Journal of African Law (2023), **67**, 409–430
doi:10.1017/S0021855323000116

RESEARCH ARTICLE

Enhancing the Right to Health in Nigeria through Judicial Intervention

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(Accepted 28 November 2022; first published online 9 June 2023)

Abstract

Human rights are best protected when they enjoy the binding enforceability of the law. Recognizing the binding status of human rights in national constitutions and legal systems is central to demanding accountability, compelling actions and sanctioning violations. Conferring human rights with legal recognition also empowers people and provides the option of pursuing remedies. Furthermore, the duty of the state to protect and respect human rights is triggered when they receive prescription under the law. In Nigeria, however, certain rights pertaining to economic, social and cultural rights do not receive the binding force of constitutional law. This article argues that the judiciary can act as an alternative and complementary recourse to advance and secure the commitment to the right to health. Drawing on a comparative perspective from countries where the judiciary has proactively upheld this right, it maintains that the Nigerian judiciary can take action to enhance the legal and judicial implementation of the right to health.

Keywords: Right to health; economic, social and cultural rights; justiciability; judicial intervention; human rights; judicial review

Introduction

The law is a vehicle for the promotion, protection and fulfilment of human rights. Human rights cannot be effectively protected in societies without the backing of the law.[1] Although people have rights independent of legal prescriptions, the law provides obligatory standards that must be respected and protected by other individuals and the state. Without the legitimacy of the law, human rights may remain mere moral claims and philosophical concepts with no practical enforceability.[2] In particular, recognizing human rights in a constitution provides a legal structure through which the exercise of power by the government is subjected to the standard of human rights.[3] In addition, legal recognition provides the basis for the implementation of the conditions that will enhance the enjoyment of all rights. In this manner, human rights exert stronger influence when they are situated within the larger framework of the law. Crucially, the law shapes the duty

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1 United Nations "Rule of law and human rights", available at: <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> (last accessed 8 July 2022).

2 O Nnamuchi "Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria" (2008) 52/1 *Journal of African Law* 1.

3 United Nations "Rule of law", above at note 1.

towards human rights and places binding obligations on state actors to respect, promote and realize rights and abstain from violations or acts that hamper their full enjoyment.[4] Notably, however, many economic, social and cultural rights (ESCRs), which include the right to health, do not enjoy full and binding recognition in the constitutions of many countries, including Nigeria.[5] Although the Nigerian Constitution asserts a policy directive for the government to promote health and wellbeing, the duty is discretionary and unenforceable in courts.[6] Moreover, the legislature has not advanced the formal codification of the right to health, despite several constitutional amendments. Likewise, the executive has failed to realize the objective of making healthcare accessible, affordable and available, and unfortunately, the Constitution does not create the means to compel the fulfilment of this objective.[7]

This article goes beyond the argument on the justiciability of health rights in the Constitution to examine ways to give practical effect to those rights through judicial interrogations, albeit within a constitutional framework. A central question in demanding respect for and protection and fulfilment of the right to health is whether and how the courts can play a significant role, especially in light of the legislature's and the executive's reluctance to fulfil these demands. This question on the means of guaranteeing the right to health is part of a wider debate on the justiciability of ESCRs in general which will also be considered. Given the importance of the judiciary in construing the law, setting standards, establishing best practices and interpreting the obligation of states, I consider several possibilities for the judicial enforcement of the right to health in Nigeria. I further address the issue of whether the judicial enforcement of the right to health is still attainable, given that the right is not constitutionally entrenched. Within that context, I highlight the means of judicial enforcement of the right to health in Nigeria by drawing on several cases in which the courts, for example the High Court of Nigeria and the African Commission, have opened the way for the recognition and guarantee of the right to health. Even where there is no justiciable right to health in the Constitution, courts in other countries have found such a right to be a component of the right to life, as an obligation under the African Charter or as enforcement of a policy directive in the absence of action by other branches of government. I will examine these cases to call for the proactive exercise of judicial powers in favour of protecting, promoting and respecting the right to health.

The article is divided into several parts: after this introduction, the second part centres on the justiciability arguments opposing and supporting ESCRs. The third part examines ways to make the right to health justiciable, and the fourth part argues for judicial intervention, drawing on examples where the court has adopted a positive attitude to the justiciability of ESCRs.

The constitutional recognition of health rights in Nigeria

In Nigeria, although the 1999 Constitution (as amended) does not expressly recognize socio-economic rights, the country's commitment to promoting certain socio-economic conditions for its people is incorporated in chapter II. The chapter on the Fundamental Objectives and Directive Principles of State Policy (FODPSP) contains a series of provisions bearing on the government's aspirational objectives for the nation and its citizens. These principles and objectives serve as

4 Office of the High Commissioner for Human Rights "International Human Rights Law", available at: <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> (last accessed 8 July 2022).

5 Nnamuchi "Kleptocracy", above at note 2; AO Oluwadayisi "Economic and socio-cultural rights in the democratic governance of Nigeria: Enforcement mechanisms beyond justiciability" (2014) 5 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 105.

6 Ibid.

7 C Campbell "Failures of Nigerian Health Insurance Scheme: The way forward" (18 January 2018) *The Guardian* (Nigeria), available at: <https://guardian.ng/features/science/failures-of-nigerian-health-insurance-scheme-the-way-forward/> (last accessed 9 July 2022).

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

a guide to any government in power in Nigeria to obey, conform to and observe for the good of the citizens. With specific regards to health, section 17(3)(c) enjoins the state to direct its policies towards safeguarding the health, safety and welfare of all persons in employment. More specifically, in section 17(3)(d), the government is to ensure that there are "adequate medical and health facilities for all persons". Although the Constitution also prescribes standards for maintaining the environment and promoting the "welfare of the people … as the primary purpose of government", the provisions are also non-binding and merely aspirational.[8]

There are three identifiable issues with this constitutional provision on health. First, it is unenforceable by the courts; second, the provisions are not deemed to be "fundamental human rights"; and third, the provision of the Constitution restrictively focuses on health and medical care. On the first point, the duty of the Nigerian authorities to guarantee the provisions is among the judicially unenforceable categories of duties and responsibilities within the contemplation of section 6(6)(c) of the 1999 Constitution. The non-justiciability challenge as reflected in this section is to the effect that the jurisdiction of the courts in Nigeria

> "shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution."

The legal consequence of this provision is that the beautifully crafted economic, social and cultural matters in chapter II, which include the "soft" duty on states to provide healthcare, cannot be the subject of determination before the courts. In this sense, the actions or inactions of the state with regard to its mandate on health cannot be subject to legal scrutiny. By the same token, the state cannot be compelled to respect, protect and fulfil its obligations in that section of the Constitution. Rulings by the Nigerian courts have tilted towards the affirmation of this ouster clause in cases of the contravention of chapter II. In *Archbishop Anthony Olubunmi Okogie (Trustee of Roman Catholic Schools) and Others v Attorney General of Lagos State*, the court maintained that the interpretation and enforcement of economic, social and cultural matters are non-juridical.[9] Likewise, this reasoning was the basis for the decision of the Court of Appeal in *Badejo v Federal Minister of Education*.[10] The lower court declined to exercise jurisdiction in an action challenging the government's university admission policy, on the ground that the action sought to establish a right to education within the purview of the FODPSP in chapter II and that the FODPSP are not enforceable by the courts. The court also adopted the traditional negative approach to the enforcement of the provisions in chapter II in the cases of *Adewole v Jakande* and *Uzoukwu v Ezeonu II*.[11]

The second challenge concerning health rights lies in the fact that the chapter enumerates some obligations on the state and authorities to provide healthcare but does not guarantee this healthcare

8 Sec 14(2)(b) of the Nigerian 1999 Constitution (as amended). See sec 20 for environmental objectives. Sec 16(2)(d) enjoins the state to direct its policy to provide "suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled".

9 [1981] 2 NCLR 350 ([1980] FNR 445). The court observed that while sec 13 of the Constitution makes it a duty and responsibility of the judiciary, among other organs of government, to conform to, observe and apply the provisions of cap II, sec 6(6)(c) makes it clear that no court has jurisdiction to pronounce on any decision as to whether any organ of government has acted or is acting in conformity with the FODPSP.

10 [1996] 8 NWLR (Pt 464), 15.

11 *Adewole v Jakande* [1981] 1 NCLR 152; in *Uzoukwu v Ezeonu II* [1991] 6 NWLR (pt 2000) 761, paras A–D, the courts, per Nasir PCA, reiterated the non-justiciability of cap II thus: "There are other rights which may pertain to a person which are neither fundamental nor justiciable in the Court. These may include rights given by the Constitution under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution."

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

as a "human right". In this sense, the provisions of chapter II are not designated as "rights"; rather, they are discretional guidelines for the state to comply with and progressively seek to fulfil, albeit with no binding obligations to do so. While these provisions aim to create social welfare conditions under which citizens can lead good lives, they are non-binding, only imposing a moral obligation on the relevant authorities for their implementation. In contrast, civil liberties and political rights are expressly recognized as "fundamental rights" in chapter IV of the Constitution. Recognizing the provisions on healthcare as human rights generates a binding duty on the state and its relevant authorities to take proactive steps to guarantee timely, acceptable, affordable, culturally appropriate and quality healthcare. It also ensures that the necessary attention is given to the underlying determinants of health, such as healthy environments, sanitation, safe and potable water, health-related information, gender equality, education, etc.

