THESIS TITLE: THE POTENTIAL ROLE OF JUSTICIABILITY IN FOSTERING COMPLIANCE WITH THE RIGHT TO HEALTH IN NIGERIA

A thesis submitted for the degree of Doctor of Philosophy (Ph.D.) in Law

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DECLARATION

This is to certify that this thesis is a result of my own work, and that no portion of it contained herein has been submitted for another degree or qualification in this or any other university, to the best of my knowledge, and that the original work is mine except where due references are made.

LIST OFABBREVIATIONS

- ACHPR African Charter on Human and Peoples' Rights
- ACRWC African Charter on Rights and Welfare of the Child
- CEDAW Convention on the Elimination of all Forms of Discrimination against Women
- CRA Child's Right Act
- CRC Children's Right Convention
- FCT Federal Capital Territory
- FMOH Federal Ministry of Health
- FRN Federal Republic of Nigeria
- ICESCER International Convention on Economic, Social, & Cultural Rights
- LFN Laws of the Federation of Nigeria
- LGA Local Government Area
- NAFDAC National Agency for Food and Drug Administration and Control
- NHA National Health Act
- NHP National Health Policy
- NHIS National Health Insurance Scheme
- NHRC National Human Rights Commission
- MDPA Medical and Dental Practitioners Act
- MDPC Medical and Dental Practitioners Council
- OHCHR The Office of the United Nations High Commissioner for Human Rights
- UDHR United Nations' Universal Declaration of Human Rights
- UN United Nations
- UNGA United Nations General Assembly
- UNICEF United Nations International Children Emergency Funds
- WHO World Health Organisation

ABSTRACT

The yearnings, hopes, aspirations of the Nigerian people are yet to be met as there continues to be a gap between the promises embodied in international human rights law especially the commitment to the right to health and the actual practice. Also, the need to develop the content of the Economic, Social and Cultural rights under which the right to health falls has been given considerably less attention despite the fact that these rights have been part of the language of international human rights since at least the adoption of the Universal Declaration of Human Rights in 1948. Under the Nigerian legal system, there is no clear legal foundation in reliance upon which the right to health claims could be asserted; consequently, the domestic courts have contributed very little to the development of socio-economic rights protection generally because of their inherent limitations. This thesis examines the potential role of the justiciability of the right to health in fostering compliance with the right to health, it argues that justiciability is a function of compliance. Since human rights treaties are binding to States, the Nigerian government can implement the right to health notwithstanding its complexities. 'Justiciability', as used in this thesis, presupposes the existence of a review mechanism to determine the compliance with the terms of the legal regime and includes judicial, quasi-judicial and other manner of approaches. The thesis provides an invaluable insight into some of the approaches that need to be taken for the protection of the right to health to experience a significant impact on both policy and practical outcomes in Nigeria. The thesis offers a theoretical basis on which the assertion that the widely accepted notion that the right to health is non-justiciable is obsolete, and the assumption that the right to health is a mere fundamental objective and directive principle must be rejected.

Keywords; Jusiticiability, Right to health, Nigeria, Constitution, United Nations, India, South Africa, Columbia, Economic Social and Cultural Right, Civil and Political Rights, Compliance, International Convention on Economic, Social and Cultural Rights, African Charter, Quasi-judicial.

CHAPTER ONE: GENERAL INTRODUCTION

1.0 A Brief Description of Nigeria's State of Health

Nigeria remains one of the countries with the highest medical-related death rates in the world.[1] The health system in Nigeria does not adequately serve the population.[2] The average Nigerian life expectancy is 54.8 years which is one of the lowest life expectancies in sub-Saharan Africa according to the World Health Report.[3] Also, infant mortality has been on the rise since the 1990s and the maternal mortality rate is one of the highest in the world.[4]

H B Riman and E.S Akpan believe that the Nigerian health system is in a comatose state and this greatly affects the right to health of everyone in the country. There are few hospitals with few and substandard drugs, inadequate and substandard technology. Infrastructural support, electricity, water, and diagnostic laboratories are lacking resulting in misdiagnosis. Medical record keeping is rudimentary and disease surveillance is also poor.[5]

The United Nations Development Programme ('UNDP') in its report ranked Nigeria's health care system 156 out of 187 in 2011 and in 2012-2013, the World Economic Forum ('WEF') ranked Nigeria 142 out of 144 in terms of its health and primary education performance.[6] The 2013 Human Development Report showed that Nigeria's life expectancy at birth was 53.3 years.[7]Also, the maternal and child health survey by the United Nations International Children's Emergency Fund ('UNICEF') in 2013 shows that Nigeria loses about 2,300 children under five years old and 145 women of childbearing age in a day, making it the second-largest contributor to the under-five and maternal mortality rate in the world.[8]

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[1]Oyeniyi Ajigboye, 'Realisation of Health Right in Nigeria: A Case for Judicial Activism' (2014) 14(2) Global Journal of Human and Social-Science- 23, 34

[2]H B Riman and E.S Akpan, 'Healthcare Financing and Health outcomes in Nigeria: Financing and Health outcomes in Nigeria: A State Level Study using Multivariate Analysis' (2012) Vol 12(15) IJHSS 296, 309

[3] Ibid 309

[4] ibid

[5]Oyeniyi Ajigboye (n 1)

[6] Nigeria Global Competitive Index: Health and Primary Education 2006-2012 Retrieved on 05/11/14 from <www.slideshare.net/statisense/nigeria-global-competitive-index-health-and-pry-education-2006-2012 > Accessed on 20th March 2017

[7] Human Development Report 2013 Retrieved on 15/11/14 from <hdr.undp.org/sites/default/files/countryprofiles/NGA.pdf> Accessed 20th March 2017

[8]Abiola Afolabi, 'Child Mortality in Nigeria' (2015) < http://www.fitila.ng/child-mortality-nigeria/> accessed on 02 June 2017

On their joint visit to Nigeria in 2015, three human rights Special rapporteurs reported that the maternal mortality ratio was 814 deaths per 100,000 live births, one of the highest in the world.[9] They also reported that the North-Eastern zone has the highest maternal mortality rate in Nigeria, at 1,549 deaths per 100,000 live births, compared with 165 deaths per 100,000 live births in the South-West.[10]

The rapporteurs were gravely concerned at the alarmingly high rate of infant, child and maternal mortality, and the high incidence of major illnesses affecting children, including polio, malaria, and diarrhoea, particularly in the Northern regions.[11] In advocating for the guarantee and protection of the right to health in Nigeria, they advised the government to strengthen the health systems so as to meet the physical and mental health of every person in the country.[12]

Also, in 2018, Nigeria was ranked 142nd out of 195 countries by a study in the Lancet of global healthcare access and quality.[13] These rankings show the rather slow improvement in the health care system. There are many reasons behind the problems of poor health systems in Nigeria. Some of these problems are related to governance issues falling under the scope of obligations related to the right to health.

Health is a concomitant responsibility of the three tiers of government under the Nigerian constitution; that is the federal government, 36 States with a Federal Capital Territory (FCT) which is part of the federal government, and 774 Local Government Areas (LGAs).[14] According to the national health policy of Nigeria, the federal government (including the FCT) is responsible for tertiary care, the State government (comprising 36 states) is responsible for secondary care and the LGA government (comprising of 774 LGAs) is responsible for primary

[9] Report of the Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, on the sale of children, child prostitution and child pornography and on contemporary forms of slavery, including its causes and consequences on their joint visit to Nigeria A/HRC/32/32/Add.2 June 2016 p 3

[10] Oyeniyi Ajigboye (n 1) 5

[11] Report of the Special Rapporteurs (n 9) 11

[12] ibid

[13] '---Measuring performance on the Healthcare Access and Quality Index for 195 countries and territories and selected subnational locations: a systematic analysis from the Global Burden of Disease Study 2016' via <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)30994-2/fulltext#%20> Accessed 10/06/2019

[14] Constitution of the Federal Republic of Nigeria 1999, part II concurrent legislative list

care. Details in the policy regarding the roles and responsibilities for each level are, however, unclear.[15]

Also, there exists a myriad of different departments, directorates, and units at each level with overlapping responsibilities.[16]This leads to the inability of actors within the health system to distinguish their roles and responsibilities between the different levels of government.[17] How the three levels of government should interact has not been established in policy.

Under human rights law, it is the duty of the state to organise itself in order to deliver the human rights agreed to.[18] However, the Nigerian government ignores its duties and obligations.[19] Individuals and groups are supposed to be entitled to participate in meaningful ways in the development and design of health policies and monitoring and evaluating the implementation of health policies.[20] To ensure avenues for meaningful participation, governments must create fair and transparent processes that are accessible to everyone.[21] Participation methods vary but could include regional or national conferences, local health committees, focus groups, budgetary oversight, and public meetings.[22]

This thesis suggests that establishing a justiciable right to health may be an important step in rectifying the many problems faced in recognising the right to health in Nigeria. Justiciability of a right gives courts the opportunity to have a say in the way a right is understood and implemented.[23] Since courts are expert legal interpreters, they are well placed to flesh out the content of socio-economic rights such as the right to health and to apply such a right in concrete contexts.[24] However, there are many factors responsible for the enjoyment of the right to health in a given society.

[15]McKenzie Andrew, Emmanuel Sokpo, and Alastair Ager, 'Bridging the Policy-Implementation Gap in Federal Health Systems: Lessons from the Nigerian Experience' (2014)5(2) Journal of Public Health in Africa 381
[16] ibid
[17] ibid
[18] Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009)5
[19] Mc Kenzie Andrew (n 15) 381
[20]Shengnan Qiu and Gillian MacNaughton, 'Mechanisms of Accountability for the Realisation of the Right to Health in China' (2017)19 (1) HHR Journal 281
[21] Ibid 282
[22] ibid
[23] Marius Pieterse, *Can rights cure? The impact of human rights litigation on South Africa's health system*, (Pretoria University Law Press 2014) 24
[24] ibid 24

Justiciability enhances deliberative and participatory democracy; that is where courts exercise their power of judicial review, they can hold the legislature and executive accountable for meeting their constitutional commitments and force them to take note of, and engage with, citizen's rights.[25]

The main essence of this thesis is to analyse the potential role of justiciability in fostering compliance with the right to health and how the justiciability of the right to health can bring about the better protection of the right in Nigeria. Therefore, this introduction briefly explains the meaning of the right to health as a human right, the concept of justiciability of the right to health generally, and then the justiciability of the right to health in Nigeria. This is to lay the background for the main issues to be discussed.

1.01 The Philosophical Foundation of the Right to Health

A number of philosophers have raised issues about the formulation and interpretation of the right to health.[26] Some claim that there is lack of clarity about the foundations and justification for the right to health.[27] They claim that failure to provide a stronger conceptual foundation and more comprehensive theoretical exposition for the right to health linked to that foundation has complicated efforts to reach a consensus about the normative content, scope, and requirements of the right.[28] Also , that it has hindered efforts by some judiciaries to interpret the right.[29] They argue further that the incomplete theoretical framework complicates efforts to set priorities for implementation of the components of the right to health in the frequent situations when lack of resources requires doing so.[30]

Daniels believes that the absence of a proper philosophical foundation, the lack of a theory of justice, and the failure to address priority setting make the right to health less meaningful.[4] Jennifer Prah Ruger stated that "One would be hard pressed to find a more controversial or nebulous human right than the right to health"[31]. She holds the view that the foundation for the right to health lacks a systematic philosophical grounding.[32] According to Sridhar

[25] Marius Pieterse, (n 23)
[26] Audrey Chapman, 'The Foundations of a Human Right to Health: Human Rights and bioethics in Dialogue' (2015) 17(1) HHR
[27] N. Daniels, *Just health: Meeting health needs fairly* (Cambridge, UK and New York: Cambridge University Press, 2008), 313-314.
[28] ibid
[29] Ibid
[30] ibid
[31] J. P. Ruger, *Health and Social justice* (Oxford and New York: Oxford University Press, 2010), p. 119.
[32] ibid

Venkatapuram, the grounding of human rights in legal instruments, rather than in some general ethical theory, leaves health rights unable to show how the idea of rights can be coherent in the context of limited resources.[33]

Daniels however acknowledges that a rights-based approach has several great strengths.[34] Thus it establishes specific governmental accountabilities for promoting population health; it addresses a broad range of environmental, legal, cultural, and social determinants of health; it emphasizes the importance of setting specific goals and targets for achieving the rights that bear on health and also monitors and evaluates progress toward these goals; it insists on good governance; and it stresses the need for transparency and participation in efforts to secure the right.[35]

The Tavistock Group in defending the human right to health gave a set of ethical principles which affirmed the human right to health.[36] The principles sought to provide a basis for discussion among all areas of medical and health care professions that would finally end in general agreement on the nature of the right to health.[37] The fundamental principle that underlines the Tavistock Group's proposal was that, while the individual remained the claimant of a right to health, the delivery of the services in response to the claim must be seen in the context of community.[38]

According to the Tavistock Group, governments have an obligation to fund medical education, training and research, to make provision for sustainable investment in support of health care professionals, and to ensure that knowledge is exchanged freely and without regard for institutional affiliation and claims of ownership.[39]

Some researchers argue that the human right to basic health is a fundamental condition for pursuing a good life and human beings have human rights to the fundamental conditions for pursuing a good life.[40] The human right to basic health has been said to entail human rights to

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[33] S. Venkatapuram, *Health justice: An argument from the capabilities approach* (Cambridge, UK and Malden, MA, 2011), pp. 182-183.
[34] ibid
[35] ibid
[36] Tony Evans, 'A Human Right to Health?' (2002) 23(2), Global Health and Governance, pp. 197-215
[37] R Smith et al, 'Shared ethical principles for everybody in health', (1999) 318 British Medical Journal, pp 248-25 1.
[38] ibid
[39] ibid
[40] S M Liao, 'Health (Care) and Human Rights: A Fundamental Conditions Approach' (2016) 37(4) Theoretical Medicine and Bioethics, 259–274

the essential resources for promoting and maintaining basic health, including adequate nutrition, basic health care, and basic education.[41] Also, it is stated that the duty bearers are every able person in appropriate circumstances, as well as governments and government agencies, private philanthropic foundations, and transnational corporations.[42]

Also, researchers have found that health care is only one of many determinants of health while other determinants include nutrition, education, housing, the level of equality in a society, clean and potable water, clean environment and so on.[43] It is noted that without defining health in terms of these social determinants, one can acknowledge the social determinants of health.[44]

The human right to basic health has been defined by the fundamental conditions approach as the adequate functioning of the various parts of our organism that are needed for the development and exercise of the fundamental capacities.[45] While non-basic health refers to any biological functioning that does not affect the various parts of our organism that are needed for the development and exercise of the fundamental capacities.[46]

Generally, arguments against a human right to health questioned the definition and extent of both human rights and health care.[47] For instance, the opponents of the Tavistock Group's proposal contend that, while civil and political claims are today generally accepted as human rights, 'it is difficult to find any rational or utilitarian basis for viewing health care in the same way'[48].

They also argued that, even if there were some general agreements on health as a human right, determining exactly who held a duty to provide the necessary resources in fulfilment of the claim remained problematic, even for the provision of basic care.[49] Again, they maintained that any definition of health care would have to take account of a wide range of social, economic, organisational, scientific and technical issues and relationships before any general agreement on the meaning and content of the right could be defined.[50]

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[41] S M Liao (n 40)
[42] ibid
[43] P Braveman, and L Gottlieb. 'The social determinants of health: it's time to consider the causes of the causes.' (2014)129 Public health reports 19-31
[44] ibid
[45] Audrey chapman (n 26)
[46] ibid
[47] ibid
[48] P Barlow, 'Health care is not a human right' (1999) 319 British Medical Journal, 321
[49] ibid
[50] ibid

The opponents added that, even if the definitional difficulty could be resolved, life and death decisions concerning availability and access would still need to be made as demand outrun supply. [51] Consequently, it was 'difficult to see how any provision of benefits [could] be termed a human right (as opposed to a legal entitlement) when to meet such a requirement would impose intolerable burdens on others'.[52]

Significantly, the human right to health often emphasised that good health can be achieved within the context of social organisation, which pays great attention to other factors such as poverty, education, housing, economic globalisation and other so on.[53] According to some commentators, the human rights movement offers this justification by identifying the 'preconditions for human well-being', which then act as a 'framework for analysis and direct responses to societal determinants of health that is more useful than traditional approaches'[54] This approach seeks to bring together the public health and human rights movements as a single, mutually supportive project.[55]

However, it is not the focus of this thesis to address these philosophical debates in substance but rather to start from the point that the right to health is embedded in human rights law and explore the potential role of justiciability in fostering compliance within the Nigerian context.

1.02 The Right to Health as an Indivisible and Interdependent Human Right

The right to health is the phrase most commonly used in international human rights conventions.[56] The human right to health is an economic, social, and cultural human right and an important feature of any healthcare system.[57] The right to health like any other human right imposes obligations on governments.[58] These obligations, in terms of human rights law, include the obligation to respect, to protect, and to fulfil fundamental human rights.[59] The

[51] IJP Loefter,'Health care is a human right' is a meaningless and devastating manifesto' (1999) 318 British Medical Journal, p 1766.
[52] P Barlow (n 48)
[53] ibid
[54] JM Mann, 'Health and human rights-protecting human rights is essential for promoting health', (1996) 312 British Medical Journal, pp 924-925
[55] ibid
[56] The International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR), The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November)
[57] Daniel Tarantola et al, *Human Rights, Health and Development* (University of New South Wales 2008) 2.
[58] ibid
[59] ibid

obligation to respect requires governments to refrain from interfering directly or indirectly with the enjoyment of these rights. The obligation to protect requires governments to take measures that prevent third parties from interfering with human rights guarantees. The obligation to fulfil includes the duties to facilitate, provide and promote human rights.[60] However, in practice, these formal obligations of governments do not necessarily ensure that rights-holders enjoy the full protection and realisation of these rights, as governments are often constrained in their ability to fully realise fundamental human rights for their citizens.[61] The relationship between the right to

The essence of what the right to health involves, who the rights-holders are, how the right is enforced, and what the actual and direct effect of this right is on the lives of people, all depend on the specific understanding and interpretation of what the right to health entails.[62] Also, no government can guarantee a person's absolute health status, so the right to health is usually described in terms of creating opportunities for people to reach their full health potential, either through a right of access to health care or through rights to the underlying conditions necessary for health, such as clean water, adequate food, the prohibition against torture, adequate housing and so on. [63]

In many human rights instruments, a distinction is made between civil and political ('CP') rights and economic, social, and cultural ('ESC') rights. CP rights include the right to life, the right to a fair trial, and the prohibition of torture and inhuman and degrading treatment. While ESC rights include the right to education, the right to food, right to health and the right to adequate housing.[64] The ESC rights are perceived to entail positive State obligations, while CP rights impose negative obligations on States.[65] Negative rights comprise an abstention of the State so that every individual can freely exercise his or her rights and freedoms.[66] Positive rights require active measures and government programs, which have financial implications

[60] Daniel Tarantola et al (n 57).
[61] ibid
[62]Leslie London, 'What is Human Rights-Based Approach to Health and does it matter?' (2013) 10(1) Health and Human Rights Journal
[63] ibid
[64] J.K. Mapulanga-Hulston, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002)6 (4) IJHR, p 29-48
[65] ibid
[66] ibid

for a State. The separation between these rights also found expression with regard to the historical evolution of the 'justiciability' of human rights. [67]

The separation between civil and political rights and social-economic rights is ambiguous notwithstanding the common presumption that the division is nearly juridically unavoidable and self-evident.[68] Most writers have criticised the division of human rights and postulate that there need to be more responsive ways to conceptualise the different rights.[69] There are significant examples that generally indicate the ambiguity of distinction based on positive and negative rights. For example, implementing civil and political rights entails qualified judges, training military forces, and the police, thus all those procedures need resources.[70]

These programmes require a positive action of the government. Therefore, civil and political rights may be described as positive rights as well.[71] Some advocates of negative rights indicate that while negative rights impose nothing on States, positive rights make claims on limited resources.[72] This division fails, for instance, in developing countries like Nigeria and other similar countries because not just the primary education, but an independent judiciary also requires financial resources. [73]In all states, negative rights must be secured via State regulation, by apparatus of legislation, police force. They also come with their attendant costs. Therefore, every characteristic over negative rights may be applied to positive rights clearly because they both require actions from the government.[74]Fredman states that:

> 'Not only do civil and political rights give rise to positive duties. Many socio-economic rights give rise to duties of restraint in addition to positive duties, thereby overlapping with civil and political rights.[75] The right to be housed includes a restraint on the state from unlawful evictions, covering the same

[67] J.K. Mapulanga-Hulston (n 64)
[68] E G Çamur, 'Civil and Political Rights vs. Social and Economic Rights: A Brief Overview' (2017) 6(1) BEÜ SBE Derg, 205-214
[69] P Alston, *Economic and Social Rights in Human Rights: An Agenda for the Next Century* (L. Henkin and J. Hargrove Eds, 1991, The American Society of International Law Press, 1994) 139
[70] ibid
[71] E G Çamur (n 68) 207
[72] ibid
[73] Ibid 209
[74] ibid
[75]ibid

ground as the civil and political rights to respect for privacy, home, and family life' [76]

Since international human rights law imposes three types or levels of obligations on States parties (tripartite typology), that is the obligations to respect, protect, and fulfil.[77] The right to health consequently imposes obligations to respect which requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health.[78] The obligation to protect requires States to take measures that prevent third parties from interfering with the right to health as guaranteed by article 12 of the International Convention on Economic, Social, & Cultural Rights ('CESCR'). The obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realisation of the right to health.[79]

It must be added that since the beginning of January 2020, the world has been hit by the Coronavirus outbreak (COVID 19) which has infected over a hundred and sixty million people globally, caused over three million deaths, and collapsed national economies.[80] The infections and responses of the world in the face of this pandemic underscore that the indivisibility of health and the range of human rights is not just a theoretical proposition.[81]

It is to be noted therefore that the varying degrees of the duties of the State to respect, protect, and fulfil rights make the positive/negative distinction of limited value in defining the role of the State in these situations. The essence of highlighting this discussion is because the theory of separation of rights between the two classes of human rights also found expression with regard to the historical evolution of the justiciability of human rights which is the theme of discussion in this thesis. So, what is this concept of Justiciability'?

[76] Sandra Fredman FBA, *Human Rights Transformed-Positive Rights, Positive Duties* (Oxford University Press 2008) 68

[77] M.Magdalena Sepulveda and Maria Magdalena Sepulveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia Nv, 2003) (http://books.google.co.in/books?id=50wITYzNxnwC&printsec=frontcover#v=onepage&q&f=false) Accessed on 22/February 2017

[78] A E Yamin, 'The Right to Health under International Law and its relevance to the United States' (2005) 95 (7) American Journal of Public Health, 1156-61

[79] ibid

[80] Johns Hopkins Coronavirus Resource < https://coronavirus.jhu.edu/map.html> Accessed 15 November 2020

[81] Obasesam Okoi &Tatenda Bwawa, 'How Health inequality affect responses to the COVID-19 pandemic in Sub-Saharan Africa' (2020)135 <https://www.sciencedirect.com/science/article/pii/S0305750X20301935> Accessed 7 July 2020

1.03 The Concept of Justiciability

Justiciability is one of the principles that determine the ideal content of the rule of law and it is an important concept that delineates the scope of judicial review.[82] Justiciability is very important to human rights as it contributes to the determination of the meaning of a right and forms part of the strategy for the implementation, realisation, and protection of such rights.[83]

Justiciability as a judicial doctrine can be directed or displaced if a constitution or a legislative body expressly directs that particular provision as justiciable or non-justiciable.[84] This means that the issues capable or incapable of judicial determination can be answered in terms of the country where they arise depending upon an appreciation of the nature and limits of the judicial function as stipulated in the country's constitution.[85]

The concept of justiciability can be defined, on the very basis of three normative preconditions cumulatively required. Firstly, there is a claim guaranteed as of legal rights (i.e., legal basis). Secondly is the right of accessing the court of law (i.e., whether the judiciary or any other body is empowered to entertain the rights in question) and thirdly, the consequence component of justiciability which aptly talks about the right to get a remedy for the violation (i.e. the right to remedy).[86] These elements are cumulative and if one element is missing, it is difficult to see the right as justiciable.[87]

Thus, for economic and social rights to be justiciable, they should embrace the three cumulative elements: claimable rights, access to court, and a remedy which may be judicial or quasi-judicial or an administrative review.[88] There are wider preconditions to justiciability; they are the existence of rule of law, democracy, and the willingness of a government to implement its laws. These elements will be analysed further in the thesis.

The inclusion of both judicial and quasi-judicial or administrative remedies in the analysis of justiciability is vital to any contemporary implementation of the principle of effective remedies to ESC rights.[89] Increasingly, domestic law provides for a diversity of such procedures,

[82] T Endicott, 'The Reason of Law' (2003) 48 American J Jurisprudence 83-1
[83] ibid
[84] Dominic McGoldrick, 'The Boundaries of Justiciability' (2010)59 (4) ICLQ 981-1019
[85] ibid
[86] ibid
[87] ibid
[88] Bruce Porter, 'Justiciability of ESC Rights and the Right to Effective Remedies: Historic Challenges and New opportunities' (2008) Beijing Paper < http://www.socialrights.ca/documents/beijing%20paper.pdf > Accessed 03 March 2017
[89] ibid

particularly in the sphere of socio-economic entitlement systems even where the ESC rights are not directly incorporated into domestic law.[90]

Particularly on the right to health, Ssenyonjo defines the term justiciability as the possibility of aggrieved individuals or groups raising claims involving alleged violations of the right to health for determination/review before domestic judicial or quasi-judicial organs. Also, that justiciability refers to the right to bring cases concerning the violations before international judicial and quasi-judicial organs.[91]

However, less attention has been given to the justiciability of the ESC rights in general compared to civil and political rights. [92] The international community has come to acknowledge that the two categories of rights are indivisible, interrelated, and interdependent and consequently, has reiterated the need to respect and to implement all rights irrespective of their classification.[93] In its General Comment No 9 (1998), the ESCR Committee declared:

> … It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent…[94]

[90] Bruce Porter (n 88)
[91]Manisulli Ssenyonjo*, Economic, Social and Cultural Rights in International Law* (Oxford and Portland, Oregon 2009) 540
[92] ibid
[93]J.K. Mapulanga-Hulston (n 64)
[94] ESCR Committee' the domestic Application of the Covenant' General comment No 9 UN Doc E/C 12/1998/24 3 December 1998 para 10

States are reminded of their obligation to give full effect to the ESC rights under international treaties. But doubts remain with respect to the implementation of the ESC rights at most domestic level and arguments remain as to whether courts can legitimately pronounce themselves on ESC rights issues.[95] The focus of this work is on the problem with the right to health in Nigeria.

Justiciability is conceived as a function of compliance and the theory of compliance is adopted to form a theoretical framework. This framework explains the reasonable steps states are required to take in response to specific directives as provided in international human rights treaties, court orders, or a quasi-judicial body like treaty-monitoring bodies. This thesis intends to contribute to the limited literature on the relationship between state compliance and the justiciability of the right to health.

1.04 Justiciability of the Right to Health in Nigeria

Nigeria has shown its commitment towards achieving human rights goals by the adoption and ratification of international and regional human rights instruments that define the content of the right to health as well as other rights.[96] The international treaties that provide for the protection of the right to health to which Nigeria is a signatory are the CESCR,[97] the International Convention on Civil and Political Rights ('ICCPR')[98], the Convention on the Elimination of All Forms of Racial Discrimination ('CERD'),[99] the Convention on the

[95] ESCR Committee (n 94)

[96] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) , the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 2020) UNTS 1577 UNTS 3 (CRC) was ratified by Nigeria in March 1991,the International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966 , entered into force 3 January 1976) 993 UNTS 3 (CESCR) was ratified by Nigeria in July 1993, the Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981)1249 UNTS 1 (CEDAW) was ratified by Nigeria in 1985, the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006 , entered into force 3 May 2008) 2515 UNTS 3(CRPD) was ratified in Nigeria in October 2010. The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November) (1999) CAB/LEG/24.9/49 (ACRWC) was ratified by Nigeria in 2000 and African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter or Banjul Charter) was incorporated into Nigerian Law as the Charter on Human and Peoples' Right(Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990

[97] The International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR) was ratified by Nigeria in July 1993

[98] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) was ratified by Nigeria on 29th July 1993

[99] The Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 21 March 1969) 660 UNTS 1 (CERD) was ratified in Nigeria on the 16thOctober, 1967

Elimination of All Forms of Discrimination against Women ('CEDAW'),[100] the Convention on the Rights of Persons with Disabilities of 2006 ('CRPD') and the Convention on the Rights of Children ('CRC').[101] At the regional level, we have the African Charter on Rights and Welfare of the Child ('ACRWC')[102] and the African Charter on Human and Peoples' Rights ('ACHPR').[103]

By ratification of the treaties on the right to health, States have an obligation to promote and protect the right to health.[104] The Scottish philosopher Tom Campbell states that '[w]orking out the specific implications of general statements of human rights is a necessary move if the rhetoric of human rights is to have a major impact on the resolution of social problems.'[105]

Consequently, Nigeria is under an obligation to respect, protect, and fulfil the right to health guaranteed under these human rights treaties. Also, the Nigerian Constitution in chapter II declares that the Nigerian State is founded on the ideals of freedom, equality, and justice.[106] Governmental action is urged to be humane and the independence, impartiality, integrity, and accessibility of the Nigerian courts are guaranteed.[107] Accordingly, by section 17(3), the State is required to direct its policy towards ensuring that the health, safety, and welfare of citizens are safeguarded and not endangered or abused and that there are adequate medical and health facilities for all.[108]

The socio-economic rights including the right to health as contained in chapter II of the Nigerian Constitution do not entitle citizens to actionable claims and these rights are said to be non-justiciable.[109]This is manifest in section 6(6)(c) of the Constitution where the judicial powers of Nigerian courts are explicitly ousted and declared not to 'extend to any issue or

[100] The Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981)1249 UNTS 1 (CEDAW)was ratified by Nigeria in 1985
[101] The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 2020) UNTS 1577 UNTS 3 (CRC) was ratified by Nigeria in March 1991
[102] The African Charter on the Rights and Welfare of the Child, 1999 was ratified by Nigeria in 2000 African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990)
[103] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) was incorporated into Nigerian Law as the Charter on Human and Peoples' Right (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990
[104]V A Leary, 'The Right to Health in International Human Rights Law.' (1994) 9 (1) Health and Human Rights, pp. 24–56. JSTOR, JSTOR, www.jstor.org/stable/4065261. 40
[105] Tom Campbell, Introduction: Realizing Human Rights, (Campbell, Goldberg, McLean and Mullen, eds.), Human Rights from Rhetoric to Reality 1986), 3
[106]Constitution of the Federal Republic of Nigeria 1999, s 17
[107] ibid
[108] ibid, s 17(3)
[109] ibid, s 6(6)(c)

question as to whether any act or omission by any authority or person or as to whether any law or judicial decision conforms with the fundamental objectives and directive principles of state policy set out in chapter two of this Constitution'.[110] This constitutional limitation makes it difficult to judicially enforce any socio-economic rights and to determine whether the Nigerian government is fulfilling its international obligations as prescribed by the international treaties and regional treaties that have been ratified.

In making a case for the justiciability of the right to health in Nigeria, this thesis challenges the notion that since the Nigerian Constitution has declared the right to health as a fundamental objective and directive principle of state policy, the right to health is therefore, non-justiciable because there are other avenue to make the right to health a justiciable right in Nigeria.

The Nigerian jurisprudence offers no greater protection against human rights violations in the protection of the human right to health other than the safeguards accorded in the Nigerian Constitution.[111] The thesis adopts the compliance theory of human rights to analyse the potential of the justiciability of the right to health and argues that a holistic approach is required to internalize and best implement the right to health in Nigeria.

The thesis argues that the interpretation of the Nigerian Constitution and the acceptance by the judiciary that all socio-economic rights are non-justiciable contradicts the international obligations towards the right to health that Nigeria has voluntarily accepted by ratifying and domesticating most of the international treaties that recognises the right to health.[112]The thesis further argues that the justiciability of the right to health can go beyond constitutional limitations by virtue of the ratification and enforcement of the African Charter. Thus, justiciability can be useful to an extent in the realisation of health rights in Nigeria.[113] Since Nigeria is bound by the obligations to respect, protect and fulfil its right to health to the people, there is an urgent need to find a way to ameliorate the unwarranted hardship being suffered by the people either through judicial or quasi-judicial means.

[110] Constitution of the Federal Republic of Nigeria 1999, s 6(6)(c)

[111]Andra le Roux-Kemp, 'Realising the Right to Health in Nigeria: Incongruities between International Obligations and Domestic Implementation' (2014)2 (1) Africa Nazarene Law Journal 134

[112] ibid

[113] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (the African Charter Act) Cap.10, Laws of the Federation of Nigeria 1990 with a commencement date of 17 March 1983

Also, there are variations among states in their level of compliance with international human rights laws.[114] Hence, this thesis reviews the theory of compliance to analyse whether the justiciability of the right to health can lead to better protection of the right in Nigeria. The Nigerian State's violation of the human rights norms regarding the right to health needs to be urgently addressed.[115]

1.1 Statement of Problem

Nigeria has a relatively large economy with enormous potential. Nonetheless, the health care system has recorded unsatisfactory performance in quality delivery for a very long time.[116] Medical services are still not accessible to many people, especially the poor and the vulnerable. The Nigerian government has failed in providing healthcare services and protecting the right to health of its citizens.[117]The government has refused to comply with its minimum obligation as required by international and regional human rights treaties. The deplorable state of health care in Nigeria can only be upturned by a pragmatic approach, which aligns with ensuring accountability on the part of the government for its compliance with fulfilment, respect, and protection obligations as required.

Particularly, this thesis analyses why Nigeria is confronted by entrenched human rights challenges despite ratifying all the core international human rights treaties. Nigeria is still said to have one of the worst human rights records in the world.[118] The judicial attitude to socio-economic rights litigation is characterised by great caution and subtle passivity just because of the constitutional limitation of these rights.[119] As a consequence, Nigerian jurisprudence on socio-economic rights is described as sparse, episodic, and incoherent.[120]

Notwithstanding the constitutional limitation on the justiciability of ESC rights including the right to health, the argument of the non-justiciability of these rights is no longer sustainable. A

[114] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikking, (eds), The Power of Human Rights: International Norms and Domestic Change. (Cambridge University Press 1999)
[115] Andra le Roux-Kemp (n 111)
[116] B A Ushie and others, 'Patient's knowledge and perceived reactions to Medical errors in a Tertiary Health facility in Nigeria' (2013) 13(3) Afri Health Sci < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3824428/ > accessed 14 January 2017
[117] Human Rights Watch 'World Report' (2019) < https://www.hrw.org/world-report/2019/country-chapters/nigeria > Accessed 09 January 2020
[118] ibid
[119]A Scott-Emuakpor, 'The Evolution of Health Care Systems in Nigeria: Which Way Forward in the Twenty-First Century' (2010) 51, Niger Med J,53-65
[120] ibid

more proactive approach to claims arising out of socio-economic rights violations needs to be embraced. This includes a better understanding of what domestic judges can do under constitutional constraints that requires an appropriate and consistent interpretation of the laws and adequate policies and implementation mechanisms.[121] Perhaps this could act as a tonic to rouse the arms of government charged with the responsibility of the protection of human rights from their apathetic attitude to the 'rights of the people'.[122]

Generally, the objections to the justiciability of ESC rights have for a long time effectively precluded many judicial institutions from playing their role in the protection of ESC rights and in ensuring that victims of all human rights violations are guaranteed access to effective remedies.[123] The objections are based on the misconceptions on the nature of the rights and also the legitimacy of judicial or quasi-judicial bodies to adjudicate upon them.[124]

For victims of a violation of the human right to health, it is important that a judicial, a quasi-judicial body or any administrative body can adjudicate their complaint in this regard. Justiciability can, to an extent, contribute to the protection and realisation of the right to health and further determines the meaning of the right.[125] This means that justiciability with other factors like the political will to enforce the right and genuine commitment on the part of the government to implement the right would lead to the realisation of the right to health as conceived under international human rights law.

To comply with international human rights laws, there has to be a way to interpret the laws such that it makes sense to the citizens in distress and assure everyone of equal justice.[126] The absence of an effective method of recognizing justiciability for the right to health narrows the range of mechanisms available for victims of the rights violations to receive remedies, it weakens the accountability of States and also undermines deterrence and fosters impunity for violations.[127]

[121] David Kennedy, 'A Critique of Adjudication: Fin De Siecle' (2001) 22 Cardozo L Rev, 991
[122] ibid
[123] A Scott-Emuakpor (n 119)
[124] ibid
[125] H D Kutigi, 'Towards Justiciability of Economic, Social, and Cultural Rights in Nigeria: A Role for Canadian-Nigerian Cooperation?' (2017) 4 (7) The Transnational Human Rights Review, 124-145
[126]Beetham David, 'What Future for Economic and Social Rights in Human Rights' (2003) The International Library of Essays in law and legal theory, 234
[127] ibid

This thesis intends to stimulate a reflection on the sensitive and significant issue of the non-justiciability of the right to health in Nigeria. The thesis argues that the justiciability of the right to health may serve as a mechanism towards the achievement of shared and well-defined priorities of the enjoyment of the right to health.

1.2 Thesis Question

The question arising from the scope of this thesis is;

What is the potential role of justiciability in fostering a better enjoyment of the right to health in Nigeria as prescribed under international laws?

1.3 Major Aims/ Objectives of the Thesis

In trying to answer the main thesis question, the following objectives are pursued;

1. To explore the compliance with the right to health under the Nigerian Legal system and then analyse the challenges and hurdles to the protection of the right in Nigeria.
2. To uncover the potential role of justiciability in fostering compliance with the right to health in Nigeria.
3. To identify and examine the impact of justiciability on the protection of the right to health.
4. To determine and analyse whether the justiciability of the right to health would likely lead to an increase in the enjoyment of the right to health in Nigeria.

1.4. Contribution to Existing Knowledge

While the study of the right to health in Nigeria has not been richly explored by literature, some authors that explored the topic have mainly focused on analysing the key public health issues impacting upon the actualization of the right to health in Nigeria and given reports on the numerous factors responsible for the poor state of health in Nigeria.[128] However, no author has focused on determining the potential role of justiciability in connection with compliance of the right to health in Nigeria.

Therefore, this research significantly contributes to the existing knowledge on the justiciability of the right to health in Nigeria in the following innovative ways:

- It established the potential role of justiciability in fostering compliance with the right to health in Nigeria.

[128] See Oyeniyi Ajigboye (n 1), O Nnamuchi, 'Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria' (2008) 52 (1) Journal of African Law, 9 and

- By analysing the connection between the theory of compliance and justiciability, the thesis established that the justiciability as a function of compliance can change a State's behavior and lead to compliance with human rights law.
- An analysis akin to a comparative analysis is carried out on the justiciability of the right to health in India, South Africa and Colombia to give insights that would generate new options and possibilities on how Nigeria can develop its jurisprudence on the right to health.

1.5 Method of Analysis

This thesis analyses the meaning and perception of the right to health in detail and the legal framework of the protection of the right to health in general and specifically in Nigeria, i.e. a description of the norms that currently applies to it. Thus, it includes a literature thesis as well as a study of relevant human rights norms, doctrines, and principles. This thesis uses a set of interpretative tools and methods such as judgments, reports of committees, statutory materials to bring order and to assess the potential role of justiciability in fostering compliance with the right to health in Nigeria.

The thesis adopts a doctrinal methodology. This means that some of the thesis is based on analysing the legal rules under the Nigerian human rights laws, the African Charter and the international treaties on the right to health and their connections or disjunctions via examination of the cases on the justiciability of the right to health as well as existing literature. The doctrinal methodology makes a legal thesis distinctive and involves rigorous analysis and creative synthesis, making the connections of seemingly disparate doctrinal strands from an inchoate mass of primary materials.[129] This methodology enables the thesis to critically analyse the meanings and implications of the rules and the principles which underpin the theory of the justiciability of the right to health.

A distinction in legal sources is made between the level of international human rights law, regional human rights, and domestic law by which is referred to the United Nations (UN), the Africa Union (AU), and Nigerian legal system respectively. It is important to state that the body overseeing the implementation of the human right to health care at the international human rights level is the Committee on Economic, Social, and Cultural Rights (the CESCR Committee). At the regional level, this role is assigned to the African Commission on Human

[129] Dawn Watkins, *Thesis Methods in Law* (Routledge 2013) 11

and People's Rights while the Nigerian Human Rights Commission oversees the implementation of human rights within Nigeria. An analysis is made on the role of these bodies towards the justiciability of the right to health.

The main advantage of using the doctrinal approach to examine this subject area of the thesis is to provide a sound structural basis from which the thesis can proceed and provide continuity and coherence on the subject matter.

Also, this research draws on international law theory of compliance through the five-phase spiral perspective, the Courtney Hillebrechts perspective, the transnational legal process theory, and the theory of acculturation approaches to determine the best theoretical approach to evaluate the potential role of the justiciability in fostering compliance with the right to health in Nigeria.

To elucidate the significance of the concept of the justiciability of the right to health, this thesis relies on a comparative method of law by exploring the practice in three selected jurisdictions which are India, South Africa, and Colombia. These case studies intend to reveal how the constitutional limits in Nigeria can be overcome with resources of internal constitutional legal interpretation as exemplified by these three jurisdictions.

The insights from these countries would generate new options and possibilities in the Nigerian jurisdiction, taking the right to health beyond rhetoric and towards the practical success of the realisation of the rights in Nigeria.[130]This reflective approach is adopted bearing in mind that the thesis does not focus its question on comparing legal systems between Nigeria and the other jurisdictions but rather an analysis to determine the potentials of justiciability in fostering compliance with the right to health in Nigeria.

The aim of this comparative method of law is usually to improve and understand one's domestic legal system by analysing how other jurisdictions have dealt with the same problem.[131]The reason for analysing the jurisprudence on the justiciability of ESC rights and specifically the right to health in South Africa and India is because these two countries apart from being common law jurisdictions like Nigeria are somewhat similarly structured in terms of their socio-economic system. Columbia is a developing country and resource rich just like

[130]Andra le Roux-Kemp (n 111)

[131]Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) OJLS 399

Nigeria, but its experience shows how the power of the people to litigate can help secure the protection of their right to health.[132]

Also, the Indian Constitution just like the Nigerian Constitution provides for socio-economic rights under its directive principles of state policy (DPSP),[133]while the South African Constitution has bolding ESC rights as justiciable rights in its constitution.[134] Colombia, India, and South Africa have developed their jurisprudence on the justiciability of ESC rights and thus analysing the system in these jurisdictions will show the different conceptions of what is meant by the justiciability of the human right to health. Nigeria can also gain lessons from their experience as their good practice and shortcomings will be analysed and used to illustrate and inform the major stakeholders on how justiciability can improve the right to health in Nigeria.

In light of the approach taken, the thesis methodology applied is mostly doctrinal. It should be admitted that the quality of available treaties, statutes, laws, cases, data, reports, and published theses related to the issues are enough to rely exclusively on textual analysis in the context of the present thesis. However, it is admitted that unlike the use of methodology in sciences, it is difficult to describe the process of legal analysis as being dictated by a methodology.[135] This is because the legal thesis process involves an exercise of reasoning and a variety of techniques often at a subconscious level with the aim of constructing an argument that is convincing in accordance with the law resources available.[136]

1.6 Thesis Structure

Chapter one of the thesis is the general introduction and contains the statement of the problem, thesis question, the aims and objective of the thesis, the justification, the method of analysis, and the general background of this study. Chapter two analyses the legal meaning and scope of the justiciability of the right to health in Nigeria and then analyse the components of the right to health as interpreted under international human rights law, general comments, case laws, and academic and other literature. Furthermore, chapter 2 analyses the elements of

[132] Arrieta-Gómez & Aquiles Ignacio, 'Realizing the Fundamental Right to Health through Litigation: The Colombian Case." *Health and human rights* vol. 20,1 (2018), 133-145
[133]Constitution of India 1950, Article 37
[134] Constitution of the Republic of South Africa 1996, s 26-31
[135]Paul Chynoweth, 'Legal Thesis' in Andrew Knight and Les Ruddock (eds), Advanced Thesis Methods in the Built Environment (Wiley-Blackwell, 2008) 34
[136]ibid

justiciability and the obligations expected from a State towards the protection of the right to health.

Chapter three focuses on analysing the level of justiciability of the right to health in Nigeria by analysing the implementation of the right to health particularly the practical measures laws, policies, practices, interventions designed to ensure its realisation of the right to health in the country. This chapter also attempts to provide the answer to the question, 'to what extent can the right to health be justiciable under the Nigerian law'.

Chapter four introduces a theoretical framework for the thesis. It reviews different perspectives to the human rights theory of compliance and connects it to the understanding of the concept of justiciability of the right to health. It reviews the compliance theory through the five-phase spiral perspective, the Courtney Hillebrechts perspective, the transnational legal process theory, and the theory of acculturation approaches to determine the best theoretical approach to evaluate the potentials of the justiciability of the right to health.

Chapter five will be exploratory, it analyses the justiciability of the right to health in three selected jurisdictions, India, South Africa, and Colombia. The purpose of the case studies is to elucidate how justiciability under different circumstances can enhance the protection of the right to health. Chapter six will critically discuss the legal conditions of success of the justiciability of the right to health. It examines the role of justiciability in the implementation of economic socio and cultural rights and then examines the effect and implication of justiciability of the right to health. It aims at assessing how justiciability can foster the protection of the right to health in Nigeria.

Chapter seven will conclude the work.

CHAPTER TWO: THE CONCEPTUAL CLARIFICATION OF THE BASIS FOR THE JUSTICIABILITY OF THE RIGHT TO HEALTH

2.0 Introduction

Generally, the justiciability of ESC rights is a question of legal creativity and political will on the part of a state as well as a case of judicial activism to fulfil socio-economic rights.[137] Therefore individuals would not be guaranteed the protection of their ESC rights merely because the international human rights treaties or the treaty monitoring bodies indicate that they are justiciable rights.[138]

The ultimate determinant of justiciability is what a particular state has or is willing to do at the domestic level.[139] The importance of the justiciability of the right to health cannot be overemphasised. In Aristotle's words: 'If we believe that men have any personal rights at all as human beings, they have an absolute right to such a measure of good health as a society, and society alone is able to give them.'[140] How then can the society guarantee and protect the right to health of its people? The crux of this thesis is to explore the potential of the justiciability in fostering compliance with the right to health in Nigeria.

