

Realisation of the right to health in Nigeria: The prospects of a dialogic approach

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1. Introduction

The central recommendation in this paper is for an interinstitutional collaboration to assist in realising the right to health in Nigeria. I argue that merely constitutionalising and judicializing the right without more, may not bring about a practical realisation. I however also argue that the absence of a constitutional and judicial stamp of authority on the right would make its realisation ineffective because, such absence would mean a lack of direction on the right. There is thus a need to balance the extremes of constitutionalisation and judicialisation as means of realising the right to health. The problem with the two extreme positions has been well captured by Keith who argues that the pro-health right position carries the potential to disrupt rational distribution of scarce resources while the anti-health right position seems incompatible with the growing trend towards justiciability of the right.¹

In Nigeria, there is generally no justiciable right to health under the Constitution which simply provides for it in the form of a directive principle. This, as Nnamdi argues, means that ‘Access to drugs and health care is illusory. In Nigeria, the right to health care is located in an “obscure” part of the constitution as one of the social objectives of Government. It is not a justiciable or pragmatic right’.² There are non-justiciable social objectives contained in chapter II of the Constitution of the Federal Republic of Nigeria, 1999 (the Constitution) styled as ‘Fundamental Objectives and Directive Principles of State Policy’ (Directive Principles) which should have ordinarily passed for Economic and Social Rights (ESR). While the Fundamental Objectives are ideals towards which the nation is expected to strive, the Directive Principles lay down the policies which are expected to be pursued in the efforts of the nation to realise these ideals.³

However, according to section 6(6)(c) of the Constitution, the power vested in the Nigerian courts does not extend to issues relating to whether the Directive Principles have been observed or complied with, except as otherwise constitutionally provided. Hence, the right to health is not, generally speaking, a justiciable right under the Nigerian Constitution as no government official can be held accountable judicially, for failure to comply with the Directive Principles under which section 17 provides for right to health. However, since the said section 6(6)(c) admits of an exception, there are other routes, such as the African Charter on Human and

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¹ K Syrett ‘Evolving the right to health: Rethinking the normative responses to problems of judicialisation’ (2018) 20(1) *Health and Human Rights* 121 at 132.

²NO Obiaraeri *Still on human rights* (Global Press Limited, 2012)212.

³ F Falana *Nigerian law on socioeconomic rights* (LegalText Publishing Company Limited, 2017) 1.

Peoples Rights (the African Charter) which might help in judicially protecting the right under consideration. Whether the African Charter which has been adopted, ratified and domesticated in Nigeria pursuant to the provisions of the Constitution is an effective route will be examined in this paper.

In this paper, I call for, and begin, an exploration of alternative mechanisms to the usual court-based models of adversarial litigation. I argue that, to ensure the practical realisation of the right to health, there should be an institutional collaboration championed by the court in a dialogic approach. Rather than being confrontational, I argue that the court should be a driver of an interinstitutional dialogue where the relevant arms of government and other key stakeholders would discuss and agree on how best to protect, promote and fulfil the right to health. Such a dialogic approach would ensure that the remedial outcome of the judicial process is not dumped but implemented by the political branches.

To make this argument, the paper proceeds in 7 sections. While section one introduces the work, section two contextualises the key terms used in the paper. Section three assesses the legal framework, standards, and determinants of the right to health while in section four, a review of the judicial position on justiciability of ESR in Nigeria is carried out. Section five analyses legislative interventions on the right to health in Nigeria, section six explores the prospects of dialogic judicial activism, and section seven concludes the paper.

2. Context

This section clarifies key concepts in right to health discourse with a view to applying them to identify more workable implementation strategies for health policies in Nigeria. The clarification is important because it contextualises the terms by narrowing down or specifying the intended meaning given to them in this paper, so as to divorce them from any broad or general meaning they are capable of bearing.

2.1. Health and right to health

The preamble to the Constitution of the World Health Organization (WHO) defines ‘health’ as ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’.⁴ This provision is interesting in that it provides a definition that can be termed all-embracing, touching on not just physical wellness but mental and social wellbeing. Thus, Atsenuwa⁵ argues that,

The move away from the conceptualisation of health in the narrow terms of absence of disease or infirmity and the recognition that social factors weigh heavily in the shaping of individuals’ health status have helped to deepen the understanding that the extent to which a society is able to secure and promote all other human rights has implications for the level of protection and enjoyment of SRH [Sexual Reproductive Health] rights by individuals in that society.

⁴The Constitution of the World Health Organization, available at https://www.who.int/governance/eb/who_constitution_en.pdf (accessed on 19 April 2020).

⁵ A Atsenuwa ‘Promoting sexual and reproductive rights through legislative interventions: A case study of child rights legislation and early marriage in Nigeria and Ethiopia’ in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and protective health and rights in the African region through human rights* (Pretoria University Law Press, 2014) 279-281.

While it is true that other social determinants play a role in how the right to health is realised, I however aver that the above definition in the WHO Constitution is rather too extensive, and so it should not be taken ‘at face value’.⁶ The problem with the definition is that it sounds more idealistic than practical. It is doubtful whether attainment of this standard of health is possible when viewed from a rights perspective. In other words, the government, for example, cannot be held accountable for the social and mental wellbeing of a person who deliberately takes steps to undermine his or her health condition.⁷

The ‘right to health’ is a controversial right and its definition has led to much confusion and debate.⁸ However, a detailed discussion on the debate goes beyond the scope of this paper. It suffices to state that the WHO Constitution defines right to health as ‘the enjoyment of the highest attainable standard of health’, and goes on to list some principles of this right as healthy child development; equitable dissemination of medical knowledge and its benefits; and government-provided social measures to ensure adequate health. It is worthy of note that the right to health has also been described as including the right to control one’s health and body and the right to be free from interferences, such as the right to be free from torture and other forms of ill-treatment.⁹ Thus, in *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*,¹⁰ the African Commission observed that the complainants’ right to health had been violated by the state in that their detention amounted to an unjustified interference with their right to health and access to medical services. This arguable includes the right not to be subjected to compulsory HIV and other health-related test.¹¹

Another version of the right to health refers to that in which government provides the necessary medical personnel and facilities to meet the health needs of the citizens. This is predicated on the fact that citizens may not have the means to access these facilities without government subsidisation. This however leads to a question as to whether or not such facilities are to be provided free of charge. Havighurst argues that there is a distinction between provision of health care and healthcare financing.¹² To him, rules on the availability of healthcare financing affects only how healthcare should be financed and does not relate to healthcare itself. In his argument, a patient cannot be said to have been denied health service where the service goes beyond his/her coverage since he/she still can access the same service through his/her personal expenses.¹³ However, I argue

⁶ T Evans ‘A human right to health?’ (2002) 23 *Third World Quarterly* 197.

⁷ For a detailed criticism of this definition, see CM Witt and others ‘Defining health in a comprehensive context: A new definition of integrative health’ (2017) 53(1) *American Journal of Preventive Medicine* 134-37.

⁸ B Toebe ‘Right to health and health care’ in D P Forsythe (ed) *Encyclopaedia of human rights* (Oxford University Press, 2009) 366.

⁹ The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, paras 64-65.

¹⁰ Communication 379/09, communicated or decided on 10 March 2015.

¹¹ See generally A Adekanle & PE Oamen ‘HIV/AIDS, the law and the human rights question: Taming discriminatory practices’ (2015) 7 *Justice Journal of the Federal Ministry of Justice of Nigeria* 216-43 for a detailed discussion.

¹² C Havighurst ‘Prospective self-denial-can consumers contract today to accept health care rationing tomorrow?’ (1992) 140 *University of Pennsylvania Law Review* 1755-1759.

¹³ *Ibid.*

here that the government should not only provide the needed healthcare personnel and facilities but it should also provide them at a largely subsidised rate that would make it affordable to everyone. This is because the primary purpose of government is to cater for the welfare and wellbeing of the people and providing affordable healthcare accords with the concept of accessibility which is discussed below. So, despite different meanings that health or healthcare may bear, the provision of healthcare as envisaged in this paper is that which conforms to the promotion of the health status of the individual person as well as the public health of the general population, or to use Gostin's idea, it is that which assures the conditions for people to be healthy by identifying, preventing and ameliorating risks to health in the population.¹⁴

3. Legal framework on the right to health

The right to health is treated as a fundamental right under international law and other regional laws to which Nigeria is a signatory.¹⁵ However, as has already been observed, the right is not part of the fundamental rights expressly recognised under the Nigerian Constitution.¹⁶ Rather, the right to health is incorporated under the Directive Principles in Chapter II which are not generally justiciable.¹⁷

There is a plethora of international and regional human rights instruments that are protective of the right to health. Although this article would focus mainly on a few of them, these instruments include the Constitution of the World Health Organization (WHO)¹⁸, Universal Declaration on Human Rights, 1948 (Universal Declaration)¹⁹, the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁰, the Convention on the Rights of the Child (CRC)²¹, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)²², and the African Charter.²³ Although these international and regional treaties have legal implications, they can also inform the development of policies and programmes in all states, whether or not a state has signed to be legally bound by the relevant treaty.²⁴

3.1 International legal framework on standards, determining elements and state's obligations on the right to health

¹⁴ LO Gostin *Public Health Law: Power, duty, restraint* (University of California Press Ltd, 2000) 4.