On the third issue, the Constitution specifically promotes access to medical and healthcare facilities and services, as opposed to a comprehensive right to health which would also ensure the appropriate conditions for the enjoyment of health without discrimination. A right to health serves important functions beyond restoring or maintaining health. The right to health, as with all human rights, contains "freedoms" and "entitlements". Freedom includes the right to make decisions and control one's own health and body, such as sexual and reproductive rights, while the entitlement aspect of the right to health pertains to the equal right and opportunity for everyone to access an adequate and affordable (or free) healthcare system, including health services, facilities and drugs.[12] Unfortunately, denying the provisions' justiciability limits the power of the court to clarify and expatiate the meaning of the health prescriptions in the Constitution to include other factors that pertain to health or underlying factors that promote good health, such as a good environment, sanitation, education, equality, etc.

The non-justiciability rationale

The issue of justiciability is one of the reoccurring debates at the heart of economic and social rights. This debate emanates from the hierarchical categorization of human rights into first generational rights, which include civil and political rights (so-called negative rights), and second generational rights, which include ESCRs (so-called positive rights). At the core of this debate is the tension between the prioritizing of obligations to civil and political rights on the one hand and the limited recognition of ESCRs on the other. This tension is closely tied up with the fact that commitments to ESCRs are relegated to an inferior status, even though they protect the most fundamental interest of citizens to have equal access to resources that are imperative to their wellbeing and security. Critics of generational classification argue that socio-economic rights have resource implications hence are not justiciable, especially in light of the scarce resources of some states to cater for these rights.[13] Civil and political rights, on the other hand, are said to incur negative obligations since they generally require the entrenchment of the law.[14] Invariably, this metaphor of the classification of rights into generations has served as a convenient way of limiting the obligations to ESCRs. Alston voiced these concerns when he berated the "second-rank status" of socio-economic rights and admonished states to accord equal emphasis to all human rights. He stated that "there are many contexts in

12 Committee on Economic, Social and Cultural Rights (CESCR) General comment no 14: The right to the highest attainable standard of health (art 12) (Document E/C 12/2000/4), para 8.

13 G Allsop "Socio-economic rights" in *Constitutional Law for Students: Part 2* (2020, UCT Libraries); N Ferreira "Feasibility constraints and the South African Bill of Rights: Fulfilling the Constitution's promise in conditions of scarce resources" (2012) 129/2 *South African Law Journal* 274 at 292–95; P Alston and G Quinn "The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9/2 *Human Rights Quarterly* 159.

14 E Wiles "Aspirational principles or enforceable rights? The future for socio-economic rights in national law" (2006) 22/1 *American University International Law Review* 35 at 45–46.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

which [ESCRs] are absent, marginalised or only half-heartedly taken on board. In circumstances in which [ESCRs] are not a fundamental part of the overall approach, there are no obvious limits to inequality."[15]

Objections to giving full legitimacy to ESCRs in constitutions are varied, but they centre on the issue of the state's capacity to deliver the necessary resources, the risk of overstretching the state's budget, the fear of politicizing the judiciary who may become too involved in policy-making and thereby usurp the role of the legislature, and other ideological objections.[16] Indeed, these factors contributed to the conceptualization of ESCRs as aspirational goals of the state in the Nigerian Constitution.

These critiques are not without merits, since the guarantee of the rights essentially entails positive obligations by the devotion of reasonable resources towards the realization of the rights; nevertheless, the justifications for restricting the enforceability of socio-economic rights are inadequate. ESCRs also demand protection and respect, which require negative obligations on the state to prevent violations by the state itself and by third parties. The state can also fulfil immediate non-budgetary duties such as the obligation to refrain from providing discriminatory medical resources and services. Moreover, states can progressively realize these rights within the context of their available resources, for example by setting up affordable and accessible primary healthcare as a starting point and then gradually providing free comprehensive healthcare for all.

International guarantee protection of ESCRs

To increase the understanding of the rationale for undermining ESCRs and the reluctance of the legislature to compel enforceability, this part briefly considers the development of the ESCRs internationally and nationally. The earliest articulations of human rights are linked to the clamour for civil and political liberties. Historical texts such as the Babylonian Code of Hammurabi, the Bible, the Koran and the Hindu Vedas are examples of older sources that raised and addressed issues of rights, duties, responsibilities of the citizens and the state, justice, etc.[17] Many other ancient and pre-modern-era documents, such as the Cyrus Cylinder, the Inca and Aztec codes of conduct and justice, the Edicts of Ashoka and ancient Egyptian laws, are considered as charters of human rights that promoted individual rights, the rights of slaves, civic rights and duties, and women's and children's rights, and laid down principles that have influenced the modern conceptualization of civil and political rights.[18] When the idea of human rights declarations, in particular, gained momentum in the Middle Ages, emphasis was laid on rights that protect an individual's freedom from violations by the government, private individuals, and public and private institutions, in addition to ensuring that everyone was given the opportunity to engage in civil life and to participate in the political affairs of society, and protecting the individual's integrity.[19] The 1218 Magna Carta, for example, protected the king's subjects, whether free or fettered, and conferred certain rights to them.[20] The 1264 Statute of Kalisz bestowed privileges on Jewish minorities in the kingdom of

15 P Alston, Report of the Special Rapporteur on extreme poverty and human rights, HRC/29/31, 27 May 2015, para 50.

16 Wiles "Aspirational principles", above at note 14 at 45–46; Allsop "Socio-economic rights", above at note 13; EG Çamur "Civil and political rights vs. social and economic rights: A brief overview" (2017) 6/1 *Journal of Bitlis Eren University Institute of Social Sciences* 205 at 206–208.

17 D Shiman *Economic and Social Justice: A Human Rights Perspective* (1999, Human Rights Resource Center, University of Minnesota) at 3–4.

18 Ibid.

19 See generally AH Robertson and JG Merrills *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (1996, Manchester University Press).

20 British Library "English translation of Magna Carta" (28 July 2014), available at: <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (last accessed 28 August 2022). The most famous clauses of the Magna Carta are clauses 39 ("No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

Poland and protected them from hate and discrimination.[21] Likewise, the 1628 English Petition of Rights, the 1789 French Declaration of the Rights of Man and of the Citizen and the 1776 United States Declaration of Independence instituted a number of rights and responsibilities that were largely civil and political in nature.[22] It is little wonder that international human rights have subsequently laid emphasis on the guarantee of civil and political rights.

It was not until the 20th century that human rights advocacy around realizing ESCRs gained a strong footing. At the turn of the 20th century, many groups, movements and proponents highlighted the issue of public safety and health and the plight of workers, and fought for the right to work in safe environments and under suitable conditions to safeguard health.[23] Furthermore, international humanitarian interventions by organizations such as the International Committee of the Red Cross, a society for the victims of armed conflict and strife, and the Geneva Conventions of 1959, that were established for the protection of the wounded and sick while also protecting civilians and prisoners of war, have provided guiding foundations for the enhancement of ESCRs.[24]

Human rights received a boost following the establishment of the League of Nations and the UN after World Wars I and II respectively. Of particular note is the rationale for establishing the League of Nations of enhancing international cooperation, preserving world peace and ensuring security.[25] The UN, which succeeded the League of Nations, has a similar but more expansive objective of promoting human rights in general, delivering humanitarian aid and promoting sustainable development, in addition to maintaining world peace and security, thus providing a way to make ESCRs a central consideration for human rights protection and thereby giving them a primus inter pares status.[26] It is plausible that the focus of these intergovernmental organizations was on political problems, disputes and civil liberties, since they emerged after devastating wars that had crippled nations, killed millions and left countless people struggling for survival.[27] Perhaps if the emergence of these organizations had been necessitated by different concerns, such as health pandemics, natural disasters, economic crises, famine and other social welfare concerns, a different approach would have been taken to emphasize the guarantee of ESCRs internationally. Notably, however, the establishment of the International Labour Organization in 1919 to promote opportunities for women and men to obtain decent and productive working conditions of freedom, equality, security and human dignity and the creation of World Health Organization in 1948 served to push socio-economic welfare to the forefront of human rights considerations.[28] Similarly, the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, established ESCRs on a par with political and civil rights as indivisible and inviolable rights. The inclusion of the civil, political, economic, social and cultural rights in the same document also served to seal the

lawful judgment of his equals or by the law of the land") and 40 ("To no one will we sell, to no one will we refuse or delay, right or justice").

21 I Lewin *The Jewish Community in Poland: Historical Essays* (1985, Philosophical Library) at 19.

22 D Shiman *Teaching Human Rights* (1993, Center for Teaching International Relations Publications) at 6–7.

23 Institute of Medicine, Division of Health Care Services and Committee for the Study of the Future of Public Health, *The Future of Public Health* (1988, The National Academy of Sciences); GP Guyton "A brief history of workers' compensation" (1999) 19 *The Iowa Orthopaedic Journal* 106.