To address the main thesis question, it is important to first analyse the legal meaning and scope of the justiciability of the right to health in Nigeria and then examine the components of the right to health as interpreted under international human rights law, general comments, case laws, and academic and other literature. This chapter also scrutinises the elements of justiciability and the obligations expected from a State towards the protection of the right to health.

[137] Manisulli Ssenyonjo (n 91) 47
[138] ibid
[139] ibid
[140] Walter P. Von Wartburg, 'A Right to Health?: Aspects of Constitutional Law and Administrative Practice, in The Right to Health as a Human Right 112 (Ren6-Jean Dupuy, ed., 1979) (a paper submitted to the July 27-29, 1978 Workshop on the right to health sponsored by the Hague Academy of International Law) in S D Jamar, 'The International Human Right to Health'(1994-1995)22(1) Southern University Law Review 1, 38

2.1 The Human Rights Treaties and the Justiciability of the Rights under the Nigerian Human Rights Law

The right to health was for the first time laid down in the Constitution of the World Health Organization (WHO) of 1946.[141] The rights enshrined in the Constitution are described in the 9 principles of the Preamble that declare the right to health 'as a right of every human being without distinction of race, religion, political belief, economic or social condition'.[142] The first principle defines health as 'a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity'.[143]

The Constitution of the WHO was a breakthrough in the field of international health and human rights and inspired the further elaboration of a right to health in human rights documents.[144]After its adoption, the right to health was laid down in the 1948 Universal Declaration of Human Rights (UDHR).

Article 25(1) of the 1948 Universal Declaration of Human Rights (UDHR) states that:

> 'Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'[145]

Furthermore, the UDHR provides for equal enjoyment of this special care and assistance by all children, whether born in or out of wedlock.[146]The Declaration was not a treaty and it was at the time not believed to create legally binding obligations.[147] It was not ratified by States but approved by the General Assembly, and the UN charter did not give the General Assembly the power to make international law.[148]

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[141] The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (Off. Rec. World Health Org., 2, 100), and entered into force on 7 April 1948.

[142] ibid

[143] The Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

[144] ibid

[145] Ibid

[146] ibid

[147]S P Marks, 'The Emergence and Scope of the Human Rights to Health' in Jose M Zuniga et al (eds) in *Advancing the Human Rights to Health* (OUP 2013) 3-23

[148] ibid

In 1966, the provisions of the UDHR were laid down in two legally binding International Covenants that cover the civil and political rights and economic, social, and cultural rights enshrined in it: the ICCPR and the CESCR.[149] The UDHR with these two covenants form the international bill of human rights which constitutes the foundation of the international normative regime for human rights.[150]

The right to health is laid down by the CESCR and is the most authoritative interpretation of the right to health in international human rights law.[151] Article 12 of the CESCR provides that;'[152]

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation 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.

The approach to the drafting of the CESCR differed from that of the UDHR in treating the right to health on its own rather than within an enumeration of components of the right to an adequate standard of living. The article went well beyond health care to cover a positive definition of health and enumerated illustrative steps to be taken to realise this right.[153]

[149]The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

[150] B C A Toebes, 'Towards an Improved Understanding of the International Human Right to Health' (1999)21 (3) Human Rights Quarterly, 661-679

[151] Ibid

[152] The International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR)

[153] ibid

According to A. Chapman, Article 12 of the CESCR contains the fullest and most definitive conception of the right to health[154]. The provision of the article protects the right to health to the highest attainable state of physical and mental health which is recognised as a human right in several international and regional human rights instruments. Furthermore, the expert committee responsible for interpreting the CESCR has clarified the meaning of the right to the highest attainable standard of health by making reference to observations which include:[155]

- The rights to human dignity, the prohibition against torture, privacy, and access to information address integral components of the right to health.
- The right to health contains freedoms such as the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from non-consensual medical treatment and experimentation.
- The right of accessibility to health care includes the right to seek, receive and impart information and ideas concerning health issues.
- The right of acceptability of health care provides that all health facilities, goods and services must be respectful of medical ethics.
- The obligation to protect the right to health includes the duty of States to ensure that medical practitioners and other health professionals meet appropriate ethical norms.
- The right of accessibility includes the right to access health care without discrimination, especially to the most vulnerable and marginalized sections of the population like the ethnic minorities, persons with disabilities, and persons with HIV/AIDS.

At the African regional level, the adoption of the African Charter on Human and Peoples' Rights in 1981 was the beginning of a new era in the field of human rights in Africa.[156]The charter came into force on 21 October 1986 and now has 54 State parties.[157] The charter was inspired by the Universal Declaration of Human Rights. The African Charter reflects a high

[154] A Chapman, 'The Right to Health: Conceptualising a Minimum Core Content', Working Paper for the Day of General Discussions on the Right to Health, 6 December 1993, CESCR, 9th Session, UN Doc E/C.12/1993/WP.24 313

[155] ibid

[156]Bahar Jibriel, 'The Justiciability and Enforcement of the Right to Health under the African Human Rights System' (2012) 1(2) Haramaya Law Review 29-50

[157] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter)

degree of specificity due in particular to the African conception of the term 'right' and the place it accords to the responsibilities of human beings.[158]

The right to health is among those ESC rights mentioned by name in Article 16 and it affirms that:

> …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 their people and to ensure that they receive medical attention when they are sick.[159]

It is noted that some of these rights in the African Charter are drafted along the same lines as CESCR. However, the provision in Article 16 on the right to health is not as extensively drafted as in the CESCR. Their construction could still lead to their understanding in an extensive manner.[160]

The difference between the African Charter and CESCR reflects a desire on the part of the drafters of the African Charter to produce an exclusively African instrument.[161] They wanted to elaborate on the normative understanding of human rights, however, the African states are also parties to the global instruments and considerable jurisprudence has been generated on these global instruments and this compels the African Commission, as well as the African Court, to refer to the global instruments and jurisprudence.[162]

Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women Protocol) is said to contain one of the most comprehensive provisions on the right to health and sexual and reproductive health under international human rights law.[163] It provides as follows:[164]

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[158] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter)

[159] Article 16 of the African Charter African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter)

[160] ibid

[161] Christopher Mbazira**, '**Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides', (2006) 2 AHRLJ 358-381

[162] ibid

[163] Ebenezer Durojaye, 'The Approaches of the African Commission to the Right to Health under the African Charter' (2013) 17 Law and Democracy Development, 397

[164] Article 14(1) and (2) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women Protocol) adopted 01 July 2003

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
   a) the right to control their fertility;
   b) the right to decide whether to have children, the number of children and the spacing of children;
   c) the right to choose any method of contraception;
   d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
   e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
   f) the right to have family planning education.
   2. States Parties shall take all appropriate measures to:
   a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
   b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
   c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

These provisions are more detailed than those of the African Charter and address more contemporary health challenges facing Africa.[165] This is the first time an international human rights instrument recognised a woman's right to self-protection in the context of HIV is guaranteed.[166] The provision is very insightful in addressing women's vulnerability to the HIV pandemic which studies have shown that the women are the majority of those infected with

[165] Ebenezer Durojaye, (n 163)
[166] ibid

HIV in Africa.[167] The reason for women's vulnerability to HIV/AIDS in Africa has been linked to an effect of acts of violence and women's low status in society coupled with cultural and religious practices that discriminate against women.[168]

Article 14 for the first time explicitly guarantees a woman's right to sexual and reproductive health, including the right to decide about her fertility, access to contraception services, and the right to abortion on certain grounds.[169] It has been estimated that unsafe abortions constitute 13% of all maternal deaths and thus a great threat to the lives of many women in Africa.[170] It must be stated that abortion even at international, regional and national levels has always generated a lot of controversies. For instance, during the Beijing Platform of Action, an attempt to recognise abortion as a human rights issue for women failed due to strong opposition by religious 'fundamentalists'. [171]

The inclusion of the right to abortion is a major victory that the African Women's Protocol recognises with limitations.[172] With this provision, the African Women's Protocol becomes a pacesetter at international law regarding an explicit recognition of abortion rights for women[173]. It remains unclear how this right will be realised given that many African countries still apply restrictive abortion laws.[174] However , it has been argued that while the inclusion of a provision on abortion in the African Women's Protocol deserves commendation, its half-hearted reform is not faithful to the overall aim of the Protocol to advance women's rights.[175]

Article 14 of the African Charter on the Rights and Welfare of the Child (Children Rights Charter) also recognises the right to health and health services for children. It provides thus;[176]

[167] UNAIDS, AIDS Epidemic Report (2012)
[168] UNAIDS, UNFPA, UNIFEM, Women and HIV/AIDS: Confronting the crisis (2004)
[169] Article 14(1) and (2) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women Protocol) adopted 01 July 2003.
[170] WHO, The World Health Report 2005 – make every mother and child count (2005)
[171] ibid
[172] Article 14(2) (c) states the instances when medical abortion is allowed that is in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.
[173] Charles Ngwena 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level' (2010) 110 International Journal of Gynaecology and Obstetrics 163–166.
[174] ibid
[175] Charles Ngwena, 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 Human Rights Quarterly at 843
[176] Article 14 of the African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November) (1999) CAB/LEG/24.9/49 (ACRWC) stipulates that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

2. State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:

(a) to reduce infant and child mortality rate;

(b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) to ensure the provision of adequate nutrition and safe drinking water;

(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;

(e) to ensure appropriate health care for expectant and nursing mothers;

(f) to develop preventive health care and family life education and provision of service;

(g) to integrate basic health service programmes in national development plans;

(h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;

(i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of basic service programmes for children;

(j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

This provision is very detailed and affirms the right to health and underlying health determinants to support and protect children and this article was drafted in line with the provision of Article 24 of the Convention on the Rights of the Child which states thus;[177]

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and

[177] Article 24 of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 2020) UNTS 1577 UNTS 3 (CRC) was ratified by Nigeria in March 1991

rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realisation of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

The importance of children's rights cannot be overemphasised and these conventions significantly focus on the need of states to place special emphasis on primary and preventive health care for children.[178] Every child thus has a right to the enjoyment of the highest possible standard of health and to have access to healthcare and medical services.

More so, there are various UN human rights treaties that have affirmed the right to health they are: International Convention on the Elimination of All Forms of Racial Discrimination of 1965

[178] Article 24 of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 2020) UNTS 1577 UNTS 3 (CRC) was ratified by Nigeria in March 1991

(CERD); it affirms the right to public health, medical care, social security, and social services.[179] The Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) affirms the right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction and to eliminate discrimination against women in the field of healthcare to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning and ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.[180]

The Convention on the Rights of the Child of 1989 (CRC) affirms the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, followed by an enumeration of six measures to 'pursue full implementation of this right'.[181] The Convention on the Rights of Persons with Disabilities of 2006 (CRPD) also affirms that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability, followed by an enumeration of six measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.[182]

From the above, it is noted that in International human rights, the right to health is closely related to and dependent upon the realisation of other human rights. Considering the right to health as not only the right to health care services, goods and facilities, but also the right to underlying determinants of health is clear indication of the fact that the right to health is dependent on and contributes to the realisation of other human rights including the rights to food, water, housing, work, education, life, non-discrimination, privacy, access to information, the prohibition against torture, among others.[183]

It is necessary to analyse the scope and nature of the right to health under International Human Rights law.

[179] Article 5 (e) (iv) of the Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 21 March 1969) 660 UNTS 1 (CERD)
[180] Articles 11.1 (f) and 12 the Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981)1249 UNTS 1 (CEDAW)
[181] Article 24 CRC
[182] Article 25CRPD
[183]Manisulli Ssenyonjo, (n 91) 540

2.2 The Scope and Nature of the Right to Health in International Human Rights Law

Human rights treaties are instruments for compelling governments of countries to fulfil certain basic entitlements and expectations that people have, either through enforcement procedures where they exist or through the exertion of public pressure on governments.[184]

The right to the highest attainable standard of health which is also referred to as 'the right to health' was first reflected in the WHO Constitution (1946)[185] and reiterated in the 1978 Declaration of Alma Ata and the World Health Declaration adopted by the World Health Assembly in 1998.

The right to health has developed in recent times and the key developments include the adoption of general comments by human rights treaty bodies. The most important of these are General Recommendation 24 of the Committee on the Elimination of Discrimination against Women (1999), General Comments No. 14 (2000) and No. 22 (2016) of the Committee on Economic, Social and Cultural Rights, and General Comment No. 15 of the Committee on the Rights of the Child (2015), all of which focus on either the right to health or parts of the right to health.[186]

Notably, in 2002 for the first time, the Human Rights Commission appointed a Special Rapporteur on the right to the highest attainable standard of health who endeavoured to apply the treaties and general comments to many themes, states, and other duty-bearers and this was an achievement in the promotion and protection of the right to health.[187]

The right to health does not mean the right to be healthy and free from illness, nor does it mean that poor government must put in place expensive health services for which they have no

[184] E D Kinney, 'The International Human Right to Health: What does it mean for our Nation and the World?' (2001)34, Indiana Law Review 1456 to 1475 -

[185]Constitution of the World Health Organization. July 22, 1946. art. 2(v). The Constitution was adopted by the International Health Conference in 1946

[186]Committee on the Elimination of Discrimination against Women, General Recommendation No. 24, Women and Health. UN Doc. CEDAW/C/1999/I/WG.II/WP.2/Rev.1. 1999Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health. UN Doc. E/C.12/2000/4. 2000Committee on Economic, Social and Cultural Rights, General Comment No. 22, The Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc. E/C.12/GC/22. 2016Committee on the Rights of the Child, General Comment No. 15, The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24) UN Doc. CRC/C/GC/15. 2013

[187]Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) Health and Human Rights 109-130

resources. Nevertheless, it does require governments and public authorities to put in place policies and action plans which will lead to available and accessible health care for all within the shortest possible time.[188]

Also, there is confusion and disagreement over what is the most appropriate term to use to address health as a human right but there appears to be no controversies on the fact that every human being should benefit from the right to health.[189] There are therefore different terms used by various author to describe the right to health, the terms commonly used in human rights and health law literature are the 'right to health,' the 'right to healthcare' or to 'medical care,' and to also the 'right to health protection.'[190]

Regardless of whether a country is developed, under-developed or semi-developed, health is considered an important sector of the economy.[191] The right to health has been defined as the right to an effective and integrated health system that is accessible to and affordable by all members of society.[192] Underpinned by the right to health, an effective health system is a core social institution, no less than a court system or a political system.[193]

Health is also indispensable for the enjoyment of other human rights. Every human has the right to the highest achievable standard of health conducive to living a life of dignity. As already discussed, the right to health being a universally recognized human right is stipulated in several international human rights laws.

The scope and nature of the right have been the subject of debate within the international community, and the means for achieving it remain similarly contested.[194]An attempt to provide an exact and universal definition for the right to health is an impossible task. The essence of what the right to health entails, who the rights-holders are, how the right is enforced, and what the actual and direct effect of this right is on the lives of people, all depend on the specific

[188] Sarah Robinson in Gro Harlem Brundtland, '25 Questions and Answers on Health and Human Rights' (2002) 1, Health and Human Rights Publication Series 1,36
[189] B Toebes (n 150)
[190] ibid
[191] O A Ayanleye, 'Women and Reproductive Health Rights in Nigeria' (2013) OIDA International Journal of Sustainable Development 131
[192] ibid
[193] Ibid 132
[194] L N Kingston et al, 'Debate; Limitations on Universality: The Right to Health and the Necessity of Legal Nationality' (2010) 10 (11) BMC International Health and Human Rights

understanding and interpretation of what the right to health actually entails.[195] All the definitions thus imply a legal obligation on states.

No government can actually guarantee a person's absolute health status. The right to health is usually described in terms of creating opportunities for people to reach their full health potential, either through a right of access to health care or through rights to the underlying conditions necessary for health, such as clean water, adequate food etc.[196]

The UN Committee on Economic Social and Cultural Right articulated this concept well in its General Comment 14 of the CESCR:

> 4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'. However, the reference in article 12.1 of the Covenant to 'the highest attainable standard of physical and mental health' is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.[197]

This means that the right to health is not restrictive but includes a wide range of socio-economic factors that promote the wellbeing of people. For instance, social determinants of health are the conditions in which people are born, grow, live, work, and age which shape their health status.[198] Thus the right cannot be realised where there is mass suffering or lack of food and clean water or where the condition of living of the people is really poor and unhealthy on the average. The Committee further interprets the right to health as defined in article 12.1 as;

[195] Andra le Roux Kemp (n 111)
[196] ibid
[197] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Document E/C.12/2000/4 (11 August 2000) para 4
[198] A R Chapman, 'The Social Determinants of Health, Health Equity and Human Rights' (2013)12(2) HHRJ

> 11. …as 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, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.[199]

Flowing from the above discussion, it can be said that the scope of the right to health extends to two important components which are that the right to access timely and appropriate healthcare and the right to health covers a wide range of socio-economic factors that promote conditions in which people can lead a healthy life and extends to the underlying determinants of health.[200]

The right to access timely and appropriate healthcare is central to the performance of health care systems around the world and thus directly related to the concept of justiciability of the right to health. States must take timely measures in their conduct and be concerned with the gravity of an illness, for instance, a failure of which will amount to failure of the duty to guarantee the right to health. However, the right to access remains a complex notion as exemplified in the variety of interpretations.[201]

Access to healthcare can only be protected if there is an understanding of what constitutes good healthcare.[202] Due to resource scarcity, the access to healthcare in practice depends largely on social security or government budget decisions and, at the private level, on the clinical judgments of health professionals and the incomes of individual patients.[203] Since the main purpose of the right to healthcare is to strike a balance between health needs and available

[199] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Document E/C.12/2000/4 (11 August 2000) para 11
[200] J Montgomery, 'Recognising a Right to Health' in R Beddard and D Hill (eds) *Economic, Social and Cultural Rights: Progress and Achievement* (London, Macmillan, 1992)184
[201] ibid
[202] Jonas Juškevičius & Janina Balsienė, 'Human Rights in Healthcare: Some Remarks on the Limits of the Right to Healthcare' (2010)4 (122) Jurisprudence 95-110
[203] ibid

resources and to ensure 'equitable access', the right must be taken seriously and made justiciable.[204]

Importantly from the excerpt above, the right to participation refers to the right of people to have a say in how decisions that affect their lives are made.[205] Generally, all legally binding international human rights treaties recognize the essential role of participation in realizing fundamental human rights. Accordingly, the General Comment provides that participation of the population in all health-related decision-making at the community, national, and international levels is an important aspect of the right to health.[206] Paragraph 43(f) of the General Comment No. 14 further directs states to use participatory methods to adopt and implement a national public health strategy and implement a plan of action to achieve it.[207]

It is important to note that the implementation and enforcement of the international right to health is difficult because it requires affirmative action on the part of the government and implicates intervention in the internal domestic affairs of nations. Having identified two components as compromising the important scope of the right to health, they are the right to healthcare and the right to the underlying determinants of health.

Also, it must be emphasized that the right to healthcare and the right to the underlying determinants of health are both very important components of the right to health. As such that a person's opportunity for good health starts long before they need health care, there is a compelling case that responsibility for health should go beyond the health and social care system to span all of society.[208] The underlying determinants include refer to the social, cultural, political, economic, commercial, and environmental factors that shape the conditions in which people are born, grow, live, work and age.[209]

Consequently, there are dangers in focusing too much on healthcare and too little on the underlying determinants or factors that affect health either directly (such as sanitation, water quality, pollution) and indirectly (such as inequality and poverty). A good case study that

[204] Jonas Juškevičius & Janina Balsienė (n 202)
[205] Sam Foster Halabi, 'Participation and the Right to Health: Lessons from Indonesia' (2009) 11(01) Health and Human Rights 49
[206]Article 4 of the 1978 Declaration of Alma-Ata on Primary Health Care states that people have the right and duty to participate individually and collectively in the planning and implementation of their health care.
[207]CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Document E/C.12/2000/4 (11 August 2000) para 43(f)
[208] Natalie Lovell et al, *What Makes us Healthy?* (The Health Foundation, London, 2018) 5
[209] ibid

reveals the danger is the comparison of the high spending on healthcare in the United States versus the much lower spending but much better quality of health and life Costa Rica.[210]

In Costa -Rica for instance Healthcare is unique in both structure and function.[211] The system provides three different services: health, water, and sanitation services.[212] Their system shows an emphasis on underlying determinants of health and success rates were shown through massive decreases in infant mortality rate, increases in life expectancy, and larger access to sanitation and clean water.[213]

Costa Rica has higher life expectancy than the United States even though its per capita income and its health expenditure are small fractions of those in the United States.[214] This is a laudable achievement considering the vastly higher living standards and health expenditures in the United States. The United States' underperformance is strongly linked to its much steeper socioeconomic gradients in health. Accordingly, the underlying determinants of health cannot be underrated in terms of health and both components must be examined at this juncture.

2.2.1 The Right to Healthcare

This right, in summary, relates to individual entitlement to accessible, available, acceptable, and good quality of healthcare including preventive and curative healthcare.[215] This right guarantees an individual's right to have access throughout his life to the necessary facilities and services for the diagnosis, treatment, care, and prevention of diseases. It also entitles individuals and groups to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health.[216]

By virtue of treaties, states are obliged to take the necessary steps for the creation of the conditions which would provide all medical services and medical attention in the event of sickness. For instance, states are also obliged to ensure appropriate pre-natal and post-natal healthcare for mothers.[217]

[210] Riley Baker and Vincent S Gallichio, 'How United States healthcare can learn from Costa Rica: A literature Review' (2020) 12(2), JPHE 106-113.
[211] ibid
[212] ibid
[213] ibid
[214] ibid
[215] Manisuli Ssenyonjo, (n 91) 519
[216] CESR General Comment No. 14 (n 183)
[217] Art 24(d) CRC, Art 10 (2) CESCR Art 25 (2) UDHR and Art 14(2) (e) ACRWC

General comment No. 14 on Article 12 CESCR espoused some guiding principles on how the right to health care is to be fulfilled: they are availability, accessibility, acceptability and good quality.[218] These principles are comprehensive in setting out the various guidelines for the provision of health care and are similar and directly related to the principles and elements of justiciability as would be explained later.

Similarly, the African Commission has adopted important resolutions and a General Comment clarifying the content and nature of the right to health guaranteed in the African Charter as stipulated in its Article 45[219] such as the African Commission has adopted Principles and Guidelines on the Implementation of Socio-economic Rights guaranteed under the Charter.[220] These Principles and Guidelines contain a broad interpretation of the right to health like General Comment 14 of the Committee on ESCR. The African Commission explains that African states must ensure availability, accessibility, acceptability, and quality health care services to all, giving special attention to the needs of vulnerable and marginalised groups in the society.[221]

The Commission in its resolution on access to medicines urges African governments to ensure the availability, accessibility, acceptability and quality of access to medicines for everyone.[222] Also, the Commission reminds African governments of their obligations to respect, protect and fulfil the right to health in the context of access to medicines.[223] The Commission also adopted a resolution calling on African governments to adopt a human rights-based approach to addressing the impact of HIV/AIDS in the region.[224] The Commission stated that it is important that all efforts adopted by African governments towards curbing the spread of HIV must be respectful of individuals' human rights.[225]

[218] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 12.
[219] Article 45 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58
[220] The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (African Commission Principles and Guidelines), adopted in 2010 and formally launched in 2011; at para 78 < http://www.escr-net.org/docs/i/1599552 (accessed 12 January 2020).
[221] ibid
[222] ACHPR/Res.141 (XXXXIIII) 08: Resolution on Access to Health and needed Medicines in Africa.
[223] ibid
[224] Resolution on the HIV/AIDS Pandemic –Threat against Human Rights and Humanity adopted at the 29th Ordinary Session of the African Commission held in Tripoli, Libya ACHPR Res.53/(XXIX)01.
[225] ibid

In October 2012, the Commission adopted a General Comment on Article 14(1)(d) and (e) of the African Women's Protocol was adopted, the General Comment explains that women and young girls are disproportionately affected by HIV due to some factors and so the commission recognises that 'women in Africa have the right to the highest attainable standard of health, which includes sexual and reproductive health and rights'.[226] The Commission also interpreted Article 14(1)(d) to refer to the overall obligation of 'States' to create an enabling, supportive, legal and social environment that empowers women to be in a position to fully and freely realise their right to self-protection and to be protected.'[227]

The General Comment is modelled on General Comments or Recommendations by the UN treaty monitoring bodies and it is remarkably one of the few occasions that the commission attempted to provide an exhaustive interpretative guide to a right.[228]

It is necessary to analyse the principles of availability, accessibility, acceptability and good quality of healthcare at this stage.

2.2.1.1 Availability of Healthcare

For there to be a right to healthcare, healthcare must be available to an individual who is guaranteed such rights.[229] Thus, hospitals, clinics and other health-related buildings, medical and professional personnel, drugs, and other equipment must be readily available in sufficient quantity as necessary for the entire population within a particular state.[230]

The General Comment No. 14 did not specify any concrete criteria to determine the adequacy of the available quantity of availability, nonetheless, the European Committee of Social Rights named three criteria for the assessment of the availability of health care they are. They are; the number of hospital beds and health care providers per inhabitant, the amount of resources allocated to health care, and the length of waiting time for admission to health care services.[231]

[226] General Comment on Art 14 (1)(d) and (e) of the Protocol to the African Charter on the Rights of Women para 5
[227] Ibid at para 10.
[228] Ebenezer Durojaye (n 163)
[229] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 12(a).
[230] ibid
[231] European Conclusions of the European Committee of Social Rights with regard to: Lithuania (2009); XIX-2 Luxembourg; Belgium (2009). In some reports, the European Committee also used the data of Organisation for Economic Co-operation and Development (OECD) as benchmark; Conclusions of the European Committee of Social Rights with regard to: XVII-2 Portugal (OECD average in 2007: 3.1 doctors/1000 inhabitants and 9,6 nurses/1000 inhabitants)

Similarly, the African Commission on Human and People's Right in the case *Free Legal Assistance Group and Others v. Zaire* brought before them, [232] also interpreted that the African Charter requires State parties to ensure that health facilities are available and accessible, and the states must take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.[233]

In Nigeria, evidence shows that healthcare is not readily available and according to UNDP as government expenditure on health as a percentage of GDP keeps declining.[234] For long, public spending on health in Nigeria was less than $5 per capita, and in some parts of the country as low as $2, far short of the $34 recommended by WHO for low-income countries within the Macroeconomics Commission Report.[235] Consequently, this level of spending makes it extremely difficult to provide even the most basic of health services and needs across the country.[236]

Also, among the many challenges facing the health system in Nigeria, as in many sub-Saharan African countries, is acute shortage of competent health care providers.[237] This is as a result of inadequate infrastructure and poor compensation packages, most of the health workers and medical professionals are lured away to developed countries in search of greener pastures.[238] Also, related to brain drain is the problem of geographical distribution of health care professionals, there is a disproportionate concentration of medical professionals in urban areas.[239]

While access to medical personnel is easily obtainable in cities, rural dwellers often have to travel considerable distances in order to get treatment. This has significant consequences on the health of inhabitants of rural areas as the unavailability of physicians and nurses within close proximity often leads to delaying and postponing visits to health care facilities until the

[232] *Free Legal Assistance Group and Others v. Zaire* Comm. No. 25/89, 47/90, 56/91, 100/93
[233] ibid
[234] Isaac A O Odeyemi and John Nixon, 'Assessing equity in health care through the national health insurance schemes of Nigeria and Ghana: a review-based comparative analysis' (2013) 12 (9) International journal for equity in health. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3626627/> Accessed 03 June 2017
[235] ibid
[236] ibid
[237] Ebuehi O, Campbell PC, 'Attraction and retention of qualified health workers to rural areas in Nigeria: a case study of four LGAs in Ogun State, Nigeria. Rural and Remote Health' (2011) 11 Available at <www.rrh.org.au/journal/article/1515> Accessed on 20 December 2017
[238] Menizibeya Osain Welcome, 'The Nigerian health care system: Need for integrating adequate medical intelligence and surveillance systems.' (2011) 3(4) Journal of pharmacy & bioallied sciences, 470-8. 0
[239] Ebuehi O, Campbell PC (n 237)

condition becomes hopeless.[240] As a result, orthodox medicine is complemented by traditional medicine in Nigeria and traditional healers provide low-cost care and are usually the first point of contact for many residents of rural areas.

Generally, the Nigerian health system has a track record of underperformance but recent improvements to the health care infrastructure in the fight to end polio, including a decentralized disease control network and improved vaccine storage, mean the country is not only on the brink of eliminating this debilitating illness but also better equipped to fight other deadly diseases such as measles, Ebola and the current fight against the pandemic coronavirus must be commended.[241]

2.2.1.2 Accessibility to Healthcare

According to GC No. 14, different dimensions of the accessibility of health care can be distinguished: non-discrimination, financial accessibility, and physical accessibility.[242] Non-discrimination is defined as the core content of the right to health care and a central guiding principle in the various health and human rights instruments and documents as stated above.

The principle of equality states that all persons, including women, street children, prisoners, older persons, undocumented persons, refugees, and internally displaced persons, persons with disabilities, indigenous people, and mentally or physically disabled children should have equal access to health care throughout their complete life cycle.[243]

This also means that there should be no discrimination in access to health care on any of the prohibited grounds, i.e. on the grounds of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.[244]

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[240] Ebuehi O, Campbell PC (n 237)

[241] National Bureau of Statistics. The Millennium Development Goals Performance Tracking Survey 2015 report. (2015). <http://www.ng.undp.org/content/nigeria/en/home/library/mdg/NigeriaMDGsSurveyReport2015.html> (accessed 2 July 2018).

[242] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 12(a)

[243] C. Chinkin, 'Health and human rights', Public Health (2006)-suppl. 1, p. 52-60.

[244] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 18; Concluding Observations of the Committee on Economic, Social and Cultural Rights with regard to: India, E/C.12/IND/CO/5, para. 52; E/CN.4/2003/58, 13 February 2003 Report The right of everyone

Also, financial accessibility requires that health care, including drugs, should be affordable for everyone should be guaranteed.[245] This affordability is an important element of the accessibility to health care and forms part of the information that should be provided in the State reports that have to be submitted to the under the CESCR.[246] The cost of health care should not place an excessive financial burden on individuals as access to health care should be based on need and not on ability to pay.[247] Individual governments should take responsibility to reduce the financial burden on patients in accordance with their social, legal and economic status.[248]

According to GC No. 14, the poorest sectors of the population should have access to free, high quality and universal primary health care, including dental care, and this can be done through health care systems and health care insurances set up by the State by adopting legislative, administrative, budgetary, judicial and other measures for the full realisation of the rights to health and health care. [249] Strengthening health care systems is the best way of meeting health care needs, improving health care equitably and distributing financial contributions.[250]

Notably, the Committee has frequently advised state members of the CESCR to set up health care systems and health care insurances to enable the cost of health care to be borne, at least in part, by the community as a whole.[251] It is instructive to note here that Article 12 European Social Charter and the Revised European Social Charter provides that member States should protect the right to health care via insurance and the article set out the obligation to establish

to the enjoyment of the highest attainable standard of physical and mental health Report of the Special Rapporteur, Paul Hunt, submitted in accordance with Commission Resolution 2002/31, para. 61.

[245] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para.12; E./C12/2008/2, 24 March 2009, Economic and Social Council. Guidelines on treaty-specific documents to be submitted by States parties under Articles 16 and 17 of the international covenant on economic, social and cultural rights, paras. 56(b), 57 (f).

[246] ibid

[247] ibid

[248] ibid

[249] Article 13, paragraph 1 ESC; Concluding Observations of the Committee on Economic, Social and Cultural Rights with regard to: Bolivia, E/C.12/BOL/CO/2, para. 34; Angola, E/C.12/AGO/CO/3, para. 36; Nicaragua, E/C.12/NIC/CO/4, para. 29; Brazil, E/C.12/BRA/CO/2, para. 28.

[250] World Health Organization Report (2002) p. 74.

[251] Concluding Observations of the Committee on Economic, Social and Cultural Rights with regard to: El Salvador, E/C.12/SLV/CO/2, para. 43; Kenya, E/C.12/KEN/CO/1, para. 20; Digest of case law of the European Committee of Social Rights, September 2008, p. 83.

and maintain a system of social security.[252] This obligation has made the right to health care to be somehow synonymous with health care insurance and benefit packages.[253]

Similarly, the African Charter limits social security rights to the aged and disabled.[254] The Women Protocol guarantees social insurance to women working in the informal sector and poor women and women heads of families including women from marginalized population groups.[255] The African Child Charter also guarantees children the right to social security, including basic nutrition, shelter, basic health care services, and social services.[256]

Physical accessibility is another criterion that has to be fulfilled to comply with the responsibilities to the right to health care. This simply means that health care has to be within safe reach and physically accessible to everyone.[257] Importantly, in the Conclusions of the Committees supervising the CESCR, a lot of attention is rightly paid to the geographical distribution of health care.[258]

Thus, in various countries including Nigeria, there are significant disparities between urban and remote, rural areas in the provision of health care, including the geographical distribution of doctors and other health care professionals.[259] States are therefore required to adopt necessary measures to address the significant disparities in physical access to health care.[260]

Also, part of the criteria of physical accessibility to health care is access for specific groups of patients, for instance, older persons and persons with disabilities should have adequate access

[252] This forms part of the State reports that have to be submitted to the Committee: States should indicate whether they have adopted a national health care policy and whether a national health care system with universal access to primary health care is in place. E./C12/2008/2, 24 March 2009, Economic and Social Council. Guidelines on treaty-specific documents to be submitted by State parties under Articles 16 and 17 of the CESCR, para. 55.
[253] A. Den Exter, 'The Right to Health Care in International Law', in: A. Den Exter and J. Sándor (eds.), Frontiers of EU Health Law. Yearbook 2002, Rotterdam: Erasmus University Press 2002, p. 22.
[254] African Charter, (n 74) art. 18(4). 138
[255] African Women Protocol, (n 145) art. 13(f). 139. Id. art. 24(a). 140
[256] African Child Charter, (n 73) art. 1.
[257] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 12(b); E./C12/2008/2, 24 March 2009, Economic and Social Council. Guidelines on treaty-specific documents to be submitted by State parties under Articles 16 and 17 of the international covenant on economic, social and cultural rights, para. 56(a).
[258] ibid
[259] Ebuehi O, Campbell PC (n 237)
[260] Concluding Observations of the Committee on Economic, Social and Cultural Rights with regard to: Albania, E/C.12/ALB/CO/1, para. 60; Tajikistan, E/C.12/TJK/CO/1, para. 67; Conclusions of the European Committee of Social Rights with regard to: XIX-2 Germany; Lithuania (2009); XVII-2 Turkey.

to buildings and other public areas where health care is provided.[261] Again, in Nigeria, accessibility remains problematic, with most of the health facilities concentrated in urban areas, far removed from rural areas where a majority of the population lives and where the need is more urgent.[262]

2.2.1.3 Acceptability and Good Quality

The General comment No. 14 acceptable health care signifies that healthcare must be culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements'[263] Thus the cultural tradition of persons should be respected, for instance, the refusal of blood transfusions by Jehovah witnesses, the use of traditional preventive care, healing practices and medicines by various indigenous groups and the use of unorthodox medicines and medical treatments.[264]

Quality sets a standard that of the available health care to be scientifically and medically appropriate and of good quality.[265] It literary requires scientifically approved and unexpired drugs and hospital equipment and an adequate training of health care personnel. However, no concrete interpretation of the term quality has been set by the committee because the quality of health care in every individual state varies and is difficult to assess within the context of international reporting procedures.[266]

Nevertheless, attention was paid to life expectancy and infant mortality rates and the number of health care professionals with secondary or higher education to obtain an impression of the level of quality of the health care provided and also waiting lists and waiting times. [267]The quality of health care services delivered in Nigeria is poor and remains a huge area of

[261] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 12(b).
[262] Ebuehi O, Campbell PC (n 237)
[263] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 12(c) This also deals with medical ethics as part of the appropriateness of health and health care.
[264] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 27. Alternative medicines include for example homeopathy, acupuncture and herbalism
[265] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 12(d); E./C12/2008/2, 24 March 2009, Economic and Social Council. Guidelines on treaty-specific documents to be submitted by State parties under Articles 16 and 17 of the CESCR, paras. 56(c), 56(d).
[266] ibid
[267] ibid

concern.[268] Most of the PHC facilities that are supposed to meet the health needs of the poor and rural dwellers are in a poor state due to poor budgetary allocation.[269]

2.2.2 The Underlying Determinants of Health

The underlying determinants of the right to health embrace a wide range of socio-economic factors that promote conditions in which people can live a healthy life. These factors are necessary for the enjoyment of the variety of goods, services, and conditions necessary for the realisation of the highest attainable standard of health.[270] UN human rights bodies listed up to 14 human rights as underlying determinants of the right to health they are: the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information and the freedoms of association, assembly and movement.[271]

The African Commission held in *Free Legal Assistance Group and Others v Zaire* as stated earlier that the right to health guaranteed under Article 16 of the African Charter places a duty on states to provide basic services such as safe drinking water and electricity, besides the more obvious requirements to supply adequate medicine.[272] In the case *Sudan Human Rights Organization and Another v Sudan*,[273] the Commission also stated that the right to health extends not only to timely and appropriate health care services but also to the underlying determinants of health, such as access to safe and portable water, an adequate supply of safe food, and nutrition.[274]

Here the African Commission has adopted the approach that the right to healthcare is intrinsically linked to the right to the underlying determinants of health. This is critical to ameliorate the hardship of vulnerable and marginalised groups, the approach has the potential of meeting the needs of those living in extreme poverty.[275] It is a known fact that in many parts

[268] Ebuehi O, Campbell PC (n 237)
[269] ibid
[270] Committee on Economic, Social and Cultural Rights. General Comment 14: The right to the highest attainable standard of health, E/C.12/2000/4, 4 July 2000, paras. para 9
[271] Ibid paras. 3, 34–37.
[272] *Free Legal Assistance Group and Others v. Zaire* (n 130)
[273] *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (Darfur case) paras 205, 212, 216 & 223.
[274] ibid
[275] *Free Legal Assistance Group case* (n 272)

of Africa a significant number of people lack access to basic amenities, and services, such as, water, electricity and sanitation that are essential for their daily existence.[276]

Therefore, interpreting the right to health to intersect with underlying determinants of health would seem to 'give life' to the meaning of the right to health.[277] Also, considering the underlying determinants of health as part of the right to health has a propensity of guaranteeing a substantive equality approach to enjoying health rights since it addresses the needs of the vulnerable and marginalised groups.[278]

It is important to note that the link made between the right to health and the underlying determinants of health is rarely made. For instance, a 2008 report by the WHO focusing on the social determinants of health failed to make the crucial link between the right to health and underlying or social determinants of health.[279] Commentators have criticised this and termed the failure of the report to make the linkage as a missed opportunity. [280] Nonetheless, the report does contain important revelations about how socio-cultural factors influence people's health by stating that 'the poorest of the poor have high levels of illness and premature mortality...health and illness follow a social gradient: the lower the socio economic position, the worse the health'. [281]

The underlying determinants of health approach adopted by the African Commission provide an opportunity for national courts in Africa to emulate it.[282] Thus, national courts may inquire into the sufficiency of underlying determinants of health and how this may interfere with the enjoyment of the right to health.[283] Moreover, courts can hold governments accountable for failing to link between the underlying determinants of health and the enjoyment of the right to health because the underlying determinants of health are almost indispensable for the enjoyment of good health, and as such policymakers must emphasise them.[284]

[276] Millennium Development Goals Report (2011).
[277] ibid
[278] Ebenezer Durojaye (n 163) 410
[279] WHO Commission on Social Determinants of Health (CSDH), Closing the gap in a generation: Health equity through action on the social determinants of health: Final report of the Commission on Social Determinants of Health (2008)
[280] Paul Hunt, 'Missed opportunities: Human rights and the Commission on Social Determinants of Health' Global Health Promotion (2009) 16/1 Supp at 36.
[281] WHO Commission on Social Determinants of Health 2008 at vi.
[282] Ebenezer Durojaye (n 163) 410
[283] ibid
[284] A R Chapman (n 198) 19

In the South African *Beja case*,[285] for instance, the High Court held that the failure of the South African government to provide safe and comfortable sanitation amounted to a violation of the rights to dignity and housing of the people.[286] The Court noted that the right to adequate housing as guaranteed under section 26 of the South African Constitution means more than 'bricks and mortar' and includes the provision of social services, such as safe and clean water, decent sanitation, and health care.[287] In essence, the Court in *Beja* would seem to imply that the right to housing cannot be enjoyed in isolation of other underlying determinants, such as, water, sanitation, healthcare, good roads and electricity. This decision is useful to the underlying determinants approach.[288] Even though the *Beja* case deals with the right to housing, the reasoning of the Court in the case is useful and can be applied to a case dealing with the right to health.[289]

While the approach adopted by the African Commission in interpreting the right to health seems protective, it is applied cautiously, and the underlying determinants of health approach operate with limitations and are usually interpreted to suit the circumstances of individual cases. As such courts may not always hold governments explicitly accountable for a breach of obligations as regards the right to health whenever an underlying health determinant is not provided.[290]

It is necessary to state that in Nigeria, most of the underlying determinants of health are not available to the people. For instance, access to safe drinking water and adequate excreta disposal facilities in Nigeria is still problematic.[291] More than half of the population has neither access to safe water nor to excreta facilities. Available data indicates that only 48% of households in Nigeria have access to improved drinking water sources, with access twice greater in urban than rural areas.[292] While safe drinking water is available to 67% of urban dwellers, the figure for rural inhabitants is only 31% and also only about 44%, have access to adequate sanitation coverage.[293] Shortage of safe drinking water sources and adequate excreta

[285] *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97.
[286] ibid
[287] ibid
[288] Ebenezer Durojaye (n 163) 411
[289] ibid
[290] ibid
[291] Aliyu, Alhaji A, and Lawal Amadu, 'Urbanization, cities, and health: The challenges to Nigeria - A review' (2017)16(4) Annals of African medicine ,149-158
[292] ibid
[293] ibid

facilities, unfortunately, contributes to the high morbidity and mortality in Nigeria, particularly among children.[294]

There is a historical lack of a consequential compact between the government and the population, such that the context in which the health system exists lacks mutual accountabilities in a framework of principals, agents, and citizens, and that context does not obviously work for the poor in Nigeria.[295] Since the extent of good health depends on determinants of health, health outcomes in Nigeria are hampered by underperformance with regards to nutrition inadequate water, sanitation, and power supply for households and health care facilities, and also the environment pollution and all these affects greatly the guarantee of the underlying health determinants.[296]

It is to be noted that the statements made by the UN Committee on Economic, Social and Cultural Rights in the General Comment No. 14 tend to make one believe that a state has compelling legal obligations to provide sufficient resources to ensure adequate health for all.[297] For instance, it is stated that health facilities, goods and services must be affordable for all, payment for health care services, as well as services related to the underlying determinants of health, have to be based on the principle of equity, equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.[298] However, the key qualification to this claim depends largely on the state's developmental level among other factors.[299]

Having tried to clarify the content and meaning of the right to health, it is important to discuss the main obligations of states parties as regards the right to health.

2.3 States Obligations towards the Right to Health

States in accordance with the major international treaties on the right to health are charged with tripartite obligations. The obligations are (1) to respect the right to health (2) to protect the right

[294] Aliyu, Alhaji A (n 291)
[295] Olusoji Adeyi, 'Health System in Nigeria: From Underperformance to Measured Optimism', (2016) 2 (4), Health Systems & Reform, 285-289
[296] ibid
[297] Paul Hunt (n 187) 109-130.
[298] ibid
[299]Committee on Economic, Social and Cultural Rights. General Comment 14: The right to the highest attainable standard of health, E/C.12/2000/4, 4 July 2000, para. 12 (a)

to health (3) and to fulfil the right to health. These obligations also help clarify what the right to health care includes and what State responsibilities follow from this right.

It is noted that the terms used in the tripartite typology of the obligations to respect, to protect, and to fulfil are not directly based on the exact terminology used in treaty texts, so the tripartite typology is more like an analytical tool to obtain a more nuanced understanding of the normative character of the State obligations that result from human rights.[300]

It is relevant to explain the implications of these tripartite obligations that is to respect, protect and fulfil just as all human rights.

2.3.1 Obligation to Respect the Right to Health

States are required to refrain from direct or indirect violations of the right to health. They are obliged to respect equal access to available health facilities and not to impede on people's access to existing health facilities.[301] Therefore a denial or limitation of equal access for all persons or groups of persons to preventive, curative and palliative health services or systemic discrimination within the health system would amount to a breach of this obligation.[302]

States in fulfilment of this obligation must refrain from acts like prohibition or impeding on traditional preventive healthcare medicines, marketing unsafe drugs, applying coercive medical treatments and limiting access to means of maintaining sexual or reproductive health such as contraceptives.[303]

The duty to respect focuses on preventing the State from unduly intervening in the enjoyment of a particular freedom or entitlement and for a State to prevent the interference, the State may need to take proactive measures, for example, to prevent State agents from acting in certain ways, or to provide reparation if a duty has been breached.[304]

Also, states can resort to judicial intervention to ensure compliance with duties to respect ESC rights, in general, can be preventive and restorative or compensatory and this is not substantially different from traditional notions of civil and political rights litigation that is, protecting against State action that threatens the status quo. This is particularly the case when

[300] E.I Koch, 'Dichotomies, Trichotomies or Waves of Duties?'(2005) 1, Human Rights Law Review, p. 82
[301] ibid
[302] ibid
[303] CESR General Comment 14 (n 299) para 34
[304] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability (HUMAN RIGHTS AND RULE OF LAW SERIES: N0. 2, 2008)

potential victims already have access to essential provisions, such as food, housing, work, income, and health care.[305]

2.3.2 Obligation to Protect the Right to Health

This obligation requires States to protect the right to health from interference by third parties. This can be done by the adoption of legislation or other measures to ensure equal access to healthcare and health-related services provided by third parties through such measures as environmental regulation of third parties; to ensure that privatisation of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of health equipment and to ensure the medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.[306]

States are also obliged to adopt legislation or other measures to protect against third party interference with the underlying determinants of health, for instance, to control the environmental impact of the activities of multinational corporations.[307] Emphasis is placed on State action that is necessary to prevent, stop, or obtain redress or punishment for third-party interference. This can be achieved through one or all of the following, state regulation of private party conduct, inspection and monitoring of compliance and administrative and judicial sanctions enforced against non-compliant third parties.[308] Such parties may be employers, landlords, providers of health care or educational services, potentially pollutant industries or private food and water suppliers.[309]

States play very important roles in ensuring compliance with duties to protect ESC rights and the roles can either be preventive, restorative or compensatory and similar to litigation that seeks to require the State to protect against the acts or failure to act of private (third) parties in the sphere of civil and political rights.[310] This intervention should work alongside and complement other State efforts such as regulation and law enforcement. However, access to

[305] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability (HUMAN RIGHTS AND RULE OF LAW SERIES: N0. 2, 2008)
[306] CESCR General Comment 14 (n 299) para 35
[307] Manisuli Ssenyonjo (n 91) 537
[308] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability (HUMAN RIGHTS AND RULE OF LAW SERIES: N0. 2, 2008)
[308] ibid
[309] ibid
[310] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability (HUMAN RIGHTS AND RULE OF LAW SERIES: N0. 2, 2008)

some basic ESC rights such as the right to health or education services, housing, or food are often left to a great extent to market forces or provided by third parties and this creates its own tensions for the State, in how it carries out its duties to protect.[311]

2.3.3 Obligation to fulfil the Right to Health

This obligation requires the State to protect the right health by adopting deliberate measures aimed at achieving universal access to care, as well as the preconditions for health. [312] It also entails the adoption of appropriate legislative, administrative, budgetary, judicial, promotional and other measures to promote and provide healthcare and access to the underlying determinants of health.[313] Thus a state is responsible for the adequate medical care of prisoners, others who come into the state's care and provision of medical care to the wounded during military operations.[314]

In this instance, the state is expected to be a proactive agent, capable of bringing about an increase in access to a range of ESC rights generally. Therefore, an emphasis is placed on State action directed at identifying problematic situations, providing relief and creating the conditions that would allow right-holders to manage their own access to the provisions protected by rights.[315]

Broadly speaking, the duty to fulfil ESC rights includes an obligation to remove obstacles to the full enjoyment of ESC rights. It also requires the implementation of measures to modify discriminatory social and cultural patterns which result in the disadvantage of vulnerable groups.[316] The duty to fulfil requires positive action by the state; it is therefore not surprising that most of the cases involving alleged breaches of these duties to fulfil concern State omissions.

