**JUSTICIABILITY OF RIGHT TO HEALTH UNDER THE NIGERIAN LEGAL REGIME**

 **BY**

 **Hon. Justice Auwal Yau, APD, LL.M[[1]](#footnote-1)**

**Appreciation**

I wish to sincerely thank the Chairperson of International Federation of Women Lawyers (FIDA) Kano Branch and her team, for inviting me to speak to the distinguished legal luminaries on justiciability of right to health under the Nigerian Legal Regime.

As can be obviously seen, I am not a specialist in the field of medical and health law and as such do not claim expertise in the area. I suspect that, this invitation has been extended to me in recognition of my modest contributions in the area on the social media platforms associated with my former law firm – AYG LEGAL (defunct), while in active legal practice, before my appointment as a High Court Judge in Jigawa State, which position I now occupy. I have to therefore say clearly that, this paper is only aimed at provoking our thoughts, and to open further discussions on the topic. Hence, it does not in any way intended to serve as an expert opinion on the topic. It is in fact a collation of existing works by other authors and a little of my humble and modest analysis thereto.

I am happy to share my limited knowledge in the area of medical and health law at this august event and I thank the organizers, for giving me this opportunity.

**Introduction**

The justiciability of human rights in Nigeria is rooted in the dichotomization of the Constitution into two distinct chapters[[2]](#footnote-2), which originated from the 1979 Constitution. The Constitution incorporated "Fundamental Objectives and Directive Principles of State Policy," which are defined as ideals the nation should strive towards and policies to pursue to realize them. The current Constitution of 1999 enumerates classic socioeconomic rights, such as the right to work[[3]](#footnote-3), the right to healthcare[[4]](#footnote-4), the right to social security[[5]](#footnote-5), the right to education[[6]](#footnote-6), and the right to environment[[7]](#footnote-7), but does not designate them as human rights. The ouster provision, Section 6(6)(c), limits judicial powers to issues related to omissions or compliance with the Fundamental Objectives and Directive Principles of State Policy. This results in aggrieved parties being unable to seek remedies in court, even when they have credible evidence of violation[[8]](#footnote-8).

The focus of this paper is on justiciability of right to health under the Nigerian legal regime vis-à-vis the non-justiiciability status of chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

**Socioeconomic Rights in Nigeria Vis-à-vis Paradigm Shift on the Global Justisciability Spectacle.**

Nigeria's default position regarding socioeconomic rights is towards non-justiciability, as the country has not embraced the bifurcation of human rights and judicial attitude towards each category of rights. However, there is a growing global shift in human rights protection, particularly in countries like Nigeria, which generally denies recognition of socioeconomic rights. The Supreme Court's pronouncement in *Olafisoye v Federal Republic of Nigeria*[[9]](#footnote-9) highlights that Section 6(6)(c) of the Constitution does not cover all cases concerning socioeconomic rights. However, there could be constitutionally legitimate paths to dismantle the prohibitory provisions. The legislative prerogative of the National Assembly is to establish and regulate authorities for the Federation or any part thereof to promote and enforce the observance of the Constitution's Fundamental Objectives and Directive Principles.

A reasonable interpretation of item 60 (a) of the Constitution seems to be that the provision grants authority to the National Assembly to confer justiciability status to the Directive Principles in Chapter II thereof. This would abrogate the application of Section 6 (6)(c), empowering courts in Nigeria to enforce the observance of the Directive Principles. A combined reading of Section 4 (1) & (2) and item 60(a) on the Exclusive Legislative List would result in the National Assembly either enacting a statutory framework declaring some or all of the provisions of Chapter II as legal entitlements (human rights) and therefore justiciable, or repealing Section 6 (6)(c), conferring jurisdiction on courts to entertain cases brought under Chapter II.

Domesticated treaties enthrone enforceable claims like statutes enacted through regular domestic legislative processes (the likes of National Health Insurance Scheme Act 2004, National Health Act 2014, etc.). The National Assembly enacted the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act in March 1983, effectively converting the Charter provisions to domestic law. This action has given the provisions full recognition and effect in Nigeria, and they are applied by all authorities. The Incorporating Act imported all the rights specified in the Charter, integrating them into Nigerian domestic law. This holistic incorporation prompted the Supreme Court in *Abacha & Others v Fawehinmi[[10]](#footnote-10)* (2000) to conclude that a treaty enacted into law by the National Assembly becomes binding and courts must give effect to it like all other laws falling within the judicial power of courts. *Nemi v. The State[[11]](#footnote-11)* affirms that the Charter has become part of Nigerian domestic law, and the enforcement of its provisions falls within the judicial powers of courts as provided by the Constitution and all other laws relating thereto. These cases are important for concretizing the domestic and foreign courts' jurisdiction, seized with matters entrenched in Chapter II of the Constitution, to exercise jurisdiction so long as the rights being invoked are also recognized by the Charter – see *Attorney-General of Ondo State v. Attorney-Genaral of the Federation & Ors[[12]](#footnote-12)*. The previous paragraphs show that, Nigeria of today is gradually shifting its paradigm from the non-justiciability posture in respect of the socioeconomic rights as contained in chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended), to a more liberal position by enacting enabling laws in respect of justiciability of some of the rights contained in the Chapter.