24 International Committee of the Red Cross "History of the ICRC" (29 October 2016), available at: <https://www.icrc.org/en/document/history-icrc> (last accessed 18 June 2022).

25 UN Geneva "League of Nations", available at: <https://www.ungeneva.org/en/league-of-nations> (last accessed 18 June 2022).

26 United Nations "United Nations Charter, Chapter I: Purposes and Principles", available at: <https://www.un.org/en/about-us/un-charter/chapter-1> (last accessed 18 June 2022).

27 UN Geneva "League of Nations", above at note 25.

28 International Labour Organization "About the ILO", available at: <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last accessed 18 June 2022).

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

place of ESCRs as inalienable and interrelated rights, marking the beginning of the hope that they can be implemented as a priority.[29]

Over the years the commitment to ESCRs has been elaborated in a number of binding human rights treaties, laws and principles, although these have been neglected in practice compared to political and civil rights.[30] The international instruments on ESCRs provide legal, political and ethical frameworks to address issues of poverty, health, hunger and food security, accommodation, inequality, housing, work, etc. This way, governments are held accountable for denying adequate healthcare, shelter, social security, education or sufficient nutritious food, just as they are held accountable for denying political freedoms and suppressing civil liberties. Of particular note is the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). The treaty was supplemented by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008. It is worth noting that the 1966 International Covenant on Civil and Political Rights was supplemented by two Optional Protocols in 1976 and 1991, further establishing the fact that this category of rights is given primacy even at the international level.

As mentioned earlier, states have a binding duty to respect, fulfil and protect human rights. The positive fulfilment of ESCRs is, however, progressive rather than immediate.[31] Progressive realization in this sense means that states have a specific and continuing obligation to "make as expeditiously and effectively as possible … the full realization" of the right, within a reasonable time.[32] With regards to health, for example, the government is obligated to take appropriate legislative, regulatory, budgetary, administrative, judicial and other necessary measures to progressively fulfil and ensure access to medicines and healthcare facilities for the realization of the right to health.[33] These measures are designed to guarantee the availability of and equal access to health facilities and healthy conditions and products for everyone.[34] Specifically, signatories to the ICESCR are obliged to create the necessary conditions for health by providing "equal and timely access to basic preventive, curative, rehabilitative health services … and appropriate treatment of prevalent diseases, illnesses, injuries and disabilities … [including] the provision of essential drugs; and appropriate mental health treatment and care".[35] States are therefore required to ensure that the appropriate legislative and policy actions comply with the basic objectives of the right to health, in line with

29 AO Oluwadayisi "Economic and socio-cultural rights", above at note 5.

30 M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995, Clarendon Press); S Leckie "Another step towards indivisibility: Violations of economic, social and cultural rights" (1998) 20/1 *Human Rights Quarterly* 81.

31 CESCR General comment no 3: The nature of states parties' obligations (art 2, para 1 of the Covenant).

32 CESCR General comment no 14, above at note 12, para 31.

33 UN General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), art 2.1 (United Nations Treaty Series vol 993), available at: <https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf> (last accessed 4 April 2023); M Dowell-Jones *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (2004, Martinus Nijhoff) at 31–32; J Tobin *The Right to Health in International Law* (2012, Oxford University Press) at 194–95; A Eide "Economic, social and cultural rights as human rights" in RP Claude and BH Weston (eds) *Human Rights in the World Community: Issues and Action* (2006, University of Pennsylvania Press) 170 at 174–76. Guideline 6 of the Maastricht Guidelines also adopts a similar interpretation: "[t]he obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation"; International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (22–26 January 1997), available at: <https://www.refworld.org/docid/48abd5730.html> (last accessed 4 April 2023).

34 It is within this context that the CESCR expatiates that "[t]he obligation to fulfil requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. For this purpose, also, States must ensure provision of health care"; CESCR General comment no 14, above at note 12, para 36. The framework of the legislation necessary for implementing the right to health at the national level is contained in id, paras 53–56.

35 Id, para 17.

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the obligation.[36] While countries such as Nigeria can be constrained from providing the necessary healthcare system due to limited resources, there is still a responsibility on the government to progressively use the available resources to give the fullest attainable expression to the realization of the right to the highest standard of health and living for everyone.[37] Countries such as Nigeria have hidden under the umbrella of the paucity of resources to deny the fulfilment of ESCRs. In many cases where ESCRs are neglected or violated, it is not because resources are not available, but rather they are mismanaged, misallocated or not sufficiently catered for.[38] Nigeria, for instance, is a country blessed with mineral and natural resources; however, resource mismanagement, corruption, misallocation, kleptocracy and appropriation of public funds have deprived the people of access to adequate, affordable and suitable healthcare services, facilities and treatments.[39] Unfortunately, in countries where ESCRs are non-justiciable, it is hard to assert the right and compel accountability to the state's obligation.

The development of ESCRs in Nigeria could also account for the reasons they are undermined, including the right to health and the reluctance of the legislature to enhance the people's enjoyment of the right. The entrenchment of human rights into the corpus of Nigeria's legal system dates back to colonial times, right before the country gained independence in 1960. Prior to independence, the affairs of Nigeria were governed by colonial administrators through the instrumentality of constitutions, although these constitutions were notably devoid of formal or conscious objectives to protect, guarantee or enforce human rights. The absence of legal human rights protection may be linked to the fact that Nigeria, like many African countries, was subjugated under a discriminatory repressive system that favoured the colonial masters and their country over the locals. Likewise, forced labour, exploitation, inhumane and degrading treatment, physical and emotional abuse and degradation were widely practised by the European colonial masters.

One of the issues that emerged in the discussion for independence and constitutional development in Nigeria was the need to provide constitutional protection in the form of human rights. This idea emanated from the clamour by minority ethnic groups that demanded the right to self-determination as a panacea for the perceived tyranny of the majority ethnic groups: Igbo, Hausa and Yoruba, in the various regions. The minorities consequently agitated for the creation of states and self-governance to allay fears about their survival after independence. The British government responded by setting up a committee, headed by Sir Henry Willinks, to ascertain the fears of the minorities and propose means of allaying those fears. This commission subsequently recommended the entrenchment of fundamental human rights protection as a safeguard against oppression by the majority group, although the commission noted that the rights may be difficult to interpret or enforce. In the commission's view, the presence of human rights

> "defined beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed … a government determined to abandon democratic courses will find ways of violating them but they are of great nature in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights."[40]

36 See generally UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General recommendation no 24: Article 12 of the Convention (Women and Health), paras 13–17.

37 S Gruskin "Human rights and public health: An overview" (1999) *Canadian HIV/AIDS Newsletter*, available at: <http://hivinsite.ucsf.edu/InSite?page=kb-08-01-07> (last accessed 9 March 2022).

38 ESCR-Net – International Network for Economic, Social & Cultural Rights "Progressive realisation and non-regression", available at: <https://www.escr-net.org/resources/progressive-realisation-and-non-regression> (last accessed 9 March 2022).

39 Nnamuchi "Kleptocracy", above at note 2 at 9–10; O Agbakoba and W Mamah *Towards a Peoples' Constitution in Nigeria: A Civic Educational Manual for the Legal Community* (2002, Human Rights Law Service) at 43.

40 B Owasanoye and M Ayo Ajomo, *Individual Rights under the 1989 Constitution* (1993, Nigerian Institute of Advanced Legal Studies) at 4.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

The above formed the basis for incorporating fundamental human rights into Nigeria's laws, although fewer enforceability considerations were given to the guarantee of the necessities for human existence, the improvement of social welfare and the enhancement of human development. Similar to the emergence of human rights at the international level, Nigeria's human rights considerations were predicated on civil liberties and political freedoms, and so little consideration was given to ESCRs, even when the country was in dire need of human development and social security at independence. The commission's approach of neglecting ESCRs has continued in the struggle for their recognition to date. Of particular note is that although the commission adopted some of the UDHR human rights norms, there were no provisions for ESCRs in the 1960 Independence Constitution or its subsequent amendments until 1979.

Nineteen years later, some aspects of ESCRs pertaining to old age and disability care, the right to work, education, food, shelter and good water, the protection of cultural expressions and traditional heritage, medical care and unemployment and sickness benefits made their way into the 1979 Constitution, albeit as Fundamental Objectives and Directive Principles of State Policy. The underrated position of economic, social and cultural interests in the Constitution has remained static. Deliberations on the ascription of these provisions as moral obligations, as against a legally binding duty, have revolved around the economic challenges of catering for ESCRs. The legislature has been reluctant to categorize social, economic and cultural interests as human rights or to place them on a par with civil and political rights in the Constitution, for fear of overburdening the budget of the state. According to the explanation of the Constitutional Drafting Committee for separating the category of rights in the Constitution and giving greater importance to civil liberties and political rights:

> "[A]ll fundamental rights are, in the final analysis, rights that impose limitations on executive government and are accordingly easily justiciable. By contrast, economic and social 'rights' are different. They do not impose any limitations on governmental powers. They impose obligations of a kind which are not justiciable. 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 basically unsound."[41]

In November 2021, the lower chamber of Nigeria's bicameral National Assembly maintained this stance and rejected a bill that sought to make chapter II justiciable and give the judiciary powers to act on the government's failure to fulfil its duty to FODPSP.[42] Giving reasons for the rejection of this long overdue but imperative amendment, one of the legislators argued that it would open a floodgate of litigation against the government and subject them to the whims and caprices of everyone who feels aggrieved. Others raised the issue of economic collapse under the burden of such a justiciable duty in a bid to provide "freebies" to citizens.[43] The arguments surrounding the implementation of ESCRs are mere exaggerations of a government that is not ready to cater for the social welfare and human development of its citizens, as a large chunk of the nation's budget is dedicated to the cost of government and maintaining the legislature, with little left for improving social protection and developing the economy.[44]

41 As cited in R Ako, N Stewart and EO Ekhator "Overcoming the (non)justiciable conundrum: The doctrine of harmonious construction and the interpretation of the right to a healthy environment in Nigeria" in A Diver and J Miller (eds) *Justiciability of Human Rights Law in Domestic Jurisdictions* (2015, Springer) 123 at 127; M Craven *The International Covenant*, above at note 30 at 6.