It is important to state that there are clauses that are predominant to the obligations of States in respect to realising the rights enshrined in the different international and regional human rights

[311] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability (HUMAN RIGHTS AND RULE OF LAW SERIES: N0. 2, 2008)
[312] A E Yamin (n 78)
[313] ibid
[314] Manisuli Ssenyonjo (n 91) 537
[315] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability (HUMAN RIGHTS AND RULE OF LAW SERIES: N0. 2, 2008)
[316] Article 16 CESR

instruments.[317] These clauses not only include provisions about progressively realising human rights, but stipulate conditions concerning limitations of the rights provided for by a State as well, they include the obligation of immediate and progressive realisation, minimum core obligation, limitations, derogations, and retrogressive measures.[318]

The duties incumbent upon states parties in the realisation of the ESC rights as contained in the CESCR are of significance to both the substance and implementation of the ESC rights in general. Article 2 (1) of the CESCR provides that:

> Each state party to the present covenant undertakes steps, individually and through international assistance and cooperation, especially economic and technical to the maximum of available resources, with a view to achieving progressively, the full realisation of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.[319]

The principle of progressive realisation of the right to health is elaborated upon below.

2.3.4 The Progressive Realisation of the Right to Health

The effective implementation or realisation of socio-economic rights is often subject to the qualifications of 'availability of resources' and 'progressive realisation'. The progressive realisation introduces an element of flexibility in terms of the obligations of states and in the enforcement of rights.[320] The concept recognises that the full realisation of socio-economic rights would not generally be achieved in a short period of time. The obligation on states therefore is 'to move as expeditiously and effectively as possible' towards full realisation.

The principle of progressive realisation as set out in article 2 of the CESCR above expects states to prioritize the implementation of the rights in the CESCR to the fullest extent of the state's capacity within a reasonable time.[321] However, since the full realisation of ESC rights

[317] State obligations as enshrined in the CESCR and ESC and RESC stand central. Other Human Rights Conventions at international level also contain these State obligations in relation to social, economic and cultural rights and civil and political rights, see e.g. part II, III and VI ICCPR; Article 24 CEDAW; Article 4 and Article 7 CERD; Article 4, Article 23 and Article 24CRC; Article 4 CRPD

[318] See part II, III and VI ICCPR; Article 24 CEDAW; Article 4 and Article 7 CERD; Article 4, Article 23 and Article 24CRC; Article 4 CRPD

[319] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, G.A. Res, 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/ 6316 (1966), 993 UN.T.S. 3, entered into force Jan. 3, 1976

[320] I A Noriega, 'Judicial Review of the Right to Health and its Progressive Realisation: The Case of the Constitutional Court of Peru' (2012) UCLJLJ 166-187

[321] ibid

cannot be achieved within a short period of time. A certain amount of flexibility is required, so for countries with significant resource constraints, immediate and absolute satisfaction of the material conditions for the enjoyment of the right to health is not an easy task to fulfil. The principle of progressive realisation originates in response to 'the fact that realisation over time, or in other words progressively, is foreseen'.[322]

The principle of progressive realisation mirrors the inevitably contingent nature of state obligations.[323] Generally, the principle of progressive realisation of economic, social and cultural rights provides States with a margin of appreciation. The states enjoy discretion in selecting the means for implementing their respective obligations as they are expected to have a key understanding of all aspects of the specific situation in their country than international or regional human rights bodies.[324] But, this discretion should not be regarded as an excuse for states not fulfilling their expected obligations.[325] Also, the progressive realisation of a right should not be interpreted as depriving States' obligations of all meaningful content of rights nor as a pretext for non-compliance, nor as implying that States have the right to defer indefinitely their efforts to ensure the full realisation of rights.[326]

The Committee on ESC rights has interpreted the principle of progressive realisation as;

> The concept of progressive realisation constitutes a recognition of the fact that full realisation of economic, social and cultural rights cannot be achieved in a short period of time …it is on the one hand a necessary flexibility device, reflecting the realities of real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the

[322] I A Noriega (n 320)
[323] Philip Alston and Gerard Quinn, 'The Nature and Scope of State Parties Obligations under the International Covenant on Economic, Social and Cultural Rights', (1987) 9 Human Rights Quarterly, 157-159
[324] A. Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', Human Rights Law Review 2009, p. 565; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997, Guideline 8.
[325] J. Asher, 'The Right to Health: A Resource Manual for NGOs', (2004) London: Commonwealth Medical Trust 2004 p. 23.
[326] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 31; UN doc. E/CN.4/1987/17, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 21, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997, Guideline 8.

> raison d'être, of the covenant which is to establish clear obligation for states parties in respect of the full realisation of the rights in question.[327]

From this quotation, one cannot easily understand what the committee means by moving expeditiously and effectively entails, despite its periodic State Reports. Chapman states that it lacks concrete standards for assessing the performance of government and their compliance with the covenant.[328]

However, State parties cannot use this principle as a get-out clause. The Committee has sought to give it a meaning that backs other phrases within article 2 (1). States may not delay in their efforts to realise their rights. They must take measures that would achieve that objective in the shortest possible time.[329] The obligation stated therefore requires a continuous improvement of conditions overtime without backward movement of any deliberately retrogressive measures except when such a regression is justified[330].

Also, the concept of progressive realisation does not avert the concept of immediate realisation of ESC obligations by state parties per se, for example, steps to be taken to ensure the protection and equal guaranty of ESC rights are immediate in their very nature.[331]Under the principle of progressive realisation in the context of the right to health, a state may, for instance, decide to increase by 20% the number of births attended by health professionals within a certain number of years, states could also set a goal of reducing infant mortality rates in rural areas and many other goals.

It has been observed however that the main obstacles to improving health protection in States have more to do with poor allocation, distribution, or efficiency in the management of available resources other than the lack of resources.[332] It can be said that justiciability of the right to health will guarantee the progressive realisation of the right to health.

[327] Andrey R. Chapman, 'A 'Violation Approach' for monitoring the International Covenant on Economic, Social and Cultural Rights', (1996) 18 Human Rights Quarterly p. 31-32
[328] Ibid p. 32
[329] Mathew Craven, The International Covenant on Economic, Social and Cultural rights: A perspectives on its Development, (Clarendon Press, Oxford, 1995) p 131
[330] ibid
[331] Ibid 132
[332] ibid

The African Charter is silent on the progressive realisation terminology.[333] However, in its elaboration on the nature of the obligations of states parties to the African Charter, the African Commission has stated:

> While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with articles 61 and 62 of the African Charter. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.[334]

The Commission's development of this concept in its jurisprudence is limited. However, it is clear from its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights that the Commission has adopted the CESCR's understanding of the concept.[335]

Under the Nigerian constitution, section 16 states the economic objectives of Nigeria and it provides that the national resources of the country shall be deployed to the attainment of the maximum welfare and happiness of every citizen.[336] The section also mandates the state to provide suitable and adequate shelter, suitable and adequate food, the provision of a national living wage, care and pensions in old age, and unemployment and sickness benefits.[337] This can be likened to the UDHR provision on progressive realization of rights, however, the constitutional provision has no force of law and is unenforceable as stated by the constitution itself.[338] Consequently, the obligation to provide basic shelter, food, education and healthcare is easily flouted.

[333]Lillian Chenwi, 'Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance (2013) 46(3), De jure 742
[334]African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights par 14. The Principles and Guidelines were formerly launched in 2011.
[335] Lillian Chenwi (n 333)
[336] Constitution of the Federal Republic of Nigeria, 1999, s 16(1)(2)
[337] ibid
[338] Ibid s 6(6) (c)

2.3.5 Minimum Core Obligation of the Right to Health

The minimum content of a right refers to essential elements or basic features without which the right is denatured or becomes unrecognizable.[339] States have the core obligation to ensure the satisfaction of at the very least, the minimum essential level of the right to health. Chapman has referred to the minimum core obligation as a floor below which health conditions and services should not be permitted to fall.[340]

The emphasis on the core obligations of the right to health is according to the CESCR is focused on access to and equitable distribution of health facilities on a non-discriminatory basis, provision of essential drugs, and implementing a national public health strategy and plan of action.[341] It emphasises the underlying determinants of health like access to minimum essential food, safe and potable water and housing.[342] Also, in the case of the right to health, the minimum core is said to refer to the minimum basic resources that are necessary to allow individuals to be free from threats to their survival and to achieve a minimal level of well-being.[343]

There are potential pitfalls of the minimum core approach, for instance, the cost of providing needed medical resources to all citizens, unlike the cost of providing universal housing and access to food and water, may be limitless since the costs of new technology are high and resources needs continue to grow as new treatments become available.[344] If the cost of providing needed medical resources to all citizens is limitless, then clearly available resources are insufficient to meet all claims and a system of rationing available resources is needed.[345]

However, states are not expected to achieve the full realisation of the right automatically, they are required to 'take steps' to achieve the right.[346] Those steps necessary to achieve the full realisation of the right to health are listed in the second paragraph of Article 12 which has been listed earlier. The steps provide a starting point for understanding the obligation to respect the right to health although their generality makes it difficult to determine specific obligations involved.

[339] I A Noriega (n 320) 174
[340] A Chapman (n 154)
[341] CESCR General Comment 14 para 43
[342] ibid
[343] I A Noriega (n 320)
[344] Andra le Roux Kemp (n 111)
[345] ibid
[346] Article 2 CESCR

Also, a State needs a device to monitor and measure the variable dimensions of the right to health. Indicators when disaggregated, provide useful information on how the right to health is realised in a country. The Office of the United Nations High Commissioner for Human Rights (*OHCHR*) has been developing a conceptual and methodological framework for such indicators.[347]

In practice, health policies, programs, and interventions cannot be implemented overnight they take time, often years. [348]Also, they usually require extensive resources, in the case of low- and middle-income countries, these resources include development assistance. For these reasons, the international right to health embraces the progressive realisation, maximum available resources, and international assistance and cooperation.[349]

These concepts do not enfeeble the right to health, they ensure that the right to health has the conceptual and operational potential to make a sustained contribution to the implementation of complex and costly health interventions that inevitably take years to put in place and will usually be ongoing.[350]

Finally, the concept of progressive realisation and the minimum core obligation of rights generally does not allow a distinction between rights as a matter of priority over another but provides that each right should be actualized to the extent that provides for the basic needs of every member of society.[351] Therefore the minimum standards should be achieved by all states, regardless of their economic condition, at the earliest possible moment. Unfortunately, not very much has been done by Nigeria to comply with the minimum core obligations.[352]

Also, notwithstanding South Africa's enforceable constitutional right to access health care services, its Constitutional Court rejected the minimum core concept due to resource constraints, the limited specificity of the Committee's definition and a lack of legislative guidance.[353] It has been argued that the court's rejection of minimum core obligations has had

[347]I A Noriega, (n 320)
[348] Paul Hunt (n 187)
[349] ibid
[350] ibid
[351] K G. Young, 'The Minimum Core of Economic, and Social Rights: A Concept in search of Content', (2008) 33 (113) Yale Journal of International Law, p. 126-139
[352] O F Olayinka, 'Implementing the Socio-Economic and Cultural Rights in Nigeria and South Africa: Justiciability of Economic Rights' (2019) 27(4) African Journal of International and Comparative Law, 564–587
[353]*Government of the Republic of South Africa and others v. Irene Grootboom and others* (2000) South African Constitutional Court. Butterworths Constitutional Law Reports 1169. Durban: LexisNexis South Africa and *Minister of health and Another v. Treatment Action Campaign and others (*2002) South African Constitutional Court. South African Law Report 721. Durban: LexisNexis South Africa

regressive outcomes for health-related needs, for instance in a decided case, the Court rejected a claim by five Soweto residents that the City of Johannesburg's free water allocations were insufficient and in violation of the state's minimum core obligations. [354]

The South African judicial rejection of the principle in favour of a 'reasonableness standard' challenges the international law principle of minimum core obligations.[355] However, while the South African Constitutional Court considers itself to lack the expertise necessary to define the core, it also indicates that a better-defined core would assist in determining the reasonableness of governmental realisation of social rights.[356]

2.3.6 Limitations, Derogations and Retrogressive Measures

There are situations in which the realisation of rights cannot be achieved, and may even be restricted or derogated from, these situations are, Limitations, Derogations and Retrogressive Measures, they are expatiated on as follows;

2.3.6.1 Limitation

Limitation is a measure that can be taken in restricting the enjoyment of economic, social and cultural rights and the right to health care. States can limit human rights in normal times for a limited number of reasons.[357] According to Müller, limitations are 'necessary and normal element of the human rights treaty system, since without them there would be an unworkable system of absolute rights of each individual'[358]. Limitations can protect the rights and freedoms of others by solving conflicts between different rights.[359]

However, the possibility to impose limitations on the enjoyment of human rights is intended to protect the rights of individuals rather than to permit the impositions of limitation by States.[360]Therefore, prescriptions on limiting the enjoyment of rights serve as an important tool

[354]*Mazibuko and others v city of Johannesburg and* others (2010) South African Constitutional Court. South African Law Report 1. Durban: LexisNexis South Africa

[355] D Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for future socio-economic rights jurisprudence' (2002)19 (1) SAJHR, 1–26

[356] Forman, Lisa et al, 'What could a strengthened right to health bring to the post-2015 health development agenda?: Interrogating the role of the minimum core concept in advancing essential global health needs' (2013) 13 BMC international health and human rights , 13-48

[357] A. Müller (n 324)

[358] ibid

[359] Ibid 564

[360] UN doc. E/CN.4/1987/17, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 46; E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 28; E/1991/23, General Comment 3 (1990), 14 December 1990, The nature of State parties' obligations, para. 42.

to strengthen the protection of economic, social and cultural rights as they establish safeguards against unjustifiable limitations.[361]

The limitation clause has been recognized in various human rights treaties, for instance, Article 4 CESCR provides for a general limitation clause.[362] Treaties usually include the condition that has to be met before a limitation can be considered legitimate and limitations can only be imposed for reasons as set out in the relevant human rights treaty.[363] CESCR specified general welfare as a reason for limitation, general welfare should be understood as 'referring primarily to the economic and social well-being of the people and the community'.[364]

Also, limitations must be determined by law, thus when a limitation is provided for by a national law, which is consistent with international human rights law and is clear and accessible to everyone then it is deemed determined by law.[365] Laws imposing limitations on the exercise of economic, social and cultural rights should however not be arbitrary, unreasonable, or discriminatory.[366]

Limitations in a democratic society must be necessary and proportional, the inclusion of the component of 'democratic society' was considered of great importance to avoid that introducing limitations in a Signatory State can lead to suppression and dictatorship.[367] However this does not translate that a state is required to be a democratic society to become or remain a party to a human rights treaty, but does imply that limitations of economic, social and cultural rights 'should be based on some consultation process […], should not be ordered unilaterally and should be subject to popular control', it was stated by the Limburg Principles on the implementation of the CESCR that:

[361] M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia 2003) 285
[362] A general limitation clause is directed to all the rights enshrined in the specific human rights treaty. Specific limitation clauses exist as well, such as enshrined in Article 8, paragraph 2 CESCR on the right to form and join trade unions and the right to strike.
[363] A Müller (n 324) 573.
[364] ibid
[365] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 48- 51.
[366] A Müller (n 324) 575
[367] ibid 577

> a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.[368]

The condition that a limitation must be proportional means that limitation, should not excessively restrict the protected right.[369] Therefore, the more severe the impact of the restriction imposed, the more difficult its justification, also, limitations can never be applied when they suppress or eliminate a right completely.[370] A limitation that is in conflict with the core content of a right can never be regarded as proportionate as this affects the essence of a right.[371]

Significantly in health care rights, there are not many conceivable situations in which it is necessary to restrict individuals the exercise of their right, the access to medical care is not very likely to endanger the exercise of rights by others nor to be in conflict with other rights.[372] But, when we talk about limiting the right to health care, one could think of a situation in which the right to enjoy the benefits of scientific progress and its applications as contained in Article 15 CESCR could somehow endanger public health.[373] Also, the imprisonment of a person could be necessary for the protection of general welfare even though this might affect the mental health of the imprisoned, this could be permissive, as long as there is no serious infringement of the health of the individual.[374]

A limitation may never be interpreted or applied to threaten the core content of the right to health care, this is not permissible because the core content of the right itself is limited and cannot be considered as proportionate.[375]

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[368] UN doc. E/CN.4/1987/17, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 55. It should be noted that this phrase does not require a State to be a democratic society in order to become or remain party to a human rights treaty

[369] C. Courtis, 'Standards to Make ESC Rights Justiciable. A Summary Exploration' (2009) 4 Erasmus Law Review, 391

[370] A Müller (n 324) 561

[371] ibid

[372] B.C.A. Toebes, *The Right to Health as a Human Right in International Law*, (Antwerp: Intersentia 1999a) 298 This could be conceivable in relation to scarce resources, but that is not a legitimate aim that is provided for by Article 4 CESCR.

[373] ibid

[374] ibid

[375] Non-discrimination is also part of the core content of the right to health care. Laws imposing limitations on the exercise of economic, social and cultural rights shall not be discriminatory, see The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 49. Also the limitation of economic, social and cultural rights of vulnerable groups as a consequence of certain policies is

2.3.6.2 Derogation

A derogation of a right or an aspect of a right means complete or partial elimination as an international obligation.[376] There are international treaties on human rights that allow states to derogate temporarily from certain human rights guarantees in times of emergency which 'threatens the life of the nation', but only to the extent strictly required by the situation.[377] Derogations however, must not conflict with the state's other international law obligations and must be non-discriminatory.[378] The main objective of a state party derogating from some human rights must be the 'restoration of a state of normalcy' where full respect for human rights can again be secured.[379]

Derogation from a particular right must be necessary in light of the prevailing exceptional threat to protect or restore a democratic public order essential for the protection of human rights.[380] It is crucial to note that unlike some other human rights treaties, there are no clauses in the UN treaties protecting ESC rights allowing for or prohibiting derogations in a state of emergency, for example in the situation of a failed state, armed conflict, or institutional collapse post-conflict.[381]

The CESCR does not comprise a general clause on derogations and the Committee clarified in General comment No. 14 that States cannot, under any circumstances whatsoever, justify non-compliance with the obligations concerning the core content of the right to health and the right to health care is non-derogable.[382] The explanation for this could have been as a result of a combination of factors including (i) the nature of the rights protected in the Covenant; (ii) the existence of a general limitations clause in the Covenant in its Article 4 which allows states to respond flexibly to extraordinary situations of tension within a democratic society, including

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not justified as this has a disproportionate effect on vulnerable groups which can never be seen as promoting general welfare,

[376] Dominic McGoldrick, 'The Interface Between Public Emergency Powers and International Law' (2004)2 International Journal of Constitutional Law, 380 at 383.

[377] For example Article 4(1) ICCPR states: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.

[378] ibid

[379] HRC, General Comment 29, para. 1

[380] A Müller (n 324) 592-593

[381] ibid

[382] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 47.

situations of emergencies, without a need for derogations;[383] and (iii) the general obligation contained in Article 2(1) was 'more flexible and accommodating'.[384]

However, it is noted that the absence of specific derogation clauses from a treaty is not per se determinative of whether derogations are completely prohibited, in the case of the CESCR, this may be taken to mean that either derogation from ESC rights are not permissible since they are not provided for and would seem inherently less compelling given the nature of ESC rights, or that they may be permissible for non-core obligations where the situation appears to be sufficiently grave as to warrant derogation. [385]

In General Comment 3, the Committee confirmed that states parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights enunciated in the Covenant, such as essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.[386] Accordingly, the CESCR has taken the view that core obligations arising from the rights recognised in the Covenant are non-derogable.[387]

In General Comment 14 on the highest attainable standard of health, the CESCR stated: '[i]t should be stressed, however, that a state party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable'.[388] In General Comment 15, on the right to water, the CESCR stated that a 'state party cannot justify its non-compliance with the core obligations set out...which are non-derogable'.[389]

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[383] A. Müller (n 324) 557 –601.

[384] ibid

[385] In Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, Communications Nos 140/94, 141/94, 145/95, 13th Annual Activity Report (1999), para. 41 the African Commission stated: 'In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations [derogations] on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances...' This view was also stated in Commission Nationale des Droits de l'Homme et des Libertes v. Chad, Communication No. 74/92, 9th Annual Activity Report (1995–1996), para. 21; Malawi African Association and Others v. Mauritania, Communication Nos 54/91, 61/91, 98/93, 164/97 –196/97 and 210/98, 13th Annual Activity Report (1999 –2000), Annex V, para. 84.

[386] CESCR, General Comment 3, para. 40

[387] E. Mottershaw, 'Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law', (2008) 12(3) IJHR 449-70

[388] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 47

[389] CESCR, General Comment 15, para. 40

It can thus be argued that without a clause providing for derogation in the CESCR, core obligations arising from ESC rights cannot be derogated from in an emergency including a situation of military occupation.[390] Also, it can be argued that derogating from rights enshrined in the CESCR is far less justified and necessary than rights enshrined in the ICCPR which provides for different clauses on derogations.[391] For instance, it is hard to imagine a situation in which it is necessary to restore the public order, people should be denied their right to health care.[392]

2.3.6.3 Retrogressive Measures

A retrogressive measure is a step back in the level of protection of a right and reduces the extent to which such a right is guaranteed.[393] The retrogressive measure was developed by the CESR to evaluate restrictions due to a lack of resources under Article 2, paragraph 1 CESCR, for example, legislation or policy can be adopted that restricts the content of the entitlements already guaranteed by legislation, or that reduces public expenditure devoted to the implementation of ESC rights.[394]

For many years, the Committee had a rather flexible approach to the adoption of retrogressive measures and did not strictly monitor such measures as adopted by States, this situation began to change after 1998 following the adoption of the Maastricht Guidelines on Violations of ESC Rights, and General Comments 13 and 14 CESCR.[395] The Maastricht Guidelines state that 'the adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed constitutes a violation of economic, social and cultural rights'.[396]

In General Comment No. 13 on the Right to Education, the Committee included the impermissibility of retrogressive measures and was also repeated in General Comment 14.[397] Retrogressive measures are prohibited and incompatible with economic, social and cultural rights and the right to health care in the absence of further justifying evidence.[398]

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[390] Manisuli Ssenyonjo,'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 1596) IJHR, 969-1012
[391] A Müller (n 324) 594
[392] ibid
[393] M. Sepúlveda, (n 361) 323
[394] Ibid 234
[395] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26 1997
[396] E/C.12/1999/10, General Comment 13 (1999), 8 December 1999, The right to education, para. 45
[397] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The right to the highest attainable standard of health, para 48
[398] ibid

The State party has the burden of proving that the measures have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the CESCR in the context of the full use of the State's available resources.[399] States must show that such measures are as indulgent as possible and that the overall enjoyment of ESC rights is not disproportionately diminished, and that these are in consistency with other State obligations and other rights.[400]

Also, just like the specific conditions required on limitations and derogations, the core content of the right to health care should not be affected as this would constitute a violation of the CESCR.[401] In view of this and the preface of the adoption of the Optional Protocol to the CESCR (OP CESCR), the Committee made a statement in which it indicated how it would evaluate State parties' retrogressive measure for which it uses resource constraints as an explanation. It will do this on an individual country case by case based on the following criteria;[402]

(a) the country's level of development;

(b) the severity of the alleged breach, whether the situation concerns the enjoyment of the minimum core content of the Covenant;

(c) the country's current economic situation, whether the country is undergoing a period of economic recession;

(d) the existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict;

(e) whether the State party has sought to identify low-cost alternatives; and

[399] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 32.
[400] A Müller (n 324) 590
[401] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 48
[402] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly by Resolution A/RES/63/117, 10December 2008; E/C.12/2007/1, 10 May 2007, An evaluation of the obligations to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant, para. 10.

(f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without enough reason.[403]

Finally, in the context of an Optional Protocol communication, where the Committee considers that a state party has not taken reasonable steps, the Committee could make recommendations, inter alia, along four principal lines:[404]

(a) recommending remedial action, such as compensation, to the victim, as appropriate;

(b) calling upon the State party to remedy the circumstances leading to a violation. In doing so, the Committee might suggest goals and parameters to assist the state party in identifying appropriate measures. These parameters could include suggesting overall priorities to ensure that resource allocation conformed with the state party's obligations under the Covenant; provision for the disadvantaged and marginalised individuals and groups; protection against grave threats to the enjoyment of economic, social and cultural rights; and respect for non-discrimination in the adoption and implementation of measures;

(c) suggesting, on a case-by-case basis, a range of measures to assist the state party in implementing the recommendations, with particular emphasis on low-cost measures. The state party would nonetheless still have the option of adopting its own alternative measures; and

(d) recommending a follow-up mechanism to ensure ongoing accountability of the state party; for example, by including a requirement that in its next periodic report the state party explain the steps taken to redress the violation.[405]

From all the discussions in section 2.3, the obligation to use 'maximum available resources' is capable of being subjected to judicial or quasi-judicial scrutiny and therefore not a bar to justiciability.[406] Also, as discussed earlier, domestic courts have dealt with cases that aim to protect the right to health as well as other ESC rights. Therefore, even though the 'availability of resources' is an important qualifier towards the realisation of ESC rights generally, it does

[403] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly by Resolution A/RES/63/117, 10December 2008; E/C.12/2007/1, 10 May 2007, An evaluation of the obligations to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant, para. 10.

[404] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Human Rights Council, Resolution 8/2, 28th Meeting, 18 June 2008, Art. 9.

[405] ibid

[406] Manisuli Ssenyonjo (n 390)

not change the immediacy of the obligation to 'take steps' including legislative and other measures to achieve the 'progressive realisation' of the rights.[407]

Also, resource constraints alone cannot justify inaction and certainly cannot be a bar to the justiciability of ESC rights, so, where the available resources are demonstrably inadequate, the state has must ensure the widest possible enjoyment of ESC rights by taking reasonable or adequate steps under the prevailing circumstances.[408] Finally, even in times of severe resource constraints, the state should protect the most disadvantaged and marginalised members or groups of society by adopting relatively low-cost targeted programmes for the realisation of ESC rights.[409]

It is argued that Nigeria is blessed with so many resources enough to reduce the alarming poverty and progressively realise the ESCR of its people if the policymakers were so inclined.[410] The non-realisation of the ESCR in Nigeria is unjustifiable and cannot be attributed to only the lack of wherewithal to satisfy the socio-economic rights of the people to a minimum of human dignity.[411] But also the direct consequence of an active process of impoverishment and de-development.[412] There are cases where international loans and grants purportedly secured to provide essential facilities for the benefit of the people have been diverted for private pockets, securing safe nests for the advantaged class.[413]

It is relevant at this stage to discuss the concept of Justiciability and the arguments for and against it as this is relevant to the main argument of the thesis.

2.4 What is the Meaning of the Concept of Justiciability?

Justiciability is an important concept which delineates the scope of judicial review and it is one of the principles that determine the ideal content of the rule of law.[414] The concept of justiciability has been defined in several ways among which are that it refers to the capacity of

[407] *Government of the Republic of South Africa and others v. Irene Grootboom and* others (2000) South African Constitutional Court. Butterworths Constitutional Law Reports 1169. Durban: LexisNexis South Africa and *Minister of health and Another v. Treatment Action Campaign and others* (2002) South African Constitutional Court. South African Law Report 721. Durban: LexisNexis South Africa
[408] Manisuli Ssenyonjo (n 390)
[409] ibid
[410] Shedrack C. Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 Yale Hum. Rts. & Dev. L.J 177-216
[411] ibid
[412] ibid
[413] ibid
[414] T Endicott, (n 82)

a particular claim to receive judicial scrutiny or determination on the basis of mandatory rules.[415]

Justiciability has also been defined as the possibility of aggrieved individuals or groups raising claims involving alleged violations of their rights for determination/review before domestic judicial or quasi-judicial organs and that it also refers to the right to bring cases concerning the violations before international judicial and quasi-judicial organs.'[416]

Justiciability deals with the boundaries of law and adjudication as such its concern is with the question of which issues are susceptible to being the subject of legal norms or adjudication by a court of law.[417]Justiciability has also been defined as a judicial doctrine subject to judicial evolution[418]. It can also be directed or displaced if a constitution or a legislative body expressly directs that particular provision as justiciable or non-justiciable.[419]

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.[420] Justiciability also serves as a review mechanism for ensuring compliance with human rights and this is key to the realisation of human rights generally, otherwise, human rights run a risk of becoming mere window dressing.[421]

Justiciability also refers to the ability to claim a remedy before an independent and impartial body when a violation of a (human) right has occurred or is likely to occur. In the case of the right to health care, on several occasions, domestic and international courts held claims on health care access justiciable, providing an effective remedy to enforce its realisation.[422]

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[415] M.J Dennis and P. Stewart, 'Justiciability of Economics, Social and Cultural Rights: should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health? (2004)98 AJIL 462

[416]Manisulli Ssenyonjo, (n 91) 54

[417] Ariel L Bendor, 'Are There Any Limits to Justiciability; The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience' (1997) 7(2) Ind. Int'l & Comp. L. Rev 311, 377

[418] ibid

[419] Dominic McGoldrick (n 84)

[420] K. Arambulo, *Strengthening the Supervision of the CESCR: Theoretical and Procedural* Aspect's (Antwerp, Intersentia, 1999)55 in Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Oxford and Portland, Oregon 2009) 280.

[421]Manisulli (n 91) 540

[422] Andre Den Exter, 'Justiciability of the Right to Healthcare' Exter 2014 <http://medicallaw.org.ua/fileadmin/user_upload/PDF/ANDRE_DEN_EXTER.pdf>

Also, the term enforceability is used and sometimes employed as a synonym for justiciability but Arambulo makes a distinction between the two concepts.[423] According to her, the justiciability of human rights is related to whether a human right is open to interpretation by a judicial or quasi-judicial body and hence whether a complaint concerning an alleged violation can be lodged with such a body. It contributes to the further determination of the meaning of such a right and therefore forms part of the strategy for the implementation, realisation and protection of economic, social and cultural rights.[424]

Enforceability of a human right, on the other hand, may have the same connotation as justiciability but comprises a wider range of effect, it does not necessarily only include judgement on whether a human rights violation occurs, it borders on whether a decision of a judicial or quasi-judicial body regarding a specific human right can actually be executed and put into effect.[425]

'Justiciability' as used in this thesis is however not limited to the concept of judicialism which is directed to the court system only. It essentially inheres the idea of other review mechanisms aside from a court process.[426] For instance a quasi-judicial body and indirect protection of the right to health through the judicial application of duties deriving from civil and political rights whose duties are closely interrelated to ESC rights obligations.[427]

Justiciability can also be used as an accountability mechanism and this can be by way of judicial, quasi-judicial, administrative, political mechanism.[428] By judicial and quasi-judicial mechanisms what is meant is resorting to the courts or other bodies capable of holding the government responsible in its duty to provide a comprehensive health system that guarantees individuals' access to health care and other determinants of health. This can also be done through domestic courts and the realisation of the right to health is achieved in practice through judicial successes with other health-related human rights.[429]

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[423] M. Scheinin, 'Justiciability and the Indivisibility of Human Rights', in: J. Squires, M. Langford, and B. Thiele, *Road to a Remedy: Current Issues in the Adjudication of Economic, Social and Cultural rights*, (Sydney: UNSW Press 2005) p. 18

[424] K. Arambulo, 'Giving Meaning to Economic, Social and Cultural Rights: A Continuing Struggle' (2003) Human Rights and Human Welfare, 111-123.

[425] ibid

[426] J.K. Mapulanga, (n 64) 29-48

[427] ibid

[428] Shengnan Qiu and Gillian MacNaughton, (n 20)

[429] ibid

An administrative mechanism involves monitoring and supervising health administrative management, as well as administrative procedures for people to bring complaints, for instance in Nigeria, the Ministry of Health, National Human Rights Commissions (NHRC), Medical and Dental Practitioners Council (MDPC), National Agency for Food and Drug Administration and Control (NAFDAC) and other relevant bodies.[430]

A political mechanism on the other hand is the ability of a government in a state to set up an appropriate health system and remedy market failures through both regulation and resource allocation.[431]This also requires the participation of every stakeholder and the people in general in the development of laws, policies, and practices that can guarantee the enjoyment of health rights.

The purpose of each of these mechanisms is to ensure that governments are answerable for their actions or inactions regarding the right to health and that rights-holders have effective remedies whenever there is a need.[432] It also goes further to explain how justiciability can lead to the adoption of health policies that have a comprehensive framework and which concentrate on the technical features of the content of the right to health and puts in place different ways of effective implementation for the benefit of the individuals in a state. The notion of justiciability, therefore, goes beyond the idea of dispute resolution.

By analysing the concept of justiciability, the nature of the obligations of state duties and compliance as provided by the international level and the role played by the development of the international human right to health in terms of its justiciability is discussed on a more general level. While the role played at the national level in terms of the justiciability of the right to health at the regional and national level in Nigeria will be elaborated upon.

Generally, discussions about the justiciability of ESC rights borders on their direct justiciability which refers to proceedings before a court and this embodies three main elements which are; whether there is an available legal right, whether a legal norm can be invoked in a proceeding before a competent judicial body and whether the victims of violations of these rights can file a complaint before any competent authority and also ask for adequate remedies. [433] The recent development of the international right to health is a drive toward its 'real-life' implementation

[430] Shengnan Qiu and Gillian MacNaughton, (n 20)
[431] ibid
[432] ibid
[433] Bruce Porter (n 88)

for the benefit of individuals, communities, and populations, and a movement from short, general, abstract, legal treaty provisions toward specific, practical human rights guidance.[434]

Accordingly, the debate about whether ESC rights are justiciable has gradually been replaced by a need to better understand how ESC rights are supposed to be adjudicated.[435] Thus, the concept of justiciability for the purpose of this thesis comprises three elements or normative preconditions which are the existence of a claimable legal right, the availability of a competent court or other authority capable of presiding over the mater and thirdly the right to a remedy which may not always exist but very necessary to consider.[436] On a wider concept, there are other elements that are equally important preconditions for justiciability, that is the existence of a rule of law and democracy. All these elements are each examined below;

2.4. 1 The Existence of Legal right

The declaration of a claimable right can be provided for in ESC rights that are entrenched in the national constitutions or other legislation that will enable an individual or group whose rights have been violated to seek redress from a judicial or non –judicial body.[437]

Notably, the constitutional entrenchment of justiciable human rights usually represents the highest-ranking norms within the domestic legal order.[438]However, the constitutionally guaranteed ESC rights are in some countries like Nigeria regarded as Fundamental objectives and directive principle of state policy and in most cases declared as non- justiciable. [439]

However, in a country like South Africa, Section 27(1) guarantees everyone the right of access to health care services. Section 27(2) imposes on the state a duty to take reasonable measures within its available resources to achieve the progressive realisation of this right. The incorporation of ESC rights in its Constitution significantly enhanced the justiciability of the rights as this empowered the courts to adjudicate the violation of the rights.[440]

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[434]Paul Hunt (n 187)
[435] ibid
[436] Bruce Porter (n 88)
[437] Sandra Liebenberg, 'The Protection of Economic, Social and Cultural Right in Domestic Legal System', in *Economic Social and Cultural Rights* (Second Rev. edn. A. Eide etal (ed.s), Martinus Nijhoff Publishers 2001), p.57
[438] ibid
[439] Constitution of the Federal Republic of Nigeria 1999, Chapter II
[440] M Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review.' (2009) 6 (11) Sur. Revista Internacional de Direitos Humanos, 98-133

The proponents of claimability argue that a right ought to be claimable, a prerequisite of which is that will enable such a right to identify its duty-bearers. O'Neill postulates that a right must be matched by some corresponding obligation, which is so assigned to others that right-holders can in principle claim or waive the right (or were not competent to do so, that others be able to at least claim it on their behalf).[441]She further explained that a normative view of rights claims has to take obligations seriously and must view them as articulating the normative requirements that fall either on states or on specified obligation-bearers.[442]

Under the international human rights law, the right to the highest attainable standard of health is a recognized human right. The International Covenant on Economic, Social and Cultural Rights is considered as the central instrument of protection for the right to health, recognizes 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' The Article provides as follows;[443]

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation 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.

This clearly affirms that international human rights recognize the right to health as a claimable right and are committed to its realisation. Also, international and regional human rights instruments address the right to health in various ways; some are of a general application while

[441]Onora O'Neill, 'The Dark Side of Human Rights', International Affairs, Vol. 81, No. 2 (2005), pp. 427-439
[442] ibid
[443] Article 12 CESCR 1966

others address the human rights of specific groups, such as women or children.[444] The treaty bodies that monitor the CESCR, the CEDAW and the CRC have adopted general comments or general recommendations on the right to health and health-related issues. The comments and recommendations provide a detailed interpretation of the provisions found in the treaties.

2.4.2 The Right of Access to court or a quasi-judicial tribunal

The second element is the availability of willing machinery to adjudicate the socio-economic legal rights. Thus, justiciability requires a capable mechanism for adjudicating upon a matter and this can be by resorting to courts or a quasi-judicial body that is readily available to adjudicate on ESC rights whenever an issue arises.[445]

Justiciability of a right requires that victims are granted access to a court or a quasi-judicial body.[446]National institutions like the human rights commission, ombudsman or other bodies in some countries have the competence to receive and act on complaints of human rights violations. For instance, in Nigeria, we have the Human Rights Commission and other regulatory bodies that can receive complaints and act on human rights violations.

National institutions may seek amicable settlements, inform complainants of their rights and how to seek redress, hear complaints or refer them to competent authorities, and make recommendations to solve human rights problems including by amending laws or other acts that obstruct the free exercise of rights.[447]

Also, there are human rights ombudsman institutions that have been given express human rights protection and promotion mandates in their governing legal framework. The number of these institutions is increasing, and they are found throughout Latin America and Europe and are scattered throughout other parts of the world both at the national and sub-national levels of governance.[448] These institutions can preside over any human right related violations including

[444] The 1965 International Convention on the Elimination of All Forms of Racial Discrimination: art. 5 (e) (iv), the 1979 Convention on the Elimination of All Forms of Discrimination against Women: arts. 11 (1) (f), 12 and 14 (2) (b, the 1989 Convention on the Rights of the Child: art. 24, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: arts. 28, 43 (e) and 45 (c), the 2006 Convention on the Rights of Persons with Disabilities: art. 25 and also the African Charter on Human and Peoples' Rights (1981)

[445] ibid

[446]A A Agbor, 'Pursuing the Right to an Effective Remedy for Human Rights Violation in Cameroon: The Need for Legislative Reform' (2017) 20 PELJ

[447] D M Gottehrer, 'Ombudsman and Human Rights Protection Institutions in OSCE Participating States' (1998) OSCE Human Dimension 21 September 1998 Implementation Meeting

[448] ibid

health-related matters. The Ombudsman receives complaints from members of the public and if it identifies a violation of rights, it initiates an investigation.[449] The Ombudsman is generally given access to the documents of relevant public authorities so that it can carry out its duties effectively and independently.[450]

It is necessary to note that the functions of Ombudsman institutions and Human Rights Commissions are very similar in the area of receiving and investigating complaints.[451] Their dissimilarity is such that where the HRI concerns itself with discrimination and human rights abuses perpetrated by individuals, groups, or the government, the Ombudsman has the primary objective of protecting nationals from rights abuses authored by public officials or institutions.[452] Thus, the function of the Ombudsman is to ensure fairness and legality in public administration, though the specific mandates of Ombudsmen vary in different countries.

Also, courts in many jurisdictions have competently decided that the right to health is justiciable. For instance, in South Africa, the Constitutional court has held in several judicial decisions and declared that the right to health like any socio-economic rights are as justiciable as any other rights and freedoms in South Africa.[453] This means that the court can competently adjudicate upon a matter whose subject matter is on the right to health.

The UN Guidelines outline what access means in this context in the following words:

> A victim of a gross violation of international human rights law... shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.[454]

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[449] Paulo Sergio Pinheiro and David Carlos Baluarte, 'National Strategies — Human Rights Commissions, Ombudsmen, and National Action Plans' (Human Development Report, Background Paper, 2000) pages 1-36
[450] ibid
[451] ibid
[452] For example, the United Kingdom Commissioner for Administration and the Western Australian State Ombudsman
[453] The Constitutional Court confirmed the justiciability of the right to health in *Soobramoney v Minister of Health KwaZulu Natal* 1998 (1) SA 765 (C)
[454] Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law (2005)

Even though, the preamble of the Basic Principles states that the Principles and Guidelines are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,[455] the term 'gross violation' itself is not clarified or explained in the Basic Principles. It is therefore assumed that it also applies to a gross violation of the right to health. Also, Principle VIII of the Basic Principles and Guidelines in outlining a set of guidelines for States in fulfilling the obligation to provide equal access to justice included that states should;

> …(c) Provide proper assistance to victims seeking access to justice and (d)Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.[456]

An example of an institution that presides over health-related matters under international human rights law is, the CESCR Optional Protocol, a quasi-judicial international institution, and the Protocol envisages three particular types of communication, which are, individual or group complaints, inter-state communications and an inquiry procedure.[457] The idea behind the procedures is to reach a settlement with the complaint or consider reforming those laws and institutions that are found to infringe a particular right.[458]

At the Regional level, Article 7 of the African Charter on Human and People's Right also recognizes the right to access to a court or a tribunal whenever there is a violation of any human right, it is assumed that this applies to the right to health as well. The article provides thus;[459]

> Every individual shall have the right to have his cause heard. This comprises:
>
> 1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

[455] Resolution 60/147 of the United Nations General Assembly (16 December 2005), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, preamble
[456]Principle I, Guideline 1, Guidelines United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law (2005)
[457]Ilias Bantekas and Lutz Oete, '*International Human Rights Law and Practice*' (Cambridge Press, 2016) 380 384
[458] ibid
[459] African Charter on Human and People's Right 1986, Article 7

2. The right to be presumed innocent until proved guilty by a competent court or tribunal;
3. The right to defence, including the right to be defended by counsel of his choice;
4. The right to be tried within a reasonable time by an impartial court or tribunal.

The African Commission on Human and People's Right is a quasi-judicial body tasked with promoting and protecting human rights and collective people's rights within the African Continent. The Commission also considers individual complaints of the African Charter on Human and People's Rights.[460] Also in Europe, the European Committee of Social Rights protects labour and workplace related rights and the right to protection of health and social security and other rights.[461]

2.4.3 The Right to a Remedy

It is a general principle of law that every right must be accompanied by the availability of an effective remedy in case of its violation, thus, the right to a remedy serves as a procedural means to ensure that individuals can enforce their rights and obtain redress.[462] The individual right to a remedy is very important and first acknowledged in international law under article 8 of the UDHR which states that;

> …everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[463]

The existence of an effective domestic remedy links to the question of the justiciability of a human rights norm, as the refusal to recognise the right to a remedy of ESC rights aggravates the lack of judicial review.[464]At the national level, there are various cases where a competent

[460]Sisay Alemahu Yeshanew, 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia' (2008) 2 AHRLJ 273-293
[461] Articles 11 and 12, European Social Charter, CETS no.35
[462] Ms. Magdalena Sepúlveda Carmona, United Nations Addendum to Report of the Special Rapporteur on extreme poverty and human rights, (HR/26/28/Add.3) (5th June 2014)
[463] Resolution 217 of the United Nations General Assembly (10 December 1948), Universal Declaration of Human Rights, UN Doc. A/810, article 8.
[464] ibid

adjudicatory body presiding over health-related matters awarded damages as compensation for victims whose rights were proven to have been violated.

