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Realization of Health Right in Nigeria: A Case for Judicial Activism

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Abstract- Nigeria adopts the dualist approach to international human right laws and it remains one of the countries with the highest medical-related death rates in the world. The nonenforceability of member state's minimum core obligation and, the non-justiciability of ECSRs in Nigeria remains seemingly, a major impediment to the realization of health right in Nigeria thus; Nigeria ranks 158 out of 177 countries on the Human Development Index. Eleanor D. Kinney suggested approaches that can advance recognition and implementation of human right to health in the US however, Kinney wittingly excluded justiciability approach to the implementation and realization of right to health given that once a legislation is enacted and full recognition is given to this class of right, policies and programs will be established and adequate funding will become essential. The present position in Nigeria is different. There are laws – international and regional treaties already domesticated. These laws are focused on the realization of health rights in Nigeria. The paper therefore, contends that given the judicial activism evidences from India, South Africa and its effects on the implementation and accessibility of health care right in these countries, the setbacks in realizing health right in Nigeria is a challenge to the Nigerian Judiciary.

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*'...The very notion of entrenching rights is to provide a basic framework of constitutional regard for every human being. It is not the duty of courts to side with one section of society against another...But there is every reason why it should be incumbent on the courts to see to it that basic respect for the dignity of every person is maintained at all times. That is why we have fundamental rights.'*¹

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¹ Sachs A., 'The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case' 140 in Jones, Peris and Kristian Stokke (eds), *Democratising Development: The politics of socio-economic rights in South Africa* (Martinus Nijhoff Leiden 2005).

I. INTRODUCTION

The right to health is the right to the highest attainable standard of health and it is recognized in at least 115 constitutions.² Therefore the adequate access to health care, such as the primary health care, sexual health care, medical and pharmaceutical technologies, and healthy environment are complimentary to any other efforts put in place by the government to ensure that its citizenry is virile and healthy. The right was first reflected in the World Health Organization constitution in 1946³ and was later reiterated in the 1978 Declaration of *Alma Ata*. Right to health was also adopted by the World Health Assembly in 1998.⁴ According to International Convention on Economic and Social Cultural Rights,⁵ and the General Comment No. 14,⁶ every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity as health is a fundamental human right. Health is indispensable for the exercise of other human rights and the realization of the right to health may be pursued through various complementary approaches. These approaches include formulation of health policies, the implementation of health programs as developed by the World Health Organisation (WHO), or the adoption of specific legal instruments for instance the domestication of international treaties which provides for the health rights. In Nigeria, the legal authority for human right to health and health care are international and regional treaties.

Office of the U.N. High Comm'n for Human Rights, *The Right to Health: Fact Sheet No. 31* 10 (2008), accessed online on 24th May, 2013 at http://www.ohchr.org/Documents/Publications/Fact_sheet31.pdf. The right to health is an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. See for example, CESCR General Comment No. 14, (E/C. 12/2000/4), para. 8., ICJ, *Rights to Health Database, Preliminary Proposal, 2002*, quoted by the Special Rapporteur on the Right to Health of the Commission on Human Rights in his first report, par.20: E/CN. 4/2003/58: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/9854302995c2c86fc1256cec005a18d7/\\$FILE/G0310979.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/9854302995c2c86fc1256cec005a18d7/$FILE/G0310979.pdf).

³ See generally the Basic Document, 43rd Edition, Geneva, World Health Organization, 2001.

⁴ See Article 25(1) of UDHR, Article 12(1) and (2) of the icescr, cerd of 1963, the cedan of 1979 and the crc of 1989.

⁵ (Article12).

⁶ (11/08/00)(E/C.12/200/4) (Paragraph 1)

These International and Regional treaties define the content of the international human right to health in Nigeria and, also impose on Nigerian government as signatory of the international and regional treaties, the duties to assure health care services, promote and protect the health of its population.⁷

II. HEALTH RIGHT IN NIGERIA

The source of human rights generally can be traced back to the Magna Carta of 1215, and the Bill of Rights 1689,⁸ and the right to health is a relatively new legal concept, borrowed from the aspirational terms of international human rights instruments and of evolving philosophies of distributive justice.⁹ In Nigeria, the health rights can be said to date back to the acceptance of Sir Henry Willink's Commission's recommendations on human constitutional conference which formed the basis for the Chapter III of the Independence Constitution of 1960 and the Republican Constitution of 1963.¹⁰ According to Babalola, the beginning of health schemes in Nigeria is traceable to the emergence of the National Development Plan in the 60's through the 70's which made provisions geared towards integrating health with other social services.¹¹ In 1988, the government introduced National Health Policy and Strategic Framework which was aimed at achieving Health for all Nigerians. In overall, the policy seeks to improve the health of all Nigerians through devising a sustainable Health System based on focusing emphasis on Primary Health Care (PHC) that promotes, protective, preventive, restores and rehabilitates, as well as ensure a socially and productive society for all individuals¹² This policy

was subsequently revised in 2004.¹³ Under the extant Constitution of the Federal Republic of Nigeria, 1999 (As Amended by the Third Alteration) all Socio-economic Rights are classified under the Fundamental Objectives and Directive Principles of State Policy and enshrined in Chapter II of the Constitution.¹⁴ The right to health has long been treated as a "second generation right," under International Human Rights Treaties and Conventions, and this implies that it is not enforceable at the national level except ratified and domesticated at the national level.¹⁵ Nigeria is a party to major international human rights treaties such as the International Covenant on Civil and Political Rights (the "ICCPR"),¹⁶ the International Covenant on Economic, Social and Cultural Rights (the "ICESCR"),¹⁷ the International Convention on the Elimination of All Forms of Racial Discrimination (the "ICERD"),¹⁸ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT"),¹⁹ the Convention on the Elimination of All Forms of Discrimination Against Women (the "CEDAW")²⁰ and the Convention on the Rights of the Child (the "CRC").²¹ At the regional level, the goal of Africa Health Strategy is to contribute to Africa's socio-economic development by improving the health of its people and by ensuring access to essential health care for all Africans, especially the poorest and most marginalized, by 2015.²² Therefore, the African Union

⁷ See generally *Eleanor D. K.* Recognition of the International Human Right to Health and Health Care in the United States accessed online on 12th February, 2013 atAccording to Lawson-Dada, F., on financing healthcare in Nigeria, the right to health care in Nigeria is derived primarily from regional and international laws and instruments ratified by Nigerian Government which foists on the government as a state, the responsibility to ensure the implementation of access to health care particularly in view of the objectives of various international instruments which serve as the platform for protecting health care rights in Nigeria. See generally Lawson-Dada, F., "Healthcare financing in Nigeria: A legal discourse" (2009) 3 *University of Ado-Ekiti Law Journal* 81 – 110 at 85,

⁸ Oputa, C.A., Human Rights in the Political and Legal Culture of Nigeria, 2nd Ndigbe Memorial Lectures, Nigerian Law Publications Ltd., Lagos (1998) 38 – 39.

⁹ Katharine G. Young & Julieta Lemaitre, *Vol. 26* (2013) The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa. *Harvard Human Rights Journal* pp. 180

¹⁰ See generally the provision of the Constitution of the Federal Republic of Nigeria, 1960, 1963 etc.