42 Vanguard News Nigeria "Just in: Reps reject bill to make Chapter Two of 1999 Constitution enforceable" (24 November 2021) *Vanguard News Nigeria*, available at: <https://www.vanguardngr.com/2021/11/just-in-reps-reject-bill-to-make-chapter-two-of-1999-constitution-enforceable/> (last accessed 19 June 2022).

43 Ibid.

44 See the 2022 budget plan and proposal at Premium Times "Nigeria's full 2022 budget presented by Buhari to National Assembly" (12 October 2021) *Premium Times*, available at: <https://www.premiumtimesng.com/news/top-news/

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

The justiciability debate

It has been argued in many quarters that socio-economic rights are characteristically non-justiciable rights. While advocates of this position perceive that this category of rights is invaluable to social wellbeing and should, therefore, deserve the aspirational support of states and even the law, they differ in their opinions on whether the support should be viewed as legally enforceable.[45] In addition, the rights are deemed to fall outside the purview of judicial appraisal. Accordingly, these rights impose a high degree of expectation on the state to take positive action to effectuate them, and subjecting this duty on states to judicial scrutiny is tantamount to expanding the role of the judiciary.

In the same light, decisions on resourcing and entitlement to fundamental economic, social and cultural values should only be exercised by the political and legislative arms of the government.[46] This argument follows the trajectory that the characteristics of ESCRs are mainly "political" as the rights involve decisions on major issues of policy, clearly within legislative and executive mandates. Furthermore, the guarantee of these rights depends on the availability of resources, which are matters for the executive and legislature to decide, not the judicial courts. Moreover, the "different" nature of ESCRs, in comparison to civil and political rights, requires a distinct means of validation, and the courts will be exceeding their mandate if they encroach onto matters that fall clearly within issues of policy-making.[47] Commenting on the marginalization of social rights such as adequate standards of living, work, health, food, shelter and education, Hunt outlines the arguments thus:

> "Many different arguments are marshalled against social rights. Some economists say they are unaffordable and some philosophers argue that they are not really rights at all. Observing that social rights raise questions of policy, some lawyers remark that it is not the role of the judiciary to decide policy."[48]

This opposition to judicial intervention can also be viewed from the perspective of democratic legitimacy and separation of powers. The "justiciability" argument is largely determined by assumptions about the role and competence of the court to make certain pronouncements, confer remedies and hold the government accountable. According to this position, ESCRs entail decisions on resource and budgets, and the judiciary simply "lack the political legitimacy and institutional competence to decide such matters".[49] Consequently, whether or not social and economic rights are termed human rights in law, it is not the place of the courts to interfere with government decisions on how to allocate resources or hold them accountable for such. Doing so will be tantamount to usurping the democratic role of policy-makers, and this could lead to a distortion of legitimate democratic processes and institutional roles.[50]

A similar argument is made for the reluctance to introduce ESCRs in many constitutions or to make them enforceable where they are found. The proper political institutions to decide on

489467-download-nigerias-full-2022-budget-presented-by-buhari-to-national-assembly.html> (last accessed 19 June 2022).

45 EC Christiansen "Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court" (2007) 38 *Columbia Human Rights Law Review* 321 at 321–22; CC Nweze "Justifiability or judicialization: Circumventing Armageddon through the enforcement of socio-economic rights" (2007) 15 *African Yearbook of International Law* 107.

46 Ibid.

47 A Nolan, B Porter and M Langford "The justiciability of social and economic rights: An updated appraisal" (2009, New York University Center for Human Rights and Global Justice), available at: <https://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf> (last accessed 4 April 2023).

48 P Hunt *Reclaiming Social Rights: International and Comparative Perspectives* (1996, Dartmouth Publishing) at xvii.

49 Christiansen "Adjudicating", above at note 45 at 322.

50 PV Fay "Constitutionalising socio-economic rights in Ireland" (PhD dissertation, Queen's University Belfast, 30 April 2008) at 2.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

economic, social and cultural budgetary allocation and the distribution of social welfare resources are the executive and legislature.[51] It is for this reason that ESCRs, including the right to health, are categorized as directive principles and addressed to the government, not the courts, to conform to, observe and apply. Keeping socio-economic rights out of the enforceable entitlements in the Constitution is, therefore, a way of enabling the executive to adopt their preferred policies and, at their discretion, to realize these rights without the pressure of judicial assessment.

This laid-back attitude to ESCRs can also be seen in states' approaches to these rights at the international level. As rightly observed by Nolan, Porter and Langford, "[s]tates opposed to the Optional Protocol to the ICESCR tend to affirm a commitment to social and economic rights as human rights but at the same time argue that there should be no interference with governments' decisions resulting in violations of these rights".[52] When the justiciability debate is situated in a broader framework of political will and democratic accountability, or is relegated to a matter for the elected representatives of the people to decide and not the unelected courts, it ignores the central place of the "subjects" of these rights (ie the right holders) and denies them access to an effective remedy when these rights are violated. Furthermore, rejecting the justiciability or "constitutionalization" of ESCRs disregards the significant aim of the Constitution – to promote and protect the citizen's wellbeing. How can the rights of citizens be secured and enhanced if the Constitution does not recognize the means for ensuring this? Indeed, the preamble to the Nigerian Constitution purposely provides that the Constitution aims to promote good government and the "welfare of all persons" in Nigeria on the principles of freedom, equality and justice. How can the people's welfare be safeguarded or promoted if the means to doing this cannot be adjudicated and enforced by the courts?

It is my argument that while the issues of democratic legitimacy and separation of powers are significant, they do not and should not trump the fundamental principle of justice, which is the major aim of many constitutions. After all, the same Constitution which grants rights to the legislature and executive also creates the judicial institution to enforce certain rights, even against the decisions of the government. In this regard, the courts are guardians of the Constitution and protectors of rights. Limiting the role of the courts with regard to health matters is tantamount to limiting a purposive aim of the Constitution. Indeed, many legal documents, including the Constitution, confer a duty on the courts to make orders and secure the constitutional rights of individuals where such rights have been or are being invaded by the activities of the government, and to intervene when called upon to do so in many cases. As the arbiters of constitutionality, they protect, preserve and promote the overriding objectives of constitutions through interpretations, remedies and punishment.[53] De Blacam writes in this regard that "when judges fail to play their proper part in the protection of constitutional rights, the irony is that they themselves breach the separation of powers".[54] Judges provide the necessary checks and balances and ensure compliance with the rule of law within the spirit of constitutional objectives. It follows that the courts can serve as protectors of economic and social rights in compelling a binding duty on the state. Scott and Macklem have observed in this respect that "courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary."[55] If all human rights – whether social, economic, cultural, civil or political rights – are to mean anything, they must be capable of being enforced without distinction, and all the more so in the face of the

51 HP Faga, F Aloh and U Uguru "Is the non-justiciability of economic and socio-cultural rights in the Nigerian Constitution unassailable? Re-examining judicial bypass from the lens of South African and Indian experiences" (2020) 14/3 *Fiat Justisia* 203 at 209.

52 Nolan, Porter and Langford "The justiciability", above at note 47.

53 See *Boland v Taoiseach* [1974] IR 338 and *The State (Quinn) v Ryan* [1965] IR 70, where the courts alluded to the fact that courts are the arbiters of constitutionality.

54 M de Blacam "Children, constitutional rights, and the separation of powers" (2002) 37 *Irish Jurist* (New Series) 113 at 142.

55 C Scott and P Macklem "Constitutional ropes of sand or justiciable guarantees?" (1992) 141/1 *University of Pennsylvania Law Review* 1 at 35–36.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

reluctance of the executive or legislative arm of the government to fulfil the essential duties towards the rights. Specifically, respecting, protecting and fulfilling the right to health will remain underrated if the courts cannot compel the necessary duties towards it. Through the exercise of their judicial powers, the courts in Nigeria can enhance the legal and judicial implementation of the right to health, despite the limitations in the Constitution.