For instance, in *Consumer Education and Thesis Centre v. Union of India,*[465] the Indian Supreme Court also tackled the problem of the health of workers in the asbestos industry. The court mandated a compulsory health insurance for every worker as an enforcement of the worker's fundamental right to health.[466]The court also had to examine the quality of drugs and medicines being marketed in the country and even asked that some of them be banned.[467]

However, this third element of justiciability must be treated with caution as under international human rights law, Article 3(a) of the International Covenant on Civil and Political Rights of 1966 (ICCPR) explicitly provides the right to an effective remedy,[468] while the CESCR does not explicitly foresee the right to an effective remedy and does not explicitly oblige the states to render ESC rights directly justiciable.[469] The CESCR considers the need to ensure justiciability to be relevant when determining the best way to give domestic legal effect to the Covenant rights.[470]

It must be noted that since international human rights covenants seek to protect individuals, as opposed to Nation-States, from violations of their economic, social, cultural, civil, and political rights,[471], most of the violations are not easily compensable, that is, the damage wrought cannot be adequately compensated by the payment of money for example.[472] This is not to say that violations of such rights cannot be compensated at all, the importance of compensating a victim of a violation of his rights is to assure people within a certain jurisdiction of effective protection of their rights. In fact, if a legal system cannot provide an effective remedy for a wrong the right is termed non-justiciable.[473] As Lord Denning stated in *Gouriet v Union of Post Office Workers,* 'a right without a remedy is no right at all'.[474]

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[465] *Consumer Education and Thesis Centre v. Union of India* (1995) 3 SCC 42.
[466] ibid
[467] *Vincent Pannikulangura v. Union of India* (1987) 2 SCC 165*; Drug Action Forum v. Union of India* (1997) 6 SCC 609; *All India Democratic Women Association v. Union of India* 1998
[468] Article 3 (a) ICCPR states that, 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'
[469] Sandra Liebenberg (n 437)
[470] ibid
[471] Ann M. Piccard, 'Justiciability of All Human Rights: Scottish Independence as Redress for British Human Rights Abuses' (2015) 27 Fla. J. Int'l L. 333, 356
[472] Ibid
[473] ibid
[474]*Gouriet v Union of Post Office Workers* [1978] AC 435

One basic tenet of civilised legal systems is that victims of any unlawful act must have the capacity to enforce their rights before any national or international body.[475]Justiciability whether direct applicability or indirect applicability can help State parties achieve their obligations to respect, protect and promote the right to health. Justiciability entails, amongst other things, ensuring that a victim of a human right violation has a claimable right, can have his or her cause heard by an independent, impartial, and duly constituted court, tribunal or forum and has a right to some sort of remedy. [476]

Finally, it must be stated that the absence of the right to an effective remedy does not however negate the possibility of litigating any violation of human rights.[477]

2.4.4 The Presence of Rule of Law

The concept is very important to the theme of this thesis as the primacy of the law is fundamental to the protection and promotion of human rights.[478] The following definition can be said to be the ideal characteristics of a society governed by the rule of law:[479]

> 1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.
>
> 2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined, and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.
>
> 3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviours.
>
> 4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.

[475] Richard H Fallon, Jnr, 'The Linkage Between Justiciability and Remedies-and Their Connections to Substantive Rights' Virginia Law Review, Vol. 92, No. 4 (June, 2006), pp. 633-705
[476] ibid
[477] ibid
[478] Clair Apodaca, 'The Rule of Law and Human Rights' (2004) 87 Judicature 292
[479] Robert Stein, 'Rule of Law: What Does It Mean?', (2009) 18 MINN. J. INT'L L. 293@304. Available at <https://scholarship.law.umn.edu/faculty_articles/424> Accessed on 08 September 2018.

> 5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.

Thus, the rule of law is a prerequisite for any efficacious legal order and there cannot be any guaranteed human rights without an efficacious legal order.[480] The rule of law is an important prerequisite for justiciability and there are three characteristics that are central to a cogent notion of the rule of law, they are; (1) the absence of arbitrary power on the part of the government; (2) the independence of the judiciary and (3) the equality before the law. Therefore, the rule of law ensures that there is protection against anarchy, it allows persons to rely on laws and plan their lives in a way in which they can predict what consequences will flow from their actions and also protects against arbitrary and capricious action of the government.[481]

It is relevant to state that the rule of law ideal requires a system of accountability of government and its actors which includes a check against the bias, irrationality, corruption, or abuse of those in power, that is the arms of government including; the legislature, the executive, the judges of a particular state. It is also inherent to the rule of law ideal that government action has limitations.[482] The concept of state responsibility or good governance is an integral part of the rule of law.[483] Good governance characterized by accessibility, accountability, predictability, and transparency promotes the rule of law and allows for the justiciability of socio-economic and cultural rights.[484]

The rule of law as a precondition for justiciability also acknowledges the importance of judicial independence. Judicial independence has been widely accepted as a complex and multifaceted concept and the United Nations explains thus:

> The judiciary shall decide matters impartially based on fact without undue influence, the judiciary shall have exclusive authority to decide on issues within its competence, judicial decisions shall not be subject to revision, [the accused

[480] Robert Stein (n 479)
[481] Berta Esperanza Hernandez-Truyol, 'The Rule of Law and Human Rights' (2004) 16 Fla J Int'l L 167
[482] ibid
[483] ibid
[484] Tahmineh Rahmani and Nader Mirzadeh Koohshahi, 'Relationship between the Rule of Law, Good Governance, and Sustainable Development', (2013) 3 (6) pp.9-22

> shall have] the right to ordinary courts or tribunals, and judicial proceedings ought to be conducted fairly.[485]

Thus, three elements are identified as the elements of judicial independence, an impartial judiciary, respect for judicial decisions, and freedom from interference.[486] The existence of these elements presupposes a guaranteed justiciable right. The relationship of the rule of law and human rights generally is distinctive as the rule of law is classified as the rule of law and not the rule of man, meaning that legal and political institutions provide a framework for policies throughout time, and not just personal and individual figures embodying the State.[487] Anne Ramberg explains that;

> The law must properly incorporate social values including the demand of human rights and international humanitarian law. But not even this is enough. The Rule of Law also requires a proper administration of justice. This in turn mandates a reliable and qualitative court system with well-educated and honest judges, prosecutors and advocates.[488]

Finally, without dwelling so much on the concept of the rule of law, the concepts that define the existence of the rule of law which are very important to the essence of justiciability of human rights generally are summarized as follows; the law must be accessible, clear and predictable, the question of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion, the law should apply equally to everyone except in reasonable circumstances, the law must provide the necessary human rights protection, that means must be provided for resolving disputes, that public officers at all levels must exercise the powers conferred on them reasonably, in good faith, that the judiciary must be independent and finally that states must comply with its international law obligations.[489]

Unfortunately, Nigeria continues to face a worsening human rights crisis across the country notwithstanding its's overwhelming ratification of human rights treaties and commitments at

[485] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, and endorsed by the General Assembly resolutions 40/32 of 29 November and 40/146 of 13 December 1985.
[486] Berta Esperanza Hernandez-Truyol (n 481)
[487] Joaquin Gonzalez Ibanez, 'International Rule of Law and Human Rights: The Aspiration of a Work in Progress' (2012) 16 J Juris 515
[488] Anne s quoted at BINGHAM, T, *The Rule of Law, Allen Lane* (Penguin Books, London, 2010) p. 171.
[489] Berta Esperanza Hernandez-Truyol (n 481)

the international and regional level.[490] Just recently in October 2020, the country witnessed unrest as young Nigerians resorted to peaceful protests against police brutality and bad governance under the hashtag #EndSARS.[491] It was reported that Soldiers sent to break up the peaceful protest shot and killed some protesters, the government denies the killings.[492] There are calls for the International Criminal Court to carry out an inquiry into the protest deaths, with the latest petition signed by 154 organisations from around the world against human rights violations under the current administration of President Muhammadu Buhari.[493]

2.4.5 Democracy

The whole aspiration to achieve international justice for democratic states comes through the completion and implementation of the International Rule of Law.[494] It is argued that democracy acts as a gateway to the Rule of Law and consequently a gateway to the justiciability of human rights.[495] Democracy requires the following elements; 1) Separation of powers, which means ensuring checks and balances, 2) Respect for human rights, this is a vital element of democracy which embodies respecting individual, collective and minority rights, 3) Free, fair and periodical elections, 4) A sovereign power, represented by the people, composed of citizens consisting of free men and women with equal rights and lastly 5) The existence of the Rule of Law and accountability, implying the pursuit of justice and the avoidance of impunity.[496]

Without delving too much into the term democracy, this thesis identifies that democratic regimes, with well-established legislators, executives and judiciaries, can better protect citizens' human rights through regulation and lawsuits. And this delineates the very purpose of the justiciability of socio-economic and cultural rights.[497]

It is therefore important to state that only where these preconditions exist can there be justiciability.[498] Because in a democracy, the rule of law protects the rights of citizens, maintains order, and limits the power of government and consequently, all citizens are equal

[490] Amnesty International, 'Nigeria Human Rights Agenda' (May 2019) AFR 44/0431/2019
[491] 'Nigeria Attempt to cover up killing of #Endsars protesters exposed' < https://www.amnesty.org.uk/press-releases/nigeria-attempt-cover-killing-endsars-protesters-exposed> Accessed 15 November 2020
[492] ibid
[493] ibid
[494] Mara Nunes da Costa, 'Human Rights and Democracy - Utopia or Reality' (2012) 60 Rev Faculdade Direito Universidade Federal Minas Gerais 26
[495] ibid
[496] ibid
[497] ibid
[498] Petalla Brandao Timo, 'The Justiciability of the Right to Health: A look into the Brazilian Case' (2012) 23 (1) Revista Latino Americana de Derechos Humanos 227 -248

under the law and no one should be discriminated against based on their race, religion, ethnic group, or gender this forms a basis of justiciability of human rights.

The justiciability of economic, social and cultural rights is subjected to extensive debate. Several arguments have been raised both against and in support of the justiciability of economic, social and cultural rights. It is useful at this stage to consider the debates surrounding the justiciability of Economic, Social and Cultural Rights generally since the right to health falls under same.

2.5 The Debate for and against the Justiciability of the Economic, Social and Cultural Rights.

Despite the United Nations' acceptance of the doctrine of indivisible and interdependent nature of the two sets of rights that is civil and political rights and economic, social and cultural rights, the concept of socio-economic rights has long generated controversy among writers and scholars.[499] Many states have left out the ESC rights from the discourse of human rights and even in some states where the ESC rights are constitutionally embedded in their domestic laws, national courts have depended on oversimplifying the characterization of the rights as non-justiciable rights.[500]

One of the main contentions is that ESC rights are non-justiciable and thus not suitable for judicial enforcement[501] because of the language in which the CESCR is couched that makes its contents to be regarded as vague and regarded as general directives for states rather than rights.[502]The Esc rights have also been said to lack precise definition or specificity due to their generality and vagueness.[503] K. Arambulo also opined that the alleged non-justiciability in the CESCR is generally based on the vagueness of formulation of economic, social and cultural rights contained in the Covenant; and as a result, their opaque normative contents. [504] He further argued that ESC rights are only 'ideals', 'endeavours' or programmatic guidelines for government policies as opposed to being legally binding human rights.[505]

[499] Philip Alston and Gerard Quinn (n 323) 157-159
[500] ibid
[501] Oliver De Schutter, *International Human Rights Law Cases, Materials and Commentary* (Cambridge University Press, 2010) 740
[502] V A Leary (n 104) p 27
[503] ibid
[504] K. Arambulo (n 424)
[505] R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford, Oxford University Press, 2000) 25

Against the issue of the vagueness of ESC rights, the ESC rights were said to be neglected during the cold war by international organisations and by western states in favour of civil and political rights and this led to the development and clarification of civil and political rights at the expense of the ESC rights.[506] The ESC rights, as well as the civil and political rights can be given relatively specific content, so that judicial or quasi-judicial organs can assess the extent to which the state and other actors respect, protect and fulfil their human rights obligations.[507]

Also, vagueness is not only confined to ESC rights but extends to civil and political rights as well and this can be diminished by judicial interpretation.[508] The process of clarification of the content of human rights is an on-going one as the CESCR has affirmed the view that:

> There is no covenant right which could not, in the majority of systems, be considered to possess at least some significant justiciable dimensions…The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in the society.[509]

Another classic argument against the justiciability of ESC rights borders on the concept of separation of powers and the argument is that economic and social rights are indeterminate, and the judges in adjudicating them would definitely act arbitrarily and make the law rather than apply it.[510]It is assumed that by adjudicating the ESC rights, judges would be exceeding their rights under a classical understanding of the concept of separation of powers because this will mean making the law and assuming the role of the legislature.[511] It may also mean assuming the role of the executive in implementing the ESC since they will make choices of the social policy which is the duty of the executive.[512]It has also been argued that the adjudication of ESC rights would be narrowing the room for the exercise of democratic self-determination.[513] Michael Walzer put it thus:

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[506] R Clayton and H Tomlinson (n 505)
[507] H D Kutigi, (n 125)
[508] ibid
[509] Oliver De Schutter (n 501) 740
[510] ibid
[511] ibid
[512] ibid
[513] ibid

> The judicial enforcement of welfare rights would radically reduce the reach of democratic decision. Henceforth, the judges would decide, and a case accumulated, they would decide in increasing detail, what the scope and character of the welfare system should be and what sorts of redistribution it required. Such decisions would clearly involve significant judicial control of the state budget and, indirectly at least, of the level of the taxation- the very issues over which the democratic revolution was originally fought.[514]

However, the argument against the justiciability of ESC rights based on separation of powers has been termed as merely political.[515]This is because the civil and political rights are not immune to delicate power balance issues between the judiciary and the legislature and executive as well.[516]Also, these considerations are of quite limited practical value when discussing the justiciability of rights as the issues at stake is not whether a right has resource implications, but whether there are substantial legal grounds for asserting that a state has an obligation to ensure that resources are allocated for a certain end.[517]

Basically, the judiciary plays a role in enforcing what the legislature has positively and clearly decided as regards all rights, expensive and cost-free, be it economic and social or civil and political rights.[518]Therefore, separation of powers involves allowing judges to examine legislative or executive acts for their conformity with the law and then to rule that whether such acts are invalid or not.[519]

Such powers imply that judges provide authoritative interpretations of the law which can result in rendering actions taken by the executive and legislature as invalid if the actions violate principles of law and rights.[520]This does not mean that the decision-making powers of the legislature and the executive, are replaced by judicial decision-making but rather a question of

[514] Michael Walzer, 'Philosophy and Democracy, Political Theory' (1981) 391-2 in Oliver De Schutter (n 501) 742
[515] International Commission of Jurists, 'A Guide for the litigation of Economic, Social and Cultural Rights in Zimbabwe' (Geneva: ICJ, 2015) via http://www.icj.org/wp-content/uploads/2016/09/Zimbabwe-Guide-ESCR-web-Publications-Thematic-Report-2015-ENG.pdf (Accessed 20th October 2017)
[516] E I Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective' (2006)10 (4), IJHR 406
[517] ibid
[518] ibid
[519] S Agbakwa (n 410)
[520] ibid

review of the policy decisions already made and this does not negate the principle of separation of powers.[521]

Also, there is another argument that courts are not equipped to deal with complex issues and that the adjudicatory process is not suitable for the resolution of problems of social policy.[522] Holmes and Sunstein argued that:

> How can judges in deciding a single case, take account of annual ceilings on government spending? Unlike a legislature a court is riveted at any one time to a particular case. Because they cannot survey a broad spectrum of conflicting social needs and then decide how much to allocate to each, judges are institutionally obstructed from considering the potentially serious distributive consequences of their decisions. And they cannot easily decide if the state made an error when concluding before the fact, that its limited resources were more effectively devoted to cases A, B and C rather than D.[523]

However, Holmes and Sunstein, do not fully subscribe to this position, they opine that courts that decide on the enforceability of rights claims in specific cases will reason more intelligently and transparently if they candidly acknowledge the way costs affect the scope, intensity, and consistency of rights enforcement'.[524] This argument that courts are not equipped procedurally and technically to deal with complex cases concerning social and economic policies is baseless because, in many jurisdictions, judicial and quasi-judicial bodies have found their way around such purported obstacles to the justiciability of ESC rights, hence proving that such bodies can play an important role in the realisation of ESC rights. [525]

With reference to the right to health, it is argued, that decisions about the allocation for healthcare resources, for example, often entail reconciling mutually interacting variables rather than choosing one goal and the exclusion of the other. Within health care itself, there are difficult choices to be made, for instance, between chronic and acute care.[526] Aside from health care, choices have to be made about how resources allocated to health care stand alongside

[521] S Agbakwa (n 410)
[522] Oliver de Schutter (n 501)
[523] Stephen Holmes and Cass R Sunstein, The Cost of Rights. Why Liberty Depends on Taxes (New York and London: W.W Norton, 1999) 95
[524] Ibid p 98
[525] ibid
[526] See the South African case between *Soobramoney v Minister of Health KwaZulu-Natal* (1997 (6) BCLR 78

those allocated to social welfare, defence, education and so on.[527] The American scholar, Lon Fuller, gave a classic statement on the limitations of the judicial function when resolving polycentric issues.[528] Using the metaphor of a spider's web, he stated that:

> We may visualise this kind of situation by thinking of a spider's web. A pull on one strand will distribute the tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would occur for example, if the double pull caused one or more of the weaker strands to snap. This is a 'polycentric' situation because it is 'many centered' – each crossing of a strand is a distinct centre for distributing tension.[529]

What this refers to is a situation that is multi-faceted and may affect many interested parties and carry complex repercussions. Fuller argued that the problems in the allocation of resources such as a case of the provision of healthcare present too strong polycentric aspect to be suitable for adjudication.[530] That is polycentricity connects to justiciability as such issues of this type cannot be subject to a judicial determination because of the process of litigation. He further added that in such a situation as the provision of healthcare, non-judicial mechanisms such as administrative institutions like the ombudsman may be preferable instead of courts.[531]

It is important to note however that polycentricity is a matter of degree and are not absolute and even Fuller notes that a high degree of polycentricity cannot be a bar to judicial resolution in itself and there may be instances where it is preferable for a court to engage in the resolution of a polycentric matter where it cannot be adequately resolved through other means. [532]Also, it cannot always be clear to a court whether a matter before it involves a complex polycentric or not as all matters before a court has a degree of polycentricity.[533]

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[527] Charles Ngwena, 'Scope and Limits of Judicialisation of the Constitutional Right to Health in South Africa: An Appraisal of Key Cases with Particular Reference to Justiciability' (2013) 14(2) R. Dir. sanit., São Paulo, p 43-87

[528] Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2). Harvard Law Review, p. 353-409

[529] ibid

[530] ibid

[531] ibid

[532]Keith Syrett, Law*, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective* (1st edn, Cambridge University Press, 2007) 130-132

[533] ibid

The argument that ESC rights are resource-intensive and costly in nature because it raises issues of public finance and policy and most likely to impose uncontrollable financial burdens upon States was buttressed as follows:

> ...ESC rights are traditionally perceived as 'positive' or 'abstract' rights in that states are required to take action to provide them, and are therefore seen as costly, progressive and non-justiciable. This view is in contrast with civil and political rights traditionally conceptualized as 'negative' (or 'concrete/real') rights, demanding freedom from the arbitrary interference of the state. This classical conception led to the conclusion that civil and political rights (as opposed to ESC rights) are cost free, in that it does not cost the state anything to refrain from non-interference, and thus the argument goes, civil and political rights can be realised immediately which in turn renders them justiciable.[534]

However, all human rights have a negative action component requiring few to no resources(the obligation to respect, a regulatory action component requiring some resources (the obligation to protect) and a positive action component requiring, to varying degrees, significant resources (the obligation to fulfil) leading to budgetary implications.[535] Therefore negative rights cannot be said to be cost-free as they are also protected through the tools of state regulation by means of legislation, police forces and other control systems.[536]

In reality, the realisation of all human rights demands allocation of resources, J. Donnelly stated as follows:

> All human rights however, require both positive action and restraint by the state itself if they are to be effectively implemented. Some rights, of course, are relatively positive. Others are relatively negative. But the distinction does not correspond to the division between civil and political rights and economic social and rights'[537]

It is believed that the full realisation of civil and political rights is heavily dependent both on the availability of resources and the development of important societal structures. [538]

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[534]Manisulli Ssenyonjo (n 91) 541
[535] ibid
[536] ibid
[537] J Donnelly, *International Human* Rights, (2nd ed, Boulder, C O, Westview Press, 1998) 25
[538] P Alston and G Quinn (n 323) 172

The UNHRC also states that all ICCPR rights impose negative duties of forbearance and positive duties of performances on State parties.[539] For example, the right to vote as contained in Article 25(b) involves the provision of an apparatus to ensure fair elections and this requires extensive positive state actions to realise.[540] So the argument in sum is that the realisation of many civil and political rights requires resources just as the economic social and cultural rights and if the civil and political rights are not rendered non-justiciable despite the fact that it requires resources then, the ESC rights should not be categorized as non-justiciable rights.[541]

Having considered the debates for and against the justiciability of ESC rights, it is maintained that the CESCR by stating that all economic, social and cultural rights are justiciable has affirmed the principle of interdependence and indivisibility of all human rights.[542] There are some elements of the ESC that has to be clarified in terms of jurisprudence and national legislation and tailored to the specific facts, just like the case of civil and political rights.[543] The CESCR also indicated that it disagrees with the position that the rights under the CESCR constitute principles and fundamental objectives rather than legal obligations that are justiciable.[544]

2.6 The Right to Health as a Justiciable Right

The right to health is justiciable just like any other human right, the characteristics of the right to health because of its legal nature will make it easier to determine whether it is a justiciable right or not. The right to health is recognised as a social right and thus is deeply connected with state benefits.[545] This means that a state is required to take measures, to act in a positive way for the right to health to be protected. And these state obligations are proportionate to the state's welfare.[546]

The interdependent, interrelation and indivisibility of social and economic rights and political and civil rights cannot be ignored. The importance of the right to health lies in its special role,

[539]Manisulli (n 91) 542
[540] Ibid 543
[541] Ibid
[542] CESCR, Concluding Observations: UK of Great Britain and Northern Ireland, UN Doc E/C.12/1/Add.79 (5 June 2002) para 24
[543] UNHCHR, Report on the Workshop on the Justiciability of ESC Rights, UN Doc E/CN.4/CN.4/2001/62/Add.2 (22 March 2001) para 6
[544] K Tomavevski, 'Justiciability of Economic, Social and Cultural Rights (1995) 55 Review of the International Commission of Jurists 202,206
[545] J.K. Mapulanga-Hulston (n 64)
[546] ibid

arguably placing it at the centre of human rights.[547] It has been pointed out that other human rights cannot be enjoyed without health. Meier, for example, has clearly stated that 'health is essential for human rights flourishing and the exercise of all other rights.'[548] The idea that other rights cannot be fully implemented without health has been affirmed by some writers.[549]

It has been emphasised that implementing social rights is not less important than implementing civil and political rights, it was stated that:

> …if the value of civil and political rights is appreciated, it is certainly worth exploring what may be gained by applying the notion of rights to social entitlements such as the 'right to health'. Further, the realisation, in practice, of civil and political rights may be rendered meaningless without the means to enjoy them has led some to argue that social rights are higher in value than civil and political rights.[550]

The position maintained is that all human rights need to be treated as equal in priority and that civil and political rights and socio-economic rights are interdependent, indivisible, interrelated and inalienable.[551] Based on the numerous evidence clarifying the position of human rights law on the justiciability of the right to health, it is clear therefore that the right to health is justiciable as any other right and in fact, in some jurisdictions, constitutional litigation has proved to be an effective avenue for the realisation of economic, social and cultural rights, and particularly of the human right to health.[552]

Again, the thesis argues that as a legal or human right, healthcare claims should be protected by law and be made justiciable. Protection by law means that the right-holder can exercise his without being hindered by others and if any hindrance occurs, such a right holder can use all permitted mechanisms to halt or remedy the hinderance.[553] Such mechanism includes but is not limited to litigation, however, as there cannot be a sole alternative for all circumstances.[554]

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[547] B M Meier, 'Highest Attainable Standard: Advancing a Collective Human Right to Public Health' (2007) 35(4) ASLME 545-555
[548] ibid
[549] B Toebes (n 150)
[550] T.K. Hervey and J Kenner, Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective, (Portland, Hart Publishing 2003) 195
[551] O Nnamuchi, 'Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria' (2008) 52 (1) Journal of African Law, 9
[552] ibid
[553] ibid
[554] ibid

In a State, the governments' accountability for the right to health stems from the understanding that they hold power in trust on behalf of the people and that their mandate includes an obligation to respect, protect, and fulfil the right to health. These duties can be carried out by adopting the best health policies without discrimination for the benefit of everyone in society and ensuring that there are appropriate mechanisms for implementing these policies.

If a government, therefore, fails to adopt good health-related policies or where there are policies but non-implementation, then litigation may be resorted to. Though there are limitations to litigation of health rights. Gloppen holds the view that;

> Litigation can contribute toward holding governments accountable with respect to both 'policy gaps' and 'implementation gaps.' Health rights litigation may serve to hold governments accountable to their laws and policies and aid implementation by empowering individuals and groups to enforce the laws more directly. This does not mean that litigation is the best approach to advance the right to health in a society nor that it necessarily contributes positively.[555]

This captures the main framework for the impact of justiciability of the right to health, the policy gaps, implementation gaps, and then the accountability of the governments would prove that there is potential in justiciability, justiciability is not merely a theory but useful in the realisation of the health rights and it has a clear role in developing our understanding of the right. This framework would also be applied in determining the extent of the justiciability of the right to health in Nigeria.

Accordingly, there are certain cases when resorting to judicial remedies is the single possible solution to effectively cease and redress human rights violations, but this is not always the case as regards the right to health. This thesis seeks to explore the other mechanism of justiciability of the right to health, like the quasi-judicial mechanism, integrated approach and so on.

But if the international right to health is to mean anything at all, it does seem appropriate to impose some implementation obligations on states and also require some type of regulation to assure implementation and enforcement. We must allow states considerable latitude to define

[555]S. Gloppen, 'Litigation as a strategy to hold governments accountable for implementing the right to health,' (2008)10(2) Health and Human Rights, 4

strategies for implementation within their national economic, social and cultural circumstances.

Given economic, social and cultural differences among the nations of the world, three major approaches can be explored. First, define universal outcome measures that measure compliance with the core state obligations of the human right to health. Second, establish systematic reporting to responsible international bodies to monitor progress on implementation and compliance with international human rights obligations. Third, highlight civil rights violations, such as discrimination against protected groups, which inhibit access to health care services.

Generally, the international sphere cannot play an effective role in the process of overcoming domestic obstacles to the justiciability of ESC rights. This is because access to international protection mechanisms is subsidiary to domestic protection, and usually requires the exhaustion of domestic remedies.[556]

Nonetheless, the existence of international complaints procedures may encourage States, where no remedies against violations of ESC rights exist, to create these remedies. This would have the merits of preventing cases from being taken before international bodies in the first place and providing an opportunity to solve a case domestically before a claim is made against the State in the international sphere.[557]

As noted earlier, there are other layers of justiciability of the right to health that will be explored by the thesis. It is necessary to highlight same at this juncture.

2.7 Other Strategies of Justiciability of the right to health

In elaborating a framework for the domestic protection of human rights, emphasis is usually placed on their inclusion in a constitutional bill of rights and ordinary legislation and the reviewability of their implementation by judicial and quasi-judicial organs.[558] Without undermining the importance of court cases in the protection of ESC rights generally, there is emerging evidence that many, but not all, judicial cases have had a direct and indirect impact, such as setting judicial precedents, influencing legal and policy developments, catalysing social

[556]Manisuli Ssenyonjo (n 91) 532
[557] ibid
[558] Sandra Liebenberg (n 437)

movements and raising awareness and even in the event of a loss, demonstrating the lack of legal protection.[559]

For instance, in Nigeria, where the court system has been described as a slow process, as a case filed in the High Court may take 5-10 years to get a verdict, courts are congested, courts are not computerised, there is need for awareness of under-utilised justiciable avenues other than litigation.[560] Other approaches to the justiciability of the right to health have been identified as quasi-judicial and the Integrated Approach.

They may be broadly categorised as direct and indirect approaches. Direct approaches are based on the argument that economic, social and cultural rights are directly enforceable by adjudicatory organs and they apply in systems where the rights are expressly protected as justiciable substantive norms.

Indirect or interdependence approaches rely on the indivisibility, interdependence, and interrelatedness of all human rights, they are typically employed in systems where economic, social and cultural rights are not clearly or sufficiently protected in applicable legal instruments.

In the African human rights system where economic, social and cultural rights are protected as (quasi) judicially enforceable substantive norms, direct approaches to the justiciability of the rights apply. Based on the integrated protection of the various groups of rights in the African Charter, the interdependence approach may also be used to close normative gaps in the Charter that result from the non-inclusion or incomplete protection of some economic, social and cultural rights. The latter is, in a way, an approach for the stronger protection and enforcement of economic, social and cultural rights in the system.[561]

2.7.1 Quasi-Judicial Body

Quasi-judicial body is commonly used to describe certain kinds of powers wielded by ministers or government departments but subject to a degree of judicial control in the manner of their exercise.[562] Generally, it is applied to powers that can be exercised only when certain facts

[559] M Langford (n 440)
[560] ibid
[561] Sisay Alemahu Yeshanew, 'Approaches to the Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives'(2011) 11 African Human Rights Law Journal Page 320
[562] H Wade, 'Quasi- Judicial and its Background' (1949)10(2) The Cambridge Law Journal 216-240

have been found to exist, and it indicates that these facts must be found in conformity with a code of rules called ' natural justice.[563]The quasi-judicial body is a useful way of monitoring violations of economic, social and cultural rights at the national, regional and international level of the protection of such rights.

At national levels, there are quasi-judicial institutions such as a Human Rights Commission and an Ombudsman that can provide an easily accessible forum for the implementation and enforcement of the right to health[564]. Such institutions can function to ensure the justiciability of human rights through quasi-judicial procedures. Human rights ombudsman institutions are those ombudsmen that have been given express human rights protection and/or promotion mandates in their governing legal framework and are becoming popular in the world at the national and sub-national levels.[565]

Also, the African Commission on Human and People's Rights is a quasi-judicial body tasked with promoting and protecting human rights and collective people's rights in the African region. The Commission also considers individual complaints of the African Charter on Human and People's Rights.[566]

The African Commission has been able to give the right to health meaningful content by relying on the normative definition of the right to health as spelt out by the CESR on the Right to the highest attainable standard of health. Therefore, applying this understanding of the right to health as extending to healthcare and the underlying determinants of health to the facts, the Commission found that the destruction of homes, livestock, and farms as well as the poisoning of water sources, amounts to a violation of Article 16 of the Charter.[567]

Importantly, the jurisprudence of the African Commission on ESC rights has had a great deal of impact at the level of sub-regional protection of human rights in Africa.[568]

2.7.2 Integrated Manner of Justiciability

This simply means an approach of protecting the human right to health by taking into account that all rights are interrelated and indivisible. The approach takes into consideration the organic

[563] H Wade (n 562)
[564] ibid
[565] ibid
[566] Sisay Alemahu Yeshanew (n 460)
[567] See the case*, Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan, Communications* nos 279/03 and 296/05 (2009) 28th Activity Report para 209-10
[568]Manisulli (n 91) 241

interdependence of rights which implies that one right forms part of another right by which it may be protected. Therefore, the economic, social and cultural rights can be read into civil and political rights.[569]

Consequently, the promotion and protection of one category of rights should 'never exempt or excuse States from the promotion and protection of the other'. Under the integrated manner, civil and political rights are instrumental for the effective protection of economic, social and cultural rights as a violation of these rights may in certain circumstances give rise to a breach of a classical civil and political rights instrument.[570]

There are two ways of adopting an integrated approach they are an indirect way and a direct way.[571] By the indirect integrated approach, elements of economic, social and cultural rights and the right to health care are considered when dealing with the substantive provisions of the ICCPR.[572] Under the direct adoption of the integrated approach, autonomous provisions of the ICCPR are directly applied to rights protected by other human rights instruments.[573] This strategy of justiciability of socio-economic and cultural rights has been used at the national, regional and international levels of the protection of the rights.

For instance, at the national level, the Indian Supreme Court can be said to have effectively utilized the integrated approach to enhance the justiciability of socio-economic rights which are made non-justiciable under art 37 of the Indian constitution.[574] This was done through creative interpretation of the civil right to life and security of a person thereby operationalizing the doctrine of indivisibility and the major advantage of the integrated approach is that the ESC can be subject to adjudication by human rights bodies and thus provide stronger protection of these rights.

The European Court of Human Rights has been using the integrated approach to the enhancement of justiciability of socio-economic rights and has advanced the enjoyment of

[569] Manisulli (n 91) 241
[570] ibid
[571] The European Committee for Social Rights applies an integrated approach, albeit by protecting civil and political demands via economic, social and cultural rights. See for example, see *European Roma Rights Centre (ERRC) v. France*, (Complaint No. 51/2008) para. 99
[572] V. Mantouvalou, 'Work and Private Life: Sidabras and Dziautas v. Lithuania' (2005) Erasmus Law Review, p. 573-585
[573] ibid
[574] See art 37 of the Indian Constitution that stipulates: 'Directive Principles of State Policies shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country', See also Bertus De Villiers, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience,' South African Journal on Human Rights, Vol. 43(1992), p.40

socio-economic rights in the region through civil and political rights which are clear, not controversial. The court further emphasised and manifested the close ties (kin) between civil and political, and economic and social rights thereby elucidating that.[575]

Also, there is the possibility of treaty-based bodies to protect or at least take into account social and economic rights when providing international protection for those rights explicitly covered by the treaties in question through an integration manner because of the interrelatedness and indivisibility of human rights.[576] The integrated approach thus provides the treaty bodies with the possibility to make complex assessments and to get a step closer to ensure the proper protection of the two classes of human rights.[577]

The major advantage of the integrated approach is that elements of economic, social and cultural rights can be subject to adjudication by human rights bodies and thus lead to stronger protection of these rights. This section has explained that there are other layers of justiciability of the right to health other than the traditional courts, However, it is necessary to state that the justiciability of the right to health in a particular state depends largely on what the State has or is willing to do to protect such a right.

2.8 Conclusion

This chapter has explained the concept of the justiciability of the right to health and highlighted the duty of the States in taking steps to effectuate the right to health. It has argued with evidence that the right to health can be justiciable and ought to be justiciable. States have obligations to respect, protect and fulfil the right to health and are expected to provide the availability of health services, healthy and safe working conditions, adequate housing, and availability of safe drinking water, pollution free and healthy environment and nutritious food for everyone.[578] States must under normal circumstances be seen to be taking relevant steps within the available resources to ensure the progressive realisation of the right of their citizens.

The chapter has also established that justiciability of the right to health is a possible means through which states can fulfil its main obligations towards the realisation of health rights. Also, knowing that the violation of this right could raise claims in front of courts each state

[575] M. Scheinin, 'Economic and Social Rights as Legal Rights', in: A. Eide, C. Krause, and A. Rosas*, Economic, Social and Cultural* Rights (The Hague: Kluwer Law International 2001) p. 29-54
[576] ibid
[577] ibid
[578] Philip Alston and Gerard Quinn (n 323)

would be spurred to adopt a national health strategy, based on its legal obligations and the general principles of international law that ensures to all the enjoyment of the right to health.

A great number of the tasks required for an adequate realisation of ESC rights depend on the interpretation of laws, policies, programs, implementation and the actions taken by the executive and legislative branches in the State.[579] Conversely, denying judicial intervention in this field seriously reduces the remedies victims of ESC rights violations can claim. It also weakens the accountability of the State and erodes deterrence consequently fostering impunity for violations.[580]

However, Nigeria has not been able to fulfil its obligations regarding the right to health, which, amongst other things, include the adoption of numerous measures aimed at giving effect to the rights for the benefit of every individual. Therefore, the substantive human rights contained in its human rights instruments, as well as the obligations imposed on States Party, only exist majorly in ink.[581]

The next chapter analyses the limited justiciability of the right to health in Nigeria.

[579] Philip Alston and Gerard Quinn (n 323)
[580] ibid
[581] Bahar Jibriel (n 156) 29-50

CHAPTER THREE: A LIMITED JUSTICIABILITY OF THE RIGHT TO HEALTH IN NIGERIA

3.0 Introduction

This chapter examines the level of justiciability of the right to health in Nigeria by analysing the implementation of the right to health particularly the practical measures laws, policies, practices, interventions designed to ensure its realisation of the right to health in the country. This chapter also attempts to provide the answer to the question, 'to what extent can the right to health be justiciable under the Nigerian law'.

The chapter scrutinises the legal protection of the right to health under the Nigerian law through the review of the constitutional and other law provisions that borders on the right to health in Nigeria and then mainly the compliance with the right to health as expressed in the International Covenant on Economic, Social and Cultural Rights (CESCR) and the African Charter on Human and Peoples' Rights (ACHPR). These two international instruments are very important because as discussed earlier, the CESCR contains the most comprehensive formulation of the right to health in international human rights law,[582] and the ACHPR is an authoritative regional human rights instrument for countries on the African continent.[583] It will be against this conception of the right to health in the Nigerian jurisprudence that will be evaluated.

The chapter argues that claims denying justiciability on the grounds of (a) an absence of a legal foundation and/or (b) paucity of resources can be done away with and that there are other factors responsible for the poor development in the healthcare sector in Nigeria. The aim of the chapter is to determine whether improved justiciability of the right to health would foster a better enjoyment of the right and to determine whether there is room for improvement of the standard of the protection of the right to health to meet up to the expected standard of the practical realisation of the health rights in Nigeria.

[582] Art 2 of the CESCR General Comment 14 (n 4) General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant) (11 August 2000) E/C.12/2000/4 <http://www.refworld.org/docid/4538838d0.html> accessed 1 March 2014

[583] Nigeria ratified the ACHPR on 22 June 1983. Accession to the CESCR was on 29 July 1993. The CESCR is legally binding for ratifying states and theoretically enforceable in domestic courts.

3.1 The Apparent Non-Justiciability of the Right to Health in the Nigerian Constitution

Nigeria as the most populous nation with over 100 ethnic nationalities on the African continent was admitted as the 100th member of the United Nations.[584] The country was buffeted by many military coups until political liberalization was ushered in by the return to civilian rule in 1999.[585] In Nigerian Constitutions, beginning from the post-independence constitution, due attention has always been given to the issue of human rights, thus there are provisions on human right protection in 1960 independence Constitution,[586] the 1963 Republican Constitution[587] and 1979 Constitution[588].

Also, in the 1999 Constitution (as amended) which is the Constitution in force till date, two Chapters,[589] are devoted to human rights subject.[590] The protection of human rights in any national constitution is a recognition and part fulfilment of the international obligation of the State to take joint and separate action in cooperation with the UN for the achievement of universal respect for, and observance of, human rights and fundamental freedoms.[591]

The preamble to the 1999 Constitution dedicates itself to promote 'good government and welfare of all persons on the principles of freedom, equality and justice'. Apart from the preamble, chapters II and IV of the Constitution extensively deal with human rights issues. However, the Constitution engenders a bifurcated regime of human rights, chapter IV embodies civil and political rights (which are primarily libertarian in character) and, in the generational paradigm of human rights discourse, form the bedrock of first generation rights while Chapter II of the Nigerian Constitution makes provision for 'Fundamental Objectives and Directive Principles of State Policy'.[592]

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[584]Oyeniyi Ajigboye (n 1) 23, 34

[585] ibid

[586] Constitution of the Federal Republic of Nigeria 1960, Chapter II, s 14 15 16 which is same as the ones contained in s 17, 18 to 33 of the 1999 Constitution.

[587] Constitution of the Federal Republic of Nigeria 1963, Chapter ii, section 18 to 40

[588] Constitution of the Federal Republic of Nigeria 1979 Constitution from section 30 to 39

[589] Constitution of the Federal Republic of Nigeria 1999, chapters 2 and 4, 1999 Constitution however the Although the provisions of chapter 2 dealing with fundamental objective and directive principles of state policy are not justiciable, they are nonetheless not without any utilitarian value as they serve as aid to interpretation of the other sections

[590] These provisions are a reproduction of the 1979 Constitution, the 1963 Constitution however had no provisions comparable with chapter 2 of the 1979 and 1999 Constitutions; but made provisions for human rights in sections

[591] J A Dada, 'Impediments to Human Rights Protection in Nigeria' (2012) 18 (1) ASICL 67Human Right under the Nigerian Constitution; Issues and Problems' (2012) 2(12) IJHSS 67

[592]ibid

The Fundamental Objective and Directive Principles of State Policy which consists of economic, social and cultural rights are extensively set out in sections 13 to 21 of the Constitution. These rights require affirmative governmental action for their enjoyment.[593]It is important to note that the obligation of the state towards the effectuation and realisation of the rights is fully captured by section 13 which provides that:

> 'It shall be the duty and responsibility of all organs of government, and of all authorities and persons exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of, (the fundamental objectives and Directive Principles of State Policy)'.[594]

In the case of the *Attorney-General of Ondo State vs. Attorney-General of the Federation & 35 ors*,[595] the Supreme Court held that section 13 does not only impose a solemn duty to observe the mandate contained in Chapter II on all organs of government and all authorities and persons exercising legislative, executive or judicial powers, but also on private individuals as well.

The court rejected the argument that the section applies only to government officials and held that the argument 'does not take account of the undeniable fact that those organs do not operate entirely within their official cocoons. They do not, in the performance of their duties act in isolation of the public'.[596] The first fundamental objective enacted in chapter II is the political objective which states that Nigeria shall be a State based on the principles of democracy and social justice.[597]

On the other hand, chapter IV makes provision for fundamental Rights, these rights seek to protect and safeguard the individuals, whether alone or as a group, against the abuse of power,

[593] Constitution of the Federal Republic of Nigeria 1999, s13-21
[594] ibid
[595] *Attorney-General of Ondo State vs. Attorney-General of the Federation & 35 ors* (2002)9 NWLR (pt 772)222 S.C., See especially the judgment of Uwaifo, J.S.C. at 381.
[596] ibid
[597] Constitution of the Federal Republic of Nigeria 1999, s13-21

especially by political authority,[598] the Constitution expressly makes these rights justiciable in the following section: [599]

> 44.
>
> (1) Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State or in the Federal Capital Territory, Abuja, in relation to him may apply to a High Court having jurisdiction in that area for redress.
>
> (2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State or in the Federal Capital Territory, Abuja, of any rights to which the person who makes the application may be entitled under this Chapter…

This section apparently makes justiciable the civil and political rights as contained in the constitution unlike the apparent non-justiciability of the economic, social and cultural rights. Therefore, the constitution outrightly makes the right to health non-justiciable, however, having signed and ratified the treaties on the right to health at the international and regional level, the right cannot be said to be non-justiciable in Nigeria. Thus, by the ratification of treaties on the right to health and especially the ratification and domestication of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act which has the force of law[600], Nigeria has an obligation to promote and protect the right to health.

The protection of the right to health comes under the fundamental objectives and directive principles on socio-political, economic, and cultural issues which are meant to guide the

[598] Constitution of the Federal Republic of Nigeria 1999, s 33-43 ; they are they include the right to life, right to dignity, these rights are similar to the ones contained in the International Covenant on Civil and Political Rights 1966, these rights are Right to life, Right to dignity of the human person, Right to personal liberty, Right to fair hearing, Right to private and family life, Right to freedom of thought, conscience and religion, Right to freedom of expression and the press, Right to peaceful assembly and association, Right to freedom of movement, Right to freedom from discrimination, Right to acquire and own immovable property anywhere in Nigeria and Right to receive prompt compensation for compulsory acquisition of property.

[599] Constitution of the Federal Republic of Nigeria 1999, s 44

[600] The African charter on Human and Peoples' Right Cap.10, Laws of the Federation of Nigeria 1990 with a commencement date of 17 March 1983.

government in the formulation of its policies.[601] Particularly S. 17 (3) (c) and (d) mandates the government of Nigeria to 'direct its policy towards ensuring the health, safety and welfare of all person in employment are safeguarded and not engendered or abused' and that 'there are adequate medical and health facilities for all persons.'

It is not entirely clear if the right to healthcare forms a part of the guaranteed rights in the Constitution as it is not explicitly contained in the 1999 Constitution.[602] The issue of health is restricted to the social and economic policy objectives of the country under chapter II of the Constitution and it is necessary to reproduce the specific section.[603] Section 17 (3) provides thus:

> (3) The State shall direct its policy towards ensuring that-
>
> (a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment;
>
> (b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;
>
> **(c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;**
>
> **(d) there are adequate medical and health facilities for all persons:**

However, the provisions of Chapter II of the Constitution wherein the above section has been excluded from adjudication by the Nigerian courts, thus, no right of action can ensue from the breach of the provisions of chapter II against the government.[604]

Section 6 (6) provides;

> (6) The judicial powers vested in accordance with the foregoing provisions of this section -

[601] Constitution of the Federal Republic of Nigeria 1999, Cap II s, 13-24 (See excerpts in chapter 2)
[602] E.B. Omoregie and D. Momodu, 'Justifying the Right to Healthcare in Nigeria –Some Comparative Lessons (2014) 14 Nig. J. Review 13, 19
[603] Constitution of the Federal Republic of Nigeria 1999, s 17(3) (C)
[604] ibid

(a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law

(b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;

(c) shall not except as otherwise provided by this Constitution, 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

Section 6 (6) (c) is highlighted for emphasis, a strict interpretation of the sub-section has meant that Nigerian courts are almost always incapable of or unwilling to entertain socio-economic rights claims.[605]In many cases, the Nigerian Supreme Court has held that the exception clause as contained in the subsection as not justiciable and to be mere declarations.[606]

A strict interpretation of section 6(6)(c) is that issues contained in Chapter II (the socio-economic and cultural rights) are not justiciable in the courts, except to the extent that they are rendered justiciable in statutes.[607] As such, the non-justiciability of Chapter II is only to the extent provided for Section 6(6)(c) of the Constitution.[608]

Section 6(6)(c) is consequently an aberration which, in a constitutional provision runs contrary to the preceding provisions of section 6 (a) (b) and against public policy whereby a fundamental policy that cuts across economic rights purports to be created.[609] The section creates a limitation to which the courts of law in Nigeria can exercise their inherent powers to adjudicate

[605] The Constitution of the Federal Republic of Nigeria 1979, also had a similar provision, and this was in force before the 1999 Constitution

[606]In the case of *A. G. Ondo State v A.G. Fed* (2002) 9NWLR (pt772), the supreme court held that, it is well established as per S.6 (6)(c) of the Constitution that rights under the Fundamental objective and Directive Principles of State Policies are not justiciable except as otherwise provided in the Constitution.

[607] *A. G. Ondo State v A.G. Fed* (2002) 9NWLR (pt772

[608] ibid

[609] OVC Ikpeze, 'Non-justiciability of Chapter II of the Nigerian Constitution as an impediment to Economic, Rights and Development' (2015) 5 (18) IITSE 50

on human rights issues and give sanctions where necessary to all matters between persons or between government, or authority and persons in Nigeria.

