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Duty without liability: The impact of article 12 of the International Covenant on Economic, Social and Cultural Rights on the right to health care in Nigeria

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Summary: *The right to health care under article 12 of ICESCR is an instrumental right because it bears vital linkages to the realisation of other rights. For the many Nigerians living in poverty, their health may be the only asset on which they can rely for the exercise of other rights, such as the right to work or the right to adequate housing. Conversely, ill-health can be a liability to the many people living in poverty in Nigeria, even more so in the absence of equal access to affordable and essential healthcare services. This article aims to review the implication of article 12 of ICESCR on some of the existing initiatives for achieving the right to health care in Nigeria, especially in respect of human rights law and policy. The article argues that for Nigeria to meet its international obligations under the right to health care, it must commit to adequate funding of healthcare services and engage with regional and international partners to ensure compliance with article 12 of ICESCR. Given that the right to health care presently is not justiciable in Nigeria because of the ouster clause contained in section 6(6)(c) of the Nigerian Constitution, the article calls for an attitudinal change in the judicial perception of economic and social rights that come before the courts.*

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It urges Nigerian courts to adopt the principle of the interdependency and indivisibility of rights, whereby judicial measures to enforce the right are given effect through the formally-enforceable civil and political rights contained in chapter four of the Nigerian Constitution. The Indian Supreme Court is reputable for taking this approach to the interpretation and enforcement of economic and social rights because the enjoyment of civil and political rights is linked to the satisfaction of economic and social rights, such as the right to health care. Finally, because of the importance of health care to a life of dignity, the article calls for Nigerian courts to adopt a progressive and broader approach when dealing with economic and social rights because of the evident connection between, for example, the right to health care and the right to life.

Key words: *right to health care; economic and social rights; maximum available resources; minimum core approach; Nigerian Constitution*

1 Introduction

Nigeria is the most populous country in Africa[1] and is reliant on oil exports as the *mainstay of its economy*. Despite the strategic position of the country in Africa, the country is greatly underserved as far as health care is concerned. In most areas the available healthcare facilities are inadequate. The healthcare system in Nigeria is fragile as a result of systemic neglect and gross inefficiency with regard to public spending on health. Its services are fragmented, and the healthcare infrastructure is in a state of decay which has affected the quality of healthcare services in the country. This has led to the country having one of the highest out-of-pocket expenditures on health care for citizens as households currently cover the cost of 75,5 per cent of the country's total healthcare spending.[2]

Several initiatives, both domestic and international, have been put in place to achieve the right to health care in Nigeria. However, most of these have ended up as mere exercises in target setting[3] without the desired impact on the ground, mainly because of the inability of the government to pursue a coherent health strategy and to create the necessary atmosphere for these healthcare initiatives to flourish.

1 See https://www.unfpa.org/data/world-population/NG (accessed 20 October 2021).
2 WHO Global Health Expenditure Database, https://apps.who.int/nha/database/Country_Profile/Index/en (accessed 20 October 2021).
3 O Enabulele 'Achieving universal health coverage in Nigeria: Moving beyond annual celebrations to concrete address of the challenges' (2020) 12 *World Medical and Health Policy* 47.

Crucially, there is no local judicial enforcement mechanism for the right to health care in Nigeria, as the Constitution effectively bars economic and social rights litigation, thereby denying liability for health rights violations.

Nigeria has committed itself to delivering universal health coverage (UHC) and has established a comprehensive national UHC policy framework.[4] However, the implementation of this framework has seen limited progress and, therefore, needs to be given greater momentum. For example, healthcare financing by the Nigerian government is among the lowest in the region and, therefore, health outcomes are correspondingly poor.[5]

Following the adoption of the Sustainable Development Goals (SDGs) at the United Nations General Assembly (UNGA) in 2015, states committed to achieving universal health coverage as part of the health-related SDGs. UHC is based on the World Health Organisation (WHO) Constitution which declares health a fundamental human right and commits to ensuring the highest attainable level of health for all. UHC means giving all people access to the essential health services that they need without financial hardship.[6] It is closely aligned with primary health care which, according to the WHO, is the most effective way to sustainably solve today's health and health system challenges,;[7] hence, 'a state party in which any significant number of individuals is deprived … of essential primary health care … is, *prima facie*, failing to discharge its obligations under the Covenant'.[8]

This article aims to review the implication of article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on some of the existing initiatives for achieving the right to health care in Nigeria, especially in the area of human rights law and policy. It makes recommendations on how best to strengthen these initiatives to achieve the aim of complying with article 12 of ICESCR. The article argues that for Nigeria to meet its international obligations under the right to health care, it must pay more than cursory attention

4 A Ugwu & M Atima 'Next level agenda in the journey towards UHC: Health for all Nigerians' *Nigeria Health Watch* (Abuja) 17 December 2020, https://allafrica.com/stories/202012170571.html?utm_campaign=allafrica%3Aeditor&utm_medium=social&utm_source=twitter&utm_content=promote%3Aaans%3Aabkgta (accessed 20 October 2021).

5 WHO 'World health statistics 2018: Monitoring health for the SDGs' (2018) 37.

6 https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-(uhc) (accessed 20 October 2021).

7 WHO 'Global conference on primary healthcare from Alma-Ata towards universal health coverage and the Sustainable Development Goals' 26 October 2019, https://apps.who.int/iris/bitstream/handle/10665/328123/WHO-HIS-SDS-2018.61-eng.pdf?sequence=1&isAllowed=y (accessed 20 October 2021).