¹¹ Afe Babalola, 2011 Health Scheme Development, being a paper presented on 3rd February, 2011 at the University Teaching Hospital, Ibadan at the SIDCAIN Diabetes and Hypertension Conference.

¹² Hodo B. Riman, & Emmanuel S. Akpan, (2010) Causality between Poverty, Health Expenditure and Health Status: Evidence from Nigeria using VECM *European Journal of Economics, Finance and Administrative Sciences - Issue 27 (2010) 121*

¹³ Nnamuchi, Obiajulu (2007) The Right to Health in Nigeria. Draft Report December 2007, <http://www.abdn.ac.uk/law/hhr.shtml>

¹⁴ See Okpara, O., *Human Rights Law & Practice in Nigeria* (Enugu; Chenglo Ltd, 2005) 61; Section 17 provides for the social objectives of the Nigerian State and makes it an obligation for government to direct its policies towards ensuring adequate medical and health facilities for all persons; ensure that the health, safety and welfare of all persons in employment are not endangered or abused. Clearly the constitutional provisions under sections 33 and 35 recognized that the rights to life, sanctity of the human person and human dignity are necessarily connected to physical and mental health of persons. A combined reading of Sections 17, 33 and 35 shows the recognition of right to health includes the provision of affordable, available, adequate, qualitative and accessible health care facilities and services by all, especially women's reproductive health rights without any discrimination.

¹⁵ Ajigboye O., "An Overview of the Legal Framework of Health Rights in Nigeria" 1 (2013) *ABUAD Law Journal*, Afe Babalola University Press, pp.

¹⁶ Ratified October, 29 1993.

¹⁷ Ratified October 29, 1993.

¹⁸ Ratified January 4, 1969.

¹⁹ Ratified July 28, 2001.

²⁰ Ratified July 13, 1985.

²¹ Ratified April 19, 1991. Nigeria has also signed the two optional protocols related to this Convention: The Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, both signed on September 8, 2000.

²² See generally, the Africa Health Strategy: 2007 – 2015, at the THIRD SESSION OF THE AFRICAN UNION CONFERENCE OF MINISTERS OF HEALTH, JOHANNESBURG, SOUTH AFRICA on "Strengthening of Health Systems for Equity and Development in Africa" 9– 13 APRIL 2007 CAMH/MIN/5(III).

has an ample provision for health rights in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (the "African Charter Act").²³ The effect of this however remains impugned as there continues to be a decline in the implementation and realization of health rights in Nigeria although Nigeria is a signatory to several international and regional treaties.

a) Approaches to realization of health rights internationally

The promotion of human rights and the fight against poverty and other socio-economic rights is now a major concern for the United Nations. This reflects in the organization's mandate and the approaches in place for the realization of these rights particularly health rights. One of the widely accepted approach to realize health right is the rights-based approach commonly referred to as the "traditional" or "generational" approach. A rights-based approach to development is based on the framework of rights and obligations. Human rights-based approach determines the relationship between individuals, groups with valid claims (rights-holders) and, State and non-state actors with correlative obligations. It works towards strengthening the capacities of rights-holders to make their claims, and of the states to meet their obligations.²⁴ This approach is now generally accepted as the capacity of citizenry to claim for ESCRs is curtailed as this category of rights are generally treated as non-justiciable.²⁵ Human Right is a basic principle that is accepted with wide consensus. It is also applicable to all democracies across the globe. Indeed some scholars see the entrenchment of these rights as a means of protecting the minorities from the majorities thus forming the core basis for a democratic society while others are of the view that by the Social Contract theory. In recent times, other scholars see it from the perspective of welfare entitlement to the citizenry.²⁶ Thus, each of these scholars holds different view on the approach to realizing human rights. Human Rights approach is the philosophical perception and theory of how to ensure the achievement of human rights goals. Primarily, the human right based approach is concerned with the realization of rights through the promotion, protection, of rights. This approach essentially seeks to address violations after they have occurred or address

human rights issues before they occur. It is a reactive and proactive measure to ensure that human rights goals are achieved.²⁷ Simply put, rights approach to realization of rights means making sure that citizens can hold governments to accountable for their human rights obligations.²⁸ Another approach is the Essential Approach. This approach to realizing human rights is based on the essence of the right sought to be protected and proponents of this approach set up a normative investigation into why we value economic and social rights and which of their aspects should be most important. Thus it raises the need for a minimum standard particularly on states obligation towards achieving the set human right goals. This approach is helpful in ensuring that advocates are able to articulate the minimum core of rights through vocabularies that draw attention to the important ethical justifications for economic and social rights. This approach is consistent with the insight that rights belong to a category of legal entitlement that is, for special reasons, immune to the vagaries of short-term politics or cost-benefit decision making.²⁹ Young argued that the strongest example of the Essence Approach views the right's core content as an embodiment of "the intrinsic value of each human right which is essential for the very existence of that right as a human right."³⁰ Oliyide on the other hand however argued that rights impose positive obligations on the government to provide conducive and decent living condition without which the negative rights i.e. the civil and political rights cannot be enjoyed. The non-justiciable class however are also fundamental to human existence and survival. He concluded by suggesting that the judiciary should, in the future improve on its gesture by making even more progressive and encouraging pronouncements appertaining to Human Rights than it has done in the past.³¹

III. THE JUDICIARY AND ESCRS IN NIGERIA

Judicial systems vary from one country to another depending on the constitutional and political

²³ Now contained in Chapter 10, Laws of the Federation 1990.

²⁴ United Nations Development Programme. 2003. "The Human Rights Based Approach to Development: Towards a Common Understanding Among the UN Agencies." New York: UNDP.

²⁵ A Fair deal: Justiciability of ESC rights – Human Rights Features, 58th Session of the CHR, April 2002. Available online at: <http://www.hrdc.net/sahrdc/hrfchr58/Issue3.htm#A%20fair%20deal>.

²⁶ C. Schneider, 'The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy' (2000) UCL Jurisprudence Review 101; See also the discussions of W. Forbath, Social Rights, courts and Constitutional Democracy – Poverty and Welfare Rights in the United State [2006] accessed online on 22nd May, 2013 at http://papers.ssrn.com/so13/papers.cfm?abstract_id=845924.