However, it is argued that the literal interpretation of section 6 (a) and 6 (b) creates a room for justiciability which is by indirect /integrated approach. Since the judicial powers extends to all inherent powers and also to all actions that determine any question that relates to civil rights and obligations, the elements of the right to health care can be considered by the power of this section when dealing with the civil rights which are outrightly justiciable.[610]

Nwabueze, a Nigerian constitutional law scholar thinks that, it is 'inappropriate' to incorporate socio-economic rights in a constitutional Bill of Rights given that these rights are not justiciable.[611] The reason being that, it would be silly to compel a State through a judicial fiat to allocate resources which it does not have.[612] In support of this view, Akande also argues that since Nigeria is not yet a welfare state in the same sense as Western countries, 'all the provisions for welfare assistance must remain unattainable goals or ideals'.[613]

Nnamuchi is however of the opinion that this view misrepresents the spirit of the Constitution and the provisions on Directive Principles as the Constitution itself has placed the entire Chapter II on Directive Principles under the Exclusive Legislative List. By this, it means that all the Directive Principles need not remain mere or pious declaration.[614] He adds that Akande's reasoning rests on the assumption that given the disparity in wealth and development, Nigeria cannot afford to provide a comparable level of welfare assistance to its citizen, say for instance wealthier industrialized countries like Canada and the United Kingdom.

But that 'this assumption suffers a troubling analytical deficiency in that it fails to heed the gradual nature of the institutional and normative changes that transformed Western countries to welfare states and that a country desirous of adopting a social welfare model must start from

[610] The integrated approach as discussed in section 2.7.2 of this thesis takes into consideration the organic interdependence of rights which implies that one right forms part of another right by which it may be protected.
[611] B Nwabueze, *Constitutional Law of the Nigerian Republic* (1964, Butterworths) at 408. He would prefer that such socio-economic rights are Directives Principles as opposed to rights capable of immediate enforcement. He asserts that although not legally enforceable, the benefit of such Principles is that they provide a yardstick for critical assessment of government actions. Institute) at 34– 35.
[612] ibid
[613] J Akande, *The Constitution of the Federal republic of Nigeria 1979 with Annotations* (1982, Sweet & Maxwell) 18
[614] O Nnamuchi (n 551)6

somewhere. It must start from a level sustainable by its economy and other considerations and make necessary improvements or adjustments as circumstances change'.[615]

Also, Okere argues that mere non-justiciability of the fundamental objectives does not completely divest the ESC rights of any legal value.[616] In his view this cannot affect the validity of the legislation; a bold judiciary may yet vest them with legal significance.[617]

It is argued that Nigerian courts can investigate whether or not fundamental rights have been violated by making reference to fundamental objectives and directive principles which may be connected to such fundamental rights. [618] But Nigerian courts appear at a time to stop at simply stating that fundamental objectives are not justiciable and do not seem to have interpreted the fundamental objectives and directive principles broadly and purposively to vest them with much legal significance.[619] The Constitution also places a duty and responsibility on all organs of government, and all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of the fundamental objective.

In practice generally, it is difficult for a violation of an economic, social or cultural right to be a subject of review by a court of law or a quasi-judicial procedure unlike the civil or political right.[620] This is due to the inferior status that the economic, social and cultural rights have suffered for a long time. Nonetheless, over the last two decades, several developments at the international and regional level have strengthened the justiciability of economic, social and cultural rights particularly the right to health.[621] This has somewhat impacted the justiciability of health rights in Nigeria as some of the cases that have been considered are discussed below.

3.2 Justiciability of the Right to Health under the Nigerian Case Law

Again it is necessary to re emphasis that the right to health just like other socio, economic and cultural rights are categorized under the fundamental objective and directive principle and

[615] O Nnamuchi (n 551)7
[616]B O Okere 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution' (1983) 32 International and Comparative Law Quarterly 214-215.
[617]ibid
[618]This has been the approach of the Indian courts towards similar provisions in the Indian Constitution which provides socio-economic rights as fundamental objectives and directive principles. See Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Another [1996] ICHRL 31 (6 May 1996) (AIR) 1996 SCC 246 (Supreme Court of India), in which the Supreme Court linked the right to health to the right to life which is justiciable under the Indian Constitution.
[619]Oyeniyi Ajigboye (n 1)
[620]Maite San Giorgi, *The Human Right to Equal Access to Healthcare* (1st edn, Intersentia 2012)
[621] ibid

declared not directly justiciable by the Nigerian Constitution.[622] The Court of Appeal had the first opportunity to define judicial attitude toward socio-economic rights claims in *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State.*[623]By a circular dated 26 March 1980, the Lagos State government purported to abolish private primary education in the state. The plaintiffs challenged the circular as unconstitutional. They applied, under the relevant provisions of the 1979 Constitution, for reference to the Federal Court of Appeal of had to consider the question;[624]

> whether or not the provision of educational services by a private citizen or organization comes under the classes of economic activities outside the major sectors of the economy in which every citizen of Nigeria is entitled to engage in and whose right so to do the state is enjoined to protect within the meaning of section 16(1) *(c)* of the Constitution of the Federal Republic of Nigeria.[625]

The Court also considered the extent of the obligation imposed on the government to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. Justice Mamman Nasir in giving his decision set out the rationale for DPSPs, he observed that fundamental objective and directive principles of the State aims to identify the ultimate objectives of the nation and lay down the policies which are expected to be pursued in the nation's quest to realise its objectives.[626] After examining the provisions of the 1979 Constitution,[627] he concluded that:

> While Section 13 ... makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, Section 6(6) *(c)* of the same Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and

[622] Constitution of the Federal Republic of Nigeria, S 6(6) (C)
[623] O Agbakoba & U Emelonye, Test of progressive realisation of economic, social and cultural rights in Nigeria (1990-1999 Budget Analysis) (2001) HURILAWS, Lagos 1-2.
[624] ibid
[625] ibid
[626] ibid
[627] Secs 13 & 6(6)(c). Sections 13-32 clause of Nigeria's Constitution was introduced for the first time in the 1979 Constitution and reproduced in the 1999 Constitution

> Directive Principles. It is clear that section 13 has not made chapter II justiciable.[628]

Also, by clarifying the ambiguity as to the precise role of the judiciary in this instance, he expressed the view that:

> the obligation of the judiciary to observe the provisions of chapter II is limited to interpreting the general provisions of the Constitution or any other statute in such a way that the provisions of the chapter are observed ... subject to the express provision of the Constitution.[629]

The judge also made it clear that 'the arbiter for any breach of and guardian of the fundamental objectives ... is the legislature itself or the electorate',[630] as it is clear from the provisions of section 4(2) and item 59*(a)* of the Exclusive Legislative List in the Second Schedule to the Constitution [631] that the National Assembly 'has the duty to establish authorities which shall have the power to promote and enforce the observance of chapter II of the Constitution and that until the authorities are established, it will be 'mere speculation to say which functions they may perform or in which way they may be able to enforce the provisions of chapter II.'[632] A careful review of *Okogie's* case explains the current attitude of the judiciary towards the justiciability of the socio-economic and cultural rights in Nigeria.[633]

In another case between the *Federal Republic of Nigeria v. Aneche*, Justice Niki Tobi of the Supreme Court of Nigeria however, observed that section 6(6)(c) provides a leeway which could make the clause justiciable as the opening portion of the subsection says the powers of judicial determination is conditional 'except as otherwise provided by the Constitution'.[634] Thus, if the Constitution provides otherwise, then the clause could be enforced. Therefore, it can be assumed that in respect of health care, if a body is established by law to provide for or ensure the provision of health care services for all Nigerians as of right, a citizen can actually

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[628] The term was first used in the 1979 Constitution. Justice Mamman Nasir described fundamental objectives as identifying 'the ultimate objectives of the nation' and the directive principles as laying down the 'policies which are expected to be pursued in the efforts of the nation to realise the national ideals' (see *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350).

[629] ibid

[630] ibid

[631] 1979 Constitution, with equivalent provisions in the 1999 Constitution

[632] ibid

[633] Stanley Ibe, 'Beyond Justiciability: Realising the Promise of Socio-Economic Rights in Nigeria' (2007) 1 AHRLJ 225-248

[634] *Federal Republic of Nigeria v. Aneche* [2004) 1 SCM 36 at 78

seek enforcement of his right to health within the provisions of the legislation establishing the body without the stricture of the general provision of section 6(6(c).[635]

Nigerian courts appear to mostly stop at simply stating that fundamental objectives are not justiciable and do not seem to have interpreted the fundamental objectives and directive principles broadly and purposively to vest them with much legal significance.[636] This means that claims that rely on the provisions of the constitution on ESC rights do not usually succeed, therefore most claims rely on the provisions of the African charter since it has been domesticated and now part of Nigerian laws.

For instance in the case of *Festus Odafe and Others v AF Federation and Others*, [637] HIV-positive detainees in prison custody alleged that they were being denied the necessary medical attention by the prison administration in a manner that unlawfully discriminated against them on grounds of their HIV status. The detainees also alleged that this violated their inherent dignity as human beings. The Nigerian Federal 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 to ensure that they receive medical attention when they are sick.[638]

The court also held that while the high cost of medical treatment is appreciated, statutes also have to be complied with and the State has a duty to honour its obligations in terms of these legislative instruments.[639] The trial judge consequently ordered the authorities to relocate the detainees to a medical facility where they could receive treatment and awarded costs in their favour.[640] This judgement is commendable and the court took a robust action to rely on the African charter rather than rely on the constitutional limitation.

In *Oronto Douglas v Shell Petroleum Development Company Limited*, [641]the applicant sued for the protection of the right to a safe environment guaranteed by article 24 of the African Charter.

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[635] Stanley Ibe (n 633)
[636] ibid
[637] *Festus Odafe and Others v Attorney General of the Federation and Others*, Unreported Suit No FHC/PH/CS/680/2003, Judgment of Honourable Justice RO Nwodo, 23 February 2004.
[638] 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
[639] ibid
[640] ibid
[641]*Oronto Douglas v Shell Petroleum Development Company Limited*, (1998) LPELR-CA/L/143/97

He contended that, contrary to the Environmental Impact Assessment Law, the defendants engaged in the construction of a hazardous liquified natural gas plant without the requisite environmental impact assessment study. A high court in Nigeria refused to entertain the suit on grounds of *locus standi*, but the court of Appeal subsequently sent the case back to the lower court for a rehearing on the grounds that the Federal High Court had breached a number of procedural rules and that it had a locus standi by virtue of the African Charter which is now a part of Nigerian laws.[642] Unfortunately, the retrial did not proceed as ordered by the Appellate Court because the project had been completed by the time the Appellate Court delivered its decision.[643]

Notably, Nigerian courts have also begun to adopt a more nuanced approach in their judicial interpretation by upholding the country's obligations on the right to life in international statutes.[644] Although these decisions do not yet expound the right to life in Nigeria to include the right to healthcare, the approach adopted by the courts could serve as a useful precedent to improve the current municipal perception of the right to healthcare as outside the ambit of the fundamental rights guaranteed in the Nigerian Constitution.[645]

Thus, in *Gbemre v. Shell Petroleum Development Company Nigeria Limited and others*,[646] in an action filed to challenge the continuous gas flaring activities of the defendant in the course of its oil and gas exploration and production in the Niger Delta area of Nigeria, the court held that the constitutionally guaranteed right to life and dignity of human person inevitably include the right to clean, poison-free, pollution-free and healthy environment. In arriving at this decision, the court not only relied on the constitutional provisions guaranteeing the right to life and dignity of the person but also on the international obligation undertaken by Nigeria under articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights which has been ratified as part of the country's municipal law.[647]

[642] *Douglas v Shell,* Unreported Suit No. CA/L/143/97 in the Court of Appeal
[643] Ibid
[644]E.B. Omoregie and D. Momodu (n 644)
[645] ibid
[646] Gb*emre v. Shell Petroleum Development Company Nigeria Limited and others* (Unreported) Suit No. FHC/B/SC/53/05
[647] ibid

3.3 An Analysis of the Legal Protection of the Right to Health in Nigeria

There are treaty provisions that have been domesticated in Nigeria and have been interpreted to prohibit numerous forms of abuse in health settings and highlights government responsibility to respect human rights itself, protect against violations by third parties, and fulfil the conditions necessary for the realisation of health rights.[648]

3.3.1 The African Charter

As discussed earlier, the African charter has been domesticated under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (the African Charter Act) [649]and therefore has the force of law in Nigeria. Article 16 as discussed earlier provides for the enjoyment of the best attainable state of physical and mental health. It is necessary to add that, other provisions worthy of mention as they relate to the right to health are; Article 4 and 5 and they provide as follows:

> 4. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
>
> 5. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.[650]

The domestication of the African Charter implies that the National Assembly can 'bestow legislative imprimatur of justiciability and enforceability to the Fundamental Objectives Directive Principles of the constitution that are enshrined in the charter. Even though the fundamental objectives and directive principles are non-justiciable under the constitution, the government has bound itself to them.[651]

On the right to health, the courts have on certain instances drawn from the constitutional recognition of health care entitlement in translating and applying constitutionally enforceable right or apply the provisions of the African Charter, thus adopting the indirect/ integrated

[648] Jonathan Cohen and Tamar Ezer, 'Human Rights in Patient Care: A Theoretical and Practical Framework' (2013) 15(2) Health and Human Rights Journal
[649] Cap.10, Laws of the Federation of Nigeria 1990 with a commencement date of 17 March 1983.
[650] Articles 4 and 5, The African Charter on Human and People's Right
[651] See the case *Fawehinmi v Abacha* [1996] 9 NWLR (Part 475) 710 at 747

approach of justiciability.[652] Notably, a distinct feature of the African Charter does not require a progressive realisation of its socio-economic rights. Article 1 of the Charter provides thus:

> The member states of the [African Union] parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative and other measures to give effect to them.

The Charter does not provide for the qualification of progressive realisation and maximum available resources for the realisation of ESC rights and some authors have argued that the ESC rights in the Charter have to be realised immediately.[653] However, the question is to what extent is such argument tenable in light of African countries' economic and political reality.[654] To date, the question whether a reasonable test or the minimum core obligations approach should be applied has to date also not been dealt with satisfactorily by the African Commission.[655]

It must be stated that the African human rights system has cleared the cloud of suspicion regarding the justiciability of ESC rights is concerned as the African Charter has outrightly declared the ESC rights to be just as justiciable as civil and political rights.[656] Consequently, the violation of the right to health or some aspects of it has been alleged before the Commission and the Commission has ruled against such violations in several cases, these cases are illustrative and are capable of influencing the Nigerian legal system and has alleged violation of the right to health as provided by the charter against the Nigerian government.[657]

The Commission confirmed its position on the unequivocal justiciability of ESC rights in the Ogoni case underscoring that 'there is no right in the African Charter that cannot be made effective.'[658] Thus, as far as the African human rights system is concerned, the cloud of suspicion regarding the justiciability of ESC rights has been cleared.[659] Also, in the case of the *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*[660], the Communication

[652] As discussed earlier, the case of *Gbemre v Shell Petroleum Development Company Nigeria Limited and others* (Unreported) Suit No. FHC/B/SC/53/05 is an example.
[653]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) 2 AHRLJ 446
[654] ibid
[655]Andra le Roux Kemp (n 111)
[656] Article 16 of the African Charter
[657] Some of the cases are mentioned in this section.
[658] See Communication 155/96, *Social and Economic Rights Action Center and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (15th Activity Report) (Ogoni Case) para. 52.
[659] ibid
[660] I*nternational PEN and ors (on behalf of Saro-Wiwa) v Nigeria*, Decision on Merits, Communication No 137/94, Communication No 139/94, Communication No 154/96, Communication No 161/97, (2000) AHRLR

against Nigeria was brought to the Commission on behalf of the Ogoni environmental activist and writer, Ken Saro-Wiwa.[661]

The communication alleged a number of irregularities and human rights violations in Saro-Wiwa's detention and trial. Specifically, on the right to health, the communication alleged that while in detention he had been severely beaten, despite his high blood pressure, he had been denied access to medicine and a doctor. The Commission held that the responsibility of the state in respect of the right to health is heightened when a person is in detention as a person's integrity and wellbeing are completely dependent on the state. The Commission then interpreted the denial of access to Ken Saro-Wiwa (prisoner) to a qualified doctor and medicine as a violation of the right to health enshrined under Article 16 of the ACHPR.[662]

Also, in the above case,[663] it was alleged that the military government of Nigeria had been directly involved in irresponsible oil development practices in the Ogoni region through the Nigerian National Petroleum Company in consortium with Shell Petroleum Development Corporation, and the operations produced contamination causing environmental degradation and health problems. In particular, the complaint alleged that the widespread contamination of soil, water, and air, the destruction of homes, the burning of crops and killing of farm animals, and the climate of terror under which the Ogoni communities had been suffering resulted in a violation of their rights to health, a healthy environment, housing and food.[664]

The Commission analysed both the negative and positive obligations of states with regard to the right to health and the right to a healthy environment and affirmed these rights impose negative obligation 'to desist from directly threatening the health and environment of their citizens.' In examining the conduct of the Nigerian government in light of these obligations, the Commission held that the Nigerian government has failed to take the necessary care required to comply with the provisions.[665]

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212 (ACHPR 1998), (2000) 7(1) IHRR 274, IHRL 195 (ACHPR 1998), 31st October 1998, African Commission on Human and Peoples' Rights [ACHPR]

[661] ibid

[662] I*nternational PEN and ors (on behalf of Saro-Wiwa) v Nigeria*, Decision on Merits, Communication No 137/94, Communication No 139/94, Communication No 154/96, Communication No 161/97, (2000) AHRLR 212 (ACHPR 1998), (2000) 7(1) IHRR 274, IHRL 195 (ACHPR 1998), 31st October 1998, African Commission on Human and Peoples' Rights [ACHPR]

[663] ibid

[664] This violates Articles 16 and 24 of the ACHPR

[665] P F Omonzejele, 'The Right to Healthcare in African Countries: Nigeria in View- A Moral Appraisal' (2010) 4(1)

Also in *Free Legal Assistance Group v Zaire* Case[666], a Communication 100/93 was submitted by the Union Interafricaine des Droits de l'Homme against Zaire alongside other communications alleging, among other things, that the mismanagement of public finances, the failure to provide basic services, and the shortage of medicines was a violation of the right to health.[667] The Commission linked the failure to provide basic services such as safe drinking water, electricity, and the shortage of medicine to the violation of the right to health as against the provisions of Article 16 of the African Charter[668]

Similarly, in the Mauritania slavery case, which communication concerns the marginalization and human rights violations suffered by black Mauritanians following a coup d'état that took place in 1984,[669]it was alleged that some detainees had been starved to death, left to die in severe weather without blankets or clothing, and were deprived of medical attention. The Commission decided that the starvation of prisoners, and denying them access to blankets, clothing, and healthcare violated Article 16 of the African Charter[670]

Also, in the case of *Purohit and Another v the Gambia*, where the complainants alleged that the provisions of the Lunatic Detention Act of the Gambia and how mental patients were being treated amounted to a violation of various provisions of the African Charter, including the right to health, the Commission expanded the realm of the right to health as encompassing both the right to access health care and the right to a healthy condition.[671]The Commission further noted that mental health patients deserve special treatment because of their condition and by virtue of their disability.[672]

It is commendable that the Commission has considered numerous communications whereby the right to health has been invoked and found violations in the majority of the cases and consequently recommended remedies that states have to take to address the alleged violation of rights of health.[673]Nonetheless, the African Charter has been criticised as lacking in conceptual clarity of the ESC rights and this makes enforcement difficult. [674] For instance, the

[666] *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) (9th Activity Report
[667] ibid
[668] ibid
[669] *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) (13th Activity Report).
[670] ibid
[671]*Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003)
[672] ibid
[673]Bahar Jibriel, (n 156)
[674]M Gomez 'Social economic rights and human rights commissions' (1995) 17 Human Rights Quarterly 155 161.

right to enjoy the best attainable state of mental and physical health leaves more questions than answers as it neither describes 'standard of health' nor 'best attainable state', thereby leaving states with little guidance as to obligations arising out of it and individuals with no clue as to the standard of expectation from their governments.[675]

Although the African Commission has managed to interpret the provisions relating to health, it is still a challenge for the Charter that some of its provisions on ESC rights are rather vague and open to varying interpretations.[676]

On the enforcement of its decisions, the Commission relies on the Assembly of Heads of State and Government, a political organ of the African Union, and the goodwill of states and this has led to governments treating the decisions with levity.[677] For instance, after the Commission found Nigeria in violation in the Ogoni case above[678], the Commission made several recommendations, including the establishment of a Development Commission for the Oil Minerals Producing Areas of Nigeria but the government took this with levity and this partly explains why the problems of the Niger Delta region persist to date.[679]

3.3.2 The Child's Rights Act

Even though the Convention on the Rights of the Child has not been directly domesticated in Nigeria, in 2003, it remarkably implemented the Child's Right Act and this was enacted to ensure that the right of the Nigerian child to survival, development, and protection of the right to health and many more rights are guaranteed, and also by the need for the Nigerian government to protect, respect and fulfil its obligations to global and regional conventions which the country has ratified.[680]

As noted earlier the Child's Rights Act 2003 (CRA 2003) was passed into law by the National Assembly against the background of Nigeria's obligation under the Convention of the Rights of the Child (CRC) which enjoins states parties to 'undertake to disseminate the Convention's principles and take all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.[681] The Act consolidates all

[675] Stanley Ibe, (n 633)
[676] ibid
[677] ibid
[678] See Communication 155/96, Social and Economic Rights Action Center and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (15th Activity Report) (Ogoni Case) para. 52.
[679] ibid
[680] The Convention on the Rights of the Child, 1989 was ratified by Nigeria in March 1991
[681] The Child's Right Act 2003

laws relating to children into one piece of legislation and specifies the duties and obligations of government, parents and other authorities, organizations and bodies concerned about children in Nigeria.[682]

The CRA protects the right to health of children having specifically provided under Section 13 of the Act that:

> 1) Every child is entitled to enjoy the best attainable state of physical, mental and spiritual health;
> 2) Every government, parent, guardian, institution service, agency organization or body responsible for the care of a child shall endeavour to provide for the child the best attainable state of health,
>
> 3) Every government in Nigeria shall-
>
> a. Endeavour to reduce infant mortality rate;
>
> b. Ensure the provisions of necessary medical assistance and health care services to all with emphasis on the development of primary health care
>
> c. Ensure the provision of adequate nutrition and safe drinking water;
>
> d. Ensure the provision of good hygiene and environmental sanitation;
>
> e. Combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;
>
> f. Ensure appropriate health care for expectant and nursing mothers;
>
> g. Support through technical and financial means, the mobilization of national and local community resources in the development of primary health care for children;[683]

The Act also makes it mandatory for parents, and guardians to ensure that their children under the age of two are immunized [684]and the Act makes it an offence liable in the first offence to a fine not exceeding the sum of ₦5,000 and in a second or any subsequent offence to

[682] The Child's Right Act 2003
[683] Child's Right Act 2003, s 13
[684] Ibid s 13 (4)

imprisonment for a term not exceeding one (1) month for a parent or guardian who fails to immunize such a child.[685]

The effect of the Child Rights Act in Nigeria is that States are supposed to enact the Child Rights Law, to be bound by it by virtue of the federal system of government that we operate. However, the Child Rights Act has suffered and continues to suffer opposition from religious and traditional groups in Nigeria, this opposition is mainly based on cultural or religious norms and practice, and also 10 states out of the 36 states of Nigeria are yet to enact the law.[686]

3.3.3 Nigeria's National Health Act 2014

The aim of the Act is to establish a framework for the Regulation, Development and Management of a National Health System, to set standards for rendering health services in the federation and other matters.[687] The goal of the Act is to achieve the Universal Health Coverage and meet the Millennium Development Goal (MDGs) target.[688]

The Act is made up of seven parts divided into sections and each part contains fundamental provisions which if effectively implemented will have a tremendous impact on health-care access and universal health coverage, health-care cost, quality and standards, practice by health-care providers, as well as patient care and health outcomes.[689]

The seven parts of NHA are Responsibility for health and eligibility for health services and establishment of National Health System, Health Establishments and Technologies, Rights and Obligations of Users and Healthcare Personnel, National Health Thesis and Information System, Human Resources for Health, Control of Use of Blood, Blood Products, Tissue and Gametes in Humans, and Regulations and Miscellaneous Provisions.[690]

Remarkably, the NHA in setting a standard for the health care delivery system in Nigeria provides that it aims:

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[685] Child's Right Act 2003, s 13(5)
[686] E Secker*, Barrier to the Implementation of the UN Convention of the Rights of the Child in Niger Delta of Nigeria* in A T Imoh and N Ansell, *Children's lives in an era of Children's Right* (2014) 173
[687] The National Health Act 2014, s 1
[688] O Enabulele and J E Enabulele, 'Nigeria's National Health Act: An assessment of health professionals' Knowledge and Perception' (2016) 57 (5) Nigerian Medical Journal: Journal of the Nigeria Medical Association p 260-265
[689] Ibid
[690] The National Health Act 2014

> to provide for persons living in Nigeria, the best possible health services within the limit of available resources, to set out the rights and duties of health care providers, health workers, health establishments and users, and to protect, promote and fulfil the rights of the people of Nigeria to have access to health care services.[691]

This legislation also indicates that access to health care is a right by providing in Section 20, (1) that a healthcare provider, health worker or health establishment shall not refuse a person emergency medical treatment for any reason whatsoever and it added a sanction of N100 000 fine or six months' imprisonment for any violator.[692]

The Act also elaborated on the rights and duties of healthcare providers, health workers, health establishments and health users and defined the relationship between the public and private health care providers.[693] The Act also and importantly provides that health users have the right to have full knowledge of their health status and nature of the treatment to be received, right to receive emergency health care and the right to basic minimum health care, right to confidentiality, and access to health records.[694]

A complaint mechanism is provided under the Act wherein any person aggrieved with the treatment in any health establishment could lay a complaint and have that complaint investigated by the Commissioner at the state level or Minister at the federal level.[695] A recent study reveals that the Act has the potential to significantly redefine Nigeria's Health System but for the objectives and goals of the NHA to be realised, there is a critical need for active and informed participation by health professionals and the people in general.[696]The government and its agencies, professional associations, unions, civil society organizations, and other stakeholders are implored to organize for the advocacy of the Act.[697]

The NHA is one of the innovative reforms in the Nigerian health sector and it can be used as a tool to strengthen the health system and as the roadmap to Universal Health Coverage (UHC)

[691] The National Health Act 2014, s1(1)
[692]ibid s20 (1) and (2)
[693]ibid s 3(3)
[694] Ibid s 20,23 and 26
[695]ibid, s 30
[696] O Enabulele and J E Enabulele (n 688)
[697] ibid

in Nigeria.[698] It can serve as a legal framework for the regulation, development and management of Nigeria's health care system and it importantly sets a standard for the delivery of health care to all citizens.[699] The people, therefore, need to be well informed about the provisions of the Act as it will empower them to demand and express their health rights as well as demand accountability and transparency in the implementation of the Act.[700]

3.4 The implications of International Human Right Treaties under Nigerian Law

It is important to state that international and regional Conventions that help protect and promote the right to health as discussed in chapter 2 are not automatically part of the sources of Nigerian laws.[701] Nigeria adopts a dualist approach which involves incorporating a treaty into the Nigerian legal framework through domestic legislation.[702] For the treaties to become part of the laws, it must be enacted as domestic law by the National Assembly in line with section 12(1) of the 1999 Constitution.[703] This means that for the treaty to be enforceable in Nigeria, under section 12(1) of the 1999 constitution, it must be enacted as law by the legislative arm of the central government.

Section 12 of the Constitution provides that:

> (1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
>
> (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
>
> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.[704]

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[698] T M Akande, 'The role of National Health Act in Nigeria Health Systems Strengthening' (2017)6(1) Savannah Journal of Medical Research and Practice ,1-10

[699] 'National Assembly. National Health Act, 2014: Explanatory Memorandum' <http://www.nassnig.org/document/download/7990> Accessed on 03 February, 2018

[700] ibid

[701] Constitution of the Federal Republic of Nigeria 1999, s 12

[702] ibid

[703] Babatunde I Olutoyin, 'Treaty Making and Its Application under Nigerian Law: The Journey So Far' (2013)3(3) IJBMI

[704] Constitution of the Federal Republic of Nigeria 1999, s 12

The implication of this section is that all the human rights treaties entered into by Nigeria will not become binding until the same has been passed into law by the National Assembly. In the Nigerian case between *General Sani Abacha v. Gani Fawehinmi*,[705] the Supreme Court held that by section 12(1) of the 1979 Constitution (the ipissima verbis of section 12(1) of the 1999 Constitution), 'an international treaty entered into by the government of Nigeria does not become ipso facto binding until enacted into law by the National Assembly and before its enactment, an international treaty has no force of law as to make its provisions actionable in Nigerian law courts.' Furthermore, the court unanimously held that 'unincorporated treaties cannot change any aspect of Nigerian law even though Nigeria is a party to those treaties.'[706]

It is necessary to add that the dualist approach which requires that a treaty must be enacted as a municipal law before it can be enforced in Nigeria appears to be merely a historical incidence and a colonial relic.[707] This resulted from the years of being under the colonial domination of Britain, Nigeria after gaining independence, automatically adopted the British practice requiring a treaty to be transformed into law before it could have effect as law in the country.[708] In the Supreme Court of Nigeria case of *Ibidapo v Lufthansa Airlines*,[709] Wali JSC explained that Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law.[710]

It is important to reemphasise that the ACHPR has been domesticated into Nigerian law by the ACHPR (Ratification and Enforcement) Act[711] and thus forms part of the law as provided by section 12(1) of the Constitution. It is then important to examine the effect of any domesticated treaty under Nigeria law.

The ACHPR should have the force of law in Nigeria and should be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive and judicial powers in Nigeria. Consequently, the provisions on the right to health in the African charter in Article 16 that 'every individual shall have the right to enjoy the best attainable state of physical and mental health and that States parties to the Charter shall take the necessary measures to

[705] *General Sani Abacha v. Gani Fawehinmi* (2000) FWLR (pt. 4) 533 at 585-586.
[706] ibid
[707] Edwin Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007)51(2) Journal of African Law, 251
[708] ibid
[709] *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Part 498) 124 at 150
[710] ibid
[711] Cap.10, Laws of the Federation of Nigeria 1990 with a commencement date of 17 March 1983.

protect the health of their people and to ensure that they receive medical attention when they are sick have the force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.[712]

Also, the Rights of the Child Act was enacted on 16 July 2003 by the federal legislative organ of Nigeria, the National Assembly, after many years of opposition from certain quarters, who feared that such an act would introduce values foreign to the diverse societies in Nigeria.[713] However, unlike the African Charter Act, this Act does not have the relevant conventions contained in it neither does it explicitly indicate on its face that it is a domestication of the relevant Convention on the Rights of the Child (CRC) and the African Union equivalent, the African Charter on the Rights and Welfare of the Child (ACRWC),[714] which were ratified by Nigeria. A careful perusal of the act reveals that it is intended to implement the provisions of the CRC and the ACRWC Conventions, since it conforms to a large extent to these international human rights instruments.[715]

Nigeria operates a federal system of government where the states are autonomous and equal, with each state operating its legislative system.[716] Consequently, having enacted the Child's Right Act at the federal level, the states are expected to formally adopt and adapt the Act for domestication as state laws.[717] This is because child rights protection issues are on the residual list of the Nigerian Constitution, giving states exclusive responsibility and jurisdiction to make laws relevant to their specific situations.[718]

Although, it became necessary after the National Assembly had legislated the CRA that each of the 36 states passes the same law using the CRA as a model since it closely followed the CRC, but no state of the federation is bound to adopt the CRA according to the system and the states that have done so have done it at their discretion.[719]An underlying factor is that even

[712] Article 16 (1), (2) of the African Charter on Human and Peoples' Rights
[713] Edwin Egede, (n 707) 255
[714] ibid
[715] ibid
[716] Federalism is used to describe a system of the government in which sovereignty is constitutionally divided between a central governing authority and constituent political units called states.
[717] UNICEF Factsheet on the Child's Right Act in Nigeria August 2007 <https://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf> Accessed 04 May 2017
[718] Any matter not mentioned either in the exclusive or concurrent list becomes a residual matter exclusively for the State House of Assembly by virtue of S.4(7)a of the 1999 Constitution of the Federal Republic of Nigeria
[719]E S Nwauche, 'Child marriage in Nigeria: (Il)legal and (un)constitutional' (2015) 15 African Human Rights Law Journal 421-432 <http://www.ahrlj.up.ac.za/nwauche-e-s-1#pgfId-1132890> Accessed 09 May 2017

though more states have joined the league of state to enact the Child Rights Act in Nigeria bringing the total number of states to 26 out of 36 in Nigeria, the states that have enacted the law tend to pay lip service to the implementation of the law.[720] This is evident by the insignificant difference in the lives of the children in the various states before and after the passage of the laws. There is still hardly any state in the federation today that numerous abuses and violations of the domesticated laws are not seen.

3. 4.1The Effect of Domesticated International Treaty and the Constitution

The justices of the Supreme Court in the Abacha case [721]were unanimous in holding that domesticated human rights treaty legislation was in no way superior to the Constitution.[722] The need for the Supreme Court to clarify the status of the African Charter which has been domesticated by the Constitution was necessary in view of the fact that some may believe that the legislation domesticating the African Charter was superior to the Constitution.[723] The Supreme Court, however rejected the view that the African Charter was superior to the constitution since to do otherwise would have been a judicial absurdity given the clear provisions of the constitution which declares it to be the supreme law of the land. [724]

There exists a real possibility of a conflict between the constitutional provisions and certain sections of the African Charter Act, which domesticates the African Charter. As we noted earlier, the fundamental human rights provisions of the constitution are limited to civil and political rights, as contained in Chapter IV of the Constitution while the African Charter Act goes beyond this to include socio-economic, cultural rights such as the right to health. Since, the constitution categorizes economic, social and cultural rights as merely fundamental objectives and directive principles under chapter II and are non-justiciable, one may wonder which will prevail if a conflict arises because the right to health is an enforceable right under the African Charter. In such a situation the conflict will be resolved in favour of the Nigerian constitution. The Constitution in Section 1(1) provides thus:[725]

[720] E S Nwauche (n 719)
[721] *Fawehinmi v Abacha* [1996] 9 NWLR (Part 475) 710 at 747
[722] ibid
[723] ibid
[724] Constitution of the Federal Republic of Nigeria 1999, s1(1) and (3)
[725] ibid

> 1. (1) This Constitution is supreme, and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
>
> (3) If 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.

By this provision, the Constitution has declared itself superior to all other laws. However, it is argued that supremacy is a complex matter and cannot be found in the Constitution alone, the judiciary has the final authority as far as interpretation of the laws and the constitution is concerned. [726]The Constitution is nothing, like any statute, but whatever the court makes of it by its (court) interpretation so whatever the court says the Constitution is, it is and nothing more than that and hence there is potential that any law which seeks to implement any good aspects of the ESCR may prevail in a court of law.[727]

3.4.2 The Effect of Domesticated Treaty and Other municipal legislation

It is necessary to consider the status of domesticated human rights treaty legislation versus municipal legislation as the Acts of the National Assembly and which of the two prevails. In the Abacha case, the Supreme Court justices were divided on the issue of the status of domesticated treaty legislation (including human rights treaties) versus 'ordinary' legislation of the National Assembly.[728] The justices were divided between the liberal constructionists who are the majority and the strict constructionists who are the minority.[729] The liberal constructionists, led by Ogundare JSC, were of the view that in case of a dispute between a domesticated treaty and a municipal law since the legislature would be presumed not to intend to breach Nigeria's international obligations, the courts should interpret a conflict in such a way that the domesticated treaty would prevail unless specifically repealed by the municipal law.

However, they also emphasised that this view should not be taken to give the domesticated treaty law any superior status over the constitution. Neither should the view be taken to debar the legislature from subsequently enacting municipal legislation that would expressly repeal

[726] A T Shehu, 'Judicial Review and Judicial Supremacy: A Paradigm of Constitutionalism in Nigeria', (2011) 11(1) International and Comparative Law Review, 45–75
[727] ibid
[728] *Fawehinmi v Abacha* [1996] 9 NWLR (Part 475) 710 at 747
[729] ibid

the domesticated treaty law.[730]The strict constructionists, on the other hand, were of the view that the domesticated treaty legislation had no special status and was on a par with any other act of the National Assembly.[731] There is yet to be another Supreme Court decision to overturn this position.

According to Egede, the liberal constructionists and the strict constructionists decisions of the supreme court only reveal the deficiency of section 12(1) of the Constitution as regards domesticated human rights treaty legislation.[732] He further holds the view that the inherent shortcoming of the dualist nature of section 12(1) in guaranteeing the individuals' right to enjoy the protection of rights under human rights treaties ratified is that, the government may ratify human rights treaties for the benefit of its citizens, enact them as law and then subsequently repeal, modify or amend the laws to deprive its citizens of the same legislature.

In relevance with the discourse on the right to health, the stance in Nigerian Jurisprudence means that international human rights treaties, even when domesticated, offer no greater protection against human rights violations other than the safeguards accorded in the Nigerian Constitution.[733] This interpretation of the Nigerian Constitution and the acceptance by the judiciary that all socio-economic rights are non-justiciable amounts to non-compliance and a contracting out of international obligations with regard to fundamental human rights obligations which Nigeria had voluntarily accepted by ratifying and domesticating the treaties.[734]

3.4.3 The Effect of Domesticated Treaty and Laws of the State

This situation was not addressed in the Abacha case however a conflict may arise between the two and under the 1999 constitution, where there is a conflict between any law validly made by the National Assembly and that enacted by the House of Assembly of a state, the former prevails and the latter (to the extent of its inconsistency) is void.[735] Therefore, since the African

[730] Edwin Egede, (n 707)
[731] ibid
[732] ibid
[733]C Onyemelukwe (n 653) 474
[734] ibid
[735] Constitution of the Federal republic of Nigeria, s 4(5) of the 1999 constitution provides with effect that if any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void.

Charter Act is by virtue of section 12(1) deemed to be a law validly made by the National Assembly in case of a dispute between the two the African Charter Act will prevail.

3.4.4 The Effect of Non-Domesticated Human Rights Treaties

Non-domesticated human rights treaties offer no protection against human rights violations in Nigeria. However, there are indirect ways of applying non-domesticated human rights treaties that may be applicable in Nigeria.

a. By Using non-domesticated human rights treaties to aid interpretation despite the strict provisions of section 12(1) of the constitution, the courts can apply non-domesticated human rights treaties indirectly, by relying on them to assist in interpreting similar provisions in the constitution and other municipal legislation.[736]

b. Non-domesticated human rights treaties as customary international law. In Nigeria, like most other common law countries, customary international law applies automatically without the need for it to be enacted in domestic legislation.[737] Human rights treaties can therefore apply in Nigeria without the need to be enacted as domestic legislation is if the provisions of the treaty have crystallized into rules of customary international law.[738].

3.5 An Evaluation of Human Right Compliance, the Rule of Law and the Effectiveness of Remedies under the Nigeria Human Rights System

This section evaluates the relationship between the theory of compliance, the rule of law and the effectiveness of remedies under the Nigerian Human Rights system.

The effective protection of human rights depends on the compliance of each state with its human rights obligations.[739] Thus, an internationalization of human rights norm into the domestic laws to ensure effective protection of human rights is not an easy task and requires elaborate legislation, effective control over state institutions such as the law enforcement agencies and continuous efforts on the part of state institutions.[740]

[736] See *Fawehinmi v Abacha* [1996] 9 NWLR (Part 475) 710 at 747
[737] *Ibidapo v Lufthansa Airlines*, see the English cases of: *Buvot v Babuit* (1737) cases t. Talbot 281; *Triquet v Bath* (1764) 3 Burr. 1478; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356
[738] Edwin Egede (n 707)
[739] Alberto Quintavalla & Klaus Heine, 'Priorities and Human Rights' (2019)23 (4) IJHR 679-697
[740] H H Koh, 'How is International Human Rights Law enforced?' (1999) 74(4) Indiana Law Journal, 1397–1417

Also, a country like Nigeria which has witnessed a change from absolutist military rule to democracy has been struggling to comply with the requirements of democracy as well as the principles and guarantee of human rights, the access to and availability of effective remedies before national courts.[741] To ensure effective domestic compliance with human rights, enormous effort and time have to be given and the result will be that everyone will have an effective means of redress, to guarantee respect for human rights and ensure legal integrity.[742]

There has to be a legislative body that legislates in compliance with international human rights commitments, an independent judiciary that protects the human rights of individuals and groups against arbitrary legislative power and guarantees effective remedies and also an executive body that does not abuse discretionary power and seeks to promote the enjoyment of human rights of every person in a state.[743]

The section argues that access to justice is an essential instrument for the protection of human rights in Nigeria and hugely buttresses the argument that justiciability is essential under the human rights system. The rule of law is considered as integral to the implementation of rights and then related directly to the betterment of rights protection, economic development, and better rights performance.[744]

Access to justice is important not only for assessing the rule of law in any society but also the quality of governance in that society. There has been a sustained struggle for the protection of the human rights of individuals, groups and communities in Nigeria. This is because, without access to justice, it is impossible to enjoy and ensure the realisation of any right, whether civil, political or socio-economic and cultural rights.[745]

Access to justice can be looked at from two perspectives the narrow sense which connotes access to law courts and the wider sense which embraces access to the political order, and the benefits accruing from the social and economic developments in the state.[746]It is, however important to underscore the point that these perspectives are not necessarily disconnected since the extent to which one can have distributive justice in any system is largely determined by the

[741] Oliver De Schutter et al., 'Human Rights Due Diligence: The Role of States', (2012) ICAR/ECCJ' 11
[742] ibid
[743] ibid
[744] ibid
[745]N S Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects' (2005) 2(3) Sur. Revista Internacional de Direitos Humanos 100-119
[746] ibid

level and effectiveness of social justice in the country.[747]The relationship between access to justice and human rights protection is such that it is only when individuals have access to the courts that they can espouse and seek the protection of their basic rights.[748]

In Nigeria, a lot of obstacles have led to a systemic inability of the legal order to guarantee access to justice in the country. These obstacles are attributed to the lack of development of the socio-economic goals in the country as such that the level of illiteracy is really high, and the condition of existence is extremely difficult for the average people and consequently, the issues concerning human rights protection necessarily take a secondary position and are not taken seriously.[749] Professor Claude Ake observed thus:

> For reasons which need not detain us here, some of the rights important in the West are of no interest and no value to most Africans. For instance, freedom of speech and freedom of the press do not mean much for a largely illiterate rural community completely absorbed in the daily rigors of the struggle for survival ... if a Bill of Rights is to make sense, it must include, among others, a right to work and to a living wage, a right to shelter, to health, to education. That is the least we can strive for if we are ever going to have a society which realises basic human rights ... in Africa, if liberal rights are to be meaningful in the context of a people struggling to stay afloat under very adverse economic and political conditions, they have to be concrete. Concrete in the sense that their practical import is visible and relevant to the conditions of existence of the people to whom they apply. And most importantly, concrete in the sense that they can be realised by their beneficiaries.*[750]*

Essentially, issues of human rights protection appear to be luxuries to a lot of people in Nigeria today and they can hardly afford to seek justice when there is a violation of their rights. Another big impediment to judicial remedies in Nigeria is the notorious problem of disobedience to court orders.[751] The fact that a court grants a remedy does not guarantee that a successful litigant will reap the fruits of the judgment. This is because judgments and orders of courts are

[747] N S Okogbule (n 745)
[748] ibid
[749] ibid
[750] C Ake, 'The African Context of Human Rights' (International Conference on Human Rights in the African Context, Port Harcourt, 9-11 June 1987)
[751] J A Dada, 'Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal' (2013) 10 Journal of Law, Policy and Globalization 2224-3259

not self-executing and the judiciary does not have its own means of enforcing its judgments and in effect that the judiciary inevitably depends on the executive for the enforcement of its judgments.[752]

Since the law is an equal dispenser of justice, it is expected to leave none without a remedy for the violation of any right. It is thus a basic and elementary principle of common law that whenever there is a wrong, legal wrong, there ought to be a remedy to redress that wrong.[753]

Therefore, the courts ought to ensure the adequacy of remedies granted to victims of human rights violations.[754]However, this legitimate expectation has remained unrealised in Nigeria. For instance, in many cases where damages are asked for, especially against the government the courts, in a seemingly deliberate and determined effort not to hurt the government, often award ridiculous sums that are not in any way compensatory.[755]

In the case of *Shugaba Darman v Minister of Internal Affairs*,[756] the applicant, then a serving Senator of the Federal Republic of Nigeria, was unlawfully deported to Chad, ostensibly for political reasons. He challenged his deportation claiming certain declaratory reliefs and damages of the sum of N1m that was about 673,000 USD at the time. Although the court declared that the deportation of the Applicant was unconstitutional and deprecated the conduct of the Respondent, it awarded only a sum of N350, 000.00 which was about 235,550 USD![757]This means that even though, the human rights guaranteed in the Nigerian Constitution are entitled to effective adjudicatory mechanisms and remedies for their enforcement, the problem lies with the effectiveness of these remedies.