8 General Comment 3 para 10.

to the funding of health care and engage with international and regional efforts aimed at the realisation of the right to health care. Finally, given that health care is central to a life of dignity,[9] I argue for access to seeking judicial remedies where and when the right to health care is violated. Although economic and social rights, such as the right to health care, are not presently justiciable in Nigeria because of the ouster clause contained in section 6(6)(c) of the Nigerian Constitution, I make the case for Nigerian courts to adopt the principle of the interdependency of rights whereby economic and social rights, which are currently unenforceable in Nigeria, are given effect through (formally-enforceable) civil and political rights. The Indian Supreme Court is reputable for taking this approach to the interpretation and enforcement of economic and social rights. According to the African Charter on Human and Peoples' Rights (African Charter) 'civil rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.[10]

The article is presented in two parts. In the first part the author analyses the theoretical framework and implications of article 12 of ICESCR for countries such as Nigeria that have ratified it. Although article 12 of ICESCR is a large subject to cover within an article of this length, the author identifies the relevant issues around the right that are relevant to the discussion of the right from the perspective of Nigeria's human rights practice.

In the second part the author analyses the legal framework for human rights practice in Nigeria. The author discusses the themes that have been extrapolated from the examination of article 12 of ICESCR in part one of this article. These themes are then explored under the broad and critical headings of the judicial and budgetary measures taken, or that should be taken if the right to health care in Nigeria is to be realised. Because of the grossly inadequate institutional support for the implementation of the right in Nigeria, the article proposes that an enhanced role should be provided for the courts in the adjudication of cases involving the right to health care. Admittedly, there is an entrenched, traditional and long-standing objection to courts getting involved in the area of public and social policy,[11] but given the systemic failures that have bedevilled successive healthcare policies in Nigeria, and the instrumental nature of the right, there is

9 J Juškevičius & J Balsienė 'Human rights in healthcare: Some remarks on the limits of the right to healthcare' (2010) 4 *Jurisprudence* 95.
10 Preamble African Charter.
11 C Gearty & V Mantouvalou *Debating social rights* (2011) 116.

a need for the courts to engage the other arms of government with regard to the realisation of the right. Where this is not possible, the courts should be willing to demonstrate judicial activism by pushing the text of the law when deciding matters connected to economic and social rights, such as the right to health care.[12]

2 Brief analysis of the right to health care and obligations of state parties under international law

Since article 12 of ICESCR is the framework on which the subject of this article is hinged, it is apposite to consider the provisions of the said article:[13]

> (1) The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[14]
> (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include 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 sickness.

From the provisions of article 12 above, I will focus on two critical and relevant elements of the provision with regard to the right to health care in Nigeria. These elements are taken from articles 12(1) and (2)(d) of ICESCR, which are (i) the highest attainable standard of physical and mental health; and (ii) the creation of conditions that would assure to all medical service and medical attention in the event of sickness.

The choice of these two elements is informed by the WHO's position on the right, which states that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of

12 M Langford 'Judicial politics and social rights' in KG Young (ed) *The future of ESR* (2019) 69.
13 Art 12 ICESCR.
14 In contrast, art 16 of African Charter refers to the right to enjoy the best attainable state of physical and mental health.

every human being without distinction of race, religion, political belief, economic or social condition'[15] and a personal conviction[16] that these two elements provide sufficient constructs within which to discuss and analyse the freedoms and entitlements inherent in the right to health care in relation to Nigeria. For instance, it may be argued that articles 12(2)(a) to (c) are adjuncts of article 12(2)(d) because to achieve these, it will require following the provisions of paragraph 12(2)(d). In my opinion, articles 12(1) and 12(2)(d) provide a conceptual framework for analysing the right to health care in Nigeria. In any case, the instances or examples listed in 12(2)(a) to (d) are for illustrative purposes only and are not exhaustive.[17] Having said that, it remains an indisputable fact that Nigeria as a contracting party to ICESCR is responsible for taking effective measures that will lead to the actualisation of the highest attainable standard of physical and mental health through the creation of conditions that would assure medical services and medical attention in the event of sickness for all Nigerians. That, in short, makes it incumbent on Nigeria to fulfil its duties and obligations under ICESCR.

In General Comment 9[18] the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) stated that the central obligation of a state party is to use all the means at its disposal to give effect to the rights arising from international human rights obligations within its jurisdiction without which international human rights law is deprived of its efficacy. Although ICESCR does not stipulate the specific means by which it is to be implemented domestically, there is an obligation on states to give effect to the rights recognised in ICESCR within their jurisdictions.[19] General Comment 9 does not provide the precise method by which a state is to give effect to ICESCR, but it has been argued that one of the viable ways of giving effect to the provisions of ICESCR is by directly incorporating its provisions into domestic law.[20] It would appear that direct incorporation of ICESCR into the state's legal system is the desired approach by the ESCR Committee as it 'avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation'[21] in the legal

15 See Preamble to the WHO Constitution.
16 General Comment 14 para 8.
17 General Comment 14 para 7.
18 Para 2.
19 J Asher *The right to health: A resource manual for NGOs* (2004) 15.
20 L Chenwi & DM Chirwa 'Direct protection of economic, social and cultural rights in international law' in DM Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 33.
21 General Comment 9 para 8.

system. However, the domestication of international law treaties in many countries, including Nigeria, depends on the nature of the legal system of that country, particularly its mode of reception of international law treaties.[22]

Although article 12 of ICESCR provides for the universal right of 'everyone to the enjoyment of the highest attainable standard of physical and mental health',[23] it does not clarify the specific minimum or the essential elements of the right. It also fails to provide the duties or minimum core obligations that have to be fulfilled by the state in respect of the right. However, the ESCR Committee issued General Comment 14 to clarify these ambiguities with regard to the standard of the contents of the right as well the minimum core and non-derogable duties that are required to be fulfilled, in order to progressively realise the full implementation of the right. The right creates both general and specific legal obligations.[24] With regard to the general obligations of the right, there is an immediate obligation to ensure that the right is exercised without discrimination of any kind as provided in article 2(1) of ICESCR. States are to ensure that steps are taken towards the full realisation of the rights.[25] States also have specific legal obligations, which are to respect, protect and fulfil the right.[26] The obligation to respect creates a negative duty on the part of the state to refrain from denying or restricting equal access to the right. For example, a state that provides discriminatory access to healthcare facilities based on the status or race of its citizens would be violating this obligation.[27] The obligation to protect requires states to ensure that measures are in place to prevent third parties that provide health care and health-related services from interfering with the access of individuals to the right. For example, there have been many cases of female genital mutilation (FGM) reported in Nigeria[28] and part of the Nigerian government's response was to outlaw such practices through the instrumentality of legislation.[29]

22 Monism and dualism are the dominant legal systems in many African countries. Broadly speaking, monism considers international and domestic law systems as one. International law will apply if it is binding on the state concerned. In contrast, dualism views international law and domestic law as separate systems, so that international law may be deemed part of domestic law only when it has been ratified by the state's legislature.