**The Meaning and Scope of Right to Health**

The Universal Declaration of Human Rights (UDHR) became the first international instrument to recognize the right to health, providing that everyone has the right to a standard of living adequate for the health and well-being of themselves and their family, including food, clothing, housing, medical care, and necessary social services. The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966 and entered into force in 1976. It states that state parties to the covenant should take steps to utilize their available resources to achieve the full realization of these rights by all appropriate means, including the adoption of legislative measures. The three regional levels' human rights instruments recognize the right to health: The European Social Charter, the American Convention on Human Rights, and the San Salvador Protocol to the ACHR. The African Charter on Human and Peoples Rights guarantees healthcare, food, water, and social security to all citizens, including reproductive health care, sufficient food and water, and social security. The right to health also contains certain "composite-rights," such as the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health; the right to prevention, treatment, and control of diseases and access to essential medicines.

**Right to Health Under the African Charter on Human and Peoples Rights (ACHPR)**

The African Charter on Human and Peoples' Rights aims to reclaim the African notion of human rights, focusing on economic and social rights, as well as the rights of peoples. The Charter provides provisions for two main types of rights: the rights of individuals and the rights of peoples. The rights of peoples include all social, economic, and cultural rights in Articles 19-24. However, the African Charter does not define socio-economic rights with terms like progressive realisation and available resources. The right to health, as envisioned by the African Charter, favors an immediate rather than a progressive approach. The African Commission has not provided effective guidance on the standard for measuring compliance by states with regard to their positive obligations in relation to socio-economic rights under the Charter. In the case of Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESCR) v Nigeria[[13]](#footnote-13), the Commission did not provide effective guidance on the standard for measuring compliance by states with regard to their positive obligations in relation to socio-economic rights under the Charter. In Free Legal Assistance Group and Others v Zaire[[14]](#footnote-14), the African Commission held that the failure of the Government of Zaire to provide basic services necessary for a minimum standard of health constituted a violation of the right to enjoy the best attainable state of physical and mental health and the obligation of the State to take the necessary measures to protect the health of its people as set out in Article 16 of the ACHPR. The Commission provided guidance on what might be included in a minimum core for the right to health and recognized the interrelatedness of the right to health to other underlying determinants. In the case of Prochit and Moore v The Gambia[[15]](#footnote-15), the African Commission provided a more comprehensive definition of the right to health under the African Charter and elaborated on the nature of positive obligations of State parties in relation to socio-economic rights in general. The Commission found that the Gambia was in violation of numerous Charter rights, including the right to health. Mental health patients, according to the African Commission, deserve special treatment because of their condition and by virtue of their disability. The Commission also noted the prohibiting effect limited resources may have for the realization of health rights and commented on the realities that African countries face in their aim to fulfil their human rights obligations. The Commission would like to read into Article 16 the obligation on the part of State parties to take concrete and targeted steps, while taking full advantage of its available resources to ensure that the right to health is fully realized in all its aspects without discrimination. The interrelatedness and interdependency of human rights are emphasized by the Commission, which describes the right to health as vital to all aspects of a person's life and well-being, as well as crucial for the realisation of all other fundamental human rights and freedoms.

**The Case of Nigeria in Realisation of Right to Health**

The Nigerian Constitution provides for civil and political rights in chapter four, while social, economic, and cultural rights (including the right to health) are provided for in chapter two. These rights are not considered fundamental rights but are described as Fundamental Objectives and Directive Principles of State Policy. The Nigerian government is required to observe these objectives and principles to promote the welfare and advancement of society. The absence of justiciable rights in the Nigerian Constitution makes it difficult to enforce socio-economic rights, measure the reasonableness of government actions, and determine whether the Nigerian Government is fulfilling its international obligations in terms of the ICESCR and the ACHPR. The unjusticiability of socio-economic rights renders the rights as moral precepts, fond hopes, and pious wishes. The Supremeity of the Constitution over the African Charter prevails, and courts generally do not apply or take judicial notice of the African Charter or the ICESCR when giving meaning to the fundamental rights and directive principles. Obstacles to the adjudication of socio-economic rights include considerable delay in public law litigation and no guarantee of enforcement or compliance with a judgment in cases involving the government or public officials as defendants. Onyemelukwe[[16]](#footnote-16) argues that this stance in Nigerian jurisprudence effectively means that international human rights treaties offer no greater protection against human rights violations other than the safeguards accorded in the Nigerian Constitution. However, the mere non-justiciability of the chapter two rights in the Nigerian Constitution and the prohibition provided for in s 12(1) against the enforceability of international law does not completely divest the right to health of all legal value for Nigerians. An excellent example of robust court action, regardless of constitutional limitations, is the case of Festus Odafe and Others v AG Federation and Others[[17]](#footnote-17). The Federal High Court relied on the ACHPR rather than the Nigerian Constitution to protect the right to health and held that Article 16(2) of the Charter requires State parties to take the necessary measures to protect the health of their people and ensure that they receive medical attention when they are sick. The trial judge ordered the authorities to relocate the detainees to a medical facility where they could receive treatment and awarded costs in their favor. But not all Nigerian courts are this free-thinking in their approach to matters concerning health law and rights. A court in Nigeria, for example, has barred a HIV positive person from attending a trial in which she was a party, based on the risk of her infecting other people in the courtroom.[[18]](#footnote-18)