¹⁵ For example, Nigeria is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples Right (the African Charter).

¹⁶ See chap IV of the Constitution which itemises only civil and political rights as enforceable fundamental rights.

¹⁷ See sec 6(6) (c) of the Constitution which ousts the jurisdiction of the courts to entertain any question as to the observance, application and compliance with the provisions of the chapter II of the Constitution.

¹⁸ The first international instrument to recognise the right to health was the Constitution of the World Health Organization which was adopted on 22 July 1946 but came into force on 7th April 1948. The WHO Constitution was adopted at the International Health Conference, New York held on 19 June 19– 22 July , 1946.

¹⁹ See art 25 of the UDHR.

²⁰ See art 12 of the ICESCR.

²¹ See art 24 of the CRC.

²² See art 12(1) of CEDAW.

²³ See art 16 of the African Charter.

²⁴ S Gruskin, EJ Mills & D Tarantola 'History, principles, and practice of health and human rights' (2007) 370 (9585) *The Lancet* 449–55.

Many countries, including Nigeria, do not have a one-stop constitutional or legislative package on the right to health. As such, looking to international human rights instruments, particularly ICESCR and the works of the Committee on Economic, Social and Cultural Rights (CESCR) is necessary to understand the contents and standards of this right.

Article 12(1) of ICESCR provides for the right to health when it states that ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. Further, general comment 14 of CESCR itemises four standards for assessing the existence of the right to health and these standards serve to open up the normative contents of the right recognised under article 12 of the ICESCR.²⁵ The standards are availability, accessibility, acceptability and quality (AAAQ). While availability appraises the presence of public healthcare personnel, facilities and services in sufficient numbers, accessibility on the other hand questions whether those healthcare personnel and facilities are within physical access to all people without discrimination on the basis of physical or other disability, whether they are economically or financially affordable and whether the people concerned have access to adequate information about health care issues. Acceptability requires that the said healthcare personnel and facilities should not just be physically available but also ethically and culturally proven to be acceptable to the people’s health needs. Lastly, quality as a standard means that the healthcare personnel and facilities should be of a standard that meets scientific and medical quality and safety, i.e. there should be medically qualified personnel to administer scientifically tested and approved healthcare facilities.

Furthermore, general comment 14 provides for the determining elements for deciding the right to health. It refers to them as ‘the underlying determinants of health’. These elements include the state’s obligation to ensure access to health facilities and services without discrimination, access to minimum essential food, sufficient, nutritionally adequate and safe enough to free one from hunger, access to basic shelter, housing and sanitation, access to adequate supply of safe and potable drinking water, provision of essential drugs from time to time as defined by the WHO’s Action Programme on Essential Drugs, equitable distribution of all health facilities, goods and services, adoption and implementation of a national public health strategy and plan of action on the basis of epidemiological evidence, and addressing health concerns of the whole population.²⁶

There is a clear correlation between health and food, shelter and water. It is therefore not surprising that the general comment 14 has knit these elements as constituent parts of right to health. In fact, paragraph 3 of the general comment states that the right to health is closely related to and dependent upon the realisation of other human rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination,

²⁵ CESCR, general comment 14 on the Right to the Highest Attainable Standard of Health adopted on 11 May 2000 as guidance for the implementation of the right to health as provided in art 12 of ICESCR.

²⁶ Ibid.

equality.²⁷ These and other rights and freedoms address integral components of the right to health.²⁸ Another useful aspect of the general comment is its departure from earlier general comments by stating unequivocally that, '[i]t should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable'.²⁹ This implies that compliance with the above obligations is mandatory for all State parties regardless of their levels of development.³⁰

General comment 14 also makes specific provisions for the tripartite state obligations to respect, protect and fulfil the right to health. Accordingly, it states that the duty to respect means that State-parties should not interfere, directly or indirectly, with the enjoyment of the right to health while the duty to protect requires the State-parties to take measures that will prevent third parties from interfering with the right to health. On the other hand, the duty to fulfil mandates the State-parties to adopt appropriate measures, whether legislative, administrative, budgetary, judicial or promotional, towards the full realisation of the right to health.³¹ Further, the obligation to fulfil includes the duty to facilitate, provide and promote the right to health.³²

On the whole, general comment 14 provides a platform for states to assess themselves (and be assessed) not just in terms of promoting right to health but also promoting the associated rights to food, water and shelter. If implemented, it also will promote equality among citizens.

There is no evidence that the Nigerian government is committed to implementing the above international obligations, Apart from the fact that primary and secondary health care systems have collapsed, Nigeria's tertiary healthcare facilities are also overcrowded and poorly funded.³³ The leaders only pay lip service to the health sector. For example, President Muhammadu Buhari of Nigeria, since he assumed office on 29 May, 2015, has travelled overseas on several occasions for medical treatment.³⁴ This is in spite of his promise to end medical tourism on

²⁷ See DM Chirwa & CI Rushwaya 'Guarding the guardians: A critical appraisal of the protocol to the African Charter on the Rights of Older Persons in Africa' (2019) 19 *Human Rights Law Review* 53–82 at 70.

²⁸ CESCR, general comment 14 (n25) para 3.

²⁹ Ibid para 47.

³⁰ K Pillay 'South Africa's commitment to health rights in the spotlight: Do we meet the international standard?' in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (Protea Book House, 2002) 66.

³¹ CESCR general comment no 14 (n25) paras 33-36.

³² Ibid para 33.

³³ K Busari 'Why Nigerian teaching hospitals are not doing well-minister' *Premium Times Newspaper* (Nigeria) 21 May 2019 available at <https://www.premiumtimesng.com/health/health-news/330891-why-nigerian-teaching-hospitals-are-not-doing-well-minister.html> (accessed on 12 June 2020).

³⁴ J Ogunsemore "'Unfit To Rule": PDP condemns Buhari's latest medical trip abroad' *The Herald Newspaper* (Nigeria) 09 May 2018 available at <https://www.herald.ng/unfit-to-rule-pdp-condemns-buharis-latest-medical-trip-abroad/> (accessed on 15 May 2020); S Tukur 'Buhari off to London on another medical trip' *Premium Times Online Newspaper* (Nigeria) 07 May 2017 available at <https://www.premiumtimesng.com/news/headlines/230592-breaking-buhari-off-london-another-medical-trip.html> (accessed on 15 May, 2020); and A Onyeji 'PHC4UHC: Etsu nupe laments medical tourism among Nigerians' *Premium Times Online Newspaper* (Nigeria) 09 May 2020 available at <https://www.premiumtimesng.com/health/health-news/329130-phc4uhc-etsu-nupe-laments-medical-tourism-among-nigerians.html> (accessed on 15 May 2020).

assumption of office.³⁵ Further, in the present COVID-19 pandemic, the political figures who contracted the virus always run to privately owned hospitals for medical attention (obviously they would have travelled abroad if not for the travel restrictions across the globe), leaving the poor people to suffer in the ill-equipped public or government-owned hospitals.³⁶ The government's non-committal attitude to the healthcare sector is evident in the below-expectation annual health budgetary allocation which keeps falling below internationally and regionally prescribed standards. For example, although the African Union's Abuja Declaration prescribes 15 per cent of annual budget benchmark for budgetary allocation to the health sector, Nigeria's health budget hovers between 1 per cent and 5 per cent of each annual budget making it rank poorly as 187th out of the 191 countries recently ranked by the WHO on health care delivery.³⁷ This failure does not show any solid commitment by the Nigerian government to the its international obligations.

3.2 Regional framework on the right to health in Nigeria

There are several regional legal frameworks in African human rights system to which Nigeria has signed up and which are protective of the right to health care. However, the focus here will be on the African Charter. The choice of this instrument is informed by the innovative and revolutionary integration that it has heralded in the sphere of human rights. The provisions of the Charter contain civil and political rights, economic, social and cultural rights and solidarity rights and unlike most human rights instruments³⁸ it provides that these rights should be treated as universally applicable, indivisible, inter-related and interdependent rights. Thus, it has been argued that, in the African context, discussions of the realisation of democracy and human rights must account for a prevalence of social and economic deprivations.³⁹ This is a major plank for the justification of the concept of indivisibility, interdependence and interrelatedness of all rights, as the reality of the practical implementation of

³⁵ British Broadcasting Corporation (BBC) News, 'Nigeria's Buhari "broke promise to end Medical Touris"' available at <https://www.bbc.co.uk/news/business-36468154> (accessed on 15 May 2020).