²⁷ See Applying a Human Rights-Based Approach to Development Cooperation And Programming: A UNDP Capacity Development Resource, Capacity Development Group Bureau for Development Policy UNDP, September 2006 accessed on 25th May, 2013 at http://www.hurilink.org/tools/Applying_a_HR_approach_to_UNDP_Technical_Cooperation--unr_revision.pdf

²⁸ "Realising Human Rights for Poor People." DFID, October 2000, pg. 7)

²⁹ Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' *The Yale Journal Of International Law* [Vol. 33: 113] p.138

³⁰ Fons Coomans, *In Search of the Core Content of the Right to Education, in EXPLORING THE CORE CONTENT OF ECONOMIC AND SOCIAL RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES* 159, 167 (Danie Brand & Sage Russell eds., 2002)

³¹ Oliyide O. & Awolowo O. Meaning, Nature and Evolution of Rights in Nigeria (2006) *Rights* (Thorne-of-Grace Limited Publishers, Lagos) 1–9, 8.

context in such country, the substantive content of the applicable legislations, the capacity of enforcing institutions and the solidity of the foundation of the rule of law.³² Therefore, it is paramount that governments in ensuring realization of human rights particularly the *ESCRs* must consider putting an independent judicial system put in place within their polity. The judiciary should in turn ensure that there are no large backlogs of cases which can erode individual's and property rights, and in return stifle the ultimate goals of the constitution.³³ Judicial systems should discourage further obstacles capable of possibly ensuring the violation of human rights of the citizens which is now argued favourably as violation of fundamental human right on its own.³⁴ It is imperative to infer that such judicial systems must not only be independent, but also be practically positive in ensuring the fulfillment of such rights which the entire system must protect. By virtue of the provisions of Section 6 of the constitution, the Courts have the powers to adjudicate on matters before it. The Constitution as the grundnorm also provides for the powers of the courts to interpret the provisions of the laws thus the courts wields the powers which enables it to state the position of the extant laws. One of the legal disputes that stare at the courts therefore, is the extent of realization and implementation of the *ESCRs* on one hand and the enforcement of this class of rights b the

citizenry. Mubangizi having carried out a comparative evaluation of the constitutional protection of Socio-economic Rights in South Africa, Ghana, Uganda, and Namibia, concluded that though many African constitutions tend to recognize civil and political rights, these constitutions generally disregard the socio-economic rights while some include these rights as "Directive Principles of States Policy". The necessary legal issue is therefore the justiciability of this class of rights in such countries.³⁵ Chapter II of the Constitution of the Federal Republic of Nigeria provides for the Fundamental Objectives and Directives Principles of State Policy.³⁶

Section 14 and 17 provides as follows:

The legal effect of these Sections is different from the legal implications of the provisions of chapter four of the same constitution as the latter is cloth with a different status – justiciability by which the citizenry can approach the courts for a remedy. This is not so in respect of the former. This is because according to Oluduro, there is "no trigger mechanism" in which case there is no clause conferring jurisdiction on any courts to hear and determine claims of infringement of these rights.³⁷ Incidentally, at the regional level, Nigeria became a party to the African Charter on Human and People's Rights (Africa Charter), which was domesticated and now forms part of the laws in Nigeria.³⁸ Advocate of judicial activism therefore had urged that extrinsic meanings be used, even when the intrinsic meanings of the provision of the laws are known.³⁹ At the core of the concept of judicial activism at any rate is the notion that in deciding a case judges (particularly those of the appellate court) may, or some advocate must, reform the law if the existing rules or

³² Bank, W. & Paper, T., 1999. WTP430 Court Performance around the World, Accessed online on 12th January, 2013 at http://sitere.sources.worldbank.org/brazilinpoextn/Resources/3817166-1185895645304/40441681186404259243/14pub_br176.pdf

³³ According to Armando Castelar Pinheiro, in Brazil, for example, it has been estimated that inefficient courts reduce investment by 10 percent, and employment by 9 percent. See Armando Castelar Pinheiro, The Hidden Costs of Judicial Inefficiency: General Concepts and Estimates for Brazil, Address at the seminar "Reformas Judiciales en America Latina: Avances y Obstaculos para el Nuevo Siglo," Conferencia Excelencia en la Justicia, Santafe de Bogota, Columbia (July 29, 1998) (transcript on file with author).

³⁴ The absence of independent and impartial tribunals is considered a violation of human rights. See, e. g., International Covenant on Civil and Political Rights, Art. 14, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, reprinted in 13 I.L.M. 50 (1974) (establishing the right of all persons to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of criminal charges or of rights and obligations in any suit at law); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, signed Nov. 4, 1950, entered into force Sept. 3, 1953, 213 U.N.T.S. 221, E.T.S. 5 ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."); American Convention on Human Rights, art. 8, signed Nov. 22, 1969, entered into force July 18, 1978, O.A.S.T.S. 36, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, doc.21, rev.6 (1979), reprinted in 9 I.L.M. 673 (1970) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.").

³⁵ John Cantius Mubangizi 2Afr.J.Legal Stud. 1 (2006) 1 - 19

³⁶ See sections 14 and 17 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended).

³⁷ See Olubayo Oluduro, (February, 2004) The Right to health in Nigeria; How justiciable? International Law, Human Rights and Development, Essays in Honour of Professor Akindele Babatunde-Oyebode Edited by Akin-Ibidapo Obe & T.F. Yerima citing Olisa Agbakoba, SAN, "Advancing Human Rights in the Fourth Republic: Prospects and Challenges" published by the Human Rights Law Service (HURI LAWS) June, 1999 p.9.

³⁸ See CAP A.9 Laws of Federation of Nigeria, 2004

³⁹ See the argument of Ronald Dworkin in Dworkin, Taking Rights Seriously, 134 - 35; where he argued that it would be wrong in interpreting the constitutional phrase, "cruel and unusual punishment" for the Supreme Court "to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned." He concluded that one justification for a statute is better than another and provides the direction for coherent development of the statute if it provides a more accurate or more sensitive or sounder analysis of the underlying moral principles. This he based on the argument that there must be a fusion of constitutional and morality, and so judges should decide which one of the two competing justification is superior as a matter of political morality and apply the statute so as to further that justification; See the review of Ronald Dworkin's work in Jesse, B. & John, B., 1986. Three Contemporary Theories of Judicial Review : A Critical Review.

principles appear defective.⁴⁰ The judicial powers in Nigeria are clearly provided for in Section 6 of the Constitution.

"Honourable Justice Kayode Eso, JSC, underscores judicial activism in the following words:

"It would be tragic to reduce judges to a sterile role and make an automaton of them. I believe it is the function of judges to keep the law alive, in motion, and to make it progressive for the purpose of arriving at the end of justice, without being inhibited by technicalities, to find every conceivable, but acceptable way of avoiding narrowness that spells injustice. Short of being a legislator, a judge, to my mind, must possess an aggressive stance in interpreting the law."⁴¹

a) *Justiciability of Health Rights under the Nigerian Constitution*

The term "justiciability" is generally understood to refer to right's faculty to be subjected to the scrutiny of a court of law and another quasi-judicial entity. A right is said to be justiciable when a judge can consider this right in a concrete set of circumstances and when this consideration can result in the further determination of this right's significance.⁴² According to Kaase, arguments on the debate of the non-justiciability and justiciability raised in opposition and for judicial enforcement of social rights are manifold. One of the argument is that the separation of powers in a democratic government require the Judiciary in performing its functions, to restrain itself from intruding on the governmental functions assigned to other branches of government and this has been argued for and against by several authors.⁴³ The implementation of

⁴⁰ Judicial Activism in Africa: Possible Defence against Authoritarian Resurgence? By E.K. Quansah Professor of law University of Botswana & CM Fombad Professor of Law University of Botswana

⁴¹ Kayode Eso, JSC, in *Transbridge Trading Company Ltd v. Survey International Ltd* (1986) 4 NWLR (pt. 37) 576 at 596-7.

⁴² See generally Arambulo K., *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights* edited by Isfahan Merali and Valerie Oosterveld. Philadelphia: University of Pennsylvania Press (Pennsylvania Studies in Human Rights), 2001, pp. 280.