23 Art 12(1).

24 General Comment 14 para 30.

25 As above.

26 General Comment 14 paras 34-36.

27 L Hiam & M Mckee 'Making a fair contribution: Is charging migrants for healthcare in line with NHS principles?' (2016) 109 *Journal of the Royal Society of Medicine* 226.

28 C Onuoha 'Female genital mutilation persists despite outlaw' *Nigerian Vanguard* (Abuja) 27 April 2018, https://www.vanguardngr.com/2018/04/female-genital-mutilation-persists-despite-outlaw (accessed 30 October 2019).

29 Prohibition of Female Circumcision Act 1985; Female Genital Mutilation Act 2003 (UK); Violence Against Persons (Prohibition) Act 2015 (Nigeria).

The obligation to fulfil requires states to sufficiently recognise the right to health care in their national political and legal systems and to adopt measures such as the implementation of legislation and a national health policy for the realisation of the right to health care.

The minimum core approach to implementing economic and social rights can become a formidable framework for the implementation of these rights, especially in cases where judicial remedies are sought. Minimum core obligations, in the author's opinion, will avail the court of a useful tool with which to measure the compliance of the government. It is important to understand that the minimum core obligation of states with respect to the right is primarily about equal access to essential primary health care that is available, accessible, affordable and of good quality.

3 Overview of the framework for the realisation of the right to health care in Nigeria

Having briefly examined article 12 of ICESCR and the obligations of states that have ratified it, the focus shifts to the second part of the article which seeks to apply the provisions of article 12 to the situation of health care in Nigeria. I propose to discuss these under two critical themes of judicial and budgetary measures in the realisation of the right.

With respect to the themes of judicial and budgetary measures in Nigeria, a few questions might help focus on and order the pattern of the analysis on the right to health care in Nigeria. What is the legal position on the right to health in Nigeria? Is Nigeria meeting the obligations of the highest attainable standard of health care in line with the core principles of article 2 and, more specifically, article 12 of ICESCR? What is the state of health care in Nigeria? Does Nigeria adequately and appropriately allocate resources to health care? Is there access to healthcare facilities? Finally, as far as these questions are concerned, one should establish what the role in and attitude of courts towards the right to health care in Nigeria are, at least from an enforcement perspective. In the part that follows I discuss these questions and offer my thoughts thereon.

3.1 Judicial measures and the right to health care in Nigeria

Nigeria operates a dualist legal system with a Constitution that is supreme to all other laws, including international treaties,[30] as far as their application is concerned in Nigeria.[31] The implication of this is that, no matter how popular and desirable the provisions of an international treaty may be, such provisions would not be regarded as comprising part of the domestic law in Nigeria, until the legislature has taken definite measures to locally enact such treaty into the *corpus juris* of Nigeria.[32]

The right to health care is not explicitly provided for in the Nigerian Constitution. Section 17(3)(c)(d) in chapter two of the Constitution[33] makes what could be described as a passing and vague reference to the right to health care by stating that the duty of the state is to ensure that there are adequate medical and health facilities for all persons. However, in section 6(6)(c) of the Constitution the judicial powers of the courts to review any question relating to the rights created under chapter two, including section 17, are ousted. The Constitution provides that '[t]he judicial powers vested in the courts shall not extend to any issue or question as to whether any act of 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'.[34] The implication of this provision is that it impedes the building of a constitutional foundation for access to the right to health care in Nigeria, at least from a rights-based perspective, because of the state's reluctance to accept its 'duty and responsibility'[35] to provide health care for its citizens, so that anyone seeking to enforce their right to health care though the court

30 Under the Nigerian dualist legal system, international treaties such as ICESCR and the African Charter do not assume automatic force of law in Nigeria, except when their provisions have been enacted into law by an Act of the National Assembly. See sec 12 of the Constitution.

31 Sec 1 of the Constitution of Nigeria; see also *Abacha & Others v Fawehinmi* (2001) AHRLR 172 (NgSC 2000), where the Supreme Court of Nigeria held that although the African Charter is in a special class of legislation arising out of Nigeria's international obligations, it nonetheless was subject to the Constitution of Nigeria.

32 See sec 12 of the Constitution of Nigeria. The Nigerian legislature has domesticated the African Charter, which is known as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.

33 This chapter is titled Fundamental Objectives and Directive Principles of State Policy. It first entered Nigeria's constitutional law lexicon in the 1979 Constitution which is the predecessor to the 1999 Constitution of Nigeria. It is believed to have been transplanted from the Indian Constitution of 1949, as amended in 1951. See J Akande *The Constitution of the Federal Republic of Nigeria 1979 with annotations* (1982) 13.

34 Sec 6(6)(c) Constitution of Nigeria.

35 Sec 13 Constitution of Nigeria.

usually is incapable of doing so because of the position of the law on economic and social rights.[36]

Furthermore, the African Charter, an international treaty to which Nigeria is a signatory, provides for the right to health care. Article 16 provides:[37]

> (1) Every individual shall have the right to enjoy the best[38] 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.