Employing judicial powers to enhance the right to health

The preceding section having made the argument for proactive judicial involvement with respect to health rights, the next point for consideration is how the courts can exercise their discretion in favour of the right to health. The following section will delineate how proactive judicial activism can ameliorate the justiciability issues in the Constitution.[56]

Making a case for the enforcement of the right to health

The judiciary can employ its powers in a number of ways to enhance the enjoyment of health rights in Nigeria. First, the courts can link the enjoyment of the right to health to other human rights, especially civil and political rights. This linkage will also bridge the gap between civil and political rights and the marginalized category of ESCRs by according them the same footing. Second, the court can make decisions based on the treaty obligations of Nigeria, for example through the state's obligations as enumerated in the African Charter on Human and Peoples' Rights (the African Charter).[57] Third, the court can make a pronouncement on the basis of the duty and obligation of the state in sections of the Constitution or other binding policy instruments. Fourth, the legislators can exercise their rights to create new laws that will make these provisions justiciable. The court can then decide based on the legislator's exercise of their rights in the Constitution to create new laws. These points are further explicated below.

Linking rights

International law has declared the interrelatedness, interdependence and indivisibility of economic, social, cultural, civil and political rights.[58] The right to health is intrinsically interlinked with all human rights, including the rights to life, liberty, development, social justice and human dignity. The right to life, for example, imposes a duty on states to refrain from unlawfully or intentionally taking life, and also a positive obligation to undertake appropriate actions to safeguard the right to life, which would include the provision of "adequate and appropriate" healthcare facilities and

56 Judicial activism is "the judicial vigour in enforcing constitutional limitations on the other branches of government and their readiness to veto those policies on the branches of government on constitutional grounds"; I Imam "Judicial activism in Nigeria: Delineating the extend [sic] of legislative-judicial engagement in law making" (2015) 15/1 *International and Comparative Law Review* 109 at 114. For a detailed discussion of judicial review with respect to ESCRs, see CR Garavito "Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America" (2011) 89/7 *Texas Law Review* 1669.

57 In *Media Rights Agenda and Others v Nigeria* [2000] AHRLR 200 (ACHPR 1998), paras 90–91, the Commission took the view that the denial of an incarcerated suspect's access to medical care while his health was deteriorating is a clear violation of the right to health under art 16 of the charter. Likewise, the Commission considered it a violation of the right to health under art 16 to deprive prisoners of food, blankets and adequate hygiene as it affected their general state of health. See African Commission on Human and Peoples' Rights "Thirteenth annual activity report, 1999–2000" at 158. In *Purohit and Another v The Gambia* [2003] AHRLR 96, the African Commission held that the Gambia fell short of satisfying the requirements of arts 16 and 18(4) of the African Charter in guaranteeing the enjoyment of the right to health, which is crucial to the realization of other fundamental rights and freedoms.

58 See for example the Vienna Declaration and Programme of Action (1993), art 5, and the Proclamation of Tehran (1968), para 13.

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treatments.[59] Without the right to health, the enjoyment of the right to life and other human rights are inconceivable.

In much of the judicial activism exercised in this regard, the courts have secured the right to health by connecting it to the enforcement of other justiciable rights, especially the right to life, bodily integrity, dignity and liberty.[60] For example, despite the non-enforceability and justiciability challenge of chapter II of the Nigerian 1999 Constitution, the Nigerian Federal High Court opened up a new window to allow the enforcement of the constitutional provisions in chapter II by relying on the justiciable fundamental rights in chapter IV of the Constitution to interpret the non-justiciable provisions in chapter II. *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* is illustrative.[61] The court delivered a landmark ruling for the protection of the right to health and a healthy environment. The appellants claimed that the degradation of the environment by the respondents violated their health-related human rights. They also sought an order to enforce their fundamental rights to life and dignity of the person pursuant to sections 33(1) and 34(1) of the Nigerian Constitution. The applicants further supported their claim by relying on articles 4 (on the right to life), 16 (on the right to healthcare) and 24 (on the right to a satisfactory environment) in the African Charter.[62] In this case, the judge relied on the guaranteed constitutional provisions on the rights to life and dignity of the person and broadly construed the right to life as extending to the right to health and a healthy environment in the African Charter.

Furthermore, the Federal High Court held that

> "Section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and Section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations Section 1.43 of 1984, under which gas flaring in Nigeria may be allowed are inconsistent with the applicant's rights to life and / or dignity of human person enshrined in Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, Vol 1, Laws of the Federation of Nigeria, (2004) and are therefore unconstitutional, null and void by virtue of Section 1(3) of the same Constitution."[63]

This case is a significant improvement in the judicial attitude to human rights, especially socio-economic provisions, for the following reasons. First, the court linked the right to a healthy environment (non-justiciable under chapter II) with the justiciable right to life and human dignity provision in the 1999 Constitution. The right to life was thus broadly interpreted to include congenital factors such as a healthy living environment. Second, although the case was not decided exclusively on the human rights provisions in the African Charter, the court relied significantly on the right to health and a healthy environment in the charter to enforce socio-economic rights in Nigeria, since the country has signed and ratified the charter. Third, this case illustrates the

59 F Menghistu "The satisfaction of survival requirements" in B Ramcharan (ed) *The Right to Life in International Law* (1985, Martinus Nijhoff) 67.

60 For example, in *Okogie v Attorney General*, above at note 9; although the courts held that the FODPSP were non-justiciable, at the same time the Court of Appeal held that the implementation of chapter II could not be done in such a way as to infringe on the fundamental rights enunciated in chapter IV of the Constitution (the freedom to hold opinion, receive and impart ideas under sec 36(1)). The court further found in favour of the plaintiffs on the basis that secs 16(1)(c) and 18 of the Constitution guarantee their rights to participate in the economy, and hindering them would amount to a violation of their fundamental rights under sec 36.

61 152 [2005] AHRLR 151 [NgHC 2005].

62 On the right to health provisions in the African Charter, the appellant argued that they have a right to "enjoy the best attainable state of physical and mental health as well as a right to a general satisfactory environment favourable to their development"; id, paras 3(b) and 4(2).

63 Id, para 5(6).

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influence and application of human rights provisions in the African Charter to grant a human rights remedy.

Similar decisions in other jurisdictions indicate that ESCRs, including the right to health, are significant to the fulfilment and enjoyment of all human rights. In *Khosa and Others v Minister of Social Development and Others* in South Africa, the socio-economic rights in the Constitution were said to be closely related to the founding values of human dignity, equality and freedom. The court therefore examined the restrictions on access to social security in connection with the right to life, equality and dignity.[64] In *Government of the Republic of South Africa and Others v Grootboom and Others*, a case on a challenge to the failure of governments to provide adequate housing, the duty to develop a programme to progressively realize ESCRs was famously discussed by the South African Constitutional Court.[65] Yacoob J observed in that case that all rights are interrelated and all are equally important. The Costa Rican Supreme Court, in *Mr William García Álvarez v Caja Costarricense de Seguro*, ruled in favour of the plaintiff, an HIV-positive person who was refused antiretroviral treatment by the social security institution.[66] The plaintiffs argued that the treatments were expensive in the private sector and so the refusal to provide them by the institution and their inaccessibility was a violation of the right to life and health. The judge, in ruling in favour of the plaintiff, decided that

> "If the right to life is especially protected in each modern State and with the right to health, any economic criteria that pretends to deny the exercise of those rights, has to be of second importance … without right to life, all the remaining rights would be useless."[67]

It follows that another way to secure respect for and protection and fulfilment of the right to health is by linking the enforcement of the provisions to the justiciable rights such as the right to life, dignity and liberty. This way, an action to enforce the right to health that will face the challenge of justiciability under the Constitution can be interpreted with regard to the right to life.

The jurisprudence of South Africa's Constitutional Court is extensive on the state's duty towards the right to health. In *Treatment Action Campaign and Others v Minister of Health and Others* and the subsequent appeal to the Constitutional Court (*Minister of Health and Others v Treatment Action Campaign and Others*), the court took the time to consider the legal obligation of the state to enforce socio-economic rights and stressed that the state is under a constitutional duty to take all necessary and reasonable actions to comply with the provision of the right to health.[68] The court decided in favour of the plaintiffs and stated that the restriction which affected the availability and accessibility of essential medicines for women and children violates the constitutional human rights provisions and constituted an "unjustifiable barrier to the progressive realization of the right to health care". In this regard, the court decided that while it is practically impossible to give everyone access to a "care service immediately" (according to the minimum core obligation), the state is under a duty to reasonably provide access to socio-economic rights on a progressive

64 [2004] (6) SA 505 (CC) (S Afr), paras 40–41. It is worth noting that the right to health has been codified as a justiciable human right in sec 27 of the South African Constitution. The case law examples are used to illustrate the link between the right to health and other human rights.

65 [2001] (1) SA 46 (CC).

66 [1997] (File 5778-V-97), available at: <http://www.poderjudicial.go.cr/scij/index_pj.asp?url=busqueda/jurisprudencia/jur_ficha_completa_sentencia.asp?nBaseDatos=1&nSentencia=15980> (last accessed 16 June 2022).

67 Ibid, as interpreted and cited in HV Hogerzeil, M Samson and JV Casanova *Ruling for Access: Leading Court Cases in Developing Countries on Access to Essential Medicines as Part of the Fulfilment of the Right to Health* (2004, World Health Organization Department of Essential Drugs and Medicines Policy) at 27–28.