Notably, there are reports of constant human rights abuses and violations in Nigeria. For instance, the inhabitants of the Niger Delta region which is an oil producing community are subjected to regular human rights abuses and violations especially their right to health.[758] The inhabitants of the community are reportedly suffering from diseases like leukaemia, cancer, chronic bronchitis and cardiovascular diseases which have resulted in many deaths.[759]. They

[752] J A Dada (n 751)
[753] *Aliyu Bello v A-G Oyo State* (1986) 5 NWLR pt. 45 828 at 889-890.
[754] J A Dada (n 751)
[755] ibid
[756] *Shugaba Darman v Minister of Internal Affairs* (1982) 3 NCLR 915 @ 1008
[757] ibid
[758] Ifeanyi Onwuazombe, 'Human Rights Abuse and Violations in Nigeria: A Case Study of the Oil-Producing Communities in the Niger Delta Region,' (2017)22(1) (8) Annual Survey of International & Comparative Law <https://digitalcommons.law.ggu.edu/annlsurvey/vol22/iss1/8> Accessed 08 June 2019
[759] ibid

also suffer pervasive water-related diseases (malaria, dysentery, tuberculosis, typhoid, and cholera) and all these diseases have been linked to environmental pollution/degradation caused by the activities of oil companies.[760]

Also, the entire Niger Delta region in Nigeria lacks access to clean portable drinking water which is an underlying determinant of health. Only about 22% of rural Nigeria has access to safe water, the Niger delta is among this rural Nigeria.[761] The federal and state government has been accused of failing to articulate an effective healthcare policy for the area or provide accessible healthcare facilities, clean portable drinking water, adequate shelter and food in the region despite being a resource rich area.[762]

Notwithstanding the constitutional provision that the State shall direct its policy towards ensuring that, there are adequate medical and health care facilities for all persons[763]. The government of Nigeria has been accused of neglecting the health, safety, well-being of citizens and the protection of the Niger Delta environment. The right to a healthy environment is non-existent and the pollution of land, air, and water in the Niger Delta violates the right to safe water and free from substances harmful to human health.[764]

Consequently, in *Social and Economic Rights Action Centre (SERAC) v. Nigeria*,[765] the African commission indicted the Nigerian Government for its complicity as well as implicated the oil corporations and state security forces in the violation of the rights of the Ogoni people of the Niger-Delta Region.[766] The communication was taken against the Nigerian government and stated that the government of Nigeria was involved in oil production through Nigerian National Petroleum Corporation (NNPC) and alleged that:

1. The operations of the Shell Petroleum Development Company of Nigeria (SPDC) caused environmental degradation and despoliation of their land with serious health problems resulting

[760] Ifeanyi Onwuazombe (n 758) 23
[761] ibid
[762] ibid
[763]Constitution of the federal Republic of Nigeria 1999, s 17(3)(d)
[764] Ifeanyi Onwuazombe (n 758) 24
[765] *SERAC v. Nigeria*, Afr. Comm'n Hum. & People's Rts., Comm. No. 155/96 (Oct. 27, 2001), <http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96 _eng.pdf.> Accessed 06 June 2018
[766] ibid

from contamination of (water, soil and air) the environment and living environment of the Ogoni people.[767]

2. The oil consortium exploited oil reserves with no regard for the health or the environment of the local communities, disposing toxic wastes into the environment and local water-ways in violation of both national and international standards constituting a violation of rights to health and clean environment.[768]

3. The Nigerian government condoned and facilitated the violations by placing legal and military powers at the disposal of the oil companies. The government further participated in the violations by executing some Ogoni leaders and, killed many innocent civilians, destroyed their villages, homes, crops and farm animals.[769]

4. The government was accused of failure to monitor the activities of the oil companies, failure to conduct environmental impact studies, preventing independent scientists from doing environmental impact studies and keeping information from the local communities in respect of oil production in the area, constituting a violation of their rights to health and to a clean environment.[770]

The African Commission held in summary that:

1. That these conditions violated the rights to health and the environment. The Commission underscored the first line of responsibility of states in the protection of human rights by holding that African governments have a duty to monitor and control the activities of oil companies.[771]

2. That the right to health required the government 'to desist from carrying out or sponsoring or tolerating any practice, policy, or legal measures violating the integrity of individuals. Also, that the right of the people to a healthy environment required the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.[772]

[767] *SERAC v Nigeria* (n 724) Para 1-9
[768] ibid
[769] ibid
[770] ibid
[771] D. Shelton, 'Decision Regarding Communications 155/96 (Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria) Case No. ACHPR/Comm. A044/1, 96 AM' (2002) J. INT'L L. 941
[772] *SERAC v Nigeria* (n 724) para. 111

3. That African states should also ensure respect for economic, social and cultural rights.[773]

4. That the governments have the duty to protect their citizens through appropriate legislation and effective enforcement, and to protect them from damaging acts that may be perpetrated by private parties. The Commission criticized how the Nigerian government related to the oil companies and concluded that the government failed to exercise the necessary degree of care required in the circumstances.[774]According to the Commission: Contrary to its obligations and despite such internationally established principles, the Nigerian Government allowed the private actors and the oil companies to devastatingly affect the well-being of the Ogoni people. This violated the provision of the African Charter and the state was held liable.[775]

The Commission's decision, in this case, reinforces the importance of the justiciability of the right to health as the commission firmly upheld justice against the oil manufacturing companies in the Niger Delta region for gross human rights violations.[776]

Recently in Nigeria, there were widespread of human rights violations that made headlines worldwide in the wake of the #EndSARS protests calling for an end to the Special Anti-Robbery Squad (SARS) for police reforms.[777] The protests started on October 8, 2020, following anger and outrage over police brutality against mostly youths, but the protests dragged on for weeks after the youths rejected the government's announcement to replace SARS with the Special Weapons and Tactics (SWAT) on Tuesday, October 13. Also, the youths were demanding accountability on the part of the government considering the poor governance and breakdown of the rule of law in the country and lack of socio-economic rights.[778]

It was reported that the supposed peaceful protests turned violent. Hoodlums who were allegedly unleashed on peaceful protesters attacked, injured and killed some people.[779] Public and private property worth billions of naira were destroyed in the chaos in several parts of Nigeria. It was also reported that security agencies allegedly shot and killed scores of unarmed citizens, tortured many and injured several others at the Lekki Tollgate on the 20th October

[773] *SERAC v Nigeria* (n 724) para 59
[774] Ibid 58
[775] ibid
[776] Ibid 111
[777] John Chuks & Adelanwa Bamgboye, 'Nigeria: #EndSARS - How Human Rights Were Violated' <https://allafrica.com/stories/202011030020.html> Accessed 06 November 2020
[778] ibid
[779] ibid

2020. The shooting of protesters proved to be a turning point in the protests. There are also reports of the killing of security personnel. The police reported the killing of 22 of its personnel nationwide. Also, police stations and operational vehicles were torched.[780]

The killings violate the provisions of Section 33 (1) of the Nigerian Constitution and Articles 4, 5, and 6 of the African Charter on Human and People's Rights which has been ratified by Nigeria.[781] Several human rights NGOs and activists in Nigeria have condemned the Lekki Tollgate shootings and urged the International Criminal Court to invoke its powers to intervene if the killings are not investigated.[782]

The UK parliament has also called on the British government to immediately commence an investigation into human rights abuses by the Nigerian government and security agencies on the peaceful protesters on the said day.[783] The UK government at its debate on the 24th November 2020 has considered imposing sanctions on officials who are found culpable.[784]

It must be emphasised that human rights are an aspect of a robust rule of law framework and the establishment of human rights may be contingent upon the pre-existence of a more general framework for the rule of law domestically, for example, a strong judiciary and a robust framework for judicial review.[785] There are prospects for improvement of access to justice in Nigeria as the government has performed poorly in protecting human rights of its people in general. The government needs to be more dedicated to promoting and protecting the human rights in the country.

3.6 Resources versus the Right to health, a false dichotomy

A huge misconception that must be addressed is that a country's low or lack of adequate resources justifies its inaction or delay in its obligations to ensure the enjoyment of the right to health of its people.[786] It must be emphasized that a country with financial difficulty or low resources is not divested of its duties to ensure the enjoyment of the right to health. States are

[780] John Chuks & Adelanwa Bamgboye (n 777)
[781] ibid
[782] These provisions guarantee the right to life and non-depravation of a person's life
[783] Jennifer Scott, 'What does the UK debate about the #EndSars protest mean?' (*BBC News*, 24 November 2020) <https://www.bbc.co.uk/news/topics/cezwd6k5k6vt/endsars-protests> Accessed 25 November 2020
[784] ibid
[785] E Schlaeppi and C McCabe, 'Rule of Law, Justice Sector Reforms and Development Cooperation' (2008): SDC Concept Paper, Swiss Agency for Development and Cooperation, p. 10 via http://www.deza.ch/ressources/resource_en_170419.pdf (accessed Feb.13 2020) cited in GSDRC 212 p.7
[786] --The right to health; key aspects and Common Misconceptions available at https://www.ohchr.org/EN/Issues/ESCR/Pages/KeyAspects.aspx Accessed on March2 2021

still required regardless, to ensure the enjoyment of minimum essential levels of the right to health in accordance with the availability of its resources.[787]

As discussed in chapter 2, the minimum core obligations attached to States is non-derogable, even in adverse circumstances.[788] Budgets should be ring-fenced to ensure that essential goods and services are universally accessible. Also, the language of progressive realization and maximal available resources suggests different standards for different countries.[789]

Again, domestic courts and regional bodies that have addressed the question have generally agreed on what minimal standards governments can be required to fulfil that is within its available resources. First, states have an obligation not to adopt retrogressive measures. For example, if a state administers a program to provide antiretroviral drugs, backsliding because of budgetary difficulties is impermissible.[790] Second, health policies and programs must not be discriminatory.[791] Third, states must undertake efforts to regulate the conduct of third parties that are interfering with the right to health, such as environmental polluters.[792] Fourth, governments can be required to develop national policies and plans of action to respond to health concerns.[793]

When a state fails to allocate sufficient resources to health care, or uses its available resources inappropriately, a citizen should be able claim that the state violates his/her right to health.[794] Also, when a particular health care intervention is denied, or when that intervention would be available to people if the state increased its allocation to health care to an acceptable level, or re-allocated resources within the health care sector to an acceptable mix of interventions, a claim can be made against the state.[795] Accordingly, a denial of healthcare based on economic grounds is a violation of the right.

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[787] --The right to health; key aspects and Common Misconceptions available at https://www.ohchr.org/EN/Issues/ESCR/Pages/KeyAspects.aspx Accessed on March2 2021

[788] Lilian Chenwi, (n 333)

[789] ibid

[790] *Alejandro Moreno Alvarez v Estado Colombiano.* SU.819/99 (Constitutional Court of Colombia, 1999). Available at: http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1999/Tutela/su819-99.htm. Accessed March 2 2021

[791] ibid

[792] *Social and Economic Rights Action Center v Nigeria.* Communication 155/96 (African Commission on Human & Peoples' Rights, Oct. 2001

[793] *Minister of Health v Treatment Action Campaign.* CCT 8/02 (Constitutional Court of South Africa, 2002).

[794] R K Lie, 'Health, human rights and mobilization of resources for health' (2004) 4 (1) BMC international health and human rights. 4

[795] ibid

3.7 Conclusion

With the current state of the law in Nigeria on health rights, there is a basis for a finding of a prima facie case of violation of health rights, and a greater onus is placed on the governments in particular circumstances to demonstrate that all available resources have been allocated as a matter of priority in meeting the most critical needs.[796]There is a need for a fundamental change in policy, regulation, financing, provision of health services and so on with a practical effort by the government to improve the access to health care and the health care system in Nigeria.[797] And this can only be achieved with the aid of an effective interpretation and application of the corpus in place in Nigeria by the judiciary.[798]

Nigeria has not engaged meaningfully with the true substantive content of health rights.[799] The absence of an explicit justiciable right to health and section 6(6) (c) of the Nigerian Constitution has limited the adjudication and enforcement of this right. For the right to health to be meaningful in Nigeria, justiciability of the right to health is required as this will allow courts to deal with health care as a legal right and not as a political issue, this will also give courts the ability to evaluate governmental health policy and resolve disputes between the individual and the states.[800]

The right to health has the potential to make an indispensable and distinctive contribution, especially in relation to the implementation of complex, costly and long-term health interventions. However, this potential is not yet fully realised in Nigeria. Building on recent happenings and reports on human rights violations, more work is needed to develop the concepts and practices that will make the right to health more effective and useful in Nigeria.[801]

It must be stated that the justiciability of the right to health should be understood as something much more than the mere inscription of this right in a domestic constitution.[802] A better understanding of the justiciability of the right to health comes from appreciating how courts with the constitutional competence to adjudicate the right to health and develop the requisite institutional competence to adjudicate the right to health within a constitutional paradigm in

[796]Oyeniyi Ajigboye, (n 1)
[797] ibid
[798] ibid
[799] Chidi A Odinkalu, (n 638)
[800] Ibid
[801] Paul Hunt (n 187) 109-130
[802] C Ngwena 'Access to health care as a fundamental right: The scope and limits of section 27 of the Constitution' (2000) 25 Journal for Juridical Science 8

which the doctrine of separation of powers is a check and balance on the relationship between organs of state.[803]

There is a need to strike a delicate and beneficial balance between the desire to maximize human rights protection and the importance of enhancing greater access to justice in Nigeria. It is only when we approach the issue along these lines that the overwhelming concern for increased access to justice in Nigeria will be realised and basic human rights will be given their proper place in the scheme of things.

[803]C Ngwena (n 802)

CHAPTER FOUR: THEORETICAL FRAMEWORK

4.0 Introduction

Nigeria has an obligation to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right to health.[804] There are variations among states in their level of compliance with international human rights laws and this has formed a topic of great significance under human rights law.[805] The Nigerian state has been in violation of the human rights norms regarding the right to health and this has informed this thesis to consider whether the justiciability of the right to health would lead to an increase of the enjoyment of the right in Nigeria.

This thesis approaches the research question by focusing on the compliance theory which borders on how a state depicts its human rights agendas as indicative of their broader commitments to human rights and the rule of law as provided in international human rights treaties, court orders and recommendations of institutions monitoring the implementation of human right treaties that protect the right to health.[806] The chapter in offering a theoretical framework for the thesis reviews different perspectives to the theory of compliance in finding out whether developing justiciability of the right to health will participate in effective change towards the protection of the right to health in Nigeria.

The chapter conceives justiciability as a function of compliance. Compliance can be categorized into different levels which are first order and second order compliance.[807] The first order compliance relates to compliance with international human rights treaties while second order compliance relates to compliance with decisions of institutions capable of determining a right as well as decisions and recommendations of institutions monitoring state compliance with international treaties.[808]

Justiciability falls into both the first and second order because it relates to whether the right is open to interpretation by a judicial or quasi-judicial body and whether a complaint concerning an alleged violation can be lodged with a competent body.[809] Justiciability contributes to the

[804] Andra le Roux-Kemp (n 111) 134
[805] Thomas Risse and Kathryn Sikkink (n 114)
[806] Courtney Hillebrecht, 'The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System' (2012) 34(4) Human Rights Quarterly, 959-85.
[807] Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019)63(4) International Studies Quarterly, 1079–1093
[808] ibid
[809] K. Arambulo (n 424). 111-123.

further determination of the meaning of a right and therefore forms part of the strategy for compliance, implementation, realisation and protection of the right.[810] In the case of the right to health care, on several occasions, domestic and international courts held claims on health care access justiciable, providing an effective remedy to enforce its realisation.[811]

This thesis intends to contribute to the limited literature on the relationship between state compliance and the justiciability of the right to health.

4.1 Relationship between Compliance and Justiciability

The term compliance is used in this thesis to mean tangible steps states are required to take in response to specific directives as provided in international human rights treaties, court orders, or a quasi-judicial body like treaty-monitoring bodies and so on.[812] Thus, the steps that a state takes to ensure a justiciable right is protected and guaranteed.[813] The literature on human rights law has emphasised the importance of domestic institutions to enforce human rights law, domestic institutions are often the sole source of enforcement for human rights norms and treaties. [814]

State compliance may take the form of any action taken by any of the branches of government towards the protection of the right to health, this is also a function of a justiciable right.[815] The executive, legislature and the judiciary can carry out measures towards the protection and fulfilment of the rights provided for under international human rights law.[816] The main obligation of a state party under international human rights law is to recognize the rights provided for under treaties and to give effect to these rights by adopting legislative, proactive and other measures, states are therefore required to undertake a general process of domestication or ratification and to ensure the implementation of the provisions of the law in its practice.[817]

[810] K. Arambulo (n 424). 111-123
[811] Andre Den Exter, (n 422)
[812] Damian Etone, 'Theoretical challenges to understanding the potential impact of the Universal Periodic Review Mechanism: Revisiting theoretical approaches to state human rights compliance' (2019) 18(1) Journal of Human Rights, 36-56
[813] ibid
[814] Oona A. Hathaway, Do Human Rights Treaties Make a Difference? (2002) 111 Yale L. J. 1935
[815] ibid
[816] ibid
[817] Courtney Hillebrecht (n 806)

A treaty monitoring body such as the African Commission has the function to clarify and differentiate between the concept of compliance and non-compliance.[818] The African Commission through the performance of its monitoring function is charged with the duty to hold states accountable to their treaty promises by outrightly pointing instances where state laws and practices do not measure up to the standard of giving full effect to the Charter.[819] This can be directly linked to the concept of justiciability which borders with the boundaries of law and adjudication.[820]

At the United Nations level, the CESCR requires that state parties must submit reports on the measures which they have adopted and the progress made in implementing the rights enshrined in the Covenant.'[821] The reports are examined by the CESCR Committee, which the international community trusts to monitor State parties' compliance with the provisions of the Covenant.[822] The African Commission's monitoring role is dependent on the opportunities provided by the submission of communications, comments and state reports and recommendations.

This function gives the Commission an opportunity to establish non-compliance.[823]The required state action will then be set out as recommendations in the Commission's finding or concluding observations.[824] Adherence to these recommendations constitutes compliance and non-adherence constitutes non-compliance and both instances are linked to the functions of justiciability that determines whether the issues can be subject of legal norms or adjudication by a competent body.[825]

Justiciability as a function of compliance can be described as a situation where domestic courts or other quasi-legal bodies are able to take account of treaty rights as provided under the norms to ensure that the State's conduct is consistent with its obligations under a treaty.[826] While evaluating the degree of independence and professionalism of domestic judiciaries necessary

[818]Stacy-Ann Elvy, 'Theories of State Compliance with International Law: Assessing the African Union's Ability to Ensure State Compliance with the African Charter and Constitutive Act' (2013) 41 Ga. J. Int'l & Comp. L. 77
[819] ibid
[820] A.L Bendor, (n 417) 312
[821] Articles 16 and 17 of the CESCR
[822] ibid
[823] Frans Viljoen, and Louw Lirette, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 (1) The American Journal of International Law, pp. 1–34.
[824] ibid
[825] ibid
[826] M.J Dennis and P. Stewart (n 415) 462

for the progressive realisation of the rule of law , justiciability of a right can be a good indicator for assessing State party's compliance with the treaties [827]

As regards the right to health, justiciability can be a mechanism for ensuring compliance with international treaty obligations, norms, court orders and so on.[828] Justiciability also serves as a tool through which treaty bodies can monitor the adequate implementation of the provisions of the treaties by state parties while also assisting governments in fulfilling their obligations for instance through the implementation of specific legislative policies and other mechanisms.[829]

4.2 The Compliance Theory

Compliance according to international relations or political science is one of the central questions in international law.[830] The absence of an explanation for why states obey international law in some instances and not in others threatens to undermine the very foundations of international law and the importance of international law cannot be undermined as it aims to alter state behaviour in some circumstances.[831]

Therefore, the understanding of the connection between international law and state actions or non-actions is very important to provide useful policy, advice and recommendations with respect to international law.[832] This brings us to the theory of compliance, which enables us to examine the role of treaties, international laws and norms, state agreements and so on to improve the function of the international legal system and develop a workable legal and regulatory framework within a state.[833]

Scholars have questioned the extent to which states comply with human rights monitoring institutions at the international and regional levels.[834] In most cases, these scholars conclude that human rights monitoring institutions have a limited and sometimes insignificant impact on the human rights practices of states.[835] For instance, at the UN level, Heyns and Viljoen[836]

[827] M.J Dennis and P. Stewart (n 415) 462
[828] Ayala, Ana, and Benjamin Mason Meier, 'A human rights approach to the health implications of food and nutrition insecurity' (2017) 38 (10) Public health reviews
[829] ibid
[830] Andrew T Guzman, 'A Compliance Based Theory of International Law' (2002) 90 (6) California Law Review 1825
[831] ibid
[832] ibid
[833] ibid
[834] Frans Viljoen, and Louw Lirette (n 823)
[835] ibid
[836] ibid

opined that UN treaty monitoring bodies 'had a very limited demonstrable impact' within states.[837] Also, Alebeek and Nollkaemper in their thesis concluded that there was only about 12 percent compliance with the views of the Human Rights Committee.[838] At the African regional level, Viljoen and Louw found that there was in actual fact a total lack of state compliance with the recommendations of the African Commission on Human and Peoples' Rights.[839]

The explanation of the theory of compliance under international law initially focused on the state as a unitary actor, recent scholarship has shifted focus from the state to sub-state actors, such as judges and judicial systems, executives, legislatures, NGOs, and civil society.[840] The literature on human rights law has emphasised the importance of domestic institutions to enforce human rights laws and treaties.[841]

Realists posit that nations often act in a manner that is consistent with international law. However, they argue that the existence of international law has no effect on national behaviour and that instances of 'compliance' are merely cases in which the nation's policy happens to be consistent with international law.[842] Understanding the function of compliance on the domestic level is significant for human rights law because human rights treaties and rulings address the relationship between states and their constituents.[843]

Also, explanations based on inter-state strategy, the distribution of power in the international system, or state preferences cannot fully define the relationship between states and citizens that human rights law seeks to control.[844] It is argued that an analysis of the domestic politics of compliance in a state can offer a framework that helps explain compliance with both human rights court's rulings, treaty body recommendations and international law.[845]

Compliance with international human rights law in domestic courts is usually subject to domestic political activities and the domestic balance of power. Human rights treaties empower domestic actors, that is the executives, judiciaries, and constituents, to lobby for human rights.

[837] Frans Viljoen, and Louw Lirette (n 823)
[838] Damian Etone, (n 812)
[839] ibid
[840] Oona A. Hathaway (n 814)
[841] ibid
[842] ibid
[843] Courtney Hillebrecht, (n 806)
[844] ibid
[845] ibid

International human rights law can play certain roles in domestic politics; 1) enabling the executive to set the national agenda on human rights; 2) providing an important, substantive source of law; and 3) empowering domestic constituents to mobilize for their rights.[846]

The international human rights tribunals' rulings and recommendations provide a legal mandate for compliance as well as a political guide.[847] Although international law can influence a range of domestic actors, from the executive to civil society, state compliance arguably has to do with a strong domestic institutional power rather than a commitment to international law.[848] Thus, compliance requires changes in the country's jurisprudence, legislation, and practice, involving actors from the executive, legislature and judiciary.[849]

Compliance with international treaties and tribunals' rulings in a state is dependent on the domestic institutions of the state.[850] That is the executives, independent judiciaries, civil society, political competition, and other domestic actors are charged with these duties.[851] The executives play an important role in setting the compliance agenda, compliance especially hinges on a broader spectrum of institutional support.[852] The same political culture that undercuts democratic institutions also informs much of human rights norms and laws.[853] Also, individual legislators and judges might have personal commitments to comply with human rights tribunals' rulings and they might use compliance as a way to buttress and legitimate a human rights policy.[854]

It is important to state that Compliance with international human rights law ultimately requires States' action, with or without pressure from civil society.[855] Social movements or group actions may be able to use the ratification of international human rights treaties to draw attention to the abuse of those rights and to leverage policy reform from governments of a

[846] Courtney Hillebrecht, (n 806)
[847] ibid
[848] ibid
[849] ibid
[850] Courtney Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change' (2014)20(4) EJIR
[851] ibid
[852] ibid
[853] ibid
[854] Courtney Hillebrecht (n 806)
[855] Grugel Jean & Enrique Peruzzotti, 'The Domestic Politics of International Human Rights Law: Implementing the Convention on the Rights of the Child in Ecuador, Chile, and Argentina.' (2012) 34 (1) Human Rights Quarterly, pp. 178–198.

particular state.[856] Even though, State actors must accept the need for change and must be willing to act to carry out their commitment to human rights and to provide principles.[857]

International human rights law, including the tribunals' rulings, can serve as an important and motivating source of law for legislators, inspiring them to push for compliance.[858] And for judges, they can find recourse in international law, supporting their judicial scholarship and opinions and advancing their initiatives to hold the executive accountable for human rights abuses.[859] The more domestic courts know and understand international tribunals, the more likely they are to advocate for compliance domestically.[860] International human rights tribunals jurisprudence complements and shapes domestic law. Therefore, the relative power or influence of the legislature and judiciary, as with the executive, and their preferences ultimately dictate the states' 'political will' for compliance.[861]

It is necessary at this stage to review some views and perspectives that have explained the compliance theory, these reviews are not exhaustive and only deals with the theories of compliance that are relevant to the argument of the thesis that justiciability of the right to health can foster better protection of the right to health in Nigeria.

4.2.1 The Five Phase Spiral Perspective

Thomas Risse, Stephen Ropp, and Kathryn Sikkink construct a 'spiral model' for the compliance or internalization of human rights norms and practices in a state.[862] This model embodies the influence of transnational human rights regimes on the normalization of state policy and has been applied to a wide range of comparative case studies to analyse the process by which the human rights discourse becomes internalized on a societal level in the language and the behaviour of the state.[863] The five-phase spiral model indicates the socialization process of human rights rules and norms focusing on the mechanisms that facilitate the internalization of norms and practices into a domestic political scene.[864]

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[856] Grugel Jean & Enrique Peruzzotti (n 855)
[857] ibid
[858] Harmen Van der Wilt, 'State Practice as Element of Customary International Law: A White Knight in International Criminal Law?' (2019), International Criminal Law Review, 1-12
[859] ibid
[860] ibid
[861] ibid
[862]Thomas Risse et al, The Persistent Power of Human Rights: From Commitment to Compliance (Cambridge, UK: Cambridge University Press, 2013) 10
[863] ibid
[864] ibid

Phase one of the model borders with the initial state of repression on behalf of the state. [865]At this stage, norm-violating states enact policies of oppression while at the same time domestic human rights organizations attempt to document violations and bring them to the attention of the international community.[866] If these domestic advocacy networks succeed in bringing attention to their cause, there is a transition into the second phase of the spiral mode which is the denial phase.[867]

The Nigerian government has been criticised as not firmly committed to promote and protect the human rights of Nigerians.[868] As discussed earlier, there was a protest just recently in Nigeria against police brutality and bad governance under the hashtag #EndSARS.[869] It was reported that Nigerian military and security operatives sent to break up the peaceful protest shot and killed a number of protesters, although the government denies the killings.[870] There are now calls for the International Criminal Court to carry out an inquiry into the protest deaths and there are ongoing investigations from around the world on human rights violations under the current administration of President Muhammadu Buhari.[871]

In its struggle to ensure the guarantee of human rights, the Nigerian government has itself acknowledged that it faces a lot of challenges.[872]

An example of the phase-one process of the spiral model occurred in the Philippines when President Ferdinand Marcos imposed martial law in September of 1972, he began a calculated campaign of human rights abuses, including the arrest of political dissidents and the arbitrary violation of civil and political rights of the citizens, members of the Moro National Liberation Front and the Communist Party of the Philippines.[873] There emerged two primary human rights organizations from these oppressive activities, they were the Task Force Detainees of the Philippines and the Free Legal Assistance Group.[874] Between these two groups the human

[865] Thomas Risse et al (n 862)
[866] ibid
[867] ibid
[868] ibid
[869] 'Nigeria's Attempt to cover up killing of #Endsars protesters exposed' < https://www.amnesty.org.uk/press-releases/nigeria-attempt-cover-killing-endsars-protesters-exposed> Accessed 15 November 2020
[870] ibid
[871] ibid
[872] ibid
[873] Eran Shor, 'Conflict, Terrorism, and the Socialization of Human Rights Norms: The Spiral Model Revisited' (2008) 55 (1) Social Problems, pp. 117–138
[874] ibid

rights abuses under Marcos's regime were monitored and documented to the international community and thus attention and focus was brought to their cause.[875]

The second phase of the model is denial and this phase usually occurs when human rights abuses are brought to the attention of the international community, the violating state is placed in the position of having to respond to the accusations of oppression.[876] Mostly, the state's response is to deny the charges made against them, often in the form of questioning the legitimacy of human rights norms in general by arguing that state sovereignty should supersede concerns over human rights.[877]

However, not all states go through the denial phase.[878] For example, in the case of Tunisia, Sieglinde Gränzer argues that Prime Minister Ben Ali skipped the denial phase moved directly into phase three which is the tactical concessions phase.[879] Thus, it is noted the length of time through which states go through each of these phases is largely dependent on the strength of the opposition, human rights networks and the State itself.[880]

The third phase of the model which is the tactical concessions stage is said to be the most important stage in achieving sustainable, long-term human rights improvements.[881] They explained that movement to the third phase of the spiral model is based primarily on the strength of the human rights networks and the vulnerability of the state to external pressure.[882]

At this stage, governments begin to enact policies aimed at curbing human rights abuses, and some states may even begin to incorporate the language of human rights into domestic political discourse.[883] The importance of this phase is most noticeable in the case of South Africa which, as David Black shows, ultimately brought about the deconstruction of apartheid and the transition to a democratic system based on respect for human rights.[884] The main motive for

[875] Eran Shor (n 822)
[876] Thomas Risse et al (n 862) 5-6
[877] ibid
[878] Eran Shor (n 822)
[879] ibid
[880] ibid
[881] Thomas Risse et al (n 862) 11
[882] ibid
[883] Gerald Robert Pace, 'Human Rights from Paper to Practice: How Far Have We Come?' (2012)1 (1) Human Rights and Human Welfare 1-2
[884] ibid

change in the South African case was attributed to the increasing isolation and 'shaming' of the government by the international community.[885]

The fourth phase is the prescriptive phase where states internalize human rights norms and practices.[886] At this stage violating states are confronted with fully mobilized human rights networks and an increasing internalization of human rights norms, which ultimately force the state to either liberalize their policies or accept some form of substantive constitutional or institutional change.[887] The impact of these networks can perhaps be most strongly felt when their continued efforts ultimately lead to a regime change for instance South Africa.[888]

The last phase of the model is the rule-consistent behaviour stage.[889] At this final stage, governments institutionalize international human rights norms into actual state practice. [890] For instance, the Nigerian Constitution of 1999 (as amended) in Chapter IV contains provisions on human rights and Nigeria has ratified several international and regional human rights treaties, notwithstanding, the country is plagued with decades of human rights violations and abuses perpetrated by state and non-state actors respectively.[891]

The importance of the spiral model is its methodological demonstration of the process through which human rights norms become internalized into state practice by states with histories of human rights violations.[892] Also, the social constructivist approach demonstrates the very real role of domestic opposition groups in mobilizing and effectuating change and the domestic groups' relationship to transnational human rights networks helps explains the underlying dynamics that pressure oppressive regimes to alter their behaviour and curb their abuse.[893] The usefulness of the model is such that it has provided a valid explanation for many changes in human rights practices in States and the governments' responses to its internal and external pressure.

However, the spiral model does not provide a truly complete picture.[894] The model is said to be generalizable across cases irrespective of cultural, political, or economic differences among

[885] Gerald Robert Pace (n 883)
[886] Thomas Risse et al (n 862) 11
[887] ibid
[888] ibid
[889] ibid
[890] Gerald Robert Pace (n 883)
[891] ibid
[892] ibid
[893] ibid
[894] Eran Shor (n 822)

countries but the model seems much more applicable to smaller powers rather than great ones.[895] With regards to South Africa, David Black discusses the role of the international community in 'shaming' South Africa and ostracizing them within the international community. Ultimately, this shaming process coupled with a lot of factors like economic sanctions aided in the eventual change of regime and the end of apartheid. However, the proponents of this theory fail to discuss the over-arching influence of great powers in this process, and especially how the model changes when the great powers themselves are the norm-violating states.[896]

Even though the spiral model offers important insights into the process of change in repressive states and provides a satisfactory theoretical framework to explain the effectiveness of the UN human rights treaty bodies, the model is only focused on civil and political rights and covers a limited subset of human rights issues and does not provide the best framework to discuss the potentials of justiciability and whether the justiciability of the right to health can lead to better protection of the right in Nigeria. The unsuitability does not however undermine the importance of the theory especially the fact that there are aspects of the model that underscore the significant role of non-governmental organizations and civil societies when considering the impact of justiciability of the right to health.

4.2.2 Courtney Hillebrechts Perspective on the Compliance Theory

Courtney Hillebrecht's perceives the theory of compliance by paying attention to processes within and between domestic political institutions and civil society actors in their implementation of remedies mandated by regional human rights courts. Hillebrecht holds a strong view that 'domestic institutions are critical for compliance[897] and that compliance is an inherently domestic affair with pro-compliance partnerships of political actors such as the different branches of government that is the executive, legislature, judiciary and human rights reformers interacting to implement the judgments of human rights courts and tribunals.[898]

This interaction of institutions, norms, and political processes recalls constructivist approaches, her perception is at the midpoint in a spectrum of incentive-based and interactional/political analysis.[899] She classifies the discussion of socialization and compliance as one of two

[895] Eran Shor (n 822)
[896] Gerald Robert Pace (n 883)
[897] Courtney Hillebrecht (n 806)
[898] ibid
[899] ibid

normative approaches and an important alternative hypothesis to her intra-state political analysis.[900] While the constructivist notions of norms, legitimacy, and social processes in international relations accounts are usually applied to inter-state processes, her focus is on political processes within the state and arguably part of the integrated and sophisticated constructivist mainstream as her analysis combines legitimacy and social process analysis with notions of incentives and reputation.[901]

Hillebrechts' suggests three causal mechanisms for compliance with human rights judgments: these are; (i) that governments can use judgments to 'signal a commitment to human rights'; (ii) domestic human rights actors find in them 'impetus and political legitimacy' for reform; and (iii) some 'strong democracies' may comply with human rights rulings with an air of 'begrudging compliance', citing the constraints imposed on them by politically inconvenient international law.[902]

This three-part typology synthesizes a quantitative coding of qualitative reports in Hillebrecht's Compliance with Human Rights Tribunals (CHRT) Dataset, which aggregates 585 judgments from the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) and categorizes them by the type of remedy required, the violations at issue, and whether the states implemented the judgments or not.[903]

Hillebrecht employs a brilliant process tracing (qualitative tools that attempt to identify causal mechanisms by distinguishing necessary and sufficient conditions) to test the data from the CHRT Dataset in relation to a country by country case studies. Hillebrecht relies on 'smoking gun' process tracing tests, which 'can lend support for hypotheses, but cannot necessarily cause researchers to reject hypotheses'.[904] The CHRT Dataset's most frequently occurring cases are selected for qualitative case study analysis by process tracing, to avoid testing the three causal mechanisms with reference to outliers.[905] The combination of quantitative and qualitative approaches adds persuasiveness to Hillebrecht's theory.[906]

[900] Courtney Hillebrecht (n 806)
[901] Elizabeth Stubbins Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory', (2014) 25(4) European Journal of International Law, 1169–1182
[902] ibid
[903] ibid
[904] ibid
[905] ibid
[906] ibid

Courtney explains that the responsibility for compliance falls to domestic actors that is the executives, legislators, and judiciaries.[907] She maintains that compliance with international human rights tribunal rulings depends on executives' political will for compliance and their ability to build pro-compliance coalitions with judges and legislators.[908] This is directly linked to the whole essence of the concept of justiciability of human rights and also means that compliance with international human rights law generally depends on the effective acts or actions or determination of the domestic organs of government in a particular state.

The relevance of this theory to this thesis cannot be overemphasised as it explains how compliance unfolds on the domestic level of human rights law, human rights treaties, and rulings, and addresses the relationship between states and their constituents.[909] The theory explains that compliance with international human rights tribunals' rulings, as with international human rights law requires more changes in the country's jurisprudence, legislation, and practice, involving actors from the executive branch, judiciary, and legislature.[910] It prescribes a compliance coalition is necessary, coalition of domestic political elites, namely executives, judges, and legislators, makes the compliance process important.[911]

The role of the judges cannot be undermined as the theory postulate that the judges and legislators can use compliance as a way to buttress and legitimate a human rights policy.[912] Judges can also find recourse in international law, supporting their judicial scholarship and opinions and advancing their initiatives to hold the executive accountable for human rights abuses. And this can advance human rights policy as well as provide protection from many political mishaps that might result from making a politically divisive decision regarding human rights.[913] This indicates that direct justiciability guarantees that significant steps are taking towards the protection of human rights.

Judges in domestic fora can as well integrate international law into their own jurisprudence allowing them to rule against the executive when supported with the weight and legitimacy of international law.[914] It is important to note that this thesis suggests that the domestic

[907] Courtney Hillebrecht (n 850)
[908] ibid
[909] James D. Ingram, 'What is a 'Right to Have Rights'? Three Images of the Politics of Human Rights' (2008) 102 Am. Pol. Sci. Rev. 401
[910] ibid
[911] ibid
[912] Beth A. Simmons (n 18).
[913] ibid
[914] Courtney Hillebrecht (n 850)

implementation of international court's rulings is largely dependent on the willingness and ability of domestic courts to enforce the rulings.[915] The more domestic courts know and understand about international tribunals, the more likely they are to advocate for compliance domestically.[916] This is very important to the case of the Nigerian jurisprudence, it is argued that compliance with the international human rights law would inform, complement and shape the domestic laws on human rights.[917]

It is noted that Hillebrecht's perception of the compliance theory deals only with judicial findings. Her work is, therefore, narrower in scope than most of the earlier work on human rights compliance theory.[918] Hillebrecht acknowledges that the greater but unmeasurable impact of human rights tribunals might be in 'the cases that human rights tribunals have deterred'[919].

Nonetheless, Hillebrecht's work has a stronger emphasis on incentives and political costs than on socialization mechanisms, it combines rational choice and constructivist approaches and her account of political actors' implementation with human rights judgments is an important contribution to the literature on compliance theory.[920]

This thesis argues in line with Hillebrecht's views that compliance is domestic, and implementation is political, and that compliance majorly rests on the activities of the state and requires actions from different actors within the state. But, justiciability, as conceived in this thesis, is wider than only judicial judgment and requires a broader theoretical framework to be able to accommodate the discussion on whether compliance with international human rights to health in Nigeria through justiciability of the right would foster better protection of the right to health in Nigeria.

4.2.3 The Institutionalist Perspective of the Compliance Theory

The institutionalist theory of state compliance with international law views states as rational actors that behave only according to self-interest.[921] According to this perspective, membership in a regional human right system, which States join to set a common standard of behaviour,

[915] Courtney Hillebrecht (n 850)
[916] ibid
[917] ibid
[918] ibid
[919] ibid
[920] ibid
[921] Catherine Powell, 'United States Human Rights Policy in the 21st Century in an Age of Multilateralism' (2002) 46 St. Louis U. L.J. 421, 425

positively impacts a state's perception of its self-interest by creating significant incentives to comply with the international rules and norms established by the regional human rights system.[922] Proponents of the institutionalist theory state that the rules and norms established by institutions will reform a state's decision-making process which then encourages a state to cooperate by surrendering certain short-term goals to reap greater benefits of long-term gains.'[923]

According to the institutionalists, human rights violations occur 'when the conditions (such as the rules and norms established by institutions to reform a state's decision-making process) supporting compliance are absent or weak, that is when international norms are ambiguous.'[924] Thus, institutionalists believe that state compliance with the norms and rules of a human rights regime will be greatest in those regions of the world where human rights regimes are strong, such as in Western Europe.' Also, the institutionalists assert that state compliance with the norms established by a human rights regime can occur in certain ways;

> By rewarding states that develop reputations for adherence to international rules; by creating greater interdependence between states thereby raising the cost of cheating; by increasing the amount of available information to ensure effective monitoring of adherence and early warning of cheating; and by reducing the transaction costs of individual agreements, thereby making cooperation more profitable for self-interested states.'[925]

The institutionalists argue that institutions 'can promote cooperation in the absence of a common or formal government by providing 'a stable environment for mutually beneficial decision-making as they guide and constrain behaviour.'[926]

International institutions, such as the African Union, bestow upon participating members the ability to create long-term relationships, effectually eliminating mere short-term relationships that lack incentives to cooperate.[927] For instance, under the direction of the African Union, the New Partnership for Africa's Development (NEPAD) was established in an effort to promote

[922] Catherine Powell (n 921) 426-427
[923] ibid
[924] Sonia Cardenas, 'Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behaviour', (2004) 6 Int'l Stud. Rev. 213, 220
[925] Catherine Powell (n 921) 426-427
[926] Stacy-Ann Elvy (n 818) 78
[927] ibid

democracy in Africa and increase economic integration and peace and security among African countries.'[928] In connection with the creation of NEPAD, the African Union also created a peer review mechanism that utilizes principles of self-monitoring, mentoring, and guidance in the hopes of promoting good governance and socio-economic cooperation in African countries.[929]

It is important to note that institutionalists emphasise on inducement, rather than persuasion or coercion of decision makers to comply with international norms as the best means of protecting and promoting human rights.[930] In fact, other than applying punitive sanctions, the institutionalist advocates for a liberal position and assumes that greater economic openness will in effect lead to increasing political reform and that trade activity provides a greater opportunity for societal contact and exchange of democratic and human rights ideas.[931]

The institutionalist perspective is quite unclear about the understanding of how institutions differ from the decisions they are supposed to structure and institutions are liable to degenerate into a series of rules which have binding force without a specific rationale for why they have that effect.[932]It is argued that it may be difficult to ensure compliance if rules have no force and there are no punitive sanctions.[933]

Also, institutions like the African Commission are weak and are unable to enforce decisions against state parties as such that their recommendations are sometimes meaningless, and victims are left to endure the continued violation of their human rights.[934] For instance, when the Nigerian government failed to participate in its process in the case of SERAC and CESR v. Nigeria, the Commission found the Nigerian government to be in breach of Articles 2, 4, 16, 18(1), 21 and 24 of the African Charter.[935] The Commission merely appealed to the government to stop the attacks on Ogoni communities, conduct an investigation into the human rights violations and prosecute officials of the security forces as well as the national Nigerian oil

[928] Stacy-Ann Elvy (n 818) 78
[929] ibid
[930] Sonia Cardenas (n 924) 217
[931] ibid
[932] Henry Farrell, 'The Shared Challenges of Institutional Theories: Rational Choice, Historical Institutionalism, and Sociological Institutionalism'. in Glückler J., Suddaby R., Lenz R. (eds) Knowledge and Institutions, (Knowledge and Space, Springer, Cham, 2018) 23-44
[933] ibid
[934] African Commission on Human and Peoples' Rights, SERAC and CESR v. Nigeria, Communication N° 155/96, October 13-27, 2001
[935] Ibid-

company, to pay compensation to victims, including resettlement assistance, to clean up the land and rivers, and to inform the population about health risks.[936]

The Commission was not able to force Nigeria to comply with its judgment, to hold Shell accountable, or to obtain remedies for the victims in Ogoni land.[937] Even though the African Commission has been successful in obtaining compliance with judgments in many cases, they still do not have the same enforcement abilities as domestic courts.[938] This is an indication of the limited level of justiciability in Nigeria and also shows the importance of domestic government can never be undermined when discussing compliance.

Flowing from the above, the institutionalist perspective does not offer the best theoretical framework to analyse the main thesis question in this thesis.

4.2.4 The Transnational Legal Process Theory

This theory was propounded by Harold Koh who says that the way to achieve compliance with international law is through the repeated participation of states in a variety of law-creating and interpreting fora, which results in the internalization or domestication of norms.[939] Koh made a distinction between three forms of norm internalization which are social, political, and legal internalization.[940] He holds that social internalization occurs when there is widespread adherence to the norm as a result of the acquisition of public legitimacy.[941]

Secondly, political internalization occurs when a government accepts an international norm as a matter of policy and legal internalization occurs when the international norm is incorporated into the domestic legal system either via executive action, legislation, judicial interpretation, or a combination of the three forms of internalization.[942]

The process of interaction, interpretation and internalization are significant to the transnational legal process theory.[943] Koh maintains that compliance is ultimately achieved as a result of the repeated process of interaction, interpretation, and internalization through which international

[936] African Commission on Human and Peoples' Rights, SERAC and CESR v. Nigeria, Communication N° 155/96, October 13-27, 2001
[937] ibid
[938] ibid
[939] H H Koh 'Transnational Legal Process Theory' (1996) 75(1), Nebraska Law Review, 181–207
[940] ibid
[941] ibid
[942] H H Koh, (n 740)
[943] ibid

human rights norms are complied with.[944] The interaction and interpretation processes are triggered by non-State actors in an effort to compel the State to implement the findings or recommendations of human rights treaty monitoring bodies.[945] The treaty monitoring or international adjudicative monitoring bodies then serve as an interpretive community that defines or clarifies the content of the relevant norms and what amounts to their violations.[946]

The state achieves legal internalization by incorporating such norms into its constitution or other domestic law and also political internalization is achieved by incorporating the norm into its government policy, and lastly, social internalization occurs when the norm is subject to public legitimacy.[947]

The transnational legal process theory is an inclusive theory because it comprehends all levels of state and nonstate interaction, influence, and compliance at the international and the domestic level.[948] Koh however, acknowledged the limitation of his theory and argued that the theory of acculturation closes the gap by identifying the micro-processes of social influence that affect his process of norm internalization.[949] Koh's theory also does not explain whether any of the three forms of internalization (legal, political, and social) can occur in the absence of an interpretive community or a law-declaring forum to create, legally interpret, or clarify the relevant rights.[950]

In accordance with the transnational legal theory, when States implement their international obligations through legislation, policies and programming, a culture of compliance is nurtured, diffusing human rights norms to walks of life in that particular State.[951] Legislation importantly makes the human rights in question justiciable in courts of law, thereby placing the responsibility for enforcement on the judiciary.[952] Accordingly, the discussion on justiciability in this thesis weighs on the transnational legal theory. The theory further explains that the disparity between treaty ratification and domestic implementation is not necessarily the

[944] H H Koh, (n 740)
[945] ibid
[946] ibid
[947] ibid
[948] Ann Kent, *Beyond Compliance: China International Organizations and Global Security* (Stanford, CA: Stanford University Press, 2007) 10
[949] H H Koh, 'Internalization through socialization' (2005) 54(4) Duke Law Journal, 975–977
[950] ibid
[951] Oche Onazi, '[Disability] Justice Dictated by the Surfeit of Love: Simone Weil in Nigeria' (2017) 28 Law Critique, 1-22
[952] ibid

weakness of international enforcement mechanism but the failure of States to internalise those norms.[953]

In Nigeria there is a great disparity between the ratification of international treaties and Conventions and their domestic implementation. The attitude is such that on record, it has signed and ratified all the core international human rights treaties and their Optional Protocols. However, it has only implemented the UN CRC through domestic legislation, and this has not been without controversy, as there is an indication of its poor record of implementation throughout the States in Nigeria.[954]

However, the transnational legal process's theory of compliance is not faultless, Weil argues that even if it were possible to internalise human rights norms, this is no guarantee for justice. According to her, the problem with human rights is more fundamental than being able to internalise them.[955] This is specifically because she believes that human rights suffer from an 'intrinsic inadequacy' and this prevents them from living up to their most important functions which is to ameliorate human suffering.[956] Also, she is of the view that even when a state absorbs or assimilate international human rights norms, principles, beliefs and values, to become part of their institutional features, those norms, principles, beliefs and values cannot foster the human capacity to empathise with or care for others.[957] According to her, our responses to human rights violations are contingent not only on the creation of institutional enforcement structures, but also on being able to recognise and empathise with those whose rights are being denied or violated altogether.[958]

Nonetheless, the transnational legal process offers one of the best theoretical approaches to understand whether the justiciability of the right to health will lead to better protection of the right, it offers a significant theory on the interaction of both state and non-state actors and thus useful in assessing whether there is a potential for change in Nigeria.