Given that there is no clear-cut provision for the right to health care in the Nigerian Constitution, the provision of article 16 referred to above could have been adequate to fill the *lacuna* in the Constitution, especially when it comes to the issue of accessing the courts to press for the enforcement of the entitlements and freedoms of the right to health care in Nigeria. However, there is a constitutional impediment in Nigeria to enforcing the above provision of the African Charter. Section 1(3) of the Constitution is very instructive in this regard. It provides that '[i]f any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void'. It follows, therefore, that when section 1(3) is read together with section 6(6)(c)[39] of the Constitution, one can only conclude that article 16 of the African Charter is not enforceable in Nigeria since the courts do not have the jurisdiction[40] to adjudicate on economic and social rights.

The above situation raises an important constitutional question regarding the status of the African Charter and its provisions within the Nigerian legal system. For a long time it was assumed that the provisions of the African Charter as ratified by the Nigerian legislature[41] had equal standing with the Constitution[42] because

36 See *Okogie v Attorney-General of Lagos State* (1981) 2 NCLR 337 57; see also *Attorney-General, Ondo State v Attorney-General, Federation* (2002) 9 NWLR (Pt 772) 22, where the Supreme Court of Nigeria suggested ways in which this provision of the Constitution could be circumvented.
37 Sec 16 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 is similarly worded.
38 Art 12 of ICESCR refers to the 'highest attainable state'.
39 This section ousts the jurisdiction of the courts in respect of social and economic rights contained in ch two of the Constitution of Nigeria.
40 *Abacha v Federal Republic of Nigeria* (2014) LPELR-22014 (SC).
41 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.
42 *Comptroller General of Prison v Adekanye* (2002) 15 NWLR (Pt 790) 318; *Fawehinmi v Abacha* (1996) 9 NWLR 710 (CA). See generally O Nnamuchi 'Kleptocracy and its many faces: The challenges of justiciability of the right to healthcare in Nigeria (2008) 52 *Journal of African Law* 1; O Ajigboye 'Realisation of health right

of its international status which no single state could unilaterally modify. However, in the case of *Abacha v Fawehinmi*[43] the Supreme Court, relying on the decision of the Privy Council in *Higgs*,[44] held as follows:[45]

> No doubt Cap 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation ... But that is not to say that the Charter is superior to the Constitution … Nor can its international flavour prevent the National Assembly … removing it from our body of municipal laws by simply repealing Cap 10. Nor also is the validity of another statute to be necessarily affected by the mere fact that it violates the African Charter or any other treaty, for that matter.

The import of the foregoing is that as it currently stands in Nigeria, the status of the African Charter, strictly speaking, is no more than an Act of the legislature. The provisions of article 16 of the African Charter, therefore, are applicable only to the extent permitted by the legislature, and since the courts do not have the judicial powers to adjudicate on economic and social rights, including the right to health care, the position of law enunciated in the *Abacha* case[46] constitutes a serious impediment to the right to access health care in Nigeria. Furthermore, because of the ouster clause in section 6(6)(c) of the Constitution, the courts as a matter of practice have generally refrained from exercising jurisdiction in matters relating to the justiciability or enforcement of social and economic rights. The principle of law here is that the courts can only invoke their judicial powers under the Constitution where a matter is justiciable. The courts will have no competence to invoke their judicial powers if a matter is not justiciable, because it is a trite principle of Nigerian law that a court cannot adjudicate on matters over which it has no jurisdiction.[47]

The above position of law in Nigeria has attracted considerable debate from experts in human rights. According to Okere, a recommendation to the Constitutional Drafting Committee (CDC) to allow for limited justiciability of economic and social rights was

in Nigeria: A case for judicial activism' (2014) 14 *Global Journal of Human Social Science* 23-34.

43 *Abacha v Fawehinmi* (n 31).

44 *Higgs & Another v Minister of National Security & Others* (2000) 2 WLR 1368.

45 This position was fully restated by the Nigerian Court of Appeal in *Odebunmi v Oladimeji (*2012) LPELR-15419 (CA).

46 *Abacha v Fawehinmi* (n 31).

47 *Nigercare Development Company Ltd v Adamawa State Water Board* (2008) WRN (Vol 20) 166.

refused on the basis that it could lead to friction between the various arms of government. Moreover, the CDC took the view that economic and social rights were not proper rights which individuals could seek to enforce in a court of law.[48] Even the suggestion of declaratory reliefs[49] was also rejected by the CDC because it was thought that these economic and social rights would be too expensive for the government to implement. Furthermore, it was rejected on the basis that the courts do not have the democratic mandate and institutional competence to interfere in the area of public and social policy which is thought to be an area within the exclusive remit of the executive, even though it is now widely held that every court enforces some vision of economic and social rights.[50] However, Onyemelukwe apparently does not agree with the position taken by the CDC. He argues that by virtue of section 13 of the Constitution, the judiciary has a responsibility and is duty-bound to observe and apply the provisions of chapter two of the Constitution.[51] Akande does not agree. She hinges her objection on the ground of limited resources. She further posits that enforcing the provisions of chapter two of the Nigerian Constitution, which contains a semblance of the right to health care, would come at a considerable cost to the Nigerian government[52] which, unlike the governments of the more affluent and industrialised Western states such as the UK and US, cannot afford to guarantee the right to health care for its citizens.[53] However, Nnamuchi disagrees with the above position, contending that even though Nigeria cannot provide access to health care at the same level as wealthier Western countries, it can progressively improve upon the minimum core obligations of the right. Nigeria might not be able to operate the social welfare model of affluent Western industrialised countries, but it can certainly provide at least some basic services such as primary health care. Similarly, Odinakalu, relying on the decision in *SERAC*,[54] contends that although there might be issues with adequate resources, the government has a duty to ensure the immediate realisation of the non-derogable elements

48 O Okere 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution' (1983) 32 *International and Comparative Law Quarterly* 214.