**Conclusion**

Judges are often criticized for being too conservative in their approach to socio-economic rights cases and not making strong orders against governments to meet their obligations. However, judges face difficulties in navigating between traditional government domains and the principle of separation of powers. The application of the minimum core standard is usually avoided, as courts can easily overstep the boundary and enter policy-making. In Nigeria, restrictive judicial attitudes, narrow constructions of standing, stringent procedures, and corruption limit the effectiveness of Nigerian courts in adjudicating socio-economic rights claims. However, courts can be valuable avenues and catalysts for realizing fundamental rights, such as the right to health, through their interpretation and vindication of state obligations in specific cases. A comparative and reflective approach would generate new options and possibilities in a given jurisdiction, taking the right to health beyond rhetoric and towards the practical success of health rights in the African continent.

*Thank You for Listening.*

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 **HON. JUSTICE AUWAL YAU, APD, LL.M**

 **(High Court of Justice, Jigawa State.)**

**BEING A PAPER PRESENTED AT FIDA KANO 2023 LAW WEEK, WITH THE THEME: “IT STARTS WITH US: WOMEN, CHILDREN AND THE LAW” HELD AT MEENA EVENT CENTRE, NO. 6 LODGE ROAD, KANO, ON 24TH JULY, 2023.**

1. High Court Judge No. 10, High Court of Justice, Jigawa State of Nigeria. [↑](#footnote-ref-1)
2. Ch. II and IV of the Constitution of the Federal Republic of Nigeria 1999 (as Amended). The former captioned those rights as “Fundamental Objectives and Directive Principles of State Police”; and the later captioned as “Fundamental Human Rights”. [↑](#footnote-ref-2)
3. Section 17 (3) (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) [↑](#footnote-ref-3)
4. Section 17 (3) (d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) [↑](#footnote-ref-4)
5. Section 17 (3) (g) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) [↑](#footnote-ref-5)
6. Section 18 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) [↑](#footnote-ref-6)
7. Section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) [↑](#footnote-ref-7)
8. Archbishop Olubunmi Okogie (Trustee of Roman Catholic Schools) and Others v. Attorney-Genaral of Lagos state (1981) 2 NCLR 337 at 350. [↑](#footnote-ref-8)
9. (2005) 51 WRN 52 [↑](#footnote-ref-9)
10. (2000) 6 NWLR (Pt. 660) 228 [↑](#footnote-ref-10)
11. (1994) 1 LRC 376 [↑](#footnote-ref-11)
12. (2002) 9 NWLR (Pt. 772) 222 at 382 [↑](#footnote-ref-12)
13. *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESCR) v Nigeria*, Communication 155/96. This case involvedalleged violations resulting from the oil-field operations of the state ownedNigerian National Petroleum Corporation (NNPC) and its joint-venture partner, Shell Petroleum Development Corporation (SPDC). [↑](#footnote-ref-13)
14. Christopher Mbazira, ‘The Right to Health and the Nature of Socio-Economic Rights Obligations under the African Charter: The Purohit Case’ (2005) 6(4) *ESR Review* 15. [↑](#footnote-ref-14)
15. Ibid [↑](#footnote-ref-15)
16. Cheluchi Onyemelukwe, ‘Access to Anti-Retroviral Drugs as a Component of the Right to Health in International Law: Examining the Application of the Right in Nigerian Jurisprudence’ (2007) 7(2) *African Human Rights Law Journal* 446. [↑](#footnote-ref-16)
17. *Festus Odafe and Others v Attorney General of the Federation and Others*, Unreported Suit No FHC/PH/CS/680/2003, Judgment of Honourable Justice R.O Nwodo, 23 February 2004. [↑](#footnote-ref-17)
18. *Georgina Ahamefule v Imperial Medical Centre and Dr Alex Molokwu*, Unreported, Suit No ID/1627/2000, Ruling of Honourable Justice of the High Court to Lagos, 5 February 2001; Chidi A Odinkalu, ‘The Impact of Economic and Social Rights in Nigeria: An

Assessment of the Legal Framework for Implementing Education and Health as Human Rights’ in V Gauri and DM Brinks (eds), *Courting Social Justice: Judicial* *Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008) 187. [↑](#footnote-ref-18)