The transnational legal process theory apart from taking human rights as a given, ends up reinforcing international human rights norms as formal, state-centric and top-down juridical

[953] Oche Onazi (n 951)
[954] About 10 states out of the 36 states of Nigeria are yet to enact the law and in fact the ones that have enacted same appear not to be bound by it. See E Secker (n 686)
[955] Simone Weil, An Anthology, (London: Penguin 2005) 71
[956] ibid
[957] ibid
[958] ibid

constructs, which suppress the possibility of properly appreciating the ability of human rights norms to foster the capacity of State agents to respond to human rights violations.[959]

4.2.5 The Theory of Acculturation

Goodman and Jinks defined acculturation as, 'the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture, without actively assessing either the merits of those beliefs and behaviours or the material costs and benefits of conforming to them'.[960] They argued that their theory of acculturation is 'an extension of Koh's and others' work on transnational norm diffusion,' which they intended to supplement by 'isolating the micro processes of social influence.'

Acculturation draws on a relationship between law and sociology, in contrast to the five-stage spiral model influenced by international relations theory.[961] Acculturation is achieved when pressure is exerted on a particular state, and the state's officials not only identify with but also conform to the cognitive frames and behavioural expectations of a particular international legal regime, this leads to the acceptance of norms in a particular state as speculated under international law and leads also to the justiciability of a particular norm in the state.[962]

The theory of acculturation disregards the view that compliance with human rights norms is best induced by the exercise of coercive power or by binding decisions emanating from human rights monitoring institutions.[963] The theory assumes that power is not merely prohibitive, material, and centralized but also productive, cultural, and diffuse.[964]

Goodman and Jinks further argue that mechanisms based on coercion are inadequate because coercion 'fails to grasp the complexity of the social environment within which states act'.[965] The monitoring and reporting system are highly effective and important functions in an acculturation-based institutional regime, the acculturation theory shows a preference for 'soft law' mechanisms but still does not call for a complete abandonment of coercive mechanisms.[966]

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[959] Oche Onazi (n 951)
[960] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law (2004) 54 (3) Duke Law Journal, 626
[961] ibid
[962] ibid
[963] Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford, Oxford University Press, 2013) 122
[964] ibid
[965] ibid
[966] ibid

The theory argues that acculturation, like coercion, is more likely to succeed and more likely to fail under certain conditions or when combined with other mechanisms.[967] The micro-processes of acculturation include mimicry, identity, and status maximization which propel cognitive and social pressures that drive a state to adopt socially legitimate attitudes, beliefs, and behaviours.[968] Goodman and Jinks explain that by identifying themselves with a reference group, states generate varying degrees of social and cognitive pressures to conform to the norms of that group.[969] The social environment within which states act propels internal cognitive and social pressures that drive states to adopt socially legitimate attitudes and beliefs and the adoption of socially legitimate attitudes, beliefs and behaviours by States can contribute to the attainment of social and political norm internalization.[970]

Koh in his review of the theory of acculturation validated the theory as a case study of internalization through socialisation.[971] He argued that by focusing on acculturation over coercion, Goodman and Jinks unmasked a new approach to influence state compliance with human rights law through a 'complex interaction between process and ideas'.[972] Therefore, Koh's transnational legal process theory and the acculturation theory could coexist and reinforce each other.[973] Social and cognitive pressures can push the language of human rights into some moral commitments within particular cultures even in terms that challenge one or more aspects of that culture.[974]

Another scholar employed a cognitive approach rather than a normative one to show how human rights norms can be advanced as rights internal to any given community's culture by the means of cognitive reframing.[975] He further argued that 'an idea once external can become internal through system-level learning'.[976] Citing the issue of female genital mutilation in Africa, he noted that a cognitive rule can be deployed that revises local normative rules that justify female genital mutilation, but that such a cognitive rule has to be locally owned.[977] For

[967] Ryan Goodman, and Derek Jinks, 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges (2005) 54 (4) Duke Law Journal, 991
[968] ibid
[969] ibid
[970] ibid
[971] H H Koh (n 949)977
[972] ibid
[973] ibid
[974] H H Koh (n 849) 977
[975] Benjamin Gregg, 'Deploying Cognitive Sociology to advance Human Rights', (2010)9(3) Comparative Sociology, 279–289
[976] ibid
[977] ibid

instance, reframing female genital mutilation as a technical, health issue rather than a normative human rights concern can advance the human rights issue as internal to the African culture.[978]

Also, Charlesworth argues that human rights compliance strategies that focus on a learning culture rather than a culture of blame are useful in achieving improved human rights protection.[979] She added that 'the idea of continuous improvement, which emphasises incremental, constantly monitored steps, can be achieved by moving from a culture that administers blame to a culture that encourages learning.[980]

Acculturation theory has been criticised as treating human rights as formal and state-centric constructs, which are not only structured hierarchically and consequently a product of top-down international juridical mechanisms[981] Also, it is not primarily concerned with accepting the ethical or moral validity, legitimacy and beliefs of human rights norms but interested in these to the extent that they conform with the needs of the social structure or organisational environment.[982] It is more concerned with the outward conformity with a social convention without private acceptance.[983]

The theory falls short of demonstrating how international human rights norms are actually internalised.[984] There is little possibility of implementing, enforcing or complying with a human rights norm without internalising those norms.[985] However, it is difficult to understand how this can be effective or sustained in a long term without being enmeshed like that norm itself or what constitutes a violation of it, especially, in a complex country like Nigeria.[986]

It is argued that acculturation is a useful compliance tool for established societies wishing to regulate the behaviour of its members and as such not the best tool to be used in a country like

[978] Benjamin Gregg (n 975)
[979] Hilary Charlesworth, 'Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict' (2010) 29 (1) Australian Yearbook of International Law, 1–16.
[980] ibid
[981] Oche Onazi (n 951)
[982] ibid
[983] ibid
[984] Goodman, Ryan, and Derek Jinks (n 967) 622–703
[985] ibid
[986] Oche Onazi (n 951)

Nigeria with its complexities.[987] But, the theory still offers an inclusive, cooperative, and collaborative framework which may be useful in some aspects of this thesis.

4.3 Conclusion

Finally, it is noted that all the theories reviewed are not immune from criticism and neither theory alone can definitively and conclusively account for all factors that will sufficiently answer the main thesis question in this thesis. The transnational legal process's' explanation on the compliance theory is presumed to be most suitable to determine whether improved justiciability of the right to health can foster a better enjoyment and compliance with the right in Nigeria. However, the theory has its flaws, and this thesis suggests a multiple or a holistic approach to predict the potential for change in the justiciability and protection of the right to health in Nigeria.

Accordingly, a holistic approach of better compliance is supported when the aspects of the theory that are directly about justiciability i.e., the Courtney Hillebrechts perspective, the institutionalist perspective, and the transnational legal process and those that are not directly about justiciability like the five-phase spiral model and the acculturation theory are emphasised and all considered together.

The holistic approach suggests adopting the five-phase spiral theory to analyse the process by which the right to health discourse can be internalized on a societal level in the language and the behaviour of Nigeria. An application of the Courtney Hillebrechts perspective to explain how compliance with the right to health can unfold on the domestic level of human rights law, human rights treaties, and rulings in Nigeria.

A consideration of the institutionalist perspective explains how the African Unions standard of behaviour impacts on Nigeria's perception to comply with right to health.[988] Also it will require emphatically the transnational legal process to explain how Nigeria's repeated participation in law creating and interpretation fora can results into the internalization of rights to health and lastly the acculturation theory should be considered to analyse the process by which the beliefs and behavioural patterns of the surrounding culture of the people affect the compliance of the right to health in Nigeria.

[987] Alkoby, Asher, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4 (1) Journal of International Law and International Relations, pp. 151-198

[988] Catherine Powell (n 921) 426-427

The theoretical framework suggests that justiciability can change state behaviour and this thesis argues that legal compliance is rooted in state internalisation of normative standards of appropriate action and right conduct within domestic fora by exploring examples from some selected jurisdictions.[989] Different scholars have developed various theories to explain how, why, and when States obey international law and they all seem to have arrived at mixed results. The thesis argues that state compliance is a fundamentally domestic and inherently a political process that requires a host of activities.[990] Understanding compliance with human rights law requires delving into domestic political actors and parsing out their motivations, capacities, and strengths.[991]

In compliance with court judgments, rulings , comments and recommendations, the executive in a state is vested with the agenda-setting powers that allow the State to carry on its duty effectively.[992] Thus, the executives can use their powers to push for compliance with a normative commitment where tribunals' rulings provide an opportunity to focus resources and attention on human rights reforms and legitimize the executive's preferred human rights policies and where compliance would bring reputational and material benefits.[993]

It is noted that even though the executive is in a privileged position with respect to compliance, the executive depends on support from the two other domestic institutions, the legislature and judiciary.[994] When an executive has sufficient political will for compliance, as well as institutional support from the other branches of government then compliance with human rights norms, rules and judgment from tribunals and also recommendation form human right bodies, can have a powerful effect on the enjoyment of human rights in a particular state.[995]

The role played by international law in advancing economic, social, and cultural rights often remains marginal.[996] It will, nevertheless, provide inspiration and authority in assisting the development of a domestic legal and judicial framework that may guarantee the effective implementation of international obligations. When apprehended constructively and in a non-

[989] Alkoby, Asher (n 987)
[990] Courtney Hillebrecht, (n 806) 959-985
[991] ibid
[992] ibid
[993] ibid
[994] ibid
[995] Daniel Abebe, 'Does International Human Rights Law in African Courts Make a Difference?' (2017) 56 Virginia Journal of International Law, 1-59
[996] ibid

selective manner, international law, used as a catalyst would have a significant impact on Nigerian legal reform.[997]

[997] Daniel Abebe (n 995)

CHAPTER FIVE: EXPLORATION / CASE STUDIES ON JUSTICIABILITY OF THE RIGHT TO HEALTH

5.0 Introduction

It cannot be overemphasised that the inferior status of economic, social and cultural rights had a negative impact on its justiciability.[998] In reality, a violation of an economic, social, or cultural right is less likely to be subject of review by a court of law or a quasi-judicial procedure compared to a civil or political rights.[999] However, over the last two decades, several developments at the international and regional level have strengthened the justiciability of economic, social and cultural.[1000] Accordingly, three selected jurisdictions (India, South Africa and Colombia) are examined to further shed light on the different avenues of justiciability of the right to health.

The right to health in these jurisdictions has witnessed some degree of justiciability which this chapter aims to analyse. This chapter explores the relevant laws from the jurisdictions, the law in practice and then discusses the relevance of the perspectives of the justiciability of the right to health in these jurisdictions to Nigeria, especially the insights that are drawn from the analysis. The essence of the chapter is to determine whether Nigeria can gain lessons from the justiciability experiences of the selected jurisdictions to promote the overall enjoyment of the right of health.

5.1 An Exploration of the perspectives to the Justiciability of the Right to Health in India, South Africa, and Colombia

There has been a noticeable increase in litigations invoking the right to health around the world, and views differ as to whether this development has led to led to the greater enjoyment of the right to health.[1001] The reason for the case studies of the right to health in India, South Africa and Colombia is to create a reflective approach that would generate new options and

[998] Michael J Dennis., and David P. Stewart (n 415) pp. 462–515.
[999] ibid
[1000] Maite San Giorgi (n 620)
[1001] Marius Pieterse (n 23) 4

possibilities in taking the right to health beyond rhetoric and towards the practical success of the realisation of the rights in Nigeria.[1002]

India and South Africa are both common law jurisdictions like Nigeria, they are similarly structured in terms of their economic system. Also, Colombia is similar to Nigeria and as a developing country, it is known for its brutal fifty-year-old civil conflict and still stands out as a striking example of judicial activism regarding health rights.[1003]

The Constitution of India and South Africa were products of popular liberation movements against exploitative regimes[1004] but the models of socio-economic rights adopted in these constitutions and the jurisprudence of the respective enforcement in courts differ a lot.[1005] Colombia has been chosen as a case study because it has made significant progress in the recognition and protection of the right to health.[1006] It has proven that litigation can be a pacific and democratic way to protect a constitutional principle of health as a fundamental and justiciable right.[1007]

The constitutional projects of post-colonial India and post-apartheid South Africa both elicited debate regarding the transformative potential of socio-economic rights.[1008] The Constituent Assembly of India sought advice from international jurists to frame its transformative goals, while the South African Constitutional Assembly formally banned input from foreign commentators but actively sought public participation as part of a broad campaign to seed the values of constitutionalism.[1009]

Lastly, the Indian Constitution just like the Nigerian Constitution provides for socio-economic rights as directive principles of state policy (DPSP).[1010] The South African Constitution has

[1002] Andra le Roux-Kemp (n 111) 119-138.

[1003] A E Yamin and Oscar Parra-Verra, 'Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates' (2010) 33 (2) Hastings Intl & Comp. L. Rev. 101-130

[1004] The Indian Constitution was adopted in 1950, three years after India achieved independence from British colonial rule. Abeyratne, supra note 2, at 28–30; Sripati, supra note 2, at 56, 75. The South African Constitution was adopted by the Constitutional Assembly in 1996, two years after the first full franchise elections after the apartheid regime. Eric C. Christiansen, Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa, 13 UCLA J. INT'L L. & FOREIGN AFF. 369, 378–81 (2008).

[1005] Natasha G Menell, 'Judicial Enforcement of Socio-economic Rights: A Comparison Between Transformative Projects in India and South Africa' (2016) 49 Cornell International Law Journal 724-746

[1006] Arrieta-Gómez & Aquiles Ignacio (n 132) 133-145

[1007] ibid

[1008] ibid

[1009] ibid

[1010] Constitution of India, 1950, Article 37

boldly included ESC rights as justiciable rights in its Constitution.[1011] Colombia passed a statutory law in 2015 (Law 1751) recognizing the constitutional right to health and was the result of a long battle between those who consider health as a fundamental right and those who consider it as a mere social right that can be addressed through public policies.[1012]

India, South Africa and Colombia have developed their jurisprudence on the justiciability ESC rights and Nigeria can gain lessons from their experiences. The chapter focuses on the interpretative arguments used by these countries to make the principle of the right to health binding and effective, their good practice and shortcomings are to illustrate and inform on the potentials of justiciability and how it can lead to better protection of the right to health in Nigeria.

5.2 The Justiciability of the Right to Health in India

In India, ESC rights are termed as directive principles and not directly justiciable just like Nigeria.[1013] Article 37 of the Indian constitution provides that DPSP '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.'[1014]

The DPSP consists of a set of social and economic objectives aimed at securing social justice within society and the meeting of social needs such as the means of livelihood, education, public health care, and decent working conditions.[1015] The DPSP are not legally enforceable and are only guidelines for creating a social order characterized by social, economic, and political justice, liberty, equality, and fraternity as enunciated in the Preamble.[1016] However, they are fundamental in the governance of the country and the State is under the duty to apply these principles while exercising its law-making power.[1017]

[1011] Constitution of the Republic of South Africa, 1996, s 26-31

[1012] Statutory Law No. 1751, of 16 February of 2015, by means of which regulates the fundamental right to health and other provisions

[1013] Article 47 of the Directive Principles of State Policy (DPSP) which are contained in part IV, articles 36 to 50, of the Indian Constitution, provides for the duty of the state to improve public health

[1014] ibid

[1015] Manisulli Ssenyonjo, (n 91) 540

[1016] Article 37 of the Directive Principles of State Policy (DPSP) which are contained in part IV, articles 36 to 50, of the Indian Constitution provides for the duty of the state to improve public health

[1017] ibid

5.2.1 The Justiciability of the Right to Health under the Laws of India

In the Indian constitution, human rights are divided into two separate parts which are contained in Part III and IV.[1018] Part III of the constitution provides for the 'Fundamental Rights', which include the right to life, the right to equality, the right to free speech and expression, the right to freedom of movement, the right to freedom of religion. These are civil and political rights. While Part IV of the constitution contains the DPSPs, which include all the social, economic and cultural rights, such as the right to education, the right to livelihood, the right to health and housing.[1019]

The Constitution provides for the fundamental rights to its citizen under part III. Some of these rights as interpreted by the courts play an important role with reference to the right to health and health care. Firstly, article 19 (1) (g) provides that all citizens shall have the right to practice any profession or carry on any occupation, trade or business subject to restrictions imposed in the interest of general public under clause (6) of Article 19.

In interpreting Article 9, the court held in the case of *Municipal Corporation v. Jan Mohammed*,[1020] that the expression in the interest of general public in clause (6) of Article 19 is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. Also, in the case of *Burrabazar Fire Works Dealers Association and Others v. Commissioner of Police, Calcutta*,[1021] the Supreme Court held that Article 19 (1) (g) does not guarantee the freedom which takes away that community's safety, health, and peace.[1022]

Therefore, the reasonable restrictions as imposed on the freedoms are wide in the sense that the Court has the power to interpret the reasonable restriction as imposed on the freedoms the same in the interest of the general public.[1023] This means that public health is very important

[1018] Constitution of India 1950, Part III and Part IV

[1019] Jayna Kothari, 'Social Rights and the Indian Constitution', 2004 (2) Law, Social Justice & Global Development Journal (LGD). <http://www.go.warwick.ac.uk/ elj/lgd/2004_2/kothari> Accessed on 20th March 2019

[1020] *Municipal Corporation v. Jan Mohammed* AIR 1986 SC 1205: (1986) 3 SCC 20

[1021] *Burrabazar Fire Works Dealers Association and Others v. Commissioner of Police, Calcutta* AIR 1998 Cal. 121

[1022] ibid

[1023] S B Satbhai, 'Right to Health in India- A Study of Constitutional and Judicial Attitude' (2014) G. E. Society's Swayamprakash Journal of Thesis 1-11

while enjoying the freedoms under the Constitution. There are several other judgments, where the supreme court has emphasised the importance of public health.[1024]

Secondly, article 21 which provides for the protection of life and personal liberty has been interpreted by the Supreme Court as imposing positive obligations upon the State to take steps for ensuring for the individual a better enjoyment of his life and dignity. The right to health as extended under Article 21 also relates to the maintenance and improvement of public health, improvement of the environment and so on.[1025]

The Supreme Court in *Bandhua Mukti Morcha vs. Union of India* [1026] held that the right to live with human dignity as enshrined in article 21 is derived from the directive principles of state policy and therefore includes the protection of the health of all its citizens.[1027] The facts, in this case, were that an NGO highlighted the deplorable condition of bonded laborers in a quarry in Haryana, there were violations of protective and welfare-oriented labour legislation, including the Bonded Labour (Abolition) Act and the Minimum Wages Act. The court in its judgment gave extensive directions to the state government to enable it to fulfil its constitutional obligation towards the bonded laborers, it stated thus:

> The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State has the right to take any action which will deprive a person of the enjoyment of these basic essentials. Since the Directive Principles of State Policy contained in clauses (e) and (f) of Article 39, Articles 41 and 42 are not enforceable in a court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic

[1024] S B Satbhai (n 1023)
[1025] ibid
[1026] *Bandhua Mukti Morcha vs. Union of India* AIR 1984 SC 802
[1027] ibid, para. 10, p. 183

> essentials which go to make up a life of human dignity, but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation, for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21…[1028]

What the court did was to bypass the non-justiciability issue of the right to health and made it justiciable by invoking the wide sweep of the enforceable article 21 of the Constitution.[1029] This judgment is very significant to the main argument of this thesis as it highlights the importance of health as a prerequisite for right to life and therefore portrays that the right to health is an important human right and its denial can be detrimental to the existence of human life.[1030]

Just like the Nigerian Constitution, the directive principles differ from the fundamental rights in India and are unenforceable in courts.[1031] Notwithstanding the limitations of the directive principles, the courts in the Bandhua's case relied on them to define the constitutional obligations of the States and to interpret and give meaning to the fundamental rights provisions.[1032] The court commendably held that the directive principles and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 gave life to Article 21 which contains the right to live with human dignity and thus, includes the protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity.[1033]

The *Bandhua* case also relies on the interdependence, interrelatedness, and indivisibility principle of human rights. The Supreme Court considered Articles 21, 39, 41, and 42 together and therefore made the right to health largely justiciable. The Court therefore took a progressive

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[1028] *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC, para. 10, p. 183

[1029] Ibid and Article 42 provides for just and humane conditions of work and maternity relief. Article 39(e) asks the state to direct its policy towards securing that citizens are not by economic necessity forced into avocations unsuited to their age and strength.

[1030] *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC

[1031] Articles 36 to 50, of the Indian Constitution, provides for the duty of the state to improve public health

[1032] *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC

[1033] ibid

approach to the interpretation of fundamental objectives and directive principles by linking them to fundamental rights, as well as employing international human rights standards in interpreting the fundamental objectives in the Indian Constitution.[1034] It is argued therefore that the Nigerian courts can adopt similar approach and make the right to health justiciable by relying on the provisions of the fundamental right such as the right to life and human dignity which are justiciable under the Constitution.[1035]

Thirdly, Article 39 provides that certain principle of policy to be followed by the State.[1036]This article guarantees the health and strength of the workers, men, and women. It also mandates that children be given the opportunities and facilities to develop in a healthy manner and a condition of freedom and dignity and that childhood and youth are protected against exploitation and moral and material abandonment.[1037] The provisions of Article 39 (e) and (f) has been said to indicate that the Constitution makers were rather anxious to protect and safeguard the interests and welfare of workers and children.[1038] The article asserts that the working class is important in nation-building and therefore state government shall provide protection to their health.[1039]

In the case between Lakshmi *Kant Pandey v. Union of India*,[1040] the petitioner, Lakshmi Kant Pandey, an attorney, wrote to the Supreme Court (Court) alleging neglect and malpractice on the part of social organizations and private adoption agencies facilitating the adoption of Indian children to foreign parents. He also noted neglect and malpractice on the part of social organizations and private adoption agencies facilitating the adoption of Indian children to foreign parents.[1041] It was alleged that the children were subjected to long and hazardous journeys to foreign countries, along with instances of neglect, impoverishment, sexual exploitation and these caused affected the general welfare especially their health.[1042] The Court

[1034] *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC
[1035] The directive principles as contained in chapter 2 of the 1999 Constitution can be considered together with the provisions in chapter 4 on fundamental human rights in such a way that the directive principles serve as aid to interpretation of the fundamental rights and therefore justiciable.
[1036] Constitution of India, Article 39
[1037] Constitution of India, Article 39 (e) and (f)
[1038] S B Satbhai (n 1023)
[1039] ibid
[1040] *Lakshami Kant Pandey v. Union of India* AIR 1984 SC 469 AIR 1984 SC 469
[1041] ibid
[1042] ibid

treated his letter as a writ petition (a filing made with a higher court to secure prompt review of an issue) and this instituted the basis of the public interest litigation.[1043]

The Court in its judgment noted that the absence of legal regulation of inter-country adoptions in India could cause enormous harm to Indian children who may, for example, be exposed to the abuses of profiteering or trafficking and to protect the welfare of children, the Court, in consultation with several social or child welfare institutions, laid out a comprehensive framework of normative and procedural safeguards for regulating inter-country adoption as protection against abuse, maltreatment or exploitation of children and to secure them healthy, decent family life.[1044]

While formulating standards and procedures the Court referenced various relevant laws and policies including Articles 15(3), 24, and 39 of the Indian Constitution regarding child welfare, and the principles embodied in the U.N. Declaration on the Rights of the Child (1959) as BHAGAWATI, J. while delivering the opinion of the court observed specifically that:

> It is obvious that in civilised society the importance of child welfare cannot be overemphasised because the welfare of the entire community, its growth and development depend upon the health and wellbeing of its children. Children are a 'supremely important national asset and the future wellbeing of the nation depends on how its children grow and develop.[1045]

Even though the subject matter, in this case, is not solely on the right to health of children, the elements of justiciability as discussed in chapter two are evident, right from the when the court treated the letter as a petition, an excellent example of how the procedural innovation of public interest litigation in India has eased rules of standing towards making the court system more accessible to disadvantaged sections of society.[1046]

The case also stands as an example of the judicial activism of the Indian Supreme Court, despite being confronted with a legal vacuum on an issue with huge social implications, the Court did not hesitate to issue elaborate guidelines to regulate adoptions and protect the rights of the

[1043] *Lakshami Kant Pandey v. Union of India* AIR 1984 SC 469 AIR 1984 SC 469
[1044] ibid
[1045] ibid (Bhagawati, J)
[1046] ibid

children.[1047] Consequently, the guidelines set forth by the Supreme Court regulated adoption over many years and became an effective tool for child rights activists in India.[1048]

Fourthly, the constitution also provides that it is the duty of the State to raise the level of nutrition and the standard of living and to improve public health in its Article 47.[1049] The Article guarantees that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.[1050]

In the case of *Vincent Panikurlangara v. Union of India*, [1051] the petitioner was an advocate and also the General Secretary of Public Interest Law Service Society, Cochin, he filed a petition under Article 32 of the Constitution of India which impleaded the Central Drugs Controller, Drugs Controller of Kerala and the Union of India, seeking directions for a ban on the import, production, trade, and distribution of drugs which have been recommended for banning by the Drugs Consultative Committee.[1052] He also sought the termination of every license which authorized the import, production, trade, and distribution of such drugs and demanded that the Central Government be directed to establish an authority to look into the hazards that could arise due to the circulation of such drugs and recommend remedies, including compensation to the victims.[1053]

Also, he requested that strict regulations be framed to ensure the quality of the approved drugs and to ensure that harmful drugs are taken out of circulation in the market.[1054] The Court considered the technical nature of the dispute and directed the Central Government to act based on expert advice, however, it did not fail to recognize other aspects of the dispute that needed to be addressed. Relying on the observations made in *Bandhua Mukti Morcha v. Union of India*, the court noted that the right to live with dignity which is a Directive Principles of State Policy included the protection of the health of the citizens.[1055] Thus, the Court referred

[1047] *Lakshami Kant Pandey v. Union of India* AIR 1984 SC 469 AIR 1984 SC 469
[1048] ibid
[1049] Constitution of India, Article 47
[1050] P M Bakshi, *The Constitution of India* (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 9th Ed, 2009) 90
[1051] *Vincent Panikurlangara v. Union of* India AIR 1987 SC 990: (1987) 2 SCC 165
[1052] *Vincent* (ibid) Available at <https://www.clawlegal.org/editorial/vincent-panikurlangara-v-union-of-india-air-1987-sc-990/ > Accessed on 03/03/2018
[1053] ibid
[1054] ibid
[1055] *Bandhua Mukti Morcha v. Union of India* 1984 AIR 802

to Article 47 of the Constitution which states that the state shall endeavour to prohibit the consumption of drugs that are harmful to health.[1056]

The Court also relied on the observation made in *Akhil Bharatiya Soshit Karmachari Sangh v. Union of India*[1057] which stated that although Directive Principles by their very nature, cannot be legally enforced, it does not decrease their importance and make them lesser than the fundamental rights.[1058] They are also binding on the various organs of the State and that the maintenance and improvement of public health are indispensable to the physical existence of the community, and thus, attending to public health is of high priority.[1059] The court stated thus:

> 'maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends, the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore is of high priority perhaps the one at the top'.[1060]

The court, in this case, explained that India as a welfare state is obligated to ensure that only quality drugs are produced, and the harmful ones are eliminated from the market to protect the fundamental rights of the citizens of the country.[1061] This fact proves the interdependence and interrelatedness of fundamental human rights and proves that the right to health is a fundamental right despite being a directive principle of state policy. The judgment is a historical judgment that shows that the ideals stated under the Directive Principles of State Policy can be enforced in the form of fundamental rights and it explains in details that the nature of the right to health requires governments and public authorities to put in place policies and action plans which will improve the public health.[1062]

Lastly, article 48-A guarantees the protection and improvement of environment and safeguarding of forests and wildlife, it requires that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.[1063] In the

[1056] *Vincent Panikurlangara v. Union of* India AIR 1987 SC 990: (1987) 2 SCC 165
[1057] *Akhil Bharatiya Soshit Karmachari Sangh v. Union of India* 1981 AIR 298
[1058] *Vincent Panikurlangara v. Union of* India AIR 1987 SC 990: (1987) 2 SCC 165
[1059] ibid
[1060] ibid
[1061] ibid
[1062] ibid
[1063] S B Satbhai (n 1023)

case of *M.C. Mehta V. Union of India*,[1064] a writ petition was filed by M.C Mehta, a social activist lawyer, he sought closure for Shriram Industries as it was engaged in manufacturing of hazardous substances and located in a densely populated area of Kirti Nagar, while the petition was pending, there was leakage of oleum gas from one of its units which caused the death of an advocate and affected the health of several others.[1065] The issue to be determined by the court included whether such hazardous industries were to be allowed to operate in such areas and if allowed whether there were any regulating mechanisms.[1066]

The Supreme court opined that they can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a matter which would pose the least risk of danger to the community and maximizing safety requirements in such industries as they also help to improve the quality of life and are essential for economic development and advancement of the well-being of the people. It also opined that the total ban on the above industry of public utility will impede the developmental activities.[1067]

Consequently, the court made an order to open the factory temporarily subject to some conditions and appointed an expert committee to monitor the working of the industry, the court also suggested that a national policy will have to be evolved by the Government for the location of toxic or hazardous industries and a decision will have to be taken in regard of the relocation of such industries to eliminate risk to the community.[1068] These conditions were formulated to ensure continuous compliance with the safety standards and procedures laid by the committees (Manmohan Singh Committee and Nilay Choudhary Committee) so that the possibility of hazard or risk to workmen could be reduced to nil.[1069]

This judgment indicates the recognition of the underlying determinants of health as the court was deeply concerned for the safety of the people from hazardous substances in their environment, it emphasised that certain standard qualities to be laid down by the government and further it should also make law on the management and handling of hazardous substances including the procedure to set up and to run industry with minimal risk to humans, animals and

[1064] *M.C. Mehta V. Union of India* JT 2002 (3) SC 527 < https://www.latestlaws.com/articles/case-analysis-m-c-mehta-v-union-of-india-shriram-industries-case-by-roopali-lamba/> Accessed 03 March 2018
[1065] ibid
[1066] ibid
[1067] ibid
[1068] ibid
[1069] ibid

so on.[1070] The importance of Articles 39 (a), 47 and 48-A by themselves and collectively which create a duty on the State to secure the health of the people, improve public health and protect and improve the environment came to play.[1071]

Also, the case of *Santosh Kumar Gupta vs. Secretary, Ministry of Environment, New Delhi*[1072] was filed in public interest in respect of the pollution of the air in the city of Gwalior and the area around about on account of plying of a large number of motor vehicles using unauthorised kerosene oil and diesel, etc. causing health hazards to the inhabitants.[1073] It was contended that the policy, controls/regulations and their implementations are inadequate thereby causing health hazards.

In its judgments, the High Court of Madhya Pradesh has laid down that pollution from cars poses a health hazard to people and that the State must ensure that emission standards are implemented maintained and are causing hazards to inhabitants because human life is very important.[1074] The law and the rules are to be framed to ensure environmental cleanliness and the authorities are under statutory obligation to maintain the atmosphere pollution free and to take necessary measures in this respect to comply with the rules.[1075] This judgment is also significant and offers clarity on the importance of the environment as an underlying determinant of the right to health.[1076]

It is worthy of mention that article 51- A creates a fundamental duty of citizens that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild-life, and to have compassion for living creatures.[1077] It shows that every citizen is under the fundamental duty to protect and improve the natural environment since it is closely related to public health. This goes to prove that there is a joint responsibility from the state as well as the citizens towards the maintenance of human and animal health and also the long-term issues relating to the improvement in the health conditions of human

[1070] *M.C. Mehta V. Union of India* JT 2002 (3) SC 527 < https://www.latestlaws.com/articles/case-analysis-m-c-mehta-v-union-of-india-shriram-industries-case-by-roopali-lamba/> Accessed 03 March 2018
[1071] ibid
[1072] *Santosh Kumar Gupta vs. Secretary, Ministry of Environment, New Delhi* AIR 1998 MP 43 <https://indiankanoon.org/doc/1536808/> Accessed on 03 March 2018
[1073] ibid
[1074] ibid
[1075] ibid
[1076] ibid
[1077] Constitution of India, Article 51-A

beings.[1078] If things were to work then both citizens and the state should play their role and contribute towards the betterment of society.

From all the analysis of the provisions of the Indian Constitution above it is concluded that although the Constitution has not included the right to health i.e. right to enjoy the highest attainable standard of physical and mental health under a specific provision, the courts have given recognition to the right to the health by carrying out an active role; by entertaining public interest litigation which provides an opportunity to the judiciary to examine the socio-economic and environmental conditions of the oppressed, poor and the downtrodden people through Public Interest Litigation (PIL) under Article 32 of the Constitution.

The Supreme court has directed the government to implement the fundamental right to life and liberty and executed protection measures in the public interest, also by offering different techniques of interpretation; adopting the integrated approach, relying on the interdependence and interrelatedness of rights and also by offering elaborative details of the scope and limits of the right to health.[1079] It can be said emphatically that the government is under a constitutional obligation to provide health facilities.[1080]

The Courts devised a means to establish the nexus between fundamental rights which are justiciable and enforceable by ease in court of law and the non-justiciable DPSP.[1081] They developed a harmonious construction in case of conflict between the two and even upheld the DPSP in the time of public interest is needed to be actualized. This seemed to promote the larger interest of society.[1082]

The next sub-section attempts to analyse the concept of the right to health in India in actual practice.

5.2.2 The Justiciability of the Right to Health in the Indian Courts

As noted earlier, the constitution of India does not expressly provide for the right to health as a fundamental right however the liberal interpretation adopted by the Indian Supreme Court in

[1078] S B Satbhai (n 1023)
[1079] See *Lakshmi, Sheela Barse, Vincent, M.C Mehta and Santosh Kumar* above
[1080] *State of Punjab v. Mahinder Singh Chawla* AIR 1997 SC 1225
[1081] Manisulli (n 91) 540
[1082] ibid

its various decisions to the right to life has brought the right to health within the ambit of the word life and declared it as a basic human right to every citizen of India.[1083]

The Indian courts have played a significant role in interpreting the constitution to include the right to health as a basic human right to every citizen even though this right is not expressly guaranteed in the constitution. The decisions given by the courts have come to prove that the importance of Healthcare, public health, a healthy environment, prevention of environmental pollution, maintenance and improvement in nutrition value for the public at large.[1084] Apart from recognizing the fundamental right to health as an integral part of the Right to Life, there is sufficient case law both from the Supreme and High Courts that lays down the obligation of the State to provide medical health services.[1085]

In the landmark case between *Consumer Education and Resource Centre Vs Union of India*[1086] The subject matter borders on the concerning occupational health hazards faced by workers in the asbestos industry. Reading Article 21 with the relevant directive principles guaranteed in articles 39 (e), 41 and 43, the Supreme Court held that the right to health and Medical care is a fundamental right under Article 21 of the constitution as it is essential for making the life of the workman meaningful and purposeful with dignity of person.[1087] It further held that the expression 'life' in Article 21 does not connote mere existence but has a much wider meaning which includes the right to livelihood, better standard of life, hygienic conditions on workplace and leisure.[1088]

The court considered the right to health of a worker as an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery and that lack of health denudes his livelihood.[1089] The compelling economic necessity to work in an industry exposed to health hazards due to

[1083] K Srinath Reddy et al, 'Towards achievement of universal health care in India by 2020: A Call to Action' (2011) 311 Lancet 764
[1084] ibid (n 1083)
[1085] ibid
[1086] *Consumer Education and Resource Centre Vs Union of India* AIR (1995) 3 SSC, 42.
[1087] ibid
[1088] ibid
[1089] ibid

indigence to bread-winning to himself and his dependents, should not be at the cost of the health and vigour of the workman.[1090]

According to Article 38, facilities and opportunities should be provided to protect the health of the workman, the provision for medical test and treatment invigorates the health of the worker for higher production or efficient service, the continued treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of the employer and the State and consequently the right to health and medical care is a fundamental right under Article 21 read alongside with Articles 39(c), 41 and 43 of the Constitution.

The right to life includes the protection of the health and strength of the worker as a minimum requirement to enable a person to live with human dignity.[1091] The court held that the State, be it union or state government or industry, public or private is enjoined to take all such actions which will promote health, strength and vigour of the workman during a period of employment and leisure and health even after retirement as basic essentials to life with health and happiness.[1092] The right to life with human dignity encompasses within its fold, some of the finer facets of human civilization that makes life worth living.[1093]

This case is very significant as it elaborates richly the scope and meaning of the right to life as envisaged in Article 21 of the Constitution, it affirms the principle of interdependence of rights, that one right forms part of another right by which it may be protected and hence the right to health is read into the right to life.[1094] The case also highlights that the jurisprudence of personhood or philosophy of the right to life envisaged in art 21 of the Constitution enlarges its sweep to encompass human personality in full bloom to sustain the dignity of a person and to live a life with dignity and equality.[1095]

Also worthy of mention is the case between *Paschim Banga Khet Mazdoor Samity and Ors., vs. State of West Bengal* [1096] where the Supreme Court specifically considered the issue of availability of resources, the court rejected the argument that social rights are non-enforceable

[1090] *Consumer Education and Resource Centre Vs Union of India AIR* (1995) 3 SSC, 42. <https://indiankanoon.org/doc/1657323/> Accessed on 03/03/2018
[1091] ibid
[1092] ibid
[1093] ibid
[1094] ibid
[1095] ibid
[1096] *Paschim Banga Khet Mazdoor Samity and Ors., vs. State of West Bengal*., 1996(4) SCC 37

due to a shortage of resources. The Court addressed the issue of adequacy and availability of emergency medical treatment.

In the case, Hakim Sheikh, a member of the Paschim Banga Khet Mazdoor Samity, fell off a train and suffered serious head injuries. He was taken to a number of state hospitals, including both primary health centres and specialist clinics, for treatment of his injuries.[1097] Seven state hospitals were unable to provide emergency treatment for his injuries because of a lack of bed space and trauma and neurological services. He was finally taken to a private hospital where he received his treatment. Feeling aggrieved by the callous and insensitive attitude of the government hospitals in Calcutta in providing emergency treatment the petitioner filed this petition in the Supreme Court and sought compensation.

The issue presented to the Court was whether the lack of adequate medical facilities for emergency treatment constituted a denial of the fundamental right to life under Article 21.[1098] Finally, the Supreme Court recognised that financial resources are needed for providing these facilities, but Justice S C Agarwal held:

> … But at the same time, it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. The Court recognised that substantial expenditure was needed to ensure that medical facilities were adequate. However, it held that a state could not avoid this constitutional obligation on account of financial constraints. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life.[1099]

This case is significant as it emphasised that the state has to strive towards enforcement and guaranteeing of social rights irrespective of financial constraints, but also emphasised the

[1097] *Paschim Banga Khet Mazdoor Samity and Ors., vs. State of West Bengal*., 1996(4) SCC 37
[1098] ibid
[1099] ibid

important issue that the need for resources arises also in the matter of enforcement of civil/political rights.[1100]

Also, the government is to secure the welfare of the people and it is the obligation of the government to provide adequate medical facilities for its people.[1101] The government discharges this obligation by providing medical care to the persons seeking to avail those facilities, the government hospitals run by the state are also duty-bound to extend medical assistance for preserving human life.[1102] Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under art 21.[1103]

The court thereafter made some additional direction in respect of serious medical cases:

- Adequate facilities are provided at the public health centers where the patient can be given basic treatment and his condition stabilized.[1104]
- Hospitals at the district and subdivision level should be upgraded so that serious cases be treated there.
- Facilities for given specialist treatment should be increased and having regard to the growing needs, it must be made available at the district and sub divisional level hospitals.
- In order to ensure availability of beds in any emergency at state level hospitals, there should be a centralized communication system so that the patient can be sent immediately to the hospital where bed is available in respect of the treatment, which is required.
- Proper arrangement of ambulance should be made for transport of patient from the public health center to the state hospitals.
- Ambulance should be adequately provided with necessary equipment and medical personnel. However, no state or country can have unlimited resources to spend any

[1100] Jayna Kothari (n 1019)
[1101] ibid
[1102] ibid
[1103] ibid
[1104] ibid

amounts on its projects, as such providing medical facilities to an employee by the state cannot be unlimited.[1105]

In another case between *Parmanand Katra v Union of India*, where a human right activist, filed a petition in public interest on the basis of a newspaper report concerning the death of a scooter rider who was knocked down by a speeding car, the report further states that the injured person was taken to the nearest hospital, but the doctors refused to attend on him. They insisted that he be taken to another hospital, located some 20 kilometres away, which was authorised to handle medico-legal cases and that the victim succumbed to his injuries before he was to the other hospital.[1106]

The petitioner sought that directions be issued to the Union of India that every injured citizen brought for treatment should instantaneously be given medical aid to preserve life and thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death, and in the event of a breach of such direction, apart from any action that may be taken for negligence, appropriate compensation should be admissible.[1107]

The supreme court in its judgment emphasised that Article 21 of the Constitution casts an obligation on the state to take every measure to preserve life.[1108] The Court found that it is the primary duty of a welfare state to ensure that medical facilities are adequate and available to provide treatment and due to the violation of the right to life of the petitioner, compensation was awarded to him. [1109]

The court ruled that every sector whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protection of life and that no law or state action can intervene to avoid or delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute, and paramount, laws or procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained, and must, therefore give way.[1110]

[1105] In the case of *State of Punjab V Ram Lubhaya Bagga* AIR 1988 SC 117 , it was held that where medical services under a policy continue to be given to an employee to get treatment in any private hospital in India, the amount of reimbursement may be limited

[1106] *Parmanand* Katra v Union of India (1989)4 SCC 286

[1107] *Parmanand* Katra v Union of India (1989)4 SCC 286 < https://indiankanoon.org/doc/498126/> Accessed on 03/March 2018

[1108] ibid

[1109] ibid

[1110] ibid

Also, the Supreme Court considered a very serious problem existing in the medico-legal field such as cases of an accident in which the doctors usually refuse to give immediate medical aid to the victim till legal formalities are completed.[1111] This can sometimes lead to the death of the injured, the court stated that the preservation of health is of paramount importance. This is because once a life is lost it cannot be restored, it is the duty of the doctors to preserve life without any kind of discrimination. [1112]

Similarly in *Paschim Banga Khet Mazoor Samity v. State of W.B.,*[1113] where the main contention was whether the non-availability of facilities for treatment of the serious injuries sustained by Hakim Seikh in the various Government hospitals in Calcutta resulted in denial of his fundamental right guaranteed under Article 21 of the Constitution.[1114] The Court ruled that under welfare state policy, the primary duty of the government is to provide adequate medical facilities for everyone.[1115]

Also, the issue of adequacy of medical health services was addressed in this case, the court held that It was held that that Article 21 imposes an obligation on the State to safeguard the right to life of every person. The preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life.[1116]

Another case worthy of mention is the case between *Mr. X. v. Hospital Z,*[1117] where the question before the court was whether a doctor can disclose to the would-be wife (with whom the marriage is contracted) of a person that he is HIV positive or does it violate the right to privacy of the person concerned.[1118] The court answered both questions in negative. The Court also held that the lady proposing to marry such a person is also entitled to all human rights which are available to any human being. [1119]Therefore, it includes the right to be told that a person,

[1111] *Parmanand* Katra v Union of India (1989)4 SCC 286 < https://indiankanoon.org/doc/498126/> Accessed on 03/March 2018
[1112] ibid
[1113] *Paschim Banga Khet Mazoor Samity v. State* of W.B 1996 (4) SCC 37
[1114] *Paschim Banga Khet Mazoor Samity v. State* of W.B 1996 (4) SCC 37
[1115] ibid
[1116] ibid
[1117] *Mr. X. v. Hospital Z* 21 AIR 2003 SC 664 < https://indiankanoon.org/doc/382721/> Accessed on 03 March 2018
[1118] ibid
[1119] ibid

with whom she was proposed to be married, was the victim of a deadly disease that is communicable.[1120]

The significance of this case is the explanation of how the court stated that every right comes with a duty barring certain rights, that is how it deals with the conflict between the right to privacy as an extension of right to life and the right of the fiancée to a healthy life as enshrined under Article 21.[1121] The court favoured the right which was more towards the public interest., it held that the fiancée's right to life should be protected over the right to privacy of an HIV patient and also that the doctor had done no wrong in disclosing the HIV positive status to the fiancée.[1122] It is important to note that the supreme court, in this case, gave primacy to the right to health over the right to privacy.[1123]

In *Kirloskar Brothers Ltd v. Employees' State Insurance Corporation*,[1124] the Supreme Court, following the Consumer Education and Thesis Centre's case, held that 'right to health' is a fundamental right of the workmen and also that this right is not only available against the State and its instrumentalities but even private industries to ensure to the workmen to provide facilities and opportunities for health and vigour of the workman assured in the provision of Part IV of the Constitution which is an integral part of right to equality under Art 14 and right to invigorated life under Article 21 which are fundamental rights.[1125]

The court also established a link between the Employees' State Insurance Act, 1948 and the Constitutional obligation of the state and held that the Act furthered the state's obligations under the DPSP in the Constitution, especially Articles 39(e) (state's obligation to secure the health of its workers), 42 (provision for just and humane conditions of work) and 47 (duty of the state to improve public health). It, therefore, held that the duty of the state lay in ensuring that welfare measures were implemented effectively.[1126]

[1120] *Mr. X. v. Hospital Z* 21 AIR 2003 SC 664 < https://indiankanoon.org/doc/382721/> Accessed on 03 March 2018

[1121] ibid

[1122] ibid

[1123] ibid

[1124] *Kirloskar Brothers Ltd v. Employees' State Insurance Corporation* (1996) 2 SCC 682.

[1125] Ibid < https://www.globalhealthrights.org/asia/kirloskar-brothers-ltd-v-employees-state-insurance-corp/> Accessed on 03 March 2018

[1126] ibid.

Another interesting case law is *Mahendra Pratap Singh vs. State of Orissa*[1127]**,** a case on the failure of the government in opening a primary health care centre in a village, the court held thus:

> 'In a country like ours, it may not be possible to have sophisticated hospitals but definitely villagers within their limitations can aspire to have a Primary Health Centre. The government is required to assist people get treatment and lead a healthy life. Healthy society is a collective gain and no Government should make any effort to smother it. Primary concern should be the primary health centre and technical fetters cannot be introduced as subterfuges to cause hindrances in the establishment of health centre.' It was also stated that, 'great achievements and accomplishments in life are possible if one is permitted to lead an acceptably healthy life'.