49 As above.

50 M Tushnet *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2008) 227.

51 See generally C 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 African Human Rights Law Journal* 446; EB Omoregie & D Momodu 'Justifying the right to healthcare in Nigeria: Some comparative lessons in Nigeria' (2014) 12 *Nigerian Juridical Review* 13.

52 O Eze *Human rights in Africa* (1984) 31.

53 J Akande *The Constitution of the Federal Republic of Nigeria 1979 with annotations* (1982) 18.

54 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

of the right to health care which are consistent with the obligations to respect, protect and fulfil its obligations under ICESCR.[55]

Notwithstanding the foregoing postulations by experts in Nigerian human rights law, the judicial position with regard to economic and social rights remains that they are unenforceable except if the legislature changes the law regarding the justiciability of economic and social rights.[56] However, there have been a few cases where the Nigerian courts have displayed some form of responsive judicial interpretation with regard to the right to health care. The case of *Odafe* is particularly noteworthy.[57] The applicant, along with three other inmates, suffered from HIV/AIDS and was being held in a prison facility in Nigeria. He applied to the Court seeking to enforce his right to treatment pursuant to sections 8 and 12 of the Nigerian Prisons Act which creates a duty on the prison authorities to cater for the health of prisoners in their charge. Relying on these sections of the Nigerian Prisons Act, the Court decided in favour of the applicant. Interestingly, in the process of reaching its decision the Court also referred to article 16 of the African Charter which is similar to article 12 of ICESCR. According to the Court:[58]

> Article 16 of African Charter Cap 10 which is part of our law recognises that fact and has so enshrined that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health'. Article 16(2) places a duty on the state to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. All the respondents are federal agents of this country and are under a duty to provide medical treatment for the applicants.

The unique feature and success of this case is the fact that it was hinged on the duty of the Minister for Internal Affairs and the Comptroller General of Prisons to provide health care for prisoners under their charge since the prisoners could not afford to do so on their own due to their being in detention.

Similarly, in the case of *Gbemre v Shell Petroleum Development Company Nigeria Limited*[59] the applicant prayed for the Court to declare that the rights to life and dignity provided under the Nigerian

55 C 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 & DM Brinks (eds) *Courting social justice judicial enforcement of social and economic rights in the developing world* (2008) 187.
56 *Federal Republic of Nigeria v Anache* [2004) 1 SCM 36 78.
57 *Odafe vs AG Federation* (2004) AHRLR 205 (NgHC 2004).
58 *Odafe* (n 57) paras 33 & 34.
59 (2005) AHRLR 151 (NgHC 2005).

Constitution[60] include the right to a clean, poison-free, pollution-free and healthy environment. Delivering its judgment, the Court held that the rights to life and dignity guaranteed under the Nigerian Constitution included the right to a clean, poison-free, pollution-free healthy environment and declared that the respondent should be restrained from further flaring gas in the applicant's community.[61]

The decisions in the *Odafe*[62] and *Gbemre*[63] cases provide a unique opportunity for creativity on the part of the judiciary in Nigeria by relying on the fundamental rights provisions of the Constitution. For example, section 33(1) of the Nigerian Constitution provides for the right to life. On the basis of the interdependency of rights, the courts should rely on the evident connection between the right to health care and the right to life, thereby giving effect to an enforceable right to health care in Nigeria as was seen in India.[64] Under the Indian Constitution the state has a duty to improve the standard of living and health care. This provision is contained in part 5 of the Indian Constitution relating to the directive principles of state policy which are not legally enforceable. Notwithstanding this, the Indian Supreme Court has developed a method of adjudicating such matters by giving a broader interpretation to the right to life. For instance, in the case of *Paschim Banga Khet Mazdor Samity*[65] the Court held that the right to life enshrined in article 21 of the Indian Constitution imposes an obligation on the state to safeguard the right to life of every person and that the denial of timely medical treatment necessary to preserve human life is a violation of the right to health which is linked to the right to life, which is justiciable under the Indian Constitution. The Court also held that the state was bound to provide medical care irrespective of resource constraints.[66]

It is submitted that even if the right to health care under the Nigerian Constitution is not justiciable, this does not mean that the right as currently couched under the Constitution does not create obligations and duties to which the state is bound. Therefore, it behoves the judiciary to hold the state to account for failing to fulfil

60 Secs 33(1) & 34(1)
61 The right to a healthy environment is provided for in sec 20 under chapter two of the Nigerian Constitution which is constitutionally not enforceable.
62 *Odafe* (n 57).
63 *Gbemre* (n 59).
64 *Vyas v Chariman, Disciplinary Authority* (1997) 4 SCC 565; *Reliance Natural Resources Ltd v Reliance Industries Ltd* (2010) 4 SCC 376.
65 *Paschim Banga Khet Mazdor Samity & Others v State of West Bengal & Another* (1996) 4 SCC 37.
66 As above; see also the case of *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161, where the Court declared that the right to live with human dignity derives its life breath from the directive principles of state policy and therefore, it must include protection of the right to health care.

its obligations with regard to the right. While it is understood that the provision of quality health care is resource-dependent, the state must implement healthcare schemes provided for in law, such as the National Health Insurance Scheme Act 2004, and the National Health Act 2014, which provides for a minimum package of healthcare services for all Nigerians. For instance, the National Health Act 2014 provides for the right to emergency healthcare treatment under the Act.[67]

With regard to the application of article 12 of ICESCR in Nigeria, I do not seek to give the impression that a rights-based approach – the domestication of ICESCR and the provision of judicial remedies – is the only effective way of realising the right to health care. However, I am inclined to make the case that projecting human dignity and health care through a rights-based framework indeed helps to give added visibility to the debate and potential implementation of economic and social rights. Viewed from a legal perspective, the idea of a rights-based approach creates corresponding duties and obligations on the part of the state and its agencies, to pay more than passing attention to the realisation of the right to health care. Sen aptly captures this perspective when he says that 'a human right can serve as a parent not only of law, but also of many other ways of advancing the cause of that right … for all'.[68]