⁴³ See Kaase T.F., *The Justiciability of Social Rights Myth or Reality?* 1(1) October, 2010 *Human Rights Review* (Department of Public Law, Ahmadu Bello University, Zaria). For arguments on non-justiciability of Socio-Economic Rights, see generally Christiansen C.E., *Columbia Human Rights Law Review*, 38 Col. Hum. Rts. L. Rev. (2007), 321; Vile M., *Constitutionalism and the Separation of Powers* (Oxford; Clarendon Press, 1967), 13; Hogan G., "Directive Principles, Social Rights and the Constitution", *Irish Jurist*, Vol. 36 (2001), 174 at 189; Villiers B.D., "Social Rights" in Van Wyk, J. Dugard B. de Villiers and D. Davis (eds). *Rights and Constitutionalism – The New South African Legal Order* (Oxford: Clarendon Press, 1996) 529 at 606. Gerard H., "Judicial Review and Social Rights" in Binchy & Sarkin (eds.) *Human Rights, the Citizen and the State: South African and Irish Approaches* (Dublin; Roundhall Sweet & Maxwell, 2001) 1 at 8. These authors argued that democratic legitimacy, separation of powers, violation of separation of powers, tampering with government policies and programmes are all reasons why Socio-economic Rights should not be enforceable in the Court. Gerard argued that "if Social Rights are

Economic, Social and Cultural Rights, is viewed to be costly since this class of right were understood as obliging the state to provide welfare to the individuals.⁴⁴ The consequence is that Nigerian public hospitals are grossly underfunded and health services are not properly managed, which has resulted in a comatose state of health infrastructure.⁴⁵ This is the live situation found in Nigeria whereas, the World Health Organization recommends that government should spend a minimum of \$34 per capita on health annually for low income countries, Nigeria has been spending between \$2 - \$5 per capita on health, which is grossly below the minimum recommended.⁴⁶ Adekoya rightly captured the situation thus:

"Nigeria with a population of over 140 million and a major producer of oil in the world have majority of her citizens living in extreme poverty. Nigeria also ranked among the 20 poorest countries in the world. As at 1996, 13 years ago, about 67% of Nigerians have been living in poverty and one can then imagine the figure would reached an alarming rate in 2009; judging from the fact that nothing tangible has been done to reverse the poverty trend in the country in spite of the much touted poverty alleviation programme of government. With the said poverty rate, over 70% of Nigerians can be regarded as desperately poor"⁴⁷

Therefore, the non-justiciability of Economic and Socio-Cultural Rights in Nigeria remains an admitted aberration considering the huge deposit of natural resources in Nigeria. The major problem with regard to the implementation and enforcement of economic and social rights as enshrined in the ICESCR is that such implementation is dependent upon the resources available within a state party; thus, these rights themselves are limited by a lack of resources.⁴⁸ International law requires a State to carry out its

made justiciable and are vindicated by the Courts, the result will tend to distort the traditional balance of the separation of powers between the Judiciary and other branches of government in that more power will flow to the judiciary"

⁴⁴ Okeowo A.O., *Economic, Social and Cultural Rights: Rights or Privileges?* Celebration of a Legal Amazon Justice Badejoko Olateju Adeniji, the Chief Judge of Oyo State (Law Legends & Company) Chapter VI p.114 – 154 at 130

⁴⁵ See the concluding observations of the Committee on Economic, Social and Cultural Rights on Nigeria's 1996's Report on ICESCR, E/C.12/1/Add.23 of 13th May, 1998 paragraph 28.

⁴⁶ See Edwin E., *Bringing Human Rights Home: An examination of the Domestication of Human Rights Treaties in Nigeria*, *Journal of African Law*, 51, 2(2007) 249 – 284, p. 264.

⁴⁷ Adekoya C.O. *Lifting Nigerians from Extreme Poverty: Grave Human Rights Challenge for Government*, Vol.1(3) January, 2009 *Akungba Law Journal*, Faculty of Law, Adekunle Ajasin University, Akungba Akoko, Akungba, Nigeria, 37 – 41 at 37.

⁴⁸ Similar to the position in Nigeria, is the position in Namibia. See also the South African case of *Soobramoney v Minister of Health* (Kwazulu-Natal), Constitutional Court of South Africa, Case CCT 32/97, 27 November 1997; available at www.law.wits.ac.za/judgenebts/soobram.html; last accessed 20 October 2007.

international obligations undertaken by it by ratifying international treaties, but it does not govern the process of incorporating international law into municipal law. The principle of sovereign equality as embodied in the UN Charter is the cornerstone of the international relations between the States.⁴⁹ Each State has different processes of incorporating international law into their domestic legal system, depending on their constitutional provisions in this respect. Thus, the process of implementation of international law at national level varies in different countries and the divergent State practices pertaining to incorporation of international law into municipal law depends on the provisions of the constitution.

b) The implications of the "African Charter Act" on health rights in Nigeria

The preamble to the African Charter on Human and People's Rights, states that ...therefore it is settled that this regional instrument is an Act with important provisions in relation to the realization of health rights in Nigeria. The relevant Section of the Regional Act states as follows:

Article 1 of the Charter

The Member States of the African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 22

1. All people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 26

States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and

improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Although given the arguments on justiciability and non-justiciability of rights it is settled beyond doubt that the constitution is the core propelling force for the implementation of health rights which is categorized under the non-justiciable rights, however, the African Charter represents a significantly new and challenging framework for the implementation of Economic Social and Cultural Rights in Nigeria. The Charter is a treaty and it therefore has the force of law. According to Article 26, Vienna Convention on the Law of Treaties, a treaty is defined as follows:

"“treaty ” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”

The Constitution of the Federal Republic of Nigeria 1999 provides that no treaty between the Federation and any other country shall have the force of law except if the treaty has been incorporated into domestic law by the National Assembly.⁵⁰ The Supreme Court of Nigeria per Achike, JSC had this to say:

“I cannot agree more with learned cross-appellant’s counsel that *Ogugu v. State (supra)* is a good authority that the African Charter, having been duly incorporated into our municipal laws, it would follow that the procedural provisions set out in the Fundamental Rights (Enforcement Procedure) Rules under Chapter 4 of the 1979 Constitution for enforcing fundamental rights enshrined in the Constitution, are applicable, by extension, to the provisions of the African Charter. As I have highlighted earlier in this judgement, the process of incorporating the African Charter into the body of our domestic laws simply places the Charter at par with all our domestic legislations and in turn brings the African Charter within the *judicial powers* of the courts established under the Constitution”

Consequently, the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act is enforceable in Nigeria.⁵¹ Sections 88 and 89 of the Constitution also empower the Parliament with oversight function on all activities of government, which in this case includes ensuring the implementation of the relevant legal instruments and policy frameworks which Nigeria is a signatory thereto. On the one hand, it can be argued that it is the duty of the Parliament to ensure that

⁴⁹ See Articles 2(1) and 2(2) of the UN Charter; see also R. P. Anand, „Sovereignty of States in International Law“, in: R.P. Anand, *Confrontation or Cooperation: International Law and the Developing Countries* (1987).

⁵⁰ Section 12(1) of the Nigerian Constitution (1999) grants the Parliament sacrosanct autonomy with regard to responsibility of ratifying all international agreements and instruments before they can assume the force of law.