The Court ordered the Government of Orissa to comply with the established requirements and procedures by the end of December 1996, this judgment is very instructive and implies that enforcing of the right to life is a duty of the state and that this duty covers the right to primary health care.[1128] Also, it emphasised that the Government is required to assist people, and its primary concern should be to see that the people get treatment and lead a healthy life, thus the right to life also includes the right to primary health care.[1129]

From the case laws analysed so far, it is crystal clear that the Right to Health despite being a directive principle and non-justiciable in the Constitution has been made enforceable and treated as justiciable by the Supreme Court which is the highest court of law in India. The Supreme Court through extensive case laws has shown that judges have the enormous potential to effect change in society where they so desire.[1130]

Even though these various judicial techniques are helping society in getting justice in the field of health care, it must be noted that there are some flaws in the system and there is room for improvement in the right to health in India. It is believed that there is a persisting inequality in

[1127] *Mahendra Pratap Singh vs. State of Orissa* AIR 1997 Ori 37.
[1128] ibid
[1129] ibid
[1130] Rajesh Kumar 'Right to health: Challenges and Opportunities' (2015) 40(4) Indian journal of community medicine 218-222

access to health care.[1131] The individuals with the greatest need for health care have the greatest difficulty in accessing health services and are least likely to have their health needs met.[1132]

The current health scenario favours the urban affluent class, which is only about 10 percent of the total population, the highly privatised health system has deprived the masses of even primary health care leading to out-of-pocket expenditure, which the vast majority cannot afford, there have been several calls to restructure the existing health system. Another serious issue that causes difficulty in the health care delivery is the high level of illiteracy and poverty.

Also, the Indian Supreme Court's decisions on ESC rights generally have at times been regarded as conservative, creating a certain level of ambivalence on their experience.[1133] The courts have mainly been concerned with pious declarations of health being a fundamental right and not the consequential issues that are equally important. Such issues include the rights of government employees to be treated in government hospitals, quality of healthcare and emergency medical care, most of the health institutions are still plagued by lack of enough beds, sufficient medicines and other similar problems.[1134]

Even though the Indian courts through a combination of strategies have shaped the agenda of the State to a considerable extent as regards ESC rights, the most crucial thing is the willingness of the state to implement the rights but unfortunately, the right to health has not been given due recognition by the state. [1135] To achieve the Constitutional obligation and objectives of health care for everyone, the government needs to mobilize non-governmental organization and the general public towards their participation for the monitoring and implementation of health care facilities.[1136]

Also, in India, where the poor and marginalized are more members and these people cannot afford paid services in any government and private hospitals, the state should develop novel health insurance policies at a nominal rate for its people.[1137]Another point to note is that while courts appear willing to provide remedies that match the violations of ESC rights, ensuring

[1131] Rajesh Kumar 'Right to health: Challenges and Opportunities' (2015) 40(4) Indian journal of community medicine 218-222
[1132] ibid
[1133] M Langford (n 440) 98-133
[1134] ibid
[1135] ibid
[1136] ibid
[1137] ibid

court supervision of the orders can be critical in guaranteeing the effectiveness of the orders.[1138] For instance, decisions in the environmental cases in India are reported to have taken years to implement and have required constant recourse to the courts.[1139]

5.3 The Justiciability of the Right to Health in South Africa

The South African jurisprudence has had a major impact on the discussion of socio-economic rights globally with many commentators arguing that the cases developed in particular reveal an effective and manageable approach in making these rights justiciable.[1140] The incorporation of ESC rights in its Constitution significantly enhanced the justiciability of the rights as this empowered the courts to adjudicate the violation of the rights.[1141]

5.3.1 The Justiciability of the Right to Health under South-Africa Laws

The goals of the right to health in South Africa coincide with the government's objective of transforming a severely inefficient and inequitable health system into one which promotes health effectively and which enables universal access to quality health care.[1142] The transformation efforts led to a widely celebrated constitutional dispensation, which centres on a Bill of Rights that establishes a broad range of fully justiciable socio-economic rights including the right to health.[1143]

The Constitution of the Republic of South Africa, 1996 gives courts extensive powers of judicial review over legislative and executive action and the powers extend to review over compliance with the socio-economic rights in the Bill of Rights including the right to health.[1144] This means that ESC rights including the right to health are justiciable in the courts. The most significant health-related provision in the Constitution is section 27(1)(a), the section provides that:

> Everyone has the right to have access to ...
>
> a. health care services, including reproductive health care.[1145]

[1138] M Langford (n 440) 98-133
[1139] ibid
[1140] ibid
[1141] Constitution of Republic of South Africa, s39(a), (b), (c)
[1142] Marius Pieterse, (n 23) 15
[1143] ibid
[1144] ibid
[1145] Constitution of the Republic of South Africa 1996, s27(1)(a).

This provision clearly has an equality-based approach that is all-inclusive and non-discriminatory in the provision of health services.[1146] Section 27(1)(a) supplements the right to equality, by embodying an entitlement against arbitrary or unfair exclusion from the ambit of policies, laws and programmes that confer health-related benefits to everyone.[1147] This provision on the right to health is phrased broadly enough to be interpreted generously, to encompass claims to all services, goods and facilities aimed at securing the greatest attainable standard of physical and mental well-being.[1148]

Thus, section 27(1)(a) could be involved in claims for access to medical treatment for physical or mental health ailments, as well as claims for nonmedicinal health services such as services aimed at health protection and promotion, and the prevention and diagnosis of illness.[1149] When interpreted in line with the CESCR's understanding of the care-related aspects of the right to health, section 27(1)(a) may thus be understood as requiring the availability, accessibility, and acceptability of preventative, diagnostic and curative health care services of adequate quality on primary, secondary and tertiary levels.[1150]

Furthermore, section 27(2), provides thus:

> The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights [guaranteed in section 27(1)].[1151]

This section specifically places a core obligation on the state to ensure that the citizens enjoy the benefit of their rights as far as the resources of the state can take and also creates a legal duty for the state which can be sued for by the people.[1152] The state is therefore obliged to adopt reasonable legal measures in to achieve the progressive realisation of the right of access to health care.[1153]

[1146] Marius Pieterse (n 23) 16
[1147] ibid
[1148] ibid
[1149] ibid
[1150] C Ngwena (n 802)
[1151] Constitution of the Republic of South Africa 1996, s 27(2)
[1152] John Tasioulas, 'Minimum Core Obligations Human Rights in the Here and Now' (2017) Nordic Trust Fund Thesis Paper 1/2007, 8 < http://documents.worldbank.org/curated/en/908171515588413853/pdf/122563-WP-Tasioulas2-PUBLIC.pdf > accessed 18 March 2019
[1153] ibid

The obligations created by section 27 can further be understood when read together with section 7(2) of the Constitution, which reflects international law by providing that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights'.[1154] It has been said that only the obligation to fulfil the right of access to health care services is subject to the limiting effect of the progressive realisation standard and resource limitation as provided by section 27(2) of the Constitution, while the obligation to respect and protect the right are more immediately enforceable.[1155]

Also, the use of the phrase 'within available resources', in section (27(2) means that there is a limitation, thus the state is not obliged to go beyond its available resources. This is unlike the CESCR which uses the phrase 'to the maximum of its available resources'. It has been observed that the phrase used in the South African Constitution could refer to the resources that the state has made available or all resources that are potentially available to meet the state's obligations.[1156]

While the phrase as used in the CESCR requires an assessment by the courts as to whether the state has made a suitable budgetary allocation to realise the right in question.[1157] However, the difference in the language used in the CESCR and the South African Constitution is at best nomenclature.[1158]and quite correctly so, that the differences in the phrase as used in the CESCR and the South African Constitution is just mere terminology and both can refer to the same situation.[1159]

Three other provisions in the Constitution of South Africa are related to the right to health and it is interesting to realise that none of these provisions has subjected the enforcement of the rights to the availability of resources nor the progressive realisation. The provisions are section 27(3) on emergency medical treatment, section 28(1) (c) on children's right to basic nutrition, shelter, basic health care, and social services, and section 35(2) (e) on right to detainees to conditions that are consistent with human dignity, it is important to analyse these sections individually.

[1154] Constitution of the Republic of South Africa 1996, s 7(2)
[1155] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, G.A. Res, 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/ 6316 (1966), 993 UN.T.S. 3, entered into force Jan. 3, 1976
[1156] ibid
[1157] Lilian Chenwi (n 333)
[1158] ibid
[1159] ibid

Section 27(3) provides with effect that no-one may be refused emergency medical treatment.[1160] This provision is very clear as it imposes a positive obligation on the state to ensure that relevant medical services are available and adequate to cope with the demands of medical emergencies.[1161] It can be argued that section 27(3) operates free from the constraints posed by section 27(2) and therefore the section places an immediate obligation on those that are required to render emergency care in the state. [1162] Then the failure to provide for emergency medical treatment would be constitutionally justifiable only in narrowly defined circumstances, in accordance with the general limitation clause in section 36 of the Constitution.[1163]

It is necessary to elaborate on what emergency care entails. It is a health service that provides prompt interventions for many disease-specific emergencies, including pregnancy-related complications, communicable and non-communicable diseases and injuries and it has three main components; care in the community; care during transportation and care on arrival at the receiving health facility.[1164] Standard emergency care appropriately distributed across a country allows for timely coordination of services and resources, and optimum efficiency and efficacy in treating a range of acute conditions, from out-of-hospital care at the scene of an injury or illness to treatment and stabilization in the emergency unit, and early operative and intensive care but unfortunately health systems in developing countries like Nigeria are fragmented and comprised of programmes with a narrow focus on disease-specific care.[1165]

A human rights approach to access to emergency care can provide both legal support that relies on international treaties, national constitutions, domestic laws and court rulings on the right to health in a country and such an element of the right to health becomes easily and readily justiciable when guaranteed.[1166]

[1160] Constitution of the Republic of South Africa 1996, s 27(3)
[1161] Marius Pieterse (n 23) 16
[1162] ibid
[1163] Section 36(1) provides that 'the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose.
[1164] Junaid A. Razzak & Arthur L. Kellermann, 'Emergency Medical Care in Developing Countries; Is it worthwhile' (2002) 80(11) Bulletin of the World Health Organization 903
[1165] ibid
[1166] Taylor W Burkholder et al, Developing Emergency Care Systems: A Human Rights Based Approach' (2019) Bulletin of the World Health Organization < http://dx.doi.org/10.2471/BLT.18.226605> Accessed on 04/03/2020

The elements of General comment 14 which serves as an interpretative guide to the right to health as discussed in chapter two can be applied to outline the function and claims of the effect of emergency care systems, that is the availability, accessibility, acceptability and quality elements. These elements do not represent an exhaustive list of functions that ensure a complete emergency system, but they are useful for setting implementation and funding priorities.[1167]

It is relevant to state therefore that emergency care is acknowledged as a human right and it places obligations and duties on countries to; (i) define the legal obligation to respect, promote and protect a universal right to emergency care; (ii) set rights-centred development priorities for emergency care systems in resource-constrained countries; and (iii) provide an instrument to monitor and evaluate emergency care systems considering human rights.[1168]

The second provision is under section 28(1)(c) which provides that children have the right to 'basic nutrition, shelter, basic health care services and social services.'[1169] This section is narrower in scope than section 27(1)(a) being that only basic health care service is guaranteed. The literal interpretation of this section means that the state is charged with a priority obligation to provide children with primary health care services within the broader framework of progressive realisation and subject only to section 36 of the Constitution.[1170]

Also, section 35(2)(e) of the Constitution guarantees detained persons a right 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at the state expense of adequate ... medical treatment', and section 35(2)(f)(iv) awards a right to communicate with and be visited by a medical practitioner of the detainee's choice. [1171]The detainees' health interests have likely been singled out for protection because of their inability to procure access to medical services for themselves, and because of the various potential health hazards posed by incarceration.[1172]

This section clearly limits the provision of such health services as are 'adequate' in light of the broader entitlement to dignified conditions of detention and section 35(2)(e) encompasses an

[1167] Taylor W Burkholder et al, (n 1166)
[1168] ibid
[1169] Constitution of the Republic of South Africa 1996, s 28(1) (c)
[1170] Marius Pieterse (n 23) 17
[1171]Constitution of the Republic of South Africa 1996, s 35(2) (e) and (f) (iv)
[1172] Marius Pieterse (n 23) 17

entitlement to receive primary health care services, non-compliance with which is capable of justification only in terms of section 36 of the Constitution.[1173]

Importantly, not only has the constitution guaranteed the right to health, the constitution has made it an enforceable right by virtue of section 38 of the Constitution which provides that anyone may approach a court for appropriate relief, either in their interest, the interests of another or the public interest when a right in the Bill of Rights has been infringed or threatened.[1174] Also, courts are not the only institutions that have been constitutionally empowered to oversee the state's compliance with health-related rights[1175] but they are both the most significant in that the executive branches of government are constitutionally obliged to heed court orders.[1176]

South Africa has acceded to most of the international treaties on which the content and dimensions of the right to health and ratified the CESCR in 2015, which contains the most authoritative formulation of the right.[1177] The understanding of the right to health at international law must influence how the right and its accompanying obligations are understood in the context of the Constitution.[1178] Section 39(1) of the Constitution emphasises that courts must promote the underlying values of an open and democratic society, must take international law into account and may also have regard to foreign law when interpreting rights in the Bill of Rights.[1179] Also, section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law' [1180]

Having analysed the relevant sections that guarantee the right to health in South Africa, it is relevant to consider the actual practice to enable us to determine the justiciability of the right to health in South Africa.

[1173] Marius Pieterse (n 23) 17
[1174] Constitution of the Republic of South Africa 1996, s 38
[1175] C Ngwena (n 802)
[1176] ibid
[1177] ibid
[1178] ibid
[1179] Constitution of the Republic of South Africa 1996, s 39(1)
[1180] ibid s 233

5.3.2 The Justiciability of the Right to Health in South Africa Courts

The South African Constitutional Court's jurisprudence shows that meaningful engagement may be a useful tool in adjudicating social and economic rights. It proves that courts may use the concept to great effect in enabling real participation by rights holders, providing them with immediate relief and prompting substantive changes to government policy over a certain period.[1181]

The first socio-economic right case to be decided by a South African court is the case between *Van Biljon v Minister of Correctional Services.*[1182]This case involved a challenge against the Department of Correctional Services for failure to provide anti-retroviral treatment for HIV/AIDS, to four HIV-positive prisoners to whom the drug had been medically prescribed.[1183] At that time, anti-retroviral medication was not yet generally available to patients in the South African public health care system.[1184] The prisoners relied on section 35(2)(e) of the Constitution, which provides that detained persons have a right to dignified conditions of detention, which includes the provision of adequate medical treatment at the state expense.[1185]

The main issue in the case was whether the treatment sought by the prisoners was 'adequate' in the circumstances and as prescribed by law, the court in resolving the issue went as far as determining whether the treatment was cost-effective.[1186]The court held that given that AZT was at that stage the most effective anti-AIDS medicine on the market, that prisoners are unable to privately procure medical treatment and the treatment had to be regarded as 'adequate' and claimable under section 35(2)(e).[1187] So denying those inmates the drug which had been medically prescribed amounted to an infringement of their rights.[1188]

Also, the Court dismissed an argument that budgetary constraints generally absolved the state from treating HIV-positive prisoners. It held that the state had failed to show that it could not afford to provide the prescribed treatment to the applicants in the instant case.[1189]The

[1181] Pillay Anashri, 'Toward effective social and economic rights adjudication: The role of meaningful engagement' (2012) 10 (3), IJCL 755
[1182] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).
[1183] ibid
[1184] ibid
[1185] Constitution of the Republic of South Africa 1996, s 35(2) (e)
[1186] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).para 49-60
[1187] *ibid*
[1188] ibid
[1189] ibid

Department was thus ordered to provide the first and second applicants with the prescribed treatment.[1190] It is not known to what extent the Department of Correctional Services complied with the Court's order, though it is safe to assume that it did so, especially given the order's limited reach. This judgment is commendable as it shows that the courts are dedicated to making the people enjoy their socio-economic rights.[1191]

In *Soobramoney v Minister of Health KwaZulu Natal*[1192] the appellant was suffering from chronic renal failure, cerebral-vascular disease, and ischemic heart disease. He needed regular dialysis at least three to four times a week which could prolong his life. He sued the government of South Africa and based his claim on s. 27(3) of the constitution.[1193] The court however held that the right to emergency medical treatment as provided under s 27 (3) of the South African constitution was not violated as his treatment could not be described as an emergency.[1194]

The Court also held that the rationing policy used was consistent with the right to have access to health care services in accordance with section 27(1)(a) of the Constitution, which, in terms of section 27(2), had to be progressively realised subject to the availability of resources.[1195] The court in its words stated that:

> What is apparent from these provisions is that the obligations imposed on the state by section 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reasons of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.[1196]

The Court indicated that decisions on health budget should be taken at the political level to suit the needs of the people.[1197] The court avoided interference with the rational decision-making

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[1190] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).para 49-60
[1191] Marius Pieterse (n 23) 62
[1192] *Soobramoney v Minister of Health KwaZulu Natal* 1998 (1) SA 765 (C)
[1193] S. 27 (3) provides that no one may be refused emergency medical treatment
[1194] ibid
[1195] The rights to life and not to be refused emergency medical treatment were held not to be relevant to the matter – paras 17-21 (per Chaskalson P).
[1196] *Soobramoney* (n 1192) para. 11
[1197]Lehmann, 'In Defence of the Constitutional Court: Litigating Socio-economic Rights and the Myth of the Minimum Core' (2006-7) 22 American University International Law Review, 163–97, at 165.

process because it believed the allocation decisions were made by State institutions in good faith and the best interest of the population.[1198] The court felt if it decided otherwise it would have infringed on the powers of the executive. The Court made a point of reiterating its role and the respect it had for the division of powers, it felt it should not be allocating resources, but rather had to confine its task to the determination of whether or not the distribution of such resources was made in accordance with the provisions of the Constitution.[1199]

It is observed in the *Soobramoney* case that the Constitutional Court of South Africa allowed greater discretion to policymakers and demonstrated greater deference to policy choices.[1200] The Court has come under fire, for its restrictive interpretation of the rights to life and not to be refused emergency medical treatment, its limited engagement with the ambit and scope of the right to have access to health care services and the limited scrutiny to which it subjected the State's assertions of the resources.[1201]

The Court should have reasoned that the inclusion of a justiciable right to health in the Constitution would inevitably call for the creation of a substantive benchmark for allocation and consequently, the content of this right has to impact the prioritisation processes involved in rationing, and it has a duty to hold governments accountable where there are policy and implementation gaps.[1202]

Another case where the judicial vindication of socio-economic rights in South Africa was demonstrated was the Treatment Action Campaign case.[1203] The TAC case was brought by Treatment Action Campaign, a South African activist organization defending the rights of people living with HIV/ AIDS, against the government's handling of the prevention of mother-to-child transmission of HIV at childbirth.[1204]

After mobilization by the TAC, a pharmaceutical company had donated a five-year stock of an antiretroviral drug ('ARV'), Nevirapine, to prevent mother-to-child transmission, but the government prohibited the use of the ARV in public hospitals, apart from its limited trial in 16 public sites.[1205] The government defended its position on the grounds that the effective

[1198] Soobramoney, (n 1192) at para. 29
[1199] ibid (n1102) Paras 25, 29-30 (per Chaskalson P for the majority); 58 (per Sachs J concurring separately).
[1200] Marius Pieterse (n 23) 63
[1201] ibid
[1202] Lehmann (n 1197) 165
[1203] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 7 para 2
[1204] ibid
[1205] *Minister of Health v Treatment Action Campaign* 2002 (5) SA at 18 paras. 49–51; 22 para. 71.

provision of ARVs was unaffordable (because it would require testing, counselling services, and formula milk), that the efficacy and safety of the drug Nevirapine was not proven, and that the use would have a negative impact on public health.[1206]

This case then became a test of the Court's willingness to meaningfully enforce the State's duties under section 27. The Court went ahead and firmly rejected the government's arguments that the judicial review of health policy constituted a breach of the separation of powers, or that its judgments could be characterised as declaratory orders;

> There is … no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the *Mpumalanga* case, this Court set aside a provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months.'[1207]

The Constitutional court examined the reasonableness of the government's policy in the TAC case and held that the costs of testing and counselling were minimal and that the safety of the drug had been vouched for by the South African Medical Review Board, which had registered the drug for private sale. [1208] Furthermore, the court held that the restriction of the ARV to designated sites was unreasonable because it excluded people who could reasonably have been included in the ambit of the policy.[1209] The Court then ordered the government to end the restriction and mandated the provision of counselling and other necessary services.[1210]

The Court showed respect for the separation of powers even though, it was deciding on a political issue rather than on the constitutionality of the case. It asserted that the government was obligated to devise and implement a more comprehensive policy that will give access to health care services to HIV-positive mothers and their new-born children, and will include the

[1206] *Minister of Health v Treatment Action Campaign* 2002 (5) SA at 18 paras. 49–51; 22 para. 71.
[1207] Ibid para. 99
[1208] ibid paras. 49–51; 22 Para. 71.
[1209] ibid
[1210] ibid

administration of Nevirapine where appropriate.[1211] The TAC case and its activities bear much of the credit for the protective reach of the right to health into the government's HIV/AIDS policy in South Africa.[1212]

The TAC case allowed the Court to reaffirm its reasonableness standard of review and emphasise the seemingly limited role of the judiciary when adjudicating upon issues that have social and economic consequences.[1213] The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional duties whenever there are policy and implementation gaps and to then subject the reasonableness of the measures to evaluation.[1214] The determinations of reasonableness often have budgetary implications, but are not directed at rearranging budgets, hence the judicial, legislative and executive functions achieve appropriate constitutional balance.[1215]

Another relevant South African case is *Minister of Health v Clicks South Africa (Pty) Ltd* .[1216] This case involved the regulation of fees for the dispensing of medicines by public and private pharmacies.[1217] The first Applicant (the Minister) had made and published the Regulations Relating to a Transparent Pricing System for Medicines and Scheduled Substances (the Regulations) under the Medicines and Related Substances Act 101 of 1965 (the Medicines Act).[1218] The first respondent, New Clicks South Africa (Pty) Ltd., and the second respondent, the Pharmaceutical Society of South Africa and others (the pharmacies) launched separate applications in a Provincial Division for orders declaring the Regulations to be unconstitutional and invalid on various grounds.[1219]

The Provincial Division, in this case, dismissed the consolidated applications and refused to grant leave to appeal to the Supreme Court of Appeal.[1220] Due to a delay in the High Court judgement, the matter was decided by the Supreme Court of Appeal first, which granted leave to appeal and held the Regulations to be invalid and of no force and effect.[1221] The Minister

[1211] TAC case (n 1207) para 122
[1212] K G Young and J Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 Harvard Human Rights Journal 204
[1213] TAC case (n 1207) para 38
[1214] ibid
[1215] ibid
[1216] *Minister of Health v New Click South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).
[1217] ibid
[1218] ibid
[1219] ibid
[1220] ibid
[1221] ibid

and the Pricing Committee thereupon appealed to the Constitutional Court, the Court considered the purpose of the Medicines Act and held that, as a whole, its purpose again whenever there are inconsistencies, the rule was to enhance the accessibility and affordability of medicines.

The Court declared that the State has a constitutional obligation to take reasonable measures to enhance access to health care, including medicines, and that these measures must be appropriate.[1222] The Court also held that the dispensing fee was not appropriate because the Minister and the Pricing Committee had not satisfied themselves that the view of the pharmacies was inaccurate. [1223]

The Court was at pains to point out that the regulations were aimed at fulfilling the state's constitutional obligation to progressively realise the right of access to health care services and that they were generally constitutionally permissible.[1224] This judgment thus implies that, as long as the state could modify the regulations in accordance with the constitution, then there won't be an issue. The judgment had the effect of derailing the state's efforts and appeared at once to unnerve the Department of Health and to energise private pharmacies in their opposition against any form of regulation of their activities.[1225]

In another case that centres on challenges to providing access to antiretroviral treatment (ARV) for prisoners is *N v Government of the Republic of South Africa*[1226]. The applicants were HIV/AIDS positive prisoners and brought an action seeking that the respondents be ordered to remove the restrictions that prevent them and other qualifying prisoners from accessing ARV treatments at accredited public healthcare facility.[1227]

Also, that the government provide them with ARV treatment in accordance with the established government Operational Plan for Comprehensive HIV and AIDS Care. The government on the other side contested the locus standi of the applicants and however did not make the lack of resources an issue but argued that the applicants were already being taken care of under what

[1222] Minister of Health (n 1216) (per the Court); 32 (per Chaskalson CJ); 437, 514-517 (per Ngcobo J); 650651 (per Sachs J); 704-706 (per Moseneke J).
[1223] ibid
[1224] Marius Pieterse (n 23) 71
[1225] ibid 71
[1226] *N v Government of the Republic of South Africa* 2006 (6) SA 543 (D) (No 1); 2006 (6) SA 568 (D) (No 2); 2006 (6) SA 575 (D) (No 3)
[1227] ibid

was described as a Wellness programme.[1228] They failed to give any evidence to suggest that the programme was substantial to take care of the applicants.[1229]

The Court held that the lack of access to anti-retroviral medication at Westville Prison by the Department of Correctional Services' was a violation of their obligations under sections 27 and 35(2)(e) of the Constitution, read together with the provisions of the National Treatment Plan.[1230] The Court held that the Department's implementation of a plan was unreasonable because it was inflexible, characterised by 'unjustified and unexplained delay' and, in places, irrational.[1231] The court, therefore, ordered the Department to provide the applicants, as well as all similarly situated prisoners at Westville prison, with immediate access to the required treatment at an accredited public health facility.

The case is very interesting as it shows how the court can justiciably use its powers to hold the government accountable whenever it fails in duty to protect the right to health of prisoners, the Court commendably went further to issue a structural interdict, in terms of which the Department had to lodge an affidavit with the applicants' attorneys within a set timeframe, in which it was mandated to set out how it would comply with the order. [1232]

The case between the *Law Society of South Africa v Minister for Transport*[1233]is worthy of mention as a claim related directly to access to health care services within the private and public health sectors succeeded.[1234] The matter arose in a different regulatory context, which is the reform of the South African third-party compensation system for victims of motor vehicle accidents that had not come up in the courts for many years.[1235]

The access to health care challenge pertained to one of the regulations,[1236] which limited the financial liability of the Road Accidents Fund in relation to medical treatment for injuries sustained in the course of motor vehicle accidents, to an amount 'determined in accordance with the Uniform Patient Fee Schedule for fees payable to public health establishments by full-

[1228] N v Government of the Republic of South Africa (n 1226)
[1229] ibid
[1230] The National Treatment Plan for HIV/AIDS laid terms of which prisoners were entitled to receive anti-retroviral treatment was proclaimed as an aftermath of the Treatment Action Campaign decision, but the State failed to adhere to the Plan.
[1231] N v Government of the Republic of South Africa (n 1226)
[1232] ibid
[1233] *Law Society South Africa v Minister of Transport* 2011 (2) BCLR 150 (CC)
[1234] ibid
[1235] ibid
[1236] Regulation 5(1) of 21 July 2008 issued under sec 17(4B) (a) of the Act.

paying patients, prescribed under … the National Health Act'.[1237] While this tariff would be sufficient to cover health care services received in the public health sector, it would not afford private-sector care.[1238] This meant that survivors of motor vehicle accidents, who were not able to pay for private medical treatment, would have to be treated for their injuries in the public sector.[1239]

The Constitutional Court in the Law society's case held that the regulation was unconstitutional for those persons who become quadriplegic or paraplegic as a result of motor vehicle accidents. This evidence before the court showed that the public health sector was not able to adequately provide the life-long, specialised care and rehabilitation required by quadriplegics and paraplegics.[1240] Therefore, quadriplegics and paraplegics would be 'constantly at risk in a state hospital as a result of the chronic lack of resources, the paucity of staff and inexperience in dealing with spinal cord injuries' [1241]and faced a 'material risk of untimely death due to untreated complications'.[1242]

The Court thus held that the prescribed tariff unjustifiably infringed the right of access to health care services, in that it was unreasonable for failing to cater for the health needs of quadriplegics and paraplegics persons and the court declared it unconstitutional.[1243] This is because the court found that the tariff was irrational because it is incapable of achieving the purpose which the Minister was seeking to achieve. That is, to enable innocent road accident victims to obtain the health services they require.[1244] The judgment is very significant, it went beyond the policy and implementation gap test to show the extent of the powers of the court as it ordered that the Minister prescribe a new tariff for health services for road accident victims.[1245]

The judgment in the Law Society case created an entitlement for quadriplegic and paraplegic victims of motor vehicle accidents to receive care in the private health sector, or at least to receive public health care that is of a quality comparable to that in the private sector.

[1237] National Health Act, 2003 (Act No. 61 of 2003)
[1238] *Law Society* (n 1233)
[1239] ibid
[1240] ibid
[1241] ibid
[1242] Ibid para 94
[1243] Ibid para 100, 108
[1244] ibid
[1245] Ibid paras 91-98

Significantly, it is arguably the strongest decision of an individual, health-related entitlement to come from the socio-economic rights jurisprudence of the Constitutional Court.[1246]

Finally, in the case between *Lee v Minister of Correctional Services*,[1247] where Mr. Lee sued the Department of Correctional Services for a significant amount of damages after he was infected with tuberculosis while in prison.[1248] It happened that health protection and infection control measures in the prison where he was being detained were almost non-existent.[1249]

The Supreme Court of Appeal and the Constitutional Court found that the act of the Correctional services was in contravention of the constitutional and statutory obligations of the state, as derived respectively from the right to receive adequate health services as provided for in section 35(2)(e) of the Constitution, and from section 12(1) of the Correctional Services Act[1250] which obliges the Department to provide prisoners with health services that are adequate to enable them to enjoy healthy lives.[1251] The prison authorities' failure to take appropriate measures to protect inmates from tuberculosis infection was accordingly held to be wrongful, thus creating an avenue for policy/implementation gap.[1252]

In reaching its decision that the prison authorities failed to adequately protect inmates from tuberculosis, the court approached the question of causation by 'simply asking whether the factual conditions of Mr. Lee's incarceration were a more probable cause of his tuberculosis than that which would have been the case had he not been incarcerated in those conditions.'[1253] As such the practical impossibility of eliminating TB did not lessen the obligation of the responsible authorities. [1254] The court, therefore, held that the act of the state was negligent and decided that a claim for damages ought to be recognised to vindicate prisoners' rights in this regard.[1255]

[1246] Marius Pieterse (n 23) 77
[1247] *Lee v Minister of Correctional Services 2013* (2) SA 144 (CC)
[1248] ibid para 42, 44 & 65
[1249] ibid
[1250] Correctional Services Act 111 of 1998, s 12(1)
[1251] Lee's case (n 1247) para 42, 44 & 65
[1252] ibid
[1253] ibid para 55
[1254]ibid
[1255] ibid

The judgment in Lee's case is very significant as it points to an unexplored avenue of individual relief for breaches of the constitutional embodiment of the right to health, which may enhance the accountability of the system for the consequences of its failures.[1256]

From the above case analysis, it can be concluded that the justiciability of the right to health has impacted greatly on the accessibility and affordability of medicines are taken seriously by the state as part of an enforceable human right.[1257] Thus, it can be concluded that the main question faced by the Constitutional Court in most of the cases mentioned was how the courts could enforce the positive obligations to fulfil the right to health as incorporated in section 27 of the Constitution without violating the principle of separation of powers.[1258]

The main issue was to find a method of scrutiny of legislation and policy that acknowledges that policy choices and decisions, the allocation of the budget within the competence of the legislative and executive branch of government and as well act as the institution of last resort to protect the rights contained in the Bill of Rights.[1259] It is observed that even though the Court did not have a clear and firm idea about its approach, it developed its perspective gradually, this is a major lesson for Nigerian courts, they can gradually develop an effective approach to hold the government accountable where there are policy/implementation gaps. The role of the judiciary in decisions about public funding and spending should be different and distinct from that of the political organs and may involve decisions at the political level in fixing the budget, however, the courts will be slow to interfere with rational decisions taken in good faith by the political organs and other competent bodies.[1260]

It must be mentioned that the Court developed its reasonableness test in the case of Government of *the Republic of South Africa and others v Grootboom and Others.*[1261] It laid the foundation for the justiciability of the obligation to progressively realise ESC rights which the court will review on the reasonableness test and exercise deference where appropriate at the stage of remedy.[1262] It held in this case that article 26 which provides for the right to adequate housing obliges the state to devise and implement a coherent, co-ordinated housing programme and that

[1256] Marius Pieterse (n 23) 78
[1257] TAC's case (n 1207)
[1258] Soobramoney's, TAC, Minister of Health v New click south Africa cases
[1259] ibid
[1260] Fons Coomans, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the 'Reasonableness' Test as Developed by the South African Constitutional Court' (2005) 65, Heidelberg J. Int L., 167-196
[1261] *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169, Children, Right
[1262] ibid

in failing to provide for those in most desperate need and the government had failed to take reasonable measures to progressively realise the right to housing.[1263] The Court also ordered that the various governments 'devise, fund, implement and supervise measures to provide relief to those in desperate need.'[1264].

When applying the reasonableness test, the court will not enquire whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent.[1265] The question would be whether the measures that have been adopted are reasonable and whether there are wide ranges of possible measures that could be adopted by the state to meet its obligations.[1266] The Court will lay down the criteria or elements of the reasonableness test.

The benefit of the reasonableness test is that it provides a flexible tool for assessing the realisation of socio-economic rights bearing in mind the characteristics of the domestic situation and local context of a particular state.[1267] It is described as a realistic standard of review because it recognizes the main responsibility of the legislative and executive branches of government for the implementation of social and economic rights and the supervisory role of the judiciary.[1268] The reasonableness test recognizes that the government has constitutional obligations to realise social and economic rights and must adopt and implement measures that provide and cater to the urgent needs of the people, however, the government is not required to do the impossible.

The government will be held accountable for its performance if measures taken do not contribute to tackling structural inequalities in society.[1269] The test also provides a strong impetus for the government to justify its policy to be reasonable, the standard of review is firm as the government is supposed to indicate which specific legislative and policy measures it has taken to comply with its constitutional obligations.[1270]

The test is a useful tool for courts to assess the implementation or lack of implementation of social and economic rights at the domestic level and significantly strengthens the justiciability

[1263] *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169, Children, Right
[1264] ibid
[1265] Fons Coomans (n 1260) 188
[1266] ibid
[1267] ibid
[1268] Ibid 190
[1269] ibid
[1270] ibid

of health rights.[1271] The reasonableness test can be adopted by the Nigerian courts to guide government authorities and it can beneficially force the Nigerian government to justify its policies and implementation of same on socio-economic rights.[1272]

Nonetheless, the reasonableness test has its weakness, it undermines the minimum core obligations element which gives states the obligation to ensure the satisfaction of at the very least, minimum essential level of socio-economic rights to health.[1273] Also, in a failed system, for example, the reasonable test may be unrealistic because of the different needs of people, limited resources and competing claims for resources, the government programs cannot be reasonable in such an instance where it does not provide for effective implementation of the most essential elements of the fundamental rights of the people against the overreaching value of human dignity.[1274]

The impact of the justiciability of the right to health in South Africa is such that apart from the TAC's victories about HIV/AIDS medication, which have admittedly brought much relief to a significant proportion of South Africa's HIV-positive poor, there is evidence that the actual affirmative successes of socio-economic rights litigation have been few.[1275] It is noteworthy that no claim in relation to treatment for diseases other than HIV/AIDS has succeeded.[1276] This has been attributed to the fact that cases were brought by the less vigilant and resourceful applicants than the TAC and partly because of the nature, magnitude, and consequences of the South African HIV epidemic.[1277]

Also, it has been suggested that the low successes of the socio-economic rights litigation may be due to the Constitutional Court's approach to the hearing and deciding of socio- economic rights claims contains both obstacles and disincentives for individual, poor litigants.[1278] Consequently, losses or empty victories for individual claimants extend beyond the

[1271] Fons Coomans (n 1260) 191
[1272] ibid
[1273] K G Young, (n 351) p. 126-139
[1274] ibid
[1275] Marius Pieterse, 'Health, Social Movements, and Rights-Based Litigation in South Africa' (2008)35(3) Journal of Law and Society, pp. 364-388
[1276] ibid
[1277] ibid
[1278] S. Liebenberg, 'South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6 Law, Democracy and Development, 300

circumstances of their cases to discourage the use of litigation as a strategy for individual rights fulfilment.[1279]

There are significant institutional obstacles associated with the judicial enforcement of socio-economic rights in South-Africa just like Nigeria, the problem is majorly with the implementation of court orders and their impact on executive responses to social problems.[1280] Since courts cannot always rely on State officials to implement court orders, it is suggested that the Constitutional Court should be more proactive when monitoring implementation of its decisions.[1281]

5.4 Justiciability of the Right to Health in Colombia

Colombia is considered an outstanding example of a country with judicial activism in its right to health.[1282] Despite its brutal fifty-year-old civil conflict, it is remarkable that the Colombian Constitutional Court developed some of the most progressive jurisprudence in the world as regards the right to health and other economic, social and cultural rights.[1283]

Litigation has proven to be a pacific and democratic way to protect a constitutional principle and thus many people had to fight to enjoy effective access to health care and consequently, health is now a fundamental and justiciable right in Colombia.[1284] The right to health is constitutionally protected in Article 49 as follows;

> Attention to health and environmental sanitation are public services [of the] responsibility of the State. The access to services of promotion, protection and recovery of health are guaranteed to all persons. It corresponds to the State to organize, direct and regulate the provision of health services . . . in accordance with the principles of efficiency, universality and solidarity. [It corresponds] also [to the State], to establish policies for the provision of health services by private entities, and to exercise supervision and control [over them]. Likewise, to establish the competences of the Nation, the territorial entities and individuals

[1279] S. Liebenberg, 'South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6 Law, Democracy and Development, 300
[1280] ibid
[1281] Jennifer Sellin, 'Justiciability of the Right to Health — Access to Medicines: The South African and Indian Experience'(2009) 4, Erasmus Law Review 445-464
[1282] A E Yamin and Oscar Parra-Verra, (n 1003)
[1283] ibid
[1284] Arrieta-Gómez & Aquiles Ignacio, (132)

> and to determine the contributions of [their] responsibility in the terms and conditions specified in the law.[1285]

The history of the development of the right to health started after many political and judicial debates as far back as the 1991 Constitution and only in 2015 Colombia passed a statutory law (Law 1751) recognizing the constitutional right to health.[1286] This law was the result of a long battle between those who regarded the right to health as a justiciable and fundamental right and the ones who thought it was non-justiciable and rather should be directed by public policies set by the legislative and executive arm of government.[1287]

It is at this point necessary to analyse the history of the judicial enforcement of the right to health in Colombia.

5.4.1 The Judicial Enforcement of the Right to Health in Columbia

The history of the Constitutional Court's role in enforcing health rights began in the early 1990s, amid the conflicting aims of an aspirational Constitution, which enshrined broad social rights and set out a new vision for Colombian society, on the one hand, and a sweeping health sector reform based upon neoliberal principles on the other.[1288] The Court departed from the Supreme Court's formalism of jurisprudence and determined that although not denominated as fundamental rights in the Constitution, social rights could become fundamental and enforceable by virtue of their connection to fundamental rights (*doctrina de conexidad*).[1289]

Thus, the rights were indirectly justiciable because of their connection to fundamental and enforceable rights. In the case of health, even though it is not a fundamental right, it acquires the status of a fundamental right in some circumstances for instance where denying care to a sick person would threaten his/her right to life.[1290]

Also, Article 86 of the 1991 Constitution of Colombia introduced *Tutela* (guardianship) which is an action presented before any judge for the immediate protection of a fundamental human right, while the action was first defined in the Constitution, Decree 2591 of 1991 and the

[1285] Constitution Political of Colombia art. 49, amended by Acto Legislativo 2 de 2009 to include a provision on drug abuse as of special concern to the Constitution.
[1286] Arrieta-Gomez & Aquiles Ignacio (n 132)
[1287] ibid
[1288] Mauricio García Villegas, 'Law as Hope; Constitutions, Courts and Social Change in Latin America' (2004) 16 FLA. J. INT'L L. 133, 140-42
[1289] A E Yamin and Oscar Parra-Verra (n 1003)
[1290] ibid

Constitutional Courts jurisprudence developed the *tutela* into an expansive institution in which courts were given wide powers to make decisions in human rights cases, eliminating all of the constraints of standing as well as most procedural limitations.[1291]

Consequently, any person can bring forth a *tutela* claiming violations of his or her fundamental rights, the rights of a larger group (e.g., a neighbourhood or an ethnic group), or the rights of a person in a vulnerable situation (e.g., children or the elderly). Also, the decree made every judge capable and qualified to order the government to take specific actions to protect these rights.[1292]

Initially, tutela actions were limited to civil and political rights.[1293] Court precedent expanded it to include the right to health, some economic and social rights as well as certain rights for the vulnerable groups (e.g., ethnic minorities, children, and internally displaced persons), this made the rights justiciable. The procedure includes both strict time limitations for judges, and sanctions for public officials, including jail for contempt of court if they fail to comply.[1294]

Significantly, the introduction of *tutelas* is said to have produced a massive amount of private litigation in Colombia. Between 1999 and 2010 it was reported that there was a total of 2,725,361 *tutela* decisions and the annual number of *tutelas* filed has been continually increasing with a striking proportion of them directed to the right to health. [1295] The right to health is now heavily litigated in Colombia due to tutelas and the support of the constitutional court of Colombia and it is approximated that about half of the tutelas in the year 2008 were related to the right to health.

According to a report by the Human Rights Ombud's Office of Colombia, between 1999 and 2008, a stunning 674,612 actions for the protection of constitutional rights were filed before the courts in relation to health rights, the Court itself had taken more than a thousand health cases since its formation.[1296] However, by 2008, it was clear that recourse to the courts had

[1291] Decree 2591, 19th November 1991, Official Journal
[1292] Manuel Jose Cepeda Espinosa, 'Readings on the Colombian Constitutional Court '(Feb. 13, 2012), available at <http://www. utexas.edu/law/colloquium/papers-public/2011-2012/02-1312_Espinosa_Opinions%20of%20Colombian%20Constitutional%20Court post.pdf > Accessed 01/12/2019
[1293] ibid
[1294] K G Young and Julieta Lemaitre (n 1212) 179-216
[1295] ibid
[1296] A E Yamin and Oscar Parra-Verra (n 1003) 112

become an essential 'escape valve' in a health system that was incapable of regulating itself, but the routinization of judicial intervention had created additional problems.[1297]

The road to justiciability of the right to health in Colombia can be divided into different parts by years and experience for clarity and ease of reference. The first part analyses the period between 1991 to 2008, the second part discusses the T 760 decision of 2008, the third part discusses the protest and crisis period between 2009–2010 while the last phase discusses the post protest and crisis phase.

5.4.2: 1991-2008: The Path to Justiciability

This is a significant period in the history of the justiciability of the right to health in Colombia. The Colombian Constitutional Court decided its first right to health case in 1992, the cases, which were decided before the 1993 reform of the national health system, established that the right to health was justiciable through the *tutela* jurisdiction.[1298] Since then, the Colombian Constitutional Court's jurisprudence has concentrated on limiting and developing the conditions of justiciability of the right to health.[1299]

Before this period, justiciability of the right to health was indirect meaning that the rights would be justiciable only when a direct link was established between the health claim and a 'fundamental right,' especially the rights to life and dignity.[1300] The Colombian Constitutional Court adopted an expansive connectivity interpretation whereby rights that the court was unwilling to deem fundamental could be treated as fundamental if in any way connected to fundamental rights for instance the right to health and social security are related to the right to life and some elements necessary to preserve one's dignity.[1301]

Following decisions of the Colombian Constitutional Court expanded the justiciability of the right to health. Also, the court determined that the right to health was always justiciable in the

[1297] K G Young and Julieta Lemaitre (n 1151) 186
[1298] ibid
[1299] ibid
[1300] Constitution Political of Colombia, Arts 1, 11
[1301] In its well-known 2006 decision on abortion, the CCC sums up its definition of dignity, [Constitutional Court], 10th of May 2006 de mayo de 2006, Judgment C-355/06 § 8.1, available at <http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm. > Accessed 01/12/2019
'In effect, this court has held that in the various cases where human dignity is a relevant criteria for making a decision, it is understood to protect: (i) autonomy or the possibility to make one's own life plan and self-determination according to its characteristics (to live as one wishes), (ii) certain concrete material conditions for existence (to live well), (iii) the intangibility of non-patrimonial goods such as physical and moral integrity (to live without humiliation)

case of subjects of special constitutional protection (*sujetos de protecci´on constitucional especial)*, such as children, pregnant women, and the elderly.[1302]

In the year 1993, Law 100 changed the public health system into one of compulsory health insurance provided by both private and public companies, combining cross-subsidies among the insured with public financing of health insurance.[1303] The law defined the content and responsibility for the compulsory health insurance plan (*plan obligatorio en salud)* and the plan was[1304] established by the government through a national council with the representation of different health industry participants, including hospital professionals, doctors, and medical experts. [1305]

The plan-controlled health care rationing decisions and was reformed periodically to fit the epidemiological data.[1306] The 1993 health sector reform in Colombia is a good example of a successful government initiative to extend social health insurance to the poor compared to the insurance scheme in Nigeria which extends to only those in active service and does not cater to the poor and needy.

Also, law 100 of 1993 assigned duties for dispensing the benefits to private healthcare providers, the law made way for private health insurance companies, (*Entidades Promotoras de Salud)* to mediate between people, the government, and healthcare providers whenever there is an issue.[1307] The law made it compulsory for every person to contribute a percentage of their earnings to buy health insurance from any of the insurance companies.[1308]More so, the system provided for subsidized health insurance for the poor.[1309]

The private health insurance companies paid healthcare providers for any expenses incurred by the people they insured through either regime (contributory or subsidized), the companies received funds from the government as well as from individual contributions.[1310]In the year

[1302] This line of argument starts in 1992 with Constitutional Court, 3rd of June 1992, Judgment T-401/92, Gazette of the Constitutional Court (vol. 2, p. 140), on mentally disabled persons and the general duty to protect of the State vis-`a-vis people in situations of evident weakness.
[1303] Health insurance premiums are a fixