitor and regulate the functions of these bodies, where the Executive, for reasons best known to it, fails or neglects to prioritize and implement the provisions of Chapter II, and by extension, the welfare of all Nigerians.<sup>60</sup>

Perhaps the most compelling argument against normative affirmation of the right to health care in Nigeria in addition to the argument of unenforceability is the financial burden this could place on the country if government is required to provide health care services and other social, economic and cultural needs of Nigerian citizens.<sup>61</sup> Another argument is that judicial enforcement of the right to health care and similar rights listed in the so-called unenforceable provisions of Chapter II is futile as any order by a court to compel enforcement of its decision could come to naught and may bring the judicial branch on an avoidable collision course with the other branches of government.<sup>62</sup> It has been suggested that perhaps a good way to approach the issue is for the court to intervene as a last resort where there is gross inaction on the part of both the executive and legislative branches in taking appropriate steps to uphold the rights.<sup>63</sup> The problem with the suggestion is that it does not establish a normative basis for such judicial intervention. Therefore, it could easily be faulted on the ground of the derogation in section 6(6)(c) of the Constitution which excludes such judicial review, especially where it is not justified by a contrary constitutional premise contained in the leeway provided by the subsection.

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<sup>60</sup> See M.L. Uwais "Fundamental Objective and Directive Principles of State Policy: Possibilities and Prospects" in C.C. Nweze (ed.) *Essays in Honour of Honourable Justice Eugene Ubaezeunu JCA* (Enugu: Fourth Dimension Publishers, 2002) 179.

<sup>61</sup> See Ibe, note 40 at 207.

<sup>62</sup> See Jill Cottrell and Yash Ghai "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in Jill Cottrell and Yash Ghai (eds.) *Economic, Social and Cultural Rights in Practise* (London: INTERIGHTS, 2004) 58-90.

<sup>63</sup> Ibe, note 61.

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A better view may be to invoke the international obligation assumed by Nigeria in the African Charter on Human and People's Rights ratified as part of Nigeria's domestic law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act since many of the provisions in Constitution are similar to the economic, social and cultural rights guaranteed by the Charter, including the right to health care.<sup>64</sup> For instance, the combined implications of Articles 1, 16 and 26 of the Charter is to impose a duty on government to recognize and implement actions towards realizing the right to health.<sup>65</sup> In specific terms, Article 1 compels signatories including Nigeria, to recognize the rights, duties and freedoms enshrined in the Charter and to "adopt legislative or other measures to give effect to them". Article 16 (1) and (2) guarantee every individual in signatory countries the right to enjoy the best attainable state of physical and mental health and require signatories to take necessary measures to realize this right. Article 26 requires signatories to guarantee the independence of the courts and to establish as well as improve on national institution(s) for the purpose of promoting and protecting the rights and freedoms guaranteed by the Charter. The Supreme Court of Nigeria has had the opportunity to adjudicate on the implication of the Charter. In *Abacha v. Fawehinmi*,<sup>66</sup> the court held that having been domesticated as part the laws of the municipal laws of the country, the Charter is binding and "courts must give effect to it like all other laws falling within the judicial powers of the courts."

Since the Supreme Court limits the judicial intervention to the extent of the "judicial powers of the courts" it could be argued that the Charter can only be enforced by the courts to the extent of their judicial power. Therefore, the derogation of section 6(6)(c) still applies. Such an argument assumes that there is legal connection between Chapter II clause of the Constitution and the Charter simply because, at least in relation to health care, they have virtually the

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<sup>64</sup> Cap A1, Laws of the Federation of Nigeria, 2004.

<sup>65</sup> See generally, Oyeniyi Ajigboye "Realizing Health Right in Nigeria: A Case for Judicial Activism" (2014) Vol. 14, 3 *Global Journal of Human Social Science* 23-34.

<sup>66</sup> See note 43. Significantly, the court also held that having been incorporated into Nigeria's municipal law even without a specific procedure of enforcement; recourse could be made to the Fundamental Rights Enforcement Rules enacted pursuant to the constitutional provision for enforcement of the charter's articles.

same provisions although that of the latter seems to be more expansive. Clearly, there is no legal nexus between both as to invoke the derogation provisions of section 6(6)(c) of the Constitution and limit the judicial powers of the courts to enforce the Charter in Nigeria. Both are different and separate legal instruments not only in conception but also in origin. The question of the superiority of one over the other also does not arise, although the Supreme Court carefully refrained from making a definitive pronouncement on this in the *Fawehinmi* case.<sup>67</sup>

Finally, a practical way to realize the right to health care in Nigeria through Chapter II clause without overwhelming financial burden to government is by incorporating the approach introduced by the Patient Protection and Affordable Care Act passed by the government of the United States of America in 2010 and affirmed by the country's Supreme Court in *National Federation of Independent Business v. Sebelius*<sup>68</sup> as a valid exercise of the Federal Government's taxing powers. The legislation which though does not by itself confer a specific right to health care on every American nevertheless mandates them to purchase health insurance or be taxed for failure to do so, and grants an expanded range of subsidies for health care services through universal coverage under the existing Medicaid program. Nigeria can take a cue from this legislation by establishing an authority to carry out similar measures pursuant to the provision of item 60(a) of the Second Schedule, Part I of the Constitution which permits the establishment and regulation of authorities to promote and enforce the observance of the chapter. The courts could then be in real position to exercise judicial powers to give effect to such measures having regard to the exception to section 6(6)(c) of the Constitution.<sup>69</sup>

## 5. CONCLUSION

In this paper, it is argued that the right to health care which is now a fully recognized international right can be accorded status in Nigeria. The paper notes that at the moment two obstacles seems to obstruct

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<sup>67</sup> See Ibe note 61.

<sup>68</sup> See note 34.

<sup>69</sup> See note 59.

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this imperative goal. First is the perception that the right to life is limited to the bare right to be alive to be protected from unlawful killing. It is argued that the amplitude of the right goes far beyond to include the right to health care. The paper cites certain decisions of the Supreme Court of India in support and argued that this comparative context could help to strengthen some of the developing case law in Nigeria which attempts to expound the ambit of the fundamental rights clause of the Constitution to include some otherwise uncharted areas. It is argued further that the second limitation to the right to health care in Nigeria is the constitutional limitations to enforcement of the policy obligations placed on the country through the government to ensure health care for employees and citizens as a whole.

However, the paper observes that this limitation appears to be overstated as the same portion of the Constitution seems to permit enforcement of the policy obligation in certain circumstances provided by the Constitution. Given the impactful nature of health care on the well-being of individuals and the society as a whole it is important to adopt a more robust attitude to the issue far beyond policy consideration. Perhaps the most practicable way to achieve this is for the Nigerian courts to adopt the purposive interpretation of the Constitution to expound the scope of certain constitutional guarantee of fundamental rights in Nigeria, including the right to life, to include the right to health care. This would impose a duty on government to provide Health care services and facilities for Nigerians. A further approach is for government to pass legislation establishing and regulating authorities to implement the health policy objectives of Chapter II clause of the Constitution and by that token elevate health care to normative status making it a subject of judicial enforcement.