³⁶ Eg see M Alabi 'Coronavirus: lagos govt speaks on hospital where Abba Kyari died' *Premium Times Online Newspaper* (Nigeria) 18 April 2020 available at <https://www.premiumtimesng.com/news/headlines/388667-coronavirus-lagos-govt-speaks-on-hospital-where-abba-kyari-died.html> (Accessed on 17 June 2020); S Ogunipe 'Abiola Ajimobi, ex-Oyo Governor, is dead' *Premium Times Online Newspaper* (Nigeria) 25 June 2020 available at <https://www.premiumtimesng.com/news/headlines/399604-abiola-ajimobi-ex-oyo-governor-is-dead.html> (Accessed 17 July 2020).

³⁷ E Onyeji '2018 Budget: Again, Nigeria falls short of AU health funding commitment' *Premium Times Online Newspaper* (Nigeria) 10 November 2019 available at <https://www.premiumtimesng.com/news/headlines/248909-2018-budget-nigeria-falls-short-au-health-funding-commitment.html> (accessed on 15 May 2020).

³⁸ For example, the United Nations Human Rights System dichotomises between Civil and Political rights which are enforceable under the International Covenant on Civil and Political Rights (ICCPR) 1966 on the one hand, and the Economic, Social and Cultural Rights which are not deemed immediately enforceable under the International Covenant on Economic, Social and Cultural Rights 1966, on the other hand. However, the UN has since adopted the principles of universality, indivisibility and Inter-dependence of Rights after these Covenants, via the Proclamation of Teheran (which was adopted at the International Conference on Human Rights of Teheran on 30 May 1968) and para 5 of the Vienna Declaration and Programme of Action of the Vienna World Conference on Human Rights of 1993 which states that 'All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'

³⁹ KA Acheampong 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights' (2001) 2 *African Human Rights Law Journal* 201.

these rights makes the distinction drawn between categories of rights of little significance. This cannot warrant placing of the socio-economic rights as a second fiddle to civil and political rights.⁴⁰ Further, the Charter has not only been ratified by Nigeria but has also been domesticated by the nation through the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act (Ratification Act).⁴¹

3.3 The African Charter on Human and Peoples Rights (Ratification and Enforcement) Act

Nigeria is a dualist system whereby international and regional legal instruments are not legally binding on it unless and until they have been domesticated into the corpus of Nigerian laws. Thus, section 12(1) of the 1999 Constitution provides that ‘No treaty between the [Nigerian] federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly’. This dualist approach is a relic from the British colonial government in Nigeria. In *Ibidapo v Lufthana Airlines*⁴² the Supreme Court of Nigeria (the Supreme Court) stated that ‘Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law’.

The Supreme Court had the opportunity to pronounce on the effect of section 12(1) in the case of *Abacha v Fawehinmi*⁴³ which turned on the status of the African Charter in Nigeria. The court held that, having been domesticated, the Charter is binding on all persons and authorities in Nigeria. In the course of delivering the judgment, the court noted that ‘.... It is therefore manifest that no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be it remains unenforceable, if it is not enacted into law of the country by the National Assembly’.⁴⁴ Hence, in *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & 2 Ors v Medical and Health Workers Union of Nigeria*,⁴⁵ unlike the African Charter, an International Labour Organisation(ILO) treaty was held inapplicable and therefore non-binding on Nigeria. In that case, the Supreme Court of Nigeria held that since the conditions of section 12(1) of the Constitution had not been satisfied, Nigeria cannot be held bound by the provisions of the ILO treaty despite its ratification. However, it should be noted that the *Registered Trustees case* no longer represents the current position of the law in Nigeria as it has been overridden by constitutional amendment. By virtue of section 254(c) (2) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, the National Industrial Court of Nigeria has been given exclusive jurisdiction to interpret labour or employment treaties, conventions or protocols, which Nigeria has ratified, whether or not they have been legislatively domesticated.

⁴⁰ Ibid.

⁴¹ Cap A9 Laws of the Federation of Nigeria 2004.

⁴² (1997) 4 NWLR (pt 498) 124 at 150. See also R. Singh ‘The use of international law in the domestic courts of the United Kingdom’ (2005) 56(2) *Northern Ireland Legal Quarterly* 119-121; *J H Rayner v Department of Trade and Industry* [1990] AC 418 at 550 on dualist constitutional tradition in the UK.

⁴³ (2000) 6 NWLR (pt 660) 228.

⁴⁴ *Supra* 356-357.

⁴⁵(2008) 37 WRN 1.

However, as Egede has argued, the decision in the *Abacha case* and by implication in the *Registered Trustees case*, “appears to detract from the crucial objective of entering into such treaties, which are meant to protect individuals from the excesses of the government and its agencies”.⁴⁶ The control that the executive arm often has over the legislative arm, seems unaccounted for by these cases. In such a situation, it becomes difficult for the legislature to make laws (such as domesticating human rights instruments) that would be at variance with the policy of the executive. This divergence between the executive and the legislature leaves a gap between international commitments and justiciable rights. For example, it negates Nigeria’s commitment under the Vienna Declaration and Programme of Action⁴⁷ which states that ‘...all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary’.

One of the issues that the *Abacha case*⁴⁸ threw up for determination was on the primacy of the domesticated African Charter vis-à-vis other Nigerian municipal laws. Although the apex court held that, being a statute with an international flavour, the African Charter enjoys some air of superiority over other municipal legislations, the court however cautioned that such municipal legislations do not include the Nigeria’s Constitution, which, by virtue of its section 1(1), is superior to all other laws. Thus, where there is a clash between a municipal law and the domesticated Charter, the municipal law must give way in that there is a rebuttable presumption that the legislature does not intend to breach international obligations under the Charter. However, where there is inconsistency between the Charter and the Constitution, the Constitution must prevail.⁴⁹ On this basis, Ogunniran notes that ‘[t]he conclusion is that the Constitution supersedes the African Charter; hence socio economic rights remain unenforceable before the courts’.⁵⁰ While I agree with Ogunniran on the issue of superiority as between the two laws, I differ with her on the point that ESR remain unenforceable.

I base my argument on the fact that the African Charter has been domesticated by the Ratification Act. Unarguably, the Act is a validly passed law of the legislature (the National Assembly) and it contains provisions that are protective of ESR. Section 6(6)(c) of the Constitution, which ousts the Courts’ jurisdiction on ESR matters, equally provides for an exception when it states that the jurisdiction can be exercised where the Constitution provides otherwise. Hence, since section 4 of the Constitution vests legislative powers on the lawmakers, any specific law (such as the Ratification Act) which makes ESR justiciable, I argue, comes within the exception that is envisaged by section 6(6)(c).

⁴⁶ E Egede ‘Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria’ (2007)51 (2) *Journal of African Law* 249-254.

⁴⁷ 1993 World Conference on Human Rights, UN doc. A/CONF 157/24, (1993) ILM 1661.

⁴⁸ (2000) 6 NWLR (pt 660) at 228

⁴⁹ See sec 1(3) of the Constitution.

⁵⁰ I Ogunniran ‘Enforceability of socio-economic rights: Seeing Nigeria through the eyes of other Jurisdictions’ (2010) *JILJ* 65.

Thus, in *Attorney-General of Ondo State v Attorney-General of the Federation & Ors*,⁵¹ the Supreme Court held that a legislation can make the otherwise non-justiciable provisions of the Constitution justiciable. This, I argue, means that the Ratification Act matches those legislative steps needed to activate the justiciability of the otherwise non-justiciable chapter II of the Constitution. Just as the apex court held, regarding the Corrupt Practices and other Related Offences Act in the *Attorney-General of Ondo case* that, '[t]he Act is meant to make justiciable by legislation a declared state policy to abolish corrupt practices and abuse of power...', I also contend here that the Ratification Act, which in any case has been judicially recognised to be of a superior statutory flavour than municipal legislation, has made justiciable by legislation those socio-economic rights that the Act has expressly provided for.

In conclusion, the point being made is that Ogunniran is correct only to the extent that the Constitution is superior to the African Charter as ratified and domesticated by Nigeria but she was wrong to have asserted that that mere superiority has robbed socioeconomic rights under the Charter of justiciability or enforceability before Nigerian courts. If she had taken the decision in the *Attorney-General of Ondo case* into consideration as I have done, perhaps her position and mine would have been on all fours, altogether. The next subheading outlines the socio-economic rights recognised under the Charter.