Towards the realisation of the right to health care, the dualist nature of the Nigerian legal system should be reconsidered, so that the relevant provisions of international human rights treaties such as article 12 of ICESCR can be directly implemented, as has been done in Kenya.[69] If this point were to be considered, the Nigerian legislature will need to review the relevant parts of the Constitution, especially section 12 which effectively creates a dichotomy in the relationship between public international law and national law, to bring it in line with a similar provision in the Kenyan Constitution which automatically makes any treaty ratified by Kenya part of the law of Kenya.[70] While this may not bring about any dramatic and sudden changes to the realisation of the right, it will certainly change the nature and impetus of the economic and social rights discourse in Nigeria. It will embolden the courts to hold the responsible

67 Sec 20.
68 A Sen 'Why and how is health a human right?' (2008) 372 *The Lancet* 1.
69 Kenya amended its Constitution in August 2010, following a referendum that saw 67% of Kenyan voters in support of the proposed changes to the 1963 Independence Constitution of Kenya. As result of this amendment, international treaties, including human rights treaties, no longer require legislative assent before becoming part of the law in Kenya. See art 2(5)(6) of the Kenyan Constitution 2010.
70 As above.

institutions and agencies of government to account for the measures being taken to realise the right and ultimately address the pervasive inequities in respect of access to health care in Nigeria.

3.2 Budgetary measures: Funding, resource allocation and the right to health care in Nigeria

Effective resource allocation is paramount in order to achieve the right to health care as envisaged in article 12 of ICESCR. As funding is critical, so also is the issue of its adequacy to meet a growing demand for health care rights-based services and access to facilities. This will inexorably lead to resource management decisions which can also impact access to the right to health care.

In December 2014 Nigeria finally passed a long-awaited and much-debated National Health Act (Act) which, among others, provided for the right to emergency healthcare treatment.[71] The Act also made it an offence for a healthcare provider to refuse to provide emergency treatment.[72] While this provision on the face of it is commendable, it does seem to be an attempt by the government to shift its obligations under the right to health care to healthcare providers, most of whom are run privately and receive no funding from the government. In the absence of financial and technical support from the government, it is morally wrong and unacceptable for the government to ask healthcare providers to bear the duty of providing emergency healthcare treatment. This provision in the Act raises an important question, at least from the perspective of those needing emergency healthcare treatment. Assuming that the argument can be made that section 20 of the Act creates an enforceable right with a corresponding duty on the part of the government to protect such a right, the question arises as to where there has been a failure to protect such right, what remedy would be available to such an individual (assuming they are still alive at the time), and against whom could they sue to enforce such right. Why would the government seek to punish the healthcare provider, whereas it is the government that has effectively failed to provide the needed resources for the provision of healthcare treatment?

71 See sec 20 of the National Health Act 2014. This provision was meant to check the attitude of some healthcare providers in Nigeria, who refuse to treat victims of crimes without clearance from the police especially in cases where such victims suffer injuries (bullet wounds) due to the use of firearms, because of Nigeria's strict laws on the possession of firearms. It was also meant to protect patients needing emergency medical care, but have no means of paying for it, since most private healthcare providers in Nigeria normally ask for a monetary deposit before administering any treatment to patients.

72 As above.

Furthermore, this kind of situation can lead to a serious moral dilemma for many private healthcare providers, especially as health care should be provided according to need and not the ability to pay, a practice that has won the National Health Service in the UK global acclaim.[73]

The foregoing highlights the importance of adequate funding if the right to health care is to be realised in Nigeria. Despite the debate on the justiciability of economic and social rights, the right to health care can only be effective with strong institutional support backed by a functional regime of resource allocation, making the right decisions and setting the right priorities for health care. Indeed, ICESCR enjoins state parties to take steps, individually and through international assistance to the maximum of available resources, towards the progressive realisation of economic and social rights through the adoption of appropriate means including, particularly, the adoption of legislative measures.[74]

At the heart of the problem of realising economic and social rights is the question of available resources as resource constraints are essential when it comes to measuring a state's compliance under ICESCR. It is an important factor when considering whether a state has taken steps towards the progressive realisation of economic and social rights.[75] However, in assessing whether a state has taken steps towards realising economic and social rights, the question as to what resources a state should devote to realising economic and social rights must first be considered. Although the term 'maximum available resources' is not defined in ICESCR, the evolving doctrine to be gleaned from the work of the ESCR Committee[76] and the opinion of experts[77] points to the fact that it is the totality of a state's resources including, but not limited to, budgetary allocation. Thus, these

73 The Commonwealth Fund 'Mirror mirror on the wall, 2014 update: How the UK healthcare system compares internationally', http://www.commonwealthfund.org/publications/fund-reports/2014/jun/mirror-mirror (accessed 28 September 2021).

74 Art 2 ICESCR.

75 RE Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social, and cultural rights' (1994) 16 *Human Rights Quarterly* 703.

76 General Comment 3 paras 3-7; UN ESCR Committee 'An evaluation of the obligation to take steps to the "maximum available resources" under an optional protocol to the Covenant' 10 May 2007, https://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf (accessed 10 October 21).

77 See D Elson et al 'Public finance, maximum available resources and human rights' in A Nolan et al (eds) *Human rights and public finance: Budget and the promotion of economic and social rights* (2013) 1; R O'Connell et al *Applying an international human rights framework to state budget allocations: Rights and resources* (2014) 61.

would include technical, administrative and other resources that can be maximally deployed without compromising other rights.[78]

ICESCR has a robust and relatively established approach in assessing the issue of maximum available resources and the concrete steps that states must take to meet their obligations under ICESCR, particularly those provided under article 2 of ICESCR. Following the work of the ESCR Committee in this regard, six different lines of approach have been identified as emerging from the practice of the Committee with regard to what amounts to the available resources.[79] It is clear from the analysis that the maximum available resources obligation covers an extensive aspect (financial and non-financial) of a state's socio-economic activities. Based on the Committee's approach, it could also include the way resources are allocated within the state. For instance, the ESCR Committee in its Concluding Observations on Guinea[80] expressed concern over the lack of resources allocated to health care and education despite the strong economic growth that had been witnessed in Guinea. It also expressed concern over the inadequate measures the state had taken to fight corruption and recommended that the state party implement effective measures to combat corruption.[81] The persistence of corruption in the state would seem to indicate a lack of commitment to its obligations under international law.