68 *Treatment Action Campaign and Others v Minister of Health and Others*, High Court of South Africa, Transvaal Provincial Div [2001] 21182/2001; *Minister of Health and Others v Treatment Action Campaign and Others* [2002] (CCT8/02) ZACC 15, paras 33, 34.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

basis.[69] Although the delineation of this reasonable standard was not clearly defined by the court, it stated that the government is required to undertake all reasonable measures to eliminate or reduce the condition and "large areas of severe deprivation that afflict our society".[70] Notably, the court referred to international treaties (such as the ICESCR) to interpret the state's obligation to adopt "reasonable measures" to implement the right to health. The court was able to adopt this progressive interpretation of the right because the right to health is recognized as a constitutional prerogative. On this note, the right to health should be incorporated in the Nigerian Constitution or other legislation as a fundamental right (a positive right) which can be enforced in a court of law, rather than leaving it as a hortatory health development objective of the state.

The Indian Supreme Court has also made socio-economic rights justiciable through its emphasis on the indivisibility of human rights, paving the way for the enforcement of the right to health. In *Samity v State of West Bengal*, for instance, access to timely healthcare necessary to preserve life was upheld by the Indian Supreme Court.[71] Deciding on the basis of the right to life, the court held that the right includes an obligation to provide access to medical treatments to preserve human life as a "[c]onstitutional obligation of the State to provide adequate medical services to the people".[72] Notably, the court held that this duty on the state is irrespective of financial and resource constraints. The Indian Supreme Court stated this as follows:

> "It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints."[73]

Similarly, in *Poltoratskiy v Ukraine*, the European Court of Human Rights took the view that "lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the [European] Convention [on Human Rights]".[74]

It should be noted that Nigeria and many countries that do not place binding obligations on the right to health share similar constitutional laws and legal systems with India. Perhaps it is not out of place to follow this judicial activism and adopt a rights-based attitude to lay down the standards for governments to comply with the obligations to the right to health and to provide medical aid to preserve human life in spite of the financial consequences to the state.[75] In India, *F. Hoffmann-La Roche Ltd and Another v Cipla Ltd* and in Kenya, *Patricia Asero Ochieng,*

69 Ibid.

70 The criterion for reasonableness was also considered by the court in noting that "all that is possible, and all that can be expected of the State, is that it acts reasonably" to guarantee ESCRs; id, para 35.

71 *Paschim Banga Khet Samity v State of West Bengal* [1996] case no 169, judgment of 6 May 1996, writ petn (civil) no 796 of 1992 (SC Agrawal, GT Nanavati JJ). In this case, Samity fell off a train and suffered serious head injuries. The necessary health facilities (including a vacant bed) to treat him were not available in six hospitals. The Court held that "failure on the part of the government to provide timely medical care to a person in need of such treatment results in a violation of his right to life guaranteed in Article 21 of the Constitution"; see para 9 of the judgment. Similarly, in *Gupta v Union of India* [1981] 2 SCR 365 (India), the court held that civil and political rights are meaningless unless accompanied by economic and social rights.

72 *Samity*, ibid, paras 9, 15–16.

73 Id, para 16.

74 Application no 38812/97, judgment delivered on 29 April 2003, para 148.

75 It should be noted that Nigeria shares a similar constitutional law and legal system with India, hence the comparative study of the two countries. This suggestion is made not only because Nigeria and India share a similar constitutional provision with regards to healthcare, but more so that both countries share a comparable socio-economic condition and political landscape.

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Maurine Atieno, Joseph Munyi, and AIDS Law Project v Attorney General further illustrate the point that litigation can effectively be used to give consideration to the rights to health and life.[76] In Uganda, the petitioners in *Centre for Health Human Rights and Development and 3 Others v Attorney General* challenged the government's failure to provide basic maternal health services as a breach of their rights to health and life.[77] In its decision, the Supreme Court adjudged that access to proper maternal healthcare and emergency obstetric care is essential in ensuring support for women's constitutional rights to health and life.[78] Fundamentally, this judgment makes a case for the judicial enforcement of health rights in a manner that is linked to a country's constitution, thus providing a good basis for its justiciability and the legal enforceability of the right.[79]

A convergence of opinion in all these cases shows that courts are now more cautious about insisting in simplistic terms that the right to health is not justiciable. While there may be a duty to respect, protect, fulfil and even remedy the right to health, these duties will often be meaningless in practice without a clear identification of the necessary duty bearers to enforce them.

Legislating the right to health in the African Charter

The ESCRs in the African Charter can be relied upon to promote the right to health in Nigeria since the charter has been ratified and adopted into the corpus of domestic laws in Nigeria. Nigeria is a dualistic state, hence treaties and international laws do not automatically carry the force of law. Under section 12(1) of the Constitution, a treaty of international law can only be recognized as valid in Nigeria when it is incorporated into national law by the National Assembly. At present, several international laws which contain significant human rights to health provisions have not been enacted into the national laws of Nigeria for domestic validity. They will require domestication by the Assembly to bear practical applicability and direct enforcement. The African Charter, however, has been ratified and domesticated accordingly, and so its entire provision, including the right to health, is enforceable in the country.[80] According to article 16 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (mirroring the same provision in article 16 of the African Charter), "every individual shall have the right to enjoy the best attainable state of physical and mental health". This simply means that the right to health is given statutory recognition. Furthermore, it is also justiciable in Nigeria, thus, unless the health provisions in the African Charter can be proven to be inconsistent with the Constitution, they are enforceable by the courts. This was the opinion of the court in *Fawehinmi v Abacha*, where the court reaffirmed the binding status of the African Charter and the import of its provision in compelling a duty from the government – whether the executive, legislative or judicial authorities in a military or democratic dispensation – unless the provisions are shown to be inconsistent, have been expressly suspended or have

76 *F. Hoffmann-La Roche Ltd and Another v Cipla Ltd* 148 [2008] DLT 598, MIPR 2008 (2) 35, judgment delivered by J Ravindra Bhat; *Patricia Asero Ochieng, Maurine Atieno, Joseph Munyi, and AIDS Law Project v Attorney General* [2009] petition no 409, para 56. In the latter, the judge ruled that the rights to health, life and human dignity are inextricably bound; there can be no argument that "without health, the right to life is in jeopardy". Note that art 43(1)(a) of the Constitution of Kenya codifies the "right to the highest attainable standard of health", including reproductive rights, as a justiciable right.

77 [2012] UGSC 48.

78 The court ruled that maternal death due to non-availability of basic maternal health commodities in hospitals was a violation of women's constitutional rights to health and life as guaranteed under the Constitution.

79 Similar to Nigeria, there is no express stipulation of the right to health in Uganda's Constitution. Although the Constitution specifically guarantees the right to life and to a clean and healthy environment (a precondition to the right to health), there is no justiciable provision for the right to health; Centre for Human Rights and Development "Review of constitutional provisions on the right to health in Uganda: A case study report" (Regional Network for Equity in Health in East and Southern Africa case study, September 2018), available at: <https://equinetafrica.org/sites/default/files/uploads/documents/CEHURD%20Constitutional%20Review%20Sep2018.pdf> (last accessed 4 April 2023).

80 By virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, Laws of the Federation of Nigeria, 2004.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

been repealed by a later statute.[81] The charter therefore strengthens the judiciary's ability to provide an enabling environment for citizens to demand better healthcare and conditions, in addition to setting standards for the provision and protection of healthcare through litigation.[82]

To add impetus to this position, a "fundamental right" is defined in Order 1, Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP) as "any of the rights provided for in chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act". This order, by including all the rights in the African Charter, effectively takes into account the enforceability of the right to health in the charter as a fundamental imperative. The practical advantages of the African Charter with respect to health have been judicially acknowledged in a number of cases. In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, the African Commission broadly identified the rights to health and a healthy environment as enforceable rights against the government when it held that Nigeria was in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter by allowing multi-national companies to carry out oil exploration operations that affected the environment and health of the Ogoni people in that region.[83] The Commission further made the point that the rights contained in the African Charter can be invoked by the Nigerian courts since its provisions have been incorporated into the body of laws in the country. The case is significant for several reasons. First, the Commission delineated the positive and negative obligations that are embedded in the rights to health and a healthy environment and further linked these rights to other human rights such as the right to housing, food and shelter. On the negative obligation to health-related rights, the Commission made the case that the government has a duty to protect citizens from damaging acts that can affect their health. This interesting aspect supports the point made earlier that the government should not rely on limited resources to deny the justiciability of the right to health. Recognizing this right will ensure that the government protects citizens from harmful acts by third parties, in addition to conferring an enforceable power to call for accountability where the government fails in this respect.

Similarly, in the case of *Socio-Economic Rights and Accountability Project (SERAP) v the Federal Republic of Nigeria and Universal Basic Education Commission*, the Economic Community of West African States (ECOWAS) Community Court of Justice upheld the justiciability of the African Charter as a part of the domestic laws in Nigeria.[84] In this case involving the right to education, the court held that it has the jurisdiction to entertain matters under the African Charter notwithstanding the fact that the educational objective in the Constitution of Nigeria is unenforceable by the court. The court ruled that "under article 9(4) of the Supplementary Protocol, the Court clearly has jurisdiction to adjudicate on applications concerning the violation of human rights that occur in the Member States of ECOWAS" and that it "has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of Nigeria cannot oust the jurisdiction of the Court".[85] These cases have laid to rest the lingering doubt about the absolute non-justiciability of the right to health in Nigeria. The cases have also provided the groundwork for subsequent arguments in favour of recognizing the right to health in Nigeria without breaching the express provisions of the Constitution. This point bears emphasis as the ouster clause in section 6(6)(c) which bars the court from exercising jurisdiction applies only to the matters contained in chapter II, thus citizens are not precluded from relying on their rights in other statutes.

81 *Gani Fawehinmi v General Sani Abacha and Others* [2000] 4 SCNJ 401 at 27. See also *AG v Atiku Abubakar* [2007] 32 NSCQR 1 at 85.

82 See *Treatment Action Campaign*, above at note 68; Ako, Stewart and Ekhator "Overcoming", above at note 41 at 123.

83 [2001] Communication no 155/96 AHRLR 60 (ACHPR 2001), para 70.

84 [2009] ECW/CCJ/APP/0808. See also *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria and Others*, suit no ECW/CCJ/APP/08/09.

85 *SERAP v Federal Republic of Nigeria*, ibid, paras 13–14.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

Although the jurisprudence of the African Charter clearly demonstrates that the right to health could be justiciable under a supra-national human rights system, exploring the channels available under the African Charter or litigating under it is not without limitations. First, parties are expected to exhaust all local remedies and to indicate measures that have been taken to resolve the matter amicably and why these measures failed, or why they were not used at all (reasons could include that the state does not afford due legislative or legal process for the protection of rights or of the rights that have been allegedly violated, the denial of access to domestic courts, unreasonable delay that has prevented the aggrieved from exhausting local remedies or delay in rendering a final judgement, the absence or ineffectiveness of local remedies, etc).[86] According to article 50 of the African Charter, "[t]he Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged". Individuals are therefore expected to use the remedies provided by the national legal system, which can be time-consuming and expensive.

Second, there is the issue of compliance with the decisions of the African Commission or international or regional human rights courts. Notably, the African Charter makes no direct reference authorizing the Commission to issue recommendations upon finding a state party in violation of its treaty obligation or provisions of the charter or to compel the enforcement of its decision or recommendation per se.[87] (The Commission's recommendations are submitted to the Assembly of Heads of State and Government of the Organisation of African Unity for adoption; the decision of the Assembly is final and sanctions are imposed where a decision is not implemented.) However, the Commission has developed a mandate to adopt recommendations upon finding that a state party is in violation of the charter, by relying on the "implied powers doctrine". Consequently, some states may view the implementation of the recommendation as voluntary or may simply ignore it, especially when the Commission is viewed as a quasi-judicial body. States can easily argue that the decisions of the Commission are non-binding and disregard the implementation of recommendations and remedies.[88] Since national mechanisms are critical to follow-up and implementation, effective means of compelling compliance is necessary to ensure the potency of these judgements and decisions.[89] In keeping with the principle of *pacta sunt servanda* (Latin: "agreements must be kept") and the tenets of article 1 of the African Charter, which enjoins the recognition of the rights, duties and freedoms enshrined in the charter and the adoption of legislative or other measures to give effect to them, Nigeria cannot legally escape its treaty obligation to be bound by decisions or recommendations emanating from the charter. The adoption of the charter into the corpus of Nigeria's legal system demands concrete obligations – to protect, respect, fulfil and remedy, especially where the government, its authorities and third parties are found to be in violation of the charter. The political will to honour the international treaty is central to this obligation. To embolden such political will, Wachira and Ayinla suggest the need for

86 AO Enabulele "Sailing against the tide: Exhaustion of domestic remedies and the ECOWAS Community Court of Justice" (2012) 56/2 *Journal of African Law* 268.

87 L Louw "Member states' compliance with the recommendations of the African Commission on Human and Peoples' Rights" in A Adeola (ed) *Compliance with International Human Rights Law in Africa: Essays in Honour of Frans Viljoen* (online ed, 2022, Oxford Academic) 149.

88 R Murray and E Mottershaw "Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights" (2014) 36/2 *Human Rights Quarterly* 349. See also *Civil Liberties Organisation v Nigeria* [2000] AHRLR 188 (ACHPR 1995).

89 See more discussion at GM Wachira and A Ayinla "Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy" (2006) 6/2 *African Human Rights Law Journal* 465.

> "the relevant decision-making body to have an institutionalised follow-up mechanism to encourage and monitor compliance and where, despite this, there is an absence of the requisite political will, then there is need for an enforcement mechanism to ensure compliance through the effective use of sanctions, whether within the framework of the body or by co-operating with relevant enforcement bodies or authorities."[90]

They further recommend the creation of an "institutionalised follow-up mechanism within the African Commission structure, and for ultimate enforcement measures through co-operation with the AU Assembly … within their political norm enforcement frameworks".[91]

Judicial intervention in another section of the Constitution

Another pathway to advancing the right to health in Nigeria is through the enforcement of the right where the law makes provision for this in another section of the Constitution. Although the non-justiciability status of chapter II of the Constitution, in section 6(6)(c), is well established, the enforcement of chapter II provisions may be permissible where it is so provided in other sections of the Constitution. This is because the barring enforceability provision of section 6(6)(c) only limits the justiciability of FODPSP to chapter II and not the entire Constitution. This point is better explained in *Olafisoye v Federal Republic of Nigeria*; the court was invited to determine the question of whether or not the National Assembly validly enacted the Corrupt Practices and Other Related Offences Act of 2000 following the powers conferred to the government under section 15(5)(2) of the Constitution.[92] This section, contained in chapter II, grants powers to the National Assembly to make laws to prohibit and abolish corrupt practices and abuse of power. The appellants, Chief Adebiyi Olafisoye and three others, were charged with offences under the Corrupt Practices and Other Related Offences Act. They objected to the validity of the law. The court in its ruling stated that section 6(6)(c) does not completely foreclose the justiciability of chapter II. In the words of Niki Tobi (JSC), "In my humble view section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words 'except as otherwise provided by this Constitution'."[93]

This means that if the Constitution otherwise makes provisions in another section which makes a matter or section in chapter II justiciable, it will be so interpreted by the courts. Although the Supreme Court judges acknowledged the fact that by the provision of section 6(6)(c) of the Constitution, section 15(5) as it stands and on face value is not justiciable, the court went further to interpret the provision of that section by relying on another justiciable part of Constitution. The court essentially based its decision on the provisions of item 60(a) of the Exclusive Legislative List of the Second Schedule to the Constitution, which vests power in the National Assembly to promote and enforce the observance of chapter II. The sub-item provides "the establishment and regulation of authorities for the Federation or any part thereof … to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution". The court emphasized that the matters in item 60(a) fall within the legislative powers of the National Assembly. Accordingly, the court proactively ruled that the legislature validly exercised its rights in the Exclusive Legislative List to "promote and enforce the observance of the provisions of Chapter 2 (II) of the Constitution" when it enacted the Corrupt Practices and Other Related Offences Act.

This case exemplifies the role of the judiciary in charting a pathway for the justiciability of ESCRs in Nigeria. In this case, the court proactively exercised its power of activism to clarify the role of the

90 Ibid.
91 Ibid.
92 *Olafisoye v Federal Republic of Nigeria* [2004] 4 NWLR (Pt 864) at 580.
93 Ibid. See also *Federal Republic of Nigeria v Anache and 3 Others* [2004] 17 NSCQR 140.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

legislature in enhancing the enforcement of FODPSP. By the same token, therefore, the right to health and the provisions of FODPSP with respect to health can be made justiciable where the National Assembly exercises its law-making powers based on item 60(a) of the Exclusive Legislative List of the Second Schedule to the Constitution. As the matter of regulating chapter II provisions falls under the Exclusive Legislative List, the National Assembly can make laws concerning the implementation and enforcement of the provisions of chapter II. In this sense, the legislature can establish and direct the relevant authorities to promote, safeguard and enforce the highest attainable standard for the right to health in Nigeria. Since the bar to the enforceability of chapter II (in section 6(6)(c)) does not extend to matters in the Exclusive Legislative List, it can be argued that the legislature can make laws that permit the enforceability of the provisions of chapter II, notwithstanding the ban in section 6(6)(c). In this connection, Obilade has noted, regarding the duties of the state to abolish corrupt practices and the abuse of power, that

> "[i]t is clear … that although Section 15(5) [in chapter II] of the Constitution is, in general not justiciable, as soon as the National Assembly exercised its powers under Section 4 of the Constitution with respect to Item 60(a) of the Exclusive Legislative List, the provisions of Section 15(5) of the Constitution become justiciable."[94]

Legislating the right to health

Although judicial intervention is significant in demanding the guarantee of the right to health, the law is the starting point for securing the enjoyment of this right. Accordingly, recognizing the right to health would generate positive health outcomes and promote the realization of health rights. An important avenue that could be explored by the judiciary to assure the highest standard of adequate healthcare for Nigerians is by interpreting subsidiary legislation that recognizes the right to health. Given the foregoing, it appears that while chapter II is non-justiciable, there are other ways in which the provisions can be made justiciable. Under section 4 of the 1999 Constitution, the legislature has the power to make laws for the peace, order and good government of the Nigerian Federation.[95] The legislature can exercise its right by creating the requisite institutions to oversee the medical care and health-related needs of Nigerians. Specifically, the provisions of section 4(2) in conjunction with item 60(a) are instrumental means of overcoming the judicial conundrum about the enforcement of chapter II.[96]

This argument also finds support in *Attorney General of Ondo State v Attorney General of the Federation and Others*.[97] The Supreme Court adopted a liberal interpretation which suggests the likelihood of the justiciability of chapter II through the relevant federal legislation. One of the main issues for determination before the court in this case was the question of whether or not the National Assembly was competent to enact the Corrupt Practices and Other Related Offences Act in relation to section 15(5) (under chapter II) as empowered under item 60(a) of

94 AO Obilade et al (eds) *Contemporary Issues in the Administration of Justice: Essays in Honour of Justice Atinuke Ige* (2002, Treasure Hall Konsult) at 127.

95 In a related manner, in the 1999 Constitution, health is listed in schedule II, part II, item 17(a) of the concurrent list; however, the wording of the item indicates that the National Assembly is charged with the responsibility of making laws for the Federation or any part thereof with respect to matters relating to health: "[t]he health, safety and welfare of persons employed to work in factories, offices or other premises or in inter-State transportation and commerce including the training, supervision and qualification of such persons". Under schedule IV, sec 2(c), one of the functions of a local government (municipal) authority is to facilitate "provision and maintenance of health services".

96 Sec 4(2) provides that "the National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution".

97 [2002] 9 NWLR (Pt 772) at 222.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

the Second Schedule to the Exclusive Legislative List.[98] The court upheld and justified the enactment of the act based on the legislative authority of the National Assembly under items 60(a), 67 and 68 of the Exclusive Legislative List. On the non-justiciability of the FODPSP, the leading judge in the case, Uwaifo S (JSC), observed that "[w]hile they [the FODPSP] remain mere declarations, they cannot be enforced by the legal process but (it) would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them … But the directive principles (or some of them) can be made justiciable by legislation."[99] This view expressed by Uwaifo adds credence to the argument that the duty to protect, respect and provide healthcare services, facilities and resources is possibly an enforceable duty on the Nigerian government when the legislature explores this ample opportunity in the exercise of their powers.

Several other cases indicate the evolving attitude of the judiciary in reconciling the key role of the legislature in providing citizens with recourse to social justice. For example, in *Bamidele Aturu v Minister of Petroleum Resources and Others*, Aturu instituted an action challenging the incessant fuel price increases and the Nigerian government's neo-liberal policy of deregulation of the downstream sector of the petroleum industry.[100] He argued that the policy of deregulation was unconstitutional and illegal, in view of section 16(1) of the Constitution (under chapter II) and sections 6(1) and 4(1) of the Petroleum Act and the Price Control Act respectively. The defendants counter-argued that the suit was not properly constituted on the grounds of locus standi and the non-justiciability of section 16(1). On the substantive issue, the court ruled that the combined reading of the provisions of section 16(1) of the Nigerian Constitution and sections 6(1) and 4(1) of the Petroleum Act and the Price Control Act respectively obliged the government to regulate and fix, from time to time, the price of petroleum products in Nigeria in such a manner as to secure the maximum welfare, freedom and happiness of Nigerian citizens. On the issue of justiciability, the court relied on *Attorney General of Ondo State v Attorney General of the Federation and Others* and held that the provisions of chapter II of the Constitution can be made justiciable through legislation. The court ruled that "by enacting the Price Control Act and Petroleum Act and providing in section 4 and 6 of those acts, for the control and regulation of prices of petroleum products, the National Assembly working in tandem with the government has made the economic objectives in section 16(i)(b) of the Constitution in Chapter II justiciable". Similarly, in *Federal Republic of Nigeria v Anache and 3 Others*, the court based its decision on the combined effect of sections 4 (2), 15(5), items 60(a) and 67 in part I of the Second Schedule and section 2(a) of part III of the Second Schedule to the 1999 Constitution to determine that the legislature has the power to make laws even for matters contained in chapter II.[101] These judicial pronouncements significantly suggest that there are alternative means by which the guarantee to health can be made justiciable by means of enacting and executing legislation to this effect.[102] Thus it is possible that the provisions on an adequate standard of healthcare for Nigerians can be made justiciable through legislative provisions to bolster the effect of the provisions in chapter II of the Constitution.[103]

98 The plaintiffs challenged the constitutionality and validity of the Corrupt Practices and Other Related Offences Act, which established the Independent Corrupt Practices and Other Related Offences Commission to prosecute alleged offenders in relation to sec 15(5) (under cap II) on the federalism principle. One of the questions before the court was whether the National Assembly is constitutionally empowered to make laws with respect to "all corrupt practices and abuse of power" in sec 15(5) under item 60(a) of the Second Schedule to the Exclusive Legislative List.

99 Uwaifo S (JSC) 391, paras G–H.

100 [2013] Suit no FHC/ABJ/CS/591/09.

101 Above at note 93.

102 RN Nwabueze "The legal protection and enforcement of the health rights in Nigeria" in CM Flood and A Gross (eds) *The Right to Health at the Public/Private Divide: A Global Comparative Study* (2014, Cambridge University Press) 382. See also *Nigeria v Anache*, above at note 93, where the court adopted the opinion that the phrase "save as otherwise provided by this Constitution" does not absolutely exclude from justiciability matters in cap II of the Constitution.

103 See for example the National Health Act, which recognizes a right to healthcare and services for Nigerians.

https://doi.org/10.1017/S0021855323000116 Published online by Cambridge University Press

To promote, regulate and safeguard the health and wellbeing of Nigerians, the National Health Act was signed into law in December 2014. Importantly, the act provides a policy framework for the enhancement, regulation and management of the national health system. The act in this respect provides a framework to "protect, promote, and fulfil the *rights* of the people of Nigeria to have access to healthcare services" (emphasis added).[104] Part of the act includes the duty to "promote availability of good quality, safe and affordable essential drugs, medical commodities, hygienic food and water".[105] It regulates both the private and public health service sectors and also creates a Basic Health Care Provision Fund to ensure every Nigerian citizen can access healthcare services. It can be said that the use of the word "right" in the act to denote the entitlements of Nigerians to a healthcare system is illustrative of the legislators' recognition of healthcare as an essential human right.[106] It could therefore be argued that the act imposes a binding human rights obligation on the government and its implementation authorities to provide healthcare to its citizens. It would be interesting, however, for the courts to expatiate whether or not this act definitely confers a right to health which would impose a binding obligation on the state to fulfil, protect, respect and promote comprehensively, and to interpret the content and meaning of this right to health in Nigeria. Nonetheless, this law is definitely another avenue that can be meaningfully exploited by the judiciary to enhance the wellbeing of Nigerians, especially their health-related concerns.

Conclusion

Against the backdrop of the constitutional challenge to the enforceability of health-related rights, this article has considered the possible measures to promote the enjoyment of the right to health through judicial interventions. It goes without saying that judges can play significant roles in overcoming the legal conundrum of the enforcement of the right to health, especially in the face of the government's abandonment of its obligations to the right. Recent cases highlighted here have indicated that the courts have broken new ground by reconciling the welfare interests of the people and expounding the role of the legislature and executive in ensuring social justice. Through judicial intervention, judges in Nigeria can further devise strategies to enforce the right to health without breaching constitutional provisions. Even if the Constitution is silent on the right to health, Nigerians can still invoke related constitutional rights in the African Charter or the provisions of international laws to demand accountability for health rights. Several legal instruments, including the Constitution, the FREP rules and the African Charter, create the legal space for this engagement. Judges can strengthen the provision, protection and availability of legal remedies, while also making jurisprudence more accommodating of human rights. The consequences of allowing the litigation of the right to health is that citizens can seek to enforce their rights and compel social changes from the responsible duty bearers.

Competing interests. None

104 Sec 1(1)(e) of the National Health Act 2014. The act provides a framework for the regulation, development and management of a national health system and sets standards for rendering health services in the federation.

105 Id, sec 2(1)(i). This duty is vested in the Ministry of Justice.

106 Sec 4(1) of the Constitution provides that "[t]he legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives". Under sec 4(4)(a), the National Assembly shall have power to make laws with respect to "any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto". What this provision seems to suggest is that the National Assembly can make laws with regards to issues relating to health as stated in schedule II, part II, item 17(a). It can be argued that the National Assembly has exercised its right under the Constitution to make access to healthcare a matter of rights, as opposed to merely stating that healthcare is an aspirational objective and directive principle of the Nigerian government.

Cite this article: Mike JH (2023). Enhancing the Right to Health in Nigeria through Judicial Intervention. *Journal of African Law* **67**, 409–430. https://doi.org/10.1017/S0021855323000116