⁵¹ Adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5 reproduced in 21 I.LM 58 and came into force on October 21, 1986.

these international instruments are complied with given the nation's commitment and obligations under these instruments. According to Brand, courts can protect socio-economic rights in two ways. Firstly, through their law-making powers of interpreting legislation and developing the rules of the common law, and secondly, by adjudicating constitutional and other challenges to state measures that are intended to advance those rights.⁵² On the other hand however, considering the provisions of Section 6(6) of the Constitution of the Federal Republic of Nigeria, one may argue that the Judiciary is empowered to determine any dispute arising from the purported implementation of the provisions of the Constitution. In the case of *Abacha v. Fawehinmi*⁵³ the Supreme Court placing reliance on the case of *Ogugu v. State*⁵⁴ held as follows:

"The individual rights contained in the Articles of the African Charter on Human and Peoples Rights are justiciable in Nigerian courts. Thus, the Articles of the Charter show that individuals are assured rights which they can seek to protect from being violated and if violated to seek appropriate remedies; and it is in the national courts such protection and remedies can be sought and if the case is established, enforced.

By virtue of International Convention of Socio-cultural Rights, States Parties to the Covenant on *ESCRs* are to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and such steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right includes those necessary for:

- a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- b. The improvement of all aspects of environmental and industrial hygiene;
- c. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness⁵⁵

A careful appraisal of these provisions reveal that it is the duty of States Parties to ensure that its citizenry are protected from any condition which would not guaranteed health care delivery system, or lead to a deteriorating condition which can foster ill health. It is

also the duty of the court to adjudicate on such complaint before it in this regard. The goal of the *ESCRs* therefore is to ensure that citizens enjoy the highest attainable standard of health. Again, it is important to consider the unequivocal declaration of the Committee on Economic, Social and Cultural Rights:

"Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both the national and international level. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition."⁵⁶

It should be noted that the fundamental rights contained in the Constitution will be meaningless if its breaches cannot be enforced. It is often said that a right, which cannot be enforced, is no right at all.⁵⁷ The African Charter places the duty and obligation on implementing institutions of the Charter and human rights advocates working in Africa to pioneer an imaginative approach to the realization of this right. According to Kinne & Clark there are different constitutions which have different patterns and provisions for health rights of their citizenries. For instance, some constitutions only make statements of aspiration, stating a goal in relation to the health of its citizens.⁵⁸ The Mozambique Constitution provides for health right and health care or public health services as an entitlement⁵⁹ and there are other constitutions which make it the duty of the state to provide health care and public health services to its citizenry. This posits that it is a state obligation which is very positive in nature.⁶⁰ It

⁵⁶ General Comment No. 14, par. 59. See Annex 1

⁵⁷ Chidi Odinkalu, *Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples Rights* in M. Evans and R. Murray (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002), p. 186.

⁵⁸ The following is an example of an aspirational statement: "The authorities shall take steps to promote the health of the population." GRW. NED. [Constitution] ch. I, art. 22, *reprinted & translated in 13 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE NETHERLANDS 4* (Gisbert H. Flanz ed., Dr. Frank Hendrick trans., 2003).

⁵⁹ The following is an example of an entitlement statement: "All citizens shall have the right to medical and health care, within the terms of the law, and shall have the duty to promote and preserve health." MOZAM. CONST. pt. II, ch. III, art. 94, *translated & reprinted in 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: MOZAMBIQUE 42* (Albert P. Blaustein & Gisbert H. Flanz, eds., Afr. Eur. Inst. trans., 1992).

⁶⁰ Example of a duty statement: The State shall legislate on all questions connected with public health and hygiene, endeavoring to attain the physical, moral, and social improvement of all inhabitants of the country. It is the duty of all inhabitants to take care of their health as well as to receive treatment in case of illness. The State will provide gratis the means of prevention and treatment to both indigents and those lacking sufficient means. URU. CONST. § II, ch. II, art. 44, *translated & reprinted in 20 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: URUGUAY* (Booklet 1) 5 (Gisbert H. Flanz ed., Reka Koerner trans., 1998).

⁵² Communication 155/96; Decision handed down at the 30th Ordinary session of the Commission held in The Gambia. For text, see University of Minnesota Human Rights Library website, online: <<http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>> (last accessed: May 30, 2005) ["Communication 155/96"].

⁵³ [2000]6 N.W.L.R Part. 660 at p.249

⁵⁴ (1994) 9 NWLR (Pt. 366) 1 at 26 – 27, (1998) 1 HRLRA 167 at 189

⁵⁵ International Covenant on Economic, Social and Cultural Rights, Article 12

imposes a duty to provide health care or public health services on the State; consequently, it can be enforced against the State. In some other countries, there are provisions of the constitution which are either pragmatic or referential. The former type of constitution states a pragmatic approach on financing health care, model of health care system in the country, and the mandate for the delivery of health care in the country,⁶¹ however, this is not a commitment or guaranty for the citizenry's enjoyment of the highest attainable health. The referential type of constitution makes provisions for health care and health right by way of incorporating specific reference to any international or regional human rights treaties recognizing a human right to health or health care.⁶² Again, this is limited in that each State has the powers to limit all International treaties' application through the provisions of the constitution. For instance in Nigeria, any treaty that is not domesticated cannot be enforced against the State. Unfortunately, international treaties do not automatically become part of national law in Nigeria just like it is in India. Consequently, the interpretation, application and implementation of international treaties at the domestic level continue to be an issue of concern to the realization of health rights in Nigeria.⁶³ International laws require a State to carry out its international obligations undertaken by it by ratifying international treaties, but it does not govern the process of incorporating international law into municipal law. In fact, the States follow different processes of incorporating international law into their domestic legal system, depending on their constitutional provisions in this respect. For instance, the United States Senate in the early 1950s considered a constitutional amendment that would have required a treaty to be implemented only by separate federal legislation in an effort to ensure

that international human rights treaties could not be used to promote civil rights for African Americans or otherwise supersede states' rights.⁶⁴ Orentlicher in considering the case of *Wideman v. Shallowford*⁶⁵ asserts that rights to healthcare in the United States have been weak because courts have rejected the possibility of "positive" rights under the Constitution.⁶⁶ There are however other writers who are of the view that where the provisions of a national law is in conflict with the provisions of a treaty which the nation is a signatory thereto, the provisions of the State law will bow for the treaty as it is the case in the United States of America.

Again, Quincy Wright stated that the terms of Article 6, paragraph 2, of the Constitution are unambiguous, "...all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding" therefore he concluded that "whatever may be the causes, the hesitancy of courts to refer directly to international law tends to emphasize national sovereignty and the political, as distinct from the legal, aspects of international relations. On the other hand, recognition of wide judicial authority to apply treaties and international law tends to emphasize the authority of the international community and the objectivity of international law"⁶⁷ This divergent State practice pertaining to incorporation of international law into municipal law has been explained by two schools of law – *monist* and *dualist*.⁶⁸ The ICESCR stipulates the obligations of the States Parties to ensure full realization of the rights recognized under the Covenant.⁶⁹ According to the Limburg Principles on Implementation

⁶¹ 23. The following is an example of a programmatic statement:

(1) Citizens have the right to health insurance that guarantees them accessible medical care and to free medical care under conditions and according to the procedure determined by law.