Given Nigeria's financial resources alone, especially from the sale of petroleum minerals,[82] it cannot be described as a poor country.[83] Its biggest challenge is the high level of institutional corruption and near absence of accountability by state institutions.[84] In view of these

78 See report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (UN Human Rights Council 2009) A/HRC/11/12/Add. 2.

79 R Uprimny et al 'Bridging the gap: The evolving doctrine on ESCR and "maximum available resources"' in KG Young (ed) *The future of economic and social rights* (2019) 627.

80 Concluding Observations on the Initial Report of Guinea, ESCR Committee (30 March 2020) E/C.12/GIN/CO/1 (2020).

81 Para 11.

82 As of 2020 Nigeria was the largest oil producer in Africa. See J Faria 'Main oil producing countries in Africa 2020' 29 July 2021, https://www.statista.com/statistics/1178514/main-oil-producing-countries-in-africa/ (accessed 18 October 2021).

83 A Enumah 'EU withdraws financial support for Nigeria, says country not poor' *Thisday* (Abuja) June 2017, https://www.thisdaylive.com/index.php/2017/06/30/eu-withdraws-financial-support-for-nigeria-says-country-not-poor/ (accessed 18 October 2021).

84 O Nnamuchi 'Bloated remuneration of political office holders as a violation of human rights: The case of right to health in Nigeria' 6 August 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306486 (accessed 20 October 2021). According to Transparency International, Nigeria is one of the lowest scoring countries on the corruption perception index (CPI), underscoring a need for urgent action, https://www.transparency.org/en/cpi/2020/index/nga (accessed 20 October 2021).

significant shortcomings in the Nigerian healthcare policy approach, I am of the considered opinion that Nigeria violates its obligations under ICESCR. The ESCR Committee in its Concluding Observations on Nigeria raised a concern about corruption and underfunding of health services in the country which has led to the rapid deterioration of health infrastructures in the country.[85] Although the report was released during the military regime in Nigeria, the issues identified in the report have remained relevant to the reality of healthcare services in Nigeria.

In terms of funding for the right, it is apparent that Nigeria is yet to fully commit to meeting its minimum obligations with regard to the right to health care as envisaged by ICESCR. It is regrettable that Nigeria has no functional public healthcare system and, to complicate matters, there is no known legal mechanism by which the actions or inactions of the government could be challenged, as was seen in South Africa, for example.[86]

In 2001 heads of state of African Union (AU) countries met and pledged to allocate a minimum of 15 per cent of their annual budget to improve health care in their respective countries. The 2011 progress report by the WHO indicates that Nigeria consistently failed to meet this target at any time during the period.[87] Although the foregoing report was released in 2011, there is no evidence of a shift in the direction of achieving the 15 per cent minimum budgetary allocation to health care. A few examples will suffice to substantiate this assertion. In 2012 the federal government of Nigeria allocated a paltry 7 per cent of the national budget to health. In 2013 it amounted to 6 per cent and in 2014 it was 8 per cent of the national budget.[88] In 2020 only 4 per cent of the national budget was allocated to health care. Out of this fraction, only 22 per cent was committed to funding capital projects that are meant to have a progressive impact on the right. The remainder was spent on recurrent expenditure such as the payment of salaries and allowances for employees and political appointees working in the Nigerian healthcare sector.[89] This trend continued in 2021. Amid the ongoing COVID-19 pandemic,

85 Concluding Observations on Nigeria (16 June 1998) E/C 12/1/Add.23 (1998).
86 See, eg, *Minister of Health & Others v Treatment Action Campaign & Others* (2002) AHRLR 189 (SACC 2002).
87 WHO 'The Abuja Declaration: Ten years on' August 2011, http://www.who.int/healthsystems/publications/abuja_report_aug_2011.pdf?ua=1 (accessed 20 October 2021).
88 A sizeable portion of this sum allocated to health care is spent on the payment of salaries and other overheads.
89 'Nigeria budgets N2 000 for the healthcare of each citizen in 2020', https://www.premiumtimesng.com/health/health-features/361373-nigeria-budgets-n2000-for-the-healthcare-of-each-citizen-in-2020.html (accessed 18 October 2021).

the country's budgetary allocation to health amounted to less than 5 per cent of the budget.[90]

It is not surprising that in the WHO healthcare expenditure information on Nigeria, the government provided only 4 per cent of the total cost of financing health care in the country.[91] On the other hand, 76,6 per cent of healthcare financing – known as out-of-pocket payments – came from private households.[92] This underscores the huge economic burden of financing health care on individual households in Nigeria.