3.4 Economic and social rights under the African Charter

The African Charter has, innovatively, provided for some justiciable socio-economic rights. These rights, which are only mentioned in passing in this paper, are the right to property⁵², the right to work under equitable and satisfactory conditions,⁵³ the right to receive equal pay for equal work done,⁵⁴ the right to enjoy the best attainable state of physical and mental health and the right to receive medical attention while sick,⁵⁵ the right to education,⁵⁶ the right to freely take part in the cultural life of one's community,⁵⁷ the right to family life,⁵⁸ the rights of the vulnerable groups like women, children from discrimination,⁵⁹ the right of the aged and the disabled to special measures of protection in keeping with their physical or moral needs,⁶⁰ the collective right to economic, social and cultural development,⁶¹ and the right to a general satisfactory environment favourable to one's development.⁶² It must be mentioned that, apart from these socio-economic rights, the African Charter also

⁵¹ (2002) 9 NWLR (pt 772) 2.

⁵² See art 14 of the African Charter which also however provides that the right may be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws (perhaps laws on payment of compensation upon acquisition, as in sec 44 of Nigeria's Constitution)

⁵³ Art 15 of the African Charter.

⁵⁴ Art 15 of the African Charter.

⁵⁵ Art 16(1) & (2) of the African Charter.

⁵⁶ Art 17(1) of the African Charter.

⁵⁷ Art 17(2) of the African Charter.

⁵⁸ Art 18(1) & (2) of the African Charter.

⁵⁹ Art 18(3) of the African Charter.

⁶⁰ Art 18(4) of the African Charter.

⁶¹ Art 22(1) & (2) of the African Charter.

⁶² Art 24 of the African Charter.

provides for civil and political rights in Articles 2 -13. This is especially worth mentioning, because, as will be seen below, the courts have relied upon these civil and political rights to protect socio-economic rights in the spirit of indivisibility and inter-dependence of human rights.

3.5 Constitutional framework on ESR in Nigeria

Constitutions are the prime domestic instruments used to express agreed human rights values.⁶³ This however does not detract from the fact that recourse can also be had to other legislative instruments, in the search for human rights recognition and protection.

The Directive Principles in Chapter II of Nigeria's Constitution are an expression of ESR. It has been observed that the Directive Objectives provide a general scheme of values that are particularly relevant to the poor and vulnerable in Nigeria.⁶⁴ Thus, the provisions of sections 13-24 of the Constitution can safely be said to accommodate ESR, albeit in a non-justiciable manner. The sections contain economic and social objectives such as provision of employment and medical care, geared towards the promotion of ESR in Nigeria. These aspects of the constitution reflect the high ideals of a liberal democratic polity and serve as guidelines to action and policy goals.⁶⁵ The Directive Principles provide a yardstick for a critical assessment of governmental actions.⁶⁶ There is no doubt that the provisions of these Directives are, for example, 'key components of a viable social security scheme'.⁶⁷ The Directive Principles have been described as a negative constitutionalisation but an important innovation in Nigerian constitutional democracy.⁶⁸ They are so described because, despite their finding their ways into the Nigerian Constitution, they are yet not judicially enforceable like their civil and political rights counterpart. Thus, the directive principles as they are currently framed under the Nigerian Constitution can simply be described as constitutionalisation without much practical impact.

Section 13 of the Constitution states that the government and its organs as well as all persons exercising executive, legislative and judicial powers have a duty to conform to, observe and apply the Directive Principles. Though this section captures the application of some principles from the Directive Principles, it is however not

⁶³ NJ Udombana 'Keeping the promise: Improving access to socioeconomic rights in Africa' (2012) 18 *Buffalo Human Rights Law Review* 135-44.

⁶⁴ D Onyekachi 'The justiciability of the fundamental objectives and directive principles of state policy under Nigerian law' (June 2, 2012), available at SSRN: <https://ssrn.com/abstract=2140361> or <http://dx.doi.org/10.2139/ssrn.2140361> (last accessed on 04 June, 2020).

⁶⁵ O Agbakoba & U. Emelonye 'Test of progressive realisation of economic, social and cultural rights in Nigeria' in *1990-1999 Budget Analysis* (HURILAWS, 2001) at 1-2 cited in S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225.

⁶⁶ BO Nwabueze *Constitutional law of the Nigerian republic* (Butterworths, 1964) 408.

⁶⁷ K Anifalaje 'Implementation of the right to social security in Nigeria' (2017) 17 *African Human Rights Law Journal* 413.

⁶⁸ AT Shehu 'The enforcement of social and economic rights in Africa: the Nigerian experience' (2013) 2(1) *Afe Babalola University Journal of Sustainable Development Law and Policy* 101.

clear how this section 13 duty can be enforced without an effective enforcement mechanism.⁶⁹ The section creates a duty whose performance, as will be discussed, has been largely constitutionally excused under the same Constitution.⁷⁰

Under the Constitution, two key sections are particularly relevant to access to healthcare. One is section 16(2)(d) which obligates the Nigerian state to direct its policy towards ensuring that 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 disabled are provided for all citizens. No doubt, these provisions of the Constitution on non-justiciable ESR are relevant to the right to health. Although they do not refer to the right to health specifically, they contain the constituent elements of health. It is arguable that a man or woman who has access to adequate shelter, suitable and adequate food, reasonable living wage, old age care and pension, employment or its absence unemployment benefit, sick benefit and welfare when disabled is more likely to be healthier than his/her fellow who lacks these basic amenities. But for the judicial impediment in section 6(6)(c) of the 1999 Constitution, section 16(2)(d) would have been a laudable mechanism to push for the right to health in Nigeria. The former section generally takes away the ESR which the latter section provides. The implication of section 6(6)(c) will be discussed in detail subsequently.

The other key section of the Constitution which captures a package of welfare that could pass for a right to health is section 17. It obliges the Nigerian state to direct its policy towards ensuring that there is equality of employment opportunities or other opportunity for the purposes of securing adequate means of livelihood, ensuring that the conditions of work are just and humane and that adequate facilities are provided for leisure and for social, religious and cultural life. More strikingly, section 17(3) (c) & (e) provide for the rights of safety, health and welfare of workers. The subsections require the state to ensure that the health, safety and welfare of workers are safeguarded and not endangered or abused; and that there is equal pay for equal work without discrimination on account of sex or any other sentimental ground whatsoever. Even more fundamentally, section 17(3)(d) provides that the Nigerian state shall direct its policy towards ensuring that there are adequate medical and health facilities for all persons. Innovatively, the 1999 Constitution also provides for the right to a clean and healthy environment. According to section 20, the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.

Notwithstanding the above constitutional coverage of socio-economic rights under the Directive Principles, the provision of section 6(6)(c) in the same Constitution makes them generally not justiciable when it provides that:

The judicial powers vested in accordance with the foregoing provisions⁷¹ of this section-

⁶⁹ S Ibe, 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225.

⁷⁰ See sec 6(6)(c) of the Constitution of Nigeria.

⁷¹ That is, sec 6(1)-(5) which name and vest judicial powers on courts of the Federation and States of 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 implication of this section is that it strictly limits the rights of individuals to approach courts for enforcement of the Directive Principles. The only exception would be where another section of the Constitution provides otherwise.⁷² A review of judicial decisions in Nigeria on section 6(6) (c) is undertaken below.

4 Judicial position on the right to health in Nigeria

It has been observed that ‘judicial attitude to socio-economic rights litigation in Nigeria is characterised by great caution and subtle passivity’.⁷³ This is owing to the stringent or literal interpretation that are commonly given to the provisions of section 6(6)(c). The section has been strictly interpreted by the courts to the effect that it radically limits potential for the justiciability of socio-economic rights in Nigeria. In this section of the paper, I review key cases relating to justiciability of ESR in Nigeria, with a view to arguing that there are 3 ways that the difficulty with realising the rights can be overcome; constitution amendment, domestic legislation and inter-institutional dialogue. While some of the reviewed cases were decided based on the provisions of the Nigerian Constitution, some of them also drew largely from the African Charter.

In *Femi Falana v Attorney-General of the Federation*⁷⁴, the applicant sought to enforce the right to health as provided in Article 16 of the African Charter by asking the court to compel the Federal Government to repair and upgrade medical facilities in the country. The trial court struck the suit out on the ground that the court’s jurisdiction to entertain any suit relating to the Directive Principles has been ousted by section 6(6)(c) of the Constitution. Curiously, the court did not refer to the provisions of Article 16 of the African Charter which was urged upon it in the application before holding that issues relating to medical facilities were not justiciable.

Further, one of the earliest cases that judicially pronounced on socio-economic rights in Nigeria was *Archbishop Anthony Olubunmi Okojie & Ors v Attorney-General of Lagos State & Ors*⁷⁵. Among the issues that called for determination was whether or not the state government’s order abolishing private schools violated the provisions of section 13 of chapter II of the then 1979 Constitution of Nigeria which provided:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter [chapter on Fundamental Objectives and Directive Principles] of this Constitution.⁷⁶

In holding that there was no violation, the Court of Appeal stated:

⁷²See the phrase in sec 6(6)(c) ‘shall not except as otherwise provided by this Constitution’.

⁷³Ibe ‘Beyond Justiciability’ (n 69) 241.

⁷⁴Suit No. FHC/IKJ/CS/M59/2010 (unreported) delivered on 10 January 2011.

⁷⁵(1981) 2 NCLR 350.

⁷⁶These provisions are the same as those of sec 13 of the extant 1999 Constitution.

While section 13 of the Constitution makes it the duty and responsibility of the judiciary amongst other organs of government to conform to and apply the provisions of chapter two, section 6(6)(c) of the same constitution makes clear that no court has jurisdiction to pronounce any decision as to whether any organ of the government has acted or is acting in conformity with the fundamental Objectives and Directive Principles of the State Policy. It is clear therefore that section 13 has not made chapter two of the Constitution justiciable.

The above judicial decision has been criticised by Odinkalu⁷⁷ who argues that there is no conflict between section 6(6)(c) and section 13 of the Constitution. According to him, such conflict:

...does not arise because of the contingent modifier in the former provision, which, in the structure of the Nigerian Constitution, necessarily means that the latter applies by virtue of the modifying contingency evinced in the former. To read the text in any other way would be to import extraneous consideration into the Constitutional text.

My understanding of what the scholar means can be summed up as follows: section 13 of the Constitution obligates all branches of government to observe the provisions of the Directive Principles; however, section 6(6)(c) of the same Constitution removes judicial powers to pronounce on the applicability of the Directive Principles, except where another section in the Constitution provides otherwise; section 13 is a section that provides otherwise and so overrides section 6(6)(c).

As convincing as Odinkalu's argument seems, I contend that it does not represent a true interpretation of the constitutional provisions. While it is true that section 6(6)(c) envisages an exception to the non-justiciability clause that is created within it, I argue that section 13 cannot operate as that exception. The plank of my argument is that section 13 forms part of chapter II of the Constitution which section 6(6)(c) has radically deprived of justiciability. In other words, chapter II of the Constitution begins from section 13 and ends in section 24. Now, section 6(6)(c) states that chapter II (i.e, sections 13 to 24) are not justiciable in Nigeria except another section of the Constitution states otherwise. However, section 13 that has been rendered non-justiciable by section 6(6)(c) creates a duty on the part of government(al) branches to enforce chapter II. What Odinkalu's argument suggests is that section 13 can fit in as that other or exceptional section of the Constitution which states otherwise (as envisaged by section 6(6)(c)). One would be doing a great violence to constitutional interpretation by severing section 13 from the other provisions contained in chapter II, because, a recourse to section 6(6)(c) reveals that the intention of the law-makers is that the entire chapter II should be affected by section 6(6)(c). Put differently, section 6(6)(c) neutralises section 13 duty. Chidikalu's position would have been correct if section 13 were not part of chapter II. Unfortunately, that is not the case here, but here is a case of 'the constitution stabbing itself in the back'⁷⁸ in that it gives a benefit with one hand

⁷⁷ C Odinkalu 'The imperative of justiciability of socioeconomic rights in Nigeria' in B Aborishade (ed) *Essays in Honour of Femi Falana*, SAN (Centre for Labour Studies, 2013) 52.

⁷⁸ Shehu 'The enforcement of social and economic rights in Africa' (n 68) 110.

(section 13) but takes it back with another hand (section 6). While the latter section has a modifier or rider that says that its application to non-justiciability of chapter II is subject to any other provision in the Constitution, I however contend here that the former section 13 is not qualified to come within the meaning of the sections envisaged by the rider 'except as otherwise provided by this Constitution', because it is a part of chapter II.

Regardless of the correct logical position the restrictive interpretation of the courts means, the hope of using section 13-imposed duty to valorise the enforceability of ESR in Nigeria has been dashed. One constitutional way out of the section 6(6)(c) quagmire would be a constitution amendment that provides for clearly justiciable socio-economic rights. That way, the argument that section 6(6)(c) is an impediment to justiciability would have been resolved. After all, as already noted, section 6(6)(c) is not an absolute bar to justiciability. Thus, in *Olafisoye v Federal Republic of Nigeria*⁷⁹, the Supreme Court of Nigeria was of the view that:

...the non-justiciability of 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'. This means that if the Constitution otherwise provides in another section which makes a section of Chapter II justiciable, it will be so interpreted by the court.

This judicial position reinforces my argument that the section that can make the application of the exception in section 6(6)(c) kick in must be a section that is unaffected by or unrelated to chapter II (which provides for Directive Principles) of the Constitution. An example of a constitutional provision that can serve as an exception to section 6(6)(c) is section 4 and item 60(a) of Part I of the Second Schedule to the 1999 Constitution. While section 4 gives the National Assembly⁸⁰ the power to make laws for the peace, order and good government of Nigeria or any part thereof, item 60(a) gives them the power to make laws that will promote and enforce the observance of the socioeconomic rights which are housed in chapter II of the Constitution. Put simply, the referenced item of the said Part I gives the National Assembly the exclusive legislative competence to make laws for the establishment and regulation of authorities for Nigeria or any part of Nigeria for the promotion and enforcement of the otherwise non-justiciable Directive Principles in chapter II of the Constitution. Thus, any law made by the National Assembly pursuant to item 60(a) would not be affected by the non-justiciability issues in section 6(6)(c).

As such, a major way that the section 6(6)(c) problem may be resolved in Nigeria, would be by the legislature enacting a statute that specifically recognises certain socio-economic rights as justiciable rights. Akinseye-George⁸¹ seems to agree with this position when he states that,

⁷⁹ (2005) 51 WRN 52.

⁸⁰ This is a bicameral federal legislature made up of the Senate and the House of Representatives.

⁸¹ Y Akinseye-George *Improving Judicial Protection of Human Rights in Nigeria* (2012, Centre for Socio-Legal Studies) 38-39.

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...The implication of this provision [section 6(6)(c)] is that an action for enforcement of human rights or judicial review cannot be founded solely on the provisions of Chapter II. It also means that judicial power cannot be invoked solely on the basis of Chapter II provisions in order to give effect to the contents of the chapter. However, ... the provisions of Chapter II of the constitution can be enforced ... on constitutional foundations outside Chapter II.

The 'constitutional foundations outside Chapter II' noted by Akinseye-George would, I argue, include a legislative step to carve out some or all of the socio-economic rights in chapter II and embed them in a statute. That way, they will become self-enforcing and judicially recognisable and implementable. Thus, it has rightly been observed that 'Parliament indeed can play a significant role in the promotion of the right to health...'⁸²

The importance of the legislative role in the realisation of ESR has been affirmed by the Supreme Court in the case of *Attorney-General of Ondo State v. Attorney-General of the Federation & others*.⁸³ Upon Nigeria's return to democratic rule in 1999 after a long period of military rule, the then President Olusegun Obasanjo perceived that corruption was the major drag on Nigeria's development. He therefore sent a bill to the National Assembly with a view to setting up a mechanism to curb corruption. This resulted in the passing of the Corrupt Practices and Other Related Offences Act 2000 (ICPC Act) which established a Commission to fight corruption throughout Nigeria. A state-level government challenged the constitutionality of the ICPC Act when its Commission sought to investigate and prosecute one of the state government officials under the Act. The contention was that the National Assembly lacked the power to enact law that would criminalise corruption at all tiers of government. In reaction, the respondent contended that the law was made pursuant to item 60(a) of Part I of the Second Schedule to the Constitution which gives the National Assembly the power to make laws that will 'justicialise' the otherwise non-justiciable chapter II. The Supreme Court rejected the applicant's argument and held that the National Assembly acted in line with their constitutionally vested legislative powers.⁸⁴ In doing so, the court accepted that the legislature could act properly under item 60(a) to make Chapter II Directive principles justiciable. Regarding the justiciability of section 15(5) of the Constitution via the ICPC Act, the apex court held:

The Act is meant to make justiciable by legislation a declared state policy to abolish corrupt practices and abuse of power...The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the

⁸²BK Twinomugisha 'Using the right to health framework to tackle non-communicable diseases in the era of neo-liberalism in Uganda' (2020) 20 *African Human Rights Journal* 147-180 at 171.

⁸³ (2002) 9 NWLR (pt 772) 2.

⁸⁴ See section 4 and item 60(a) of the Constitution. See also *Alhaji Sani Dododo v Economic & Financial Crimes Commission and others* (2013) 1 NWLR (pt 1336) 464 at 510 where the Court of Appeal, per Nwodo JCA held that, 'The EFCC Act and the ICPC Act are enactments towards achieving the goal of abolishing corruption. The drive to abolish corrupt practices by established enactment and statutory provisions must not be extinguished in construction of statutes. The intendment of the legislation must be conveyed and its provisions complied too'.

Executive and the National Assembly, working together, to give expression to any one of them through enactment as occasion may demand.

This decision has thus introduced a legislative leeway out of the constitutional impediment contained in section 6(6) (c) by recognising the power of the legislature to make the constitutionally non-justiciable ESR statutorily justiciable. Further, the last sentence in the above judicial opinion also fortifies the point that there is a need for collaboration among the various arms of government and stakeholders on how best to protect and promote ESR. The place of the legislature in the entire socio-economic rights protection chain cannot be over-emphasised. Hence, the court held in the *Archbishop Anthony Olubunmi Okojie case*⁸⁵ that ‘the arbiter for any breach of the Objectives and Directive Principles of State Policy is the legislature itself or the electorate’.

It is imperative to emphasise the vital role of the legislature in the protection of socio-economic rights in Nigeria. This role is vital both in terms of making local legislation and domesticating international instruments that are protective of these rights. In fact, the much protection that the Nigerian and regional judiciaries have accorded socio-economic rights has been rooted on legislative, rather than solely constitutional interventions.

4.1 Courts’ navigation of the justiciability debacle through the African Charter

The African Charter has been used as a potent force to push for socio-economic rights in Nigeria. This has been done both at the national and regional court levels. Ekhatior argues that the African Charter has had some positive impact on the Nigerian legal system and that the relevance of the Charter should be well-publicised among the citizens.⁸⁶ However, the limited success recorded would not have been possible if there had not been a legislative intervention in the form of domestication of the Charter via the Ratification Act. Thus, in this section of the paper, I analyse the courts’ decisions on the provisions of the African Charter, with a view to highlighting the potency of legislative intervention in the realisation of ESR. Put differently, the following cases highlight how the Courts have used the Charter to drive the realisation of ESR in Nigeria.

In *Abacha v Fawehinmi*⁸⁷, the Supreme Court stated that having become part of Nigeria’s municipal laws by virtue of the Ratification Act, the enforcement of the African Charter should be within the constitutionally vested judicial powers of courts in deserving cases.⁸⁸ Hence, in the case of *Jonah Gbemre v Shell Petroleum Development Company of Nigeria Ltd & 2 Ors*⁸⁹, a Federal High Court held that the actions of a multi-national oil company and its officials in engaging in continuous gas flaring during oil exploration in the applicant’s community amounted to a violation of the fundamental rights to life and human dignity under sections 33 and 34 of the Nigeria’s Constitution. These constitutional provisions are justiciable and the court reasoned that gas flaring violates rights to life and human dignity under the sections. Further, the court held that the actions also

⁸⁵ (1981) 2 NCLR 350.

⁸⁶ E Ekhatior ‘The impact of the African Charter on Human and Peoples’ Rights on domestic law: A case study of Nigeria’ (2015) 41(2) *Commonwealth Law Bulletin* 253-270.

⁸⁷ (2000) 6 NWLR (pt 660) 228; *Ogugu v State* (1994) 9 NWLR (pt 366) 1.

⁸⁸ A similar decision was held in the Court of Appeal case of *Ohakosim v COP* (2009) 15 NWLR (pt 1164) 229.

⁸⁹ FHC/B/CS//53/05, (unreported) delivered on November 14, 2005.

violated the applicant's rights to health and healthy and satisfactory environment under Articles 16 and 24 of the African Charter. Commendably, this decision did not only treat human rights as indivisible-in that a threat to a living environment is a threat to life- but it also went ahead to expressly hold the applicants' socio-economic rights as legally protectable under the Charter. Unfortunately, rather than build on this positive judicial outcome, this revolutionary jurisprudence in the area of socio-economic rights was rejected by the government. Apart from frustrating the execution of the judgment, the government 'punished' the judge by transferring him to another division and the case-file has since disappeared from the archives.⁹⁰

In another instance, the African Charter was also used to vindicate socio-economic rights in Nigeria in *Joseph Odafe & Ors v Attorney-General of the Federation & Ors*⁹¹ where the Federal High Court held:

The government of this country has incorporated the African Charter on Human and Peoples' Rights (Cap 10) as part of the law of the country. The Court of Appeal in *Ubani v. Director, SSS* (1999) 11 NWLR Pt 625) 129 held that African Charter is applicable in this country. The African Charter has entrenched the socioeconomic rights of a person. The court is enjoined to ensure the observance of these rights.

In that case, prison inmates who had tested positive to HIV/AIDS were quarantined on the basis of their HIV status. They were also not given access to medical care. The court held that they were entitled to medical treatment from the government and that failure to so provide would amount to non-compliance with section 8 of the Prisons Act and Article 16 of the African Charter.⁹²

Another commendable judicial validation of socio-economic rights in Nigeria, through the African Charter, is the recent Court of Appeal's decision in *Alhaji Sani Dododo v Economic & Financial Crimes Commission and Ors*.⁹³ There the court found that '[t]he African Charter is now part of the laws of this country protecting the social economic rights of citizens. The African Charter is preserved by the 1999 Constitution and must be always relied on to recognize political and socioeconomic rights'.⁹⁴

Lastly on the African Charter, African regional judicial and quasi-judicial bodies have equally given a positive reinforcement to the protection of socio-economic rights in Nigeria. In *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*⁹⁵, the applicants had filed the suit on behalf of the Ogoni Community of Rivers State Nigeria. They alleged that multinational oil

⁹⁰ WO Egbewole & TN Alatise 'Realising socio-economic rights in Nigeria and the justiciability question: Lessons from South Africa and India' (2017) 8(3) *International Journal of Politics and Good Governance* 1 at 13.

⁹¹ (2004) AHRLR at 205.

⁹² See also the Court of Appeal case of *Organ v Nigerian Liquefied Natural Gas Ltd* (2010) All FWLR (pt 535) 293 at 338 where the court, per Saulawa JCA, held that '...And it's the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive and judicial powers, to strictly conform to, observe and apply the provisions of the Constitution, most especially under Chapter II i.e., regarding fundamental objectives and directive principles of State policy'.

⁹³ (2013) 1 NWLR (pt1336) 468.

⁹⁴ *Supra*.

⁹⁵ Communication No 155 of 1996 delivered on the 30th Ordinary Session in October 2001.

companies were being empowered militarily by the Nigerian government to deposit toxic waste into their living environment thereby causing a serious threat to their lives, means of livelihood and clean environment. The African Commission on Human and Peoples Rights held that Nigeria was in violation of Articles 4, 14, 16, 18 and 24 of the African Charter by its collusion and condonation of environmental pollution. It thus urged the government to stop military attacks on the Ogoni people and provide adequate reparation and compensation. This is a commendable pronouncement, though the Commission's decisions are not binding on state-parties to the Charter, but merely of persuasive value. Similarly, in *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, the ECOWAS Court of Justice held that '...it is well established that the rights guaranteed by the African Charter are justiciable before this Court... the contention of the Government that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold'.⁹⁶

However, a major downside to the jurisprudential vindication of ESR in Nigeria, generally, is that, apart from the *Attorney-General Ondo State case*, most of the domestic decisions that favour socio-economic rights in Nigeria are of the lower rung of the judiciary-at best the Court of Appeal. The reasons could be two-pronged. First, the constitutional provisions in section 6(6)(c) may put off unsuccessful rights litigants and advocates from further appealing ESR cases to appellate courts with a reputation of being unsympathetic to such cases. Another reason, on the part of government, is the unfortunate government's posture of being unaccountable when it fails to obey a subsisting court order which compels the realisation of ESR. That is, the Nigerian government would not obey any court order that confrontationally pushes it to respect, protect and fulfill ESR, hence people perceive ESR litigation and appeal as a waste of time. However, future opportunities for the Supreme Court to pronounce on the effect of local statutes on socio-economic rights, are to be looked forward to. It is also hoped that non-implementation by the government-which directly hampers the impact of judicial decisions- becomes a thing of the past.

4.2 Further legislative interventions on socio-economic rights in Nigeria

Apart from the ICPC Act and the Ratification Act already discussed, some Nigerian enactments have in one way or the other catered for the ESR generally and right to health in particular. These legislative interventions should be explored for a better realisation of ESR in Nigeria. The essence of this section of the paper is to highlight some further legislative steps or interventions which the courts can, in line with the rule in *Attorney-General Ondo case* above, explore to escape from the problem of justiciability in section 6(6)(c) of the Constitution. Although there is no available evidence that the courts have yet relied on these enactments, I argue that they are veritable tools to dealing with non-justiciability.

⁹⁶ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission*, No. ECW/CCJ/APP/0808.

4.2.1. The National Health Insurance Scheme Act⁹⁷

This Act provides for the establishment of a National Health Insurance Scheme (NHIS) with a view to providing access to good health care for the Nigerian citizens.

By the provisions of the Act, funding of the NHIS shall be by contributions from employees who are expected to pay 5% each of their monthly basic income into the fund while the employer pays 10%. The beneficiaries under the scheme shall be the employee, his spouse and four children. As for those in the informal sector, they are to make a monthly contribution as may be determined from time to time.

The NHIS has been hailed as ensuring equitable distribution of health care costs among different income groups, maintaining high standard of health care delivery services and efficient health care delivery.⁹⁸ However, I argue that the reality on ground does not seem to support this assertion. Apart from the fact that many people in Nigeria are unemployed and out of business and thus cannot afford the percentage contribution that will make them eligible under the Act, there are also cases of non-implementation of the scheme in various government parastatal. For example, some Nigerian universities are yet to key into the NHIS as staff of such universities are left to take their health issues into their own hands. Another problem is, even where the scheme exists, the terrible work ethic in many Nigeria hospitals makes it difficult for it to work. One doubts the efficiency of service delivery where doctors and other health workers are either not at their duty post or swiping away their phones rather than attend to patients. There is a need for review of the scheme by making it more accessible to all. Thankfully, the National Assembly has just passed a new bill that seeks to address some of these issues.

4.2.2. The National Health Act

This Act was eventually passed into law on October 31, 2014 after it was first introduced into the Nigerian legislative space in 2004. The Act is historical for not only being the first comprehensive domestic statute on health, it is equally the first indigenously crafted legal framework to accord explicit recognition to the right to health care in Nigeria.⁹⁹ It makes provisions for developing, regulating and managing a national health system for the Nigerian people. Section 2(1)(i) of the Act says it is the responsibility of the Government to ‘promote availability of good quality, safe and affordable essential drugs, medical commodities, hygienic food and water’. This is a commendable provision as it provides for not just bare right to health but also the determinants of health as already discussed in this paper. It also provides for existential healthcare services by stating that all citizens shall be entitled to a basic minimum package of health services.¹⁰⁰ Another commendable portion

⁹⁷ Cap N42 Laws of the Federation of Nigeria 2004.

⁹⁸ Falana, *Nigerian Law on Socioeconomic Rights* (n 3) 27.

⁹⁹ O Nnamuchi & others ‘Nigeria’s National Health Act, National Health Insurance Scheme Act and National Health Policy: A recipe for universal health coverage or what?’ (2018) 37(4) *Medicine and Law* at 645-650.

¹⁰⁰ Sec15(3) of the Act.

of the Act is that it recognises two of the ICESR tripartite duties of the Nigerian state to protect, promote and fulfil the right of the Nigerian people to healthcare services.¹⁰¹ However, it is not certain why the duty to respect was not expressly mentioned in the section. It is submitted here that this is a major omission that calls for an amendment of the Act. The duty to respect, given its importance, should not be subsumed under the duties to protect and fulfil socioeconomic rights.

It has been argued 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’.¹⁰² I entirely agree to this position and based on my earlier argument in this paper, the Act can kick in as an exception to the non-justiciability provisions in section 6(6)(c) of the Constitution, in line with the decision in *Attorney-General of the Federation v Attorney-General of Ondo State* case already examined. Therefore, litigants and courts should explore the potency of the Act in promoting the right to health.

4.2.3 Discrimination against Persons with Disabilities (Prohibition) Act 2018

Although Nigeria’s ratification of the Convention on the Rights of People with Disabilities and its Optional Protocol was in 2007 and 2010 respectively, this domestication Act had just been assented to by President Muhammadu Buhari on Wednesday January 23, 2019. The bill had been in the National Assembly for the past 18 years but was finally passed in 2016. The passage and subsequent assent to the bill opens a new chapter of hope for those living with disabilities.

The highlights of the Act on right to health is that it provides that persons living with disabilities shall have a right to unfettered access to adequate health care without discrimination.¹⁰³ A person who has been certified as having mental disability by the appropriate body shall be entitled to free medical and health services in all public institutions.¹⁰⁴ Also, persons with disabilities shall have priority service in all queues, school and employment accommodations and emergencies.¹⁰⁵ It also commendably established an institutional mechanism for the implementations of the Act. Thus, section 31 of the Act establishes the National Commission for Persons with Disabilities.

5. Towards a better judicial protection of ESR in Nigeria: The promise of dialogic judicial approach

From what has been discussed so far, there is no doubt that there exists in Nigeria some legislative leeway towards making ESR justiciable. However, the problem is, even where courts decide to give decisions that protect ESR in Nigeria, there is a problem of implementation. The executive and legislative arms would resist any judicial attempt to engage with issues of allocation of resources. This could lead to the nagging debate on separation of powers and democratic legitimacy. I align myself with Ibe that ‘To concentrate on justiciability alone is to miss

¹⁰¹ Sec 1(1)(c) and (e) of the Act.

¹⁰² JH Mike ‘Access to medicines to guarantee women’s rights to health in Nigeria’ (2019) 86 *Journal of Law, Policy and Globalization* 41-51.

¹⁰³ Sec 21 (1) of the Disabilities Act.

¹⁰⁴ Sec 21(2) & 22 of the Disabilities Act.

¹⁰⁵ Sec 26 and 27 of the Disabilities Act.

the point. If socioeconomic rights become immediately justiciable in Nigeria today, there would still be no guarantee of socio-economic rights, as enforcement of decisions could become a major issue'.¹⁰⁶ At the moment, there seems not to be any cooperation among the respective branches of government on realisation of ESR. For example, a former Attorney General of the Federation recently openly recounted how he blocked an attempt by the legislature to make some provisions of Chapter 11 of the Constitution justiciable.¹⁰⁷ This mutual mistrust obvious leads to problem of implementation and enforcement of laws that are protective of ESR. As a way out of these problems of enforcement and 'counter-majoritarian difficulty',¹⁰⁸ I propose that the courts should engage in dialogic judicial activism, as against monologic or confrontational judicial activism.

Ever since the term 'judicial activism' came into limelight through the work of a historian and social critic, Arthur Schlesinger, Jr. in his January 1947 Fortune magazine article¹⁰⁹, it has been a subject of controversy in legal and political discourses.¹¹⁰ While a detailed discussion on the dialogic model or the debate about its meaning and ideological contexts has been the focus of some research¹¹¹, it suffices to advance a working definition for judicial activism. According to Jones, 'At the broadest level, judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation'.¹¹² On his part, Graglia states that 'By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit'.¹¹³ Further, O'Scannlain defines it thus: 'judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective'.¹¹⁴ Summarily, I can safely state that judicial activism is a judicial process that departs from the regular norm of adjudication in that, while taking the Judge's personal perception and opinions into consideration, it goes beyond constitutional limitation to advance individual rights.

There are two models of judicial activism; the extreme model and the moderate model. The extreme model is operational where a court is so intrusive and ubiquitous that it virtually dominates the institutions of government while the moderate or conservative model recognises the strict separation of powers and only fills the gaps in

¹⁰⁶ Ibe 'Beyond Justiciability' (n 69) 246.

¹⁰⁷ A Abdulaziz 'How I stopped Jonathan from signing controversial constitutional amendment-ex AGF Adoke' *Premium Times Online Newspaper* (Nigeria) 10 September 2019 1.

¹⁰⁸ See Alexander Bickel, *The least dangerous branch* (Bobbs-Merrill, 1962).

¹⁰⁹ KD Kmiec 'The origin and current meanings of judicial activism' (2004) 92(5) *California Law Review* 1441.

¹¹⁰ I. Imam 'Judicial activism in Nigerian Supreme Court and the consolidation of democracy' PhD thesis, University of Ilorin, 2012 at 169 cited in SN Okogbule & CT Brown 'Social and economic rights and transformative constitutionalism in Africa: Imperative of expanding the frontiers of judicial activism' (2019)16 (2) *US-China Law Review* 52-64 at 52.

¹¹¹ The full discussion of dialogic judicial activism is outside the scope of this paper. For a detailed discussion, see Philip Oamen, 'Democracy, human rights and court's interventions: Exploring a dialogic approach' (forthcoming in the Commonwealth Law Bulletin).

¹¹² G Jones 'Proper judicial activism'(2002) 14 *Regent U.L.Rev* 141-143.

¹¹³ LA Graglia 'It's not constitutionalism, it's judicial activism' (1996) 19 *Harv. J.L. & Pub. Pol'y* 293-296.

¹¹⁴ DF O'Scannlain, 'On judicial activism' (2004) *Open Spaces Q.* available at <https://open-spaces.com/articles/on-judicial-activism/> (accessed on 20 June 2020).

legislation in an effort to attain justice or drive the true purpose of the legislative enactment.¹¹⁵ While the former model can be termed a monologic judicial activism, the latter can be referred to as a dialogic judicial activism.¹¹⁶ The dialogic judicial activism envisaged here is one where, though the court identifies some gaps in the body of law, it does not just go ahead to intrude into the affairs of the other compartments or departments of governments. Rather, the court is to engineer a deliberative and collaborative discussion with all key stakeholders on how to fill the gaps. If this is done, it would avoid a situation where litigants are handed mere paper victories by an activist judge without any corresponding post-judgment value. Dialogic activism would lead to what Rodriguez-Garavito refers to as ‘positive-sum litigation’ where the judgment does not only positively impact on the litigant but also lead to ‘a broader, favorable repercussions for the fulfilment of a socioeconomic right’.¹¹⁷ This dialogic approach would not only see the court handing down mutually agreeable decisions on ESR but it would also engender or enhance its post-judgment monitoring process as the court would galvanise the entire system towards the realisation of ESR. The key players in this dialogic approach include the court, the executive, the legislature, the rights users and rights claimants (whether as rights violation victims or NGOs representing and advocating for such victims).¹¹⁸ These all should collaborate right from the budgetary allocation stage up to the actual delivery of healthcare services.

The court can assume this dialogic role by enabling an inter-institutional discussion, before and after any judicial decision on the realisation of ESR. Comparatively, the Nigerian courts can borrow from the Indian experience where the court enforces a judgment monitoring mechanism for the purposes of ensuring that its decisions are implemented by the political branches rather than being dumped as mere paper remedies. For example, in India, there is some sort of court’s consultation with other branches on issues of ESR. The Indian Supreme Court often appoints experts to engage with relevant stakeholders, to dissect technical areas of ESR as such a process seeks to “preserve respect for democratic authority of legislative bodies and the expertise of the executive authorities, while at the same time moving the implementation of social and economic guarantees forward”.¹¹⁹ In the Colombian Constitutional Court’s Judgment in the T-025 case¹²⁰, the court established a monitoring process for its judgment which process engaged many concerned citizens, government and

¹¹⁵ SN Okogbule & CT Brown ‘Social and economic rights and transformative constitutionalism in Africa: Imperative of Expanding the frontiers of judicial activism’ (2019) 16(2) *US-China Law Review* 52-55.

¹¹⁶ C Rodriguez-Gavarito ‘Beyond enforcement: Assessing and enhancing judicial impact’ in M Langford, C Rodriguez-Gavarito & J Rossi (eds) *Social Rights Judgments and the Politics of Compliance: Making It Stick* (2017, Cambridge University Press) 79-80.

¹¹⁷ Ibid.

¹¹⁸ Oamen ‘Democracy, human rights and court’s interventions’ (n111).

¹¹⁹ A Pillay ‘Revisiting the Indian experience of economic and social rights adjudication: The need for a principled approach to judicial activism and restraint’ (2014) 63 *International and Comparative Law Quarterly (ICLQ)* 385-408.

¹²⁰ See the Colombian Constitutional Court’s Judgment T-025, Corte Constitucion [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (slip op, at 1).

stakeholders on how best to ensure that the impact of ESR decision was felt.¹²¹ Further, in South Africa, the Constitutional Court in the case of *Occupiers of 51 Olivia Road, Berea Township and Others v City of Johannesburg and Others* (Olivia Road case)¹²², adopted a collaborative or dialogic approach by embracing the concept of meaning engagement. It reasoned that both parties in ESR cases should meaningfully engage with one another by discussing the common problem and finding a common solution before reporting back to the court. The value of such a process is that it leads to democratic experimentalism or participation of all concerned in fashioning a way out.

One major hurdle that the Nigerian courts may face in championing this collaborative or consultative course of action is jurisdictional competence. Even where the issue of justiciability of ESR in Nigeria has been settled (for example, through legislative intervention) it could still be argued that the Nigerian courts do not have the constitutional power to engage in collaborative discussion with the political branches on issues of rights interpretation. Thus, there could be an argument that the court should determine a rights-focused lawsuit, either for or against the government without having to engage the latter on how to comply with the decision. While I see this as a challenge, it is not however an insurmountable one. The basis of my argument is that the Nigerian constitution is already tilting towards a dialogic, amicable or collaborative dimension, though gradually. For example, section 254(c) (3) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 provides that:

The National Industrial Court may establish an Alternative Dispute Resolution Centre within the Court premises on matters which jurisdiction is conferred on the court by this Constitution or any Act or Law;

Provided that nothing in this subsection shall preclude the National Industrial Court from entertaining and exercising appellate and supervisory jurisdiction over an arbitral tribunal or commission, administrative body, or board of inquiry in respect of any matter that the National Industrial Court has jurisdiction to entertain or any other matter as may be prescribed by an Act of the National Assembly or any Law in force in any part of the Federation.

The above constitutional provisions have clearly donated powers to the Industrial Court to engage in alternative disputes resolution as far as its jurisdiction, which is largely on employment/labour matters, is concerned. The provisions should be explored to ‘test-run’ the efficacy of a dialogic judicial approach to ESR realisation. In a similar vein, it is argued here that, in the event that the National Assembly activates its powers under item 60(a) of the Constitution as already discussed, by establishing legal and institutional framework for the implementation

¹²¹ See C Rodriguez-Garavito ‘Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America’ (2011) 89 *Texas Law Review* 669-1691 for a detailed discussion on this point.

¹²² 2008 (3) SA 208(CC).

of ESR tomorrow, the Constitution can similarly be amended to give the courts the power to collaborate with the other arms of government or other stakeholders, engage in judgment implementation processes and establish special commissions on ESR issues. Put differently, the Nigerian Constitution can be amended to enable the courts to set up commissions, hold public hearings and issue follow-up orders on ESR just as it is obtainable in India and Colombia.

Apart from the courts, the civil society organisation (CSOs) is another major stakeholder in the drive to realise ESR through the dialogic approach. With regard to right to health in Africa, Forman argues that ‘social movements have advanced rhetorical and institutional recognition for universal access to ARVs [Antiretroviral drugs] as a fundamental human right...’¹²³ The CSOs in Nigeria must go into the court-facilitated collaboration with the same zest that they exude in public mobilisation with a view to presenting convincing reasons for government’s provision of facilities that would meet the realisation of ESR in Nigeria. That way, the government would not only be well- informed but would see the CSOs as a partner in progress, not as a foe.

6. Conclusion

In this paper, I have examined the legal status and the courts’ handling of the right to health in Nigeria. I have argued that whereas there is no general constitutionally justiciable right to health in Nigeria, the legislatively domesticated African Charter and other local legislations can be used to vindicate the right. I have also observed that judicial disposition towards this right is rather ambivalent. Further, I argued that even in cases where ESR have been declared justiciable under the African Charter, there have been the challenges of implementation; there is a lack of political will to implement these rights in Nigeria.

Consequently, I have argued that mere constitutionalisation and judicialisation of rights is not enough to herald the needed practical enjoyment of ESR. I have thus recommended a dialogic judicial approach where the court would engage in an inter-institutional conversation and collaboration with the other arms of government and other key stakeholders in a round table discussion and agree on how ESR should be projected and promoted and what budget should be voted for such, per time. There should be an inter--institutional approach by all branches and agencies of government and relevant stakeholders, right from the budgetary or allocative decision-making stage, championed by the court. This way, judicialisation would not just be a mere rhetoric but ‘...contribute to facilitating “social learning” as to the need for limit-setting in health care and the criteria which might underpin decisions in this context’.¹²⁴ The proposed dialogic judicial approach would engender a more robust realisation for the right under consideration because it would witness less confrontation and more cooperation among relevant actors.

¹²³ L Forman ‘The right to health and AIDS medicines in sub-sahara Africa: Assessing the outcomes of a human rights-based approach to medicine’ in C Ngwenya & E Durojaye (eds) *Strengthening the Protection of Sexual and Protective Health and Rights in the African region through Human Rights* (Pretoria University Law Press, 2014) 237.

¹²⁴ K Syrett ‘Evolving the Right to Health’ (n1) 124.

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While agreeing with Toebes that government intervention in healthcare delivery is necessary because individuals themselves are not always capable of caring for their own health completely,¹²⁵ I have however suggested that there should be a departure from the confrontational path or ‘command and control’ approach which has not yielded much fulfilment of ESR in Nigeria. Securing the needed government intervention through court-inhered dialogue or interinstitutional collaboration, would be more efficacious to the realisation of the right under review.

¹²⁵ B Toebes *Right to Health and Health Care, Encyclopaedia for Human Rights* (University Press, 2009) 365-366.