(2) The citizens' healthcare is financed from the state budget, by employers, by personal and collective insurance payments, and from other sources under conditions and according to a procedure determined by law.

(3) The state protects the health of the citizens and encourages the development of sports and tourism. (4) No one may be subjected to forced medical treatment or sanitary measures except in cases provided by law. (5) The state exercises control over all health institutions as well as over the production of pharmaceuticals, biologic [a] substances and medical equipment and over their trade. BULG. CONST. ch. II, art.52, *translated & reprinted in 3 Constitutions of the Countries of the World: Bulgaria 11* (Gisbert H. Flanz ed., 2004).

⁶² The following is an example of a referential statement: "International treaties, to whose ratification Parliament has consented and by which the Czech Republic is obligated, are part of the legal order; if the international treaty provides for something other than the law, the international treaty shall be used." 'USTAVA CR. [Constitution] (Czech Rep.) ch. I, art. 10, *translated & reprinted in 5 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CZECH REPUBLIC 2* (Gisbert H. Flanz ed., Gisbert H. Flanz & Patricie H. Ward trans., 2003).

⁶³ See the Indian Case of *Jolly Jeorge v. Bank of Cochin*, AIR 1980 SC 470.

⁶⁴ See Louis H., Editorial Comments—U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, (1995) 89 *American Journal of International Law* 341, 347; See also, Robert Traer, U.S. Ratification of the International Covenant on Economic, Social and Cultural Rights, in *Promises to keep: Prospects for Human Rights* 1, 3-5 (Charles S. McCoy ed., 2002) at 4.

⁶⁵ See *Cnty. Hosp.*, 826 F.2d 1030, 1033 (11th Cir.1987) where the court held that "The Constitution is a charter of negative rather than positive liberties." See also: *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

⁶⁶ Orentlicher, D., 2012. Robert H. McKinney School of Law Legal Studies Research Paper No. 2012 - 11 Rights to Healthcare in the United States : Inherently Unstable Rights to Healthcare in the United States : Inherently Unstable.

⁶⁷ Quincy W. National Court and Human Rights – The Fujii Case, *The American Journal of International Law*, Vol. 45, No. 1 (Jan., 1951), pp. 62-82.

⁶⁸ Agarwal S.K. IMPLEMENTATION OF INTERNATIONAL LAW IN INDIA: ROLE OF JUDICIARY, accessed online on 1th January, 2013 at http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf.

⁶⁹ See art 2(1) of the ICESCR 1966 which provides as follows: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

of the International Covenant on Economic, Social and Cultural Rights, “a failure by a State Party to comply with an obligation contained in the International Covenant on Economic, Social and Cultural Rights is, under international law, a violation of the International Covenant on Economic, Social and Cultural Rights.”⁷⁰ This is also similar to Article 19 of the Vienna Convention on the Law of Treaties, 1969, which states that “a state is at liberty to enter reservations to a treaty where such reservations are not prohibited, provided for by the treaty, or such reservations are not incompatible with the object and purpose of the treaty itself.”

c) Judicial Activism

Generally, there is little consensus on the meaning of the term ‘judicial activism’.⁷¹ According to *Craig Green*, a Westlaw search revealed that the terms “judicial activist” and “judicial activism” appeared in 3,815 law review articles during the 1990s and in 1,817 more articles between 2000 and 2004.⁷² It is a philosophy of decision-making whereby judges follow their personal views about public policy among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violation and are willing to ignore precedent.⁷³ It is a paradigm of philosophical liberalism based on a legal concept that courts should endeavour to expound the horizon of law by utilitarian approach to adjudication.⁷⁴ Judicial activism is a necessary tool for growing the law and nurturing justice as it serves as an instrument for the effective social and economic engineer.⁷⁵ There is also no better definition of judicial activism than the judges interpreting laws to meet the demands of substantive justice, irrespective of the bare letters of the law and the Constitution. It implies the judges bringing its head out of and demonstrating that it

hears the cry of the oppressed see the oppressive bravado of the oppressor and interprets the law to show that oppression and arbitrariness do not pay the oppressed and the society.⁷⁶ Judges also exhibits judicial activism when they modify the law from what was previously stated to be the existing law by substituting their own decision from that of the elected representatives of the people.⁷⁷ In the case of *Yaundoo v. Attorney General of Guyana*,⁷⁸ the Court stated as follows

“the question of procedure and access to court are imperative, while civil and criminal justice are very important to the people, every citizen’s right has to be recognized and translated into actual judicial remedies. Denying this right would lead to erosion and denuding the real value of our society...”

Charles Evans Hughes puts it succinctly as follows:

“a poor judge is perhaps the most wasteful indulgence of the community. You can refuse to patronize a merchant who does not carry good stock, but you have no recourse if you are haled before Judge whose (sic) mental or moral goods are inferior. An honest, high minded, able and fearless Judge is the most valuable servant of democracy for he (sic) illuminates justice as he interprets and applies the law, as he makes clear the benefits and the short coming of the standards of individual community right among a free people”⁷⁹

Oputa, JSC (as he then was) has once noted:

“In a progressing world, the law and the administration of justice cannot afford to be static and regressive. The only option open to our jurisprudence is intelligent, mature and progressive activism. We are not to fold our hands and do nothing. No. Our judges have to so interpret the law such that it makes sense to our citizens in distress and assures them of equal protection of the law, equal freedom under the law, and equal justice. And this is what judicial activism is all about.”⁸⁰

IV. EVIDENCE OF JUDICIAL ACTIVISM FROM OTHER COUNTRIES

A careful perusal of the founding provisions of the Republic of South Africa’s constitution reveals that

⁷⁰ See “The Limburg Principles on Implementation of the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 122 par 70.

⁷¹ Reyneck Thokozani Matemba, 2010. *Judicial Activism: Usurpation of Parliament’s and Executive’s legislative functions, or a Quest for Justice and Social Transformation* Judicial Activism: Usurpation of Parliament’s and Executive’s legislative functions, or a Quest for Justice and Social Transformation. Accessed online on 16th December, 2012 at http://sas-space.sas.ac.uk/2857/1/Matemba_LLM_ALS_Dissertation.pdf. See also C Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security*, Lanham, Rowman & Littlefield (1997) at pp. 1 – 33.

⁷² Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1442 (2004); see also Bradley C. Canon, *A Framework for the Analysis of Judicial Activism, in SUPREME COURT ACTIVISM AND RESTRAINT* 385, 386 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (describing prevalent activism debates as “little more than a babel of loosely connected discussion”).

⁷³ Bryan A. Garner, *Black’s Law Dictionary*, Eighth Edition, (USA: West & Thompson, 2004) 862

⁷⁴ Honourable Justice Pats-Acholonu I.C., “Growing the Law, Nurturing Justice”: Essay in Honour of Justice Niki Tobi, Enugu, 2005.

⁷⁵ Iweoha P.I., March, 2010 Vol. 2, No.1, *Judicial Activism in a State of Legislative Depression, Legislative Practice Review* 4

⁷⁶ See Daily Independent, Thursday, November, 1 2007 page II cited by IBRAHIM IMAM in *The Myth of Judicial Activism in Nigeria: Making Sense of Supreme Court Judgments*. Accessed online on 13th May, 2013 at <http://unilorin.edu.ng/publications/imami/THE%20MYTH%20OF%20JUDICIAL%20ACTIVISM%20IN%20NIGERIA%20N%20202.pdf>

⁷⁷ Paul Mahoney, “Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin” (1990) 11, *Hum. Rts. L.J.* 57, 58.