In 2016 Nigeria published a revised National Health Policy.[93] According to the policy, the overall goal was 'to strengthen Nigeria's health system, particularly the primary health care sub-system, to deliver effective, efficient, equitable, accessible, affordable, acceptable and comprehensive healthcare services to all Nigerians'.[94] Despite the introduction of the revised policy and its avowed goal, Nigeria still has one of the highest rates of child and maternal mortality in the world.[95] According to the WHO a major contributory factor to the high level of maternal mortality is the corresponding high level of inequities in access to healthcare services. This highlights the need for the Nigerian government to address this issue by ensuring that access to health care is improved through the provision of more funds for healthcare facilities in the budget, as more than half of the world's maternal deaths occur in sub-Saharan Africa, of which Nigeria forms part.[96] With respect to the right, the issue here is not the dearth of healthcare policies and legislation, but a puzzling absence of the required will to follow these policies through. As a result, the progressive realisation[97] requirement of the right to health care has been anything but progressive. Despite all the rhetoric and target setting that have characterised the push for the realisation of the right to health care, there is still evidence of a

90 https://www.devex.com/news/sponsored/2-decades-on-nigeria-falls-short-of-landmark-health-pledge-99555 (accessed 21 October 2021).
91 WHO Global Health Expenditure Database (2020), http://apps.who.int/nha/database/country_profile/Index/en (accessed 18 October 2021).
92 Out-of-pocket payments are defined as direct payments made by individuals to healthcare providers at the time of service use.
93 The initial policy was made in 1988 and revised in 2004.
94 Federal Ministry of Health 'National Health Policy: Promoting the health of Nigerians to accelerate socio-economic development' September 2016, https://naca.gov.ng/wp-content/uploads/2019/10/National-Health-Policy-Final-copy.pdf (accessed 18 October 2021).
95 'Nigeria maternal mortality rate' IndexMundi (2019), http://www.indexmundi.com/nigeria/maternal_mortality_rate.html (accessed 18 October 2021).
96 WHO 'Maternal mortality fact sheet (2019), http://www.who.int/mediacentre/factsheets/fs348/en/ (accessed 18 October 2021).
97 Art 2 ICESCR.

lack of commitment judging by the negligible amount allocated to health care in successive Nigerian budgets.

Under ICESCR[98] states are enjoined to take steps to progressively achieve the highest attainable standard of health care to the maximum of available resources. It is doubtful whether less than 5 per cent of the annual budget allocated to health care amounts to the maximum of available resources.

4 Conclusion

Despite the far-reaching international commitments to take the necessary steps towards ensuring the protection and fulfilment of economic and social rights by the Nigerian government, the country still lags behind when compared to many countries in terms of the various health care performance indicators, thus effectively repudiating liability for a failure to protect the right to health care. The right to health care is a fundamental human right and is critical to the enjoyment of other human rights. It ties in with the central theme of human rights which is the protection of the dignity of the human person. The government, therefore, must take all reasonable steps within its powers to ensure that this right is enjoyed to a reasonable standard by all Nigerians. The current level of commitment to realising the right to health care is far from impressive and, what is more, the situation of health care in Nigeria today is inexcusable. The blatant display of inadequate levels of commitment to successive healthcare policies must be reversed if Nigeria is serious about meeting its international obligations with regard to the right to health care in article 12.

The ESCR Committee in General Comment 14 stated that the realisation of the right to health care should be pursued through numerous complementary approaches, including appropriate legislative, administrative, budgetary, promotional and judicial measures. However, the evidence reviewed in this article reveals that authorities in Nigeria are yet to fully commit their resources in pursuing the realisation of the right, especially in the area of resource allocation which, as already stated, is critical to the realisation of the right to health care in Nigeria.

With reference to the role of the judiciary in promoting the right to health care, the courts should be more receptive to the principle

98 As above.

of the interdependency of rights when they adjudicate matters concerning economic and social rights. In a few instances the courts have stretched the provisions of chapter four of the Nigerian Constitution to include elements of the rights provided in chapter two, and they should be commended for taking that approach. However, the point should be made that the decisions of courts with respect to justiciable and enforceable economic and social rights may not always have the desired impact on the lives of the citizens if the other arms of government, especially the executive, lack the will to implement those decisions. For example, the National Health Act 2014 has created a few agencies with specific duties, the performance or non-performance of which could potentially have an impact on the right to health care. It therefore is important that persons who feel that the acts of these agencies have been unlawful are able to approach the courts for redress. For its part, the government must be prepared to give effect to the provisions of the Act for the promotion of the right to health care.

With access to health care increasingly assuming the language of human rights, a pivotal role for Nigerian courts in the implementation of the right to health care cannot be ignored. It is time that the Nigerian courts were supported to perform these roles effectively. The courts should be willing to engage the other arms of government in some constitutional and democratic conversation[99] with regard to the right to health care and should not allow the judicial institution to be marginalised or snagged by what seems to be outdated and insupportable theories premised on the idea of separation of powers, a lack of institutional capacity and democratic legitimacy,[100] especially as (albeit limited) studies[101] carried out so far have highlighted the benefits of a constitutionally-guaranteed healthcare right, especially in a country such as Nigeria, where the government is less politically sensitive to the will of the citizens.

Section 13 of the Constitution creates a duty on the part of the government, and the unique nature of this situation is that where there is a duty, there must be a corresponding right to demand the performance of such a duty. The Constitution cannot, therefore, create such a duty without liability for some sort of justiciability

99 M Tushnet 'Dialogic judicial review' (2008) 61 *Arkansas Law Review* 205.

100 G van Bueren 'Including the excluded: The case for an economic, social and cultural Human Rights Act' (2000) *Public Law* 1.

101 See D Brinks & V Gauri 'A new policy landscape: Legalising social and economic rights in the developing world' in V Gauri & D Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 303; S Gloppen 'Litigating health rights: Framing the analysis' in A Yamin & S Gloppen (eds*) Litigating health rights: Can courts bring more justice to health?* (2011) 17.

for economic and social rights, especially the right to health care. Rights are what people possess by reason of their humanity.[102] Rights are not grants by the state and where there is a systemic failure to grant access to such rights, the courts must be able to find ways of overcoming these obstacles on the presumption that the legislature cannot legislate to oust the obligations into which a state has freely entered internationally. Therefore, the Nigerian courts should display an increased willingness to give economic and social rights a progressive interpretation based on the notion of the interdependency of rights.

102 B Fortman '"Adventurous" judgments: A comparative exploration into human rights as a moral-political force in judicial law development' (2006) 2 *Utrecht Law Review* 22.