⁷⁸ (1971)A.C. 972

⁷⁹ Presidential address to the American Bar Association in 1925

⁸⁰ Oputa, C.A., JSC “Legal and Judicial Activism in an Emergent Democracy: The Last Hope for the Common Man?” in Okeke, C., *Towards Functional Justice: Seminar papers of Justice Chukwudifu A. Oputa* (Golden Press Ltd, Ibadan, 2007) 12-36 at 27.

human dignity, achievement of equality and advancement of a democratic society based on rights and freedoms, and supremacy of the constitution is a unique distinction which serves as the basis for justiciability of ESCRs in South Africa.⁸¹ Section 1 provides as follows:

1. Republic of South Africa.-The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 - a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - b. Non-racialism and non-sexism.
 - c. Supremacy of the constitution and the rule of law.
 - d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Section 27 and 27 of the South African Constitution provides as follows:

26. Housing

- 1) Everyone has the right to have access to adequate housing
- 2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- 3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.

27. Health care, food, water and social security

- 1) Everyone has the right to have access to—
 - a. health care services, including reproductive health care; . . .
- 2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
- 3) No one may be refused emergency medical treatment.⁸²

These provisions in the Constitution in South Africa afford South African citizenry the opportunity to have access to the Court. Simply put, the rights tagged as ESCRs in Nigeria are enforceable in South Africa as the courts can adjudicate on issues bothering on right to health, alongside other economic and socio-cultural rights. There is no doubt that the 1996 South African Constitution includes the Bill of Rights in addition to

traditional civil and political rights, and makes these rights enforceable by the courts, by virtue of Section 38 of the Constitution. In India, the Indian Constitution has similar provisions for the protection of health rights of its citizenry, howbeit, as a Directive of State on Fundamental Principle. Section 37 of the Indian Constitution provides as follows:

Application of the principles contained in this Part.-

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

The Indian Constitution envisages a welfare State at the Federal level as well as the State level. This is also *in tandem* with the provisions of several international treaties on socio-cultural rights which India is a signatory thereto. In India, the Fundamental Rights and Directive Principles are interpreted harmoniously with the Fundamental Human Rights as the Supreme Court is of the position that these principles supplement each other.⁸³ According to Vijayashri, India's leaders had a unified vision on human rights. Although, there seem to be a distinction between judicially enforceable rights otherwise known as Fundamental Rights and the socio-economic obligations on the State known as Directive Principles of State Policy in the Indian Constitution,⁸⁴ Maneka Gandhi case formed the basis for a rethink of the position of the court on the distinction between Fundamental Human Rights and Directive Principles of State Policy. In Maneka Gandhi's case,⁸⁵ Maneka having being issued a passport on 1st June, 1976 under the Passport Act 1967, was requested by a letter originating from the regional passport officer, New Delhi on the 2nd July, 1977 to surrender her passport under section 10(3) (c) of the Act in public interest, within 7 days from the date of receipt of the letter. Maneka Gandhi demanded by a letter from the Regional passport officer, New Delhi a copy of the statement of reasons for such order. However the government of India, Ministry of External Affairs refused to produce any such reason in the interest of general public. Maneka Gandhi consequently, filed a writ petition under Article 32 of the Constitution in the Supreme Court challenging the order of the government of India as violating her fundamental rights guaranteed under Article 21 of the

⁸³ In *Unni Krishnan, J.P. v. State of Andhra Pradesh*, (1993) 1 SCC 645, Justice Jeevan Reddy declared as follows "The provisions of Parts III and IV are supplementary and complementary to each other and not exclusionary of each other and that the fundamental rights are but a means to achieve the goal indicated in Part IV".

⁸⁴ Vijayashri Sripati 2007 Constitutionalism in India and South Africa: A comparative Study from a Human Rights Perspective Volume 16: 49 *Tulane Journal of International and Comparative Law* pp. 95

⁸⁵ *Maneka Gandhi v. Union of India and Another* 1978-(001)-SCC-0248-SC, 1978-(002)-SCR-0621-SC, 1978-AIR-0597-SC

⁸¹ Sandra Liebenberg, South Africa's Evolving Jurisprudence on Socio-Economic Rights, 6 *Law Democracy & Dev.* 159 (2002), accessed online on 22nd May, 2013 at http://www.communitylawcentre.org.za/Projects/Socio-EconomicRights/research/socio-economicrights_jurisprudence/evolving_jurisprudence.pdf

⁸² See Section 27(3) South Africa Constitution, 1996.

constitution. The main issues before the court in this case were as follows:

1. Whether right to go abroad is a part of right to personal liberty under Article 21.
2. Whether the Passport Act prescribes a 'procedure' as required by Article 21 before depriving a person from the right guaranteed under the said Article.
3. Whether section 10(3) (c) of the Passport Act is violative of Article 14, 19(1) (a) and 21 of the constitution.
4. Whether the impugned order of the regional passport officer is in contravention of the principles of natural justice.

The Supreme Court of India, per Justice K. Iyer, held as follows:

“a fundamental right is not an island in itself”.

The expression “personal liberty” in Article 21 was interpreted broadly to engulf a variety of rights within itself. The court further observed that the fundamental rights should be interpreted in such a manner so as to expand its reach and ambit rather than to concentrate its meaning and content by judicial construction. Article 21 provides that no person shall be deprived of his life or personal liberty except in accordance with procedure established by law but that does not mean that a mere semblance of procedure provided by law will satisfy the Article, the procedure should be just, fair and reasonable. The principles of natural justice are implicit in Article 21 and hence the statutory law must not condemn anyone unheard. A reasonable opportunity of defense or hearing should be given to the person before affecting him, and in the absence of which the law will be an arbitrary one”

This was the origin of the activism that led to blurring of the line of distinction and the arguments on justiciability of rights that are termed non-enforceable in India.⁸⁶ The Indian judiciary has a unique position under the Constitution as an independent organ of state designed to provide a countervailing check on the functioning of the other two organs in their respective spheres. Armed with the power to strike down executive, quasi-judicial and legislative actions as unconstitutional, the judiciary has, as the ultimate interpreter of constitutional provisions, expounded the basic features of the Constitution.⁸⁷ The judiciary in exercising its

constitutional powers in India had declared that there is no division of fundamental human rights on one hand and the Directive Principle of State Policies on the other hand as the Directive Principle of State Policies are subordinate to the fundamental rights.⁸⁸ Nigeria has one of the worst statistics in the world in maternal health because only about 3,000 registered gynecologists operate in Nigeria with a population of over 170 Million.⁸⁹ Nigeria has one of the highest rates of maternal mortality in the world. One Nigerian woman dies in childbirth every ten minutes.⁹⁰ There is a need for a national approach to health education, promotion, and behavior change. Currently, the unit within the primary health care responsible for health promotion needs to be supported and strengthened to discharge her responsibilities effectively.⁹¹ It is humbly submitted that the judiciary in a way, has a major role to play in realizing health rights today. In terms of the actual number of maternal deaths, Nigeria is ranked second in the world behind India and Nigeria is part of a group of six countries in 2008 that collectively accounted for over 50% of all maternal deaths globally. In terms of the maternal mortality ratio, Nigeria is ranked eighth in Sub-Saharan Africa behind, Angola, Chad, Liberia, Niger, Rwanda, Sierra Leone and Somalia.⁹² Health indices in Nigeria are pathetic. Nearly a quarter of a million newborn babies die each year. There has been no significant reduction in the average national neonatal mortality rate over the past decade. There is wide variation in mortality between states, between urban and rural areas and among the poorest families compared to the richest.⁹³

V. CONCLUSION

In Nigeria just as applicable in other developing countries, the human right to health is recognized in numerous international instruments which these countries are signatories thereto, but the realization of economic, social and cultural rights generally, depends

⁸⁶ See the case of *State of Kerala v N.V. Thomas* (1976) 2 S.C.C 310 at 367

⁸⁹ 'Nigeria has worst statistics in maternal health care' by Odogwu Emeka Odogwu, *Nnewi* 24/06/2012 <http://www.thenationonline.net/2011/index.php/news/51418-%E2%80%98nigeria-has-worst-statistics-in-maternal-health-care%E2%80%99.html>

⁹⁰ Abdulraheem I. S., Olapipo A. R. & Amodu M. O. Vol. 4(1), January 2012 Primary health care services in Nigeria: Critical issues and strategies for enhancing the use by the rural communities *Journal of Public Health and Epidemiology* pp. 5-13, DOI: 10.5897/JPHE11.133 Available online at <http://www.academicjournals.org/JPHE> ISSN 2141-2316 ©2012 Academic Journals

⁹² Bankole, Akinrinola, Gilda Sedgh, Friday Okonofua, Collins Imarhiagbe, Rubina Hussain and Deirdre Wulf. 2009 "Barriers to Safe Motherhood in Nigeria". New York: Guttmacher Institute. Available online at: www.guttmacher.org p. 3.

⁹³ Federal Ministry of Health. Saving newborn lives in Nigeria: Newborn health in the context of the Integrated Maternal, Newborn and Child Health Strategy. 2nd edition. Abuja: Federal Ministry of Health, Save the Children, Jhpigo; 2011.

⁸⁶ See the cases of *Sunil Batra v. Delhi Administration*, A.I.R. 1980 S.C. 1565, *Charles Sobraj v. Delhi Administration*, A.I.R 1978 S.C. 1590 among others cases on the prisoner's rights to include freedom from mental and physical torture, and prohibition of the use of chains and fetters on prisoners.

⁸⁷ See the case of *State of Rajasthan v. Union of India* (1977) 3 S.C.C 592 at 662, See S. Muralidhar, *An Overview of the Experience of the Indian Judiciary First South Asian Regional Judicial Colloquium on Access to Justice*, New Delhi, 1-3 November, 2002. Available online at <http://www.ielrc.org/content/w0202.pdf>

significantly on action of the state, notwithstanding party states obligations under the international treaty which they are parties thereto.⁹⁴ It is therefore obvious that in advocating for the realization of health rights in Nigeria, Ladan's comment on the implementation of international treaty is right. According to Ladan, "implementing an international treaty means putting the treaty into effect. It goes a bit further than mere observance of the law. It implies that its general aim, the result that was desired by those who adopted the treaty is achieved or will be achieved, so that the treaty-rules can be said to have been given full effect."⁹⁵ In the absence of such judicial activism, a constitution would become stultified and devoid of the inner strength necessary to survive and provide normative order for the changing times.⁹⁶ It is generally accepted that domestic laws should be interpreted as far as possible in a way which conforms to a State's international legal obligations.⁹⁷ Given the legal framework put in place in Nigeria on health rights and the powers of the judiciary, one cannot but wonder the basis for sustaining such arguments which holds the plank of "non-justiciability" of health rights in Nigeria. It is submitted that the coast is clear for a sail into a new dispensation of health care system administration in Nigeria, and realization of this right in Nigeria today as the legal circumstances in Nigeria are stronger than the chances and opportunities converted through activism in India and South Africa. The judiciary therefore is protected by the domestication of the provisions of the African Charter on Human Rights on health rights in Nigeria. The judiciary is the last hope of a common man in Nigeria where there are frightening statistics on maternal mortality ratio, infant mortality rate, life expectancy even at birth, equipment and facilities available for the larger portion of the population, judges are challenged to give life to the wordings of the constitution, and apply the appropriate laws irrespective of the political consequences of such decisions particularly in the interest of the citizenry. This will also enable the State to comply with its obligations as required by the international law. Some have suggested that legal remedies might be restricted to violations emanating from failures to meet these minimum core requirements, but the concept of the "minimum core content" needs to be clearly distinguished from the idea of justiciability which had been the major impediment to

the realization of health rights in Nigeria. The Nigerian health system is in comatose, few hospitals with few drugs, inadequate and substandard technology and a lack of infrastructural support, including electricity, water and diagnostic laboratories resulting in misdiagnosis. Medical record keeping is rudimentary and diseases surveillance is very poor. Delivery of health care becomes a personal affair and dependent on ability to pay for basic laboratory and physician services.⁹⁸ The rather pathetic downturn of the state of the health care sector in Nigeria can only be upturned by an approach which aligns with ensuring accountability on the part of the government for its compliance with fulfillment, respect and protection obligations under the African Charter. This cannot be achieved with an element of judicial activism in Nigeria today given the past experiences and the judicial attitude demonstrated by the judges. It is also to be noted that with the current state of the law in Nigeria on health rights, the issue of justiciability has lost its relevance as the incorporation of the African Charter has provided a basis for a finding of a *prima facie* case of violation of health rights, and thereby placing a greater onus on the governments in particular circumstances to demonstrate that all available resources have been allocated as a matter of priority to meeting the most critical needs. There is a need for a fundamental change in policy, regulation, financing, provision of health services, reorganization, management and institutional arrangements, with a practical effort by the government to improve the access to health care and health system in Nigeria in a bid to improve the health status of Nigerian citizens. This can only be achieved with the aid of an effective interpretation and application of the *corpus* in place in Nigeria by the judiciary.

⁹⁴ Ajigboye O., (2013) An Overview of the Legal Framework for the Protection of the Right to Health in Nigeria *ABUAD Law Review* Afe Babalola University Publishers, Ado Ekiti.

⁹⁵ Ladan M.T. (2013) An overview of the Rome Statute of the International Criminal Court: Jurisdiction and Complementarity Principle and issues in Domestic Implementation in Nigeria Vol. 1. Issues 1(2013) *Journal of Sustainable Development Law and Policy* (Afe Babalola University, Ado- Ekiti)

⁹⁶ S.P. Sathe Judicial Activism: The Indian Experience (2001) 32 *Journal of Law & Policy* [Vol. 6:29

⁹⁷ See the General Comment No. 9 on the domestic application of the Covenant

⁹⁸ S. A. J. Obansa & Akinagbe Orimisan *January 2013 Vol. 4 (1)* Health Care Financing in Nigeria: Prospects and Challenges *Mediterranean Journal of Social Sciences* 221 Doi:10.5901/mjss.2013.v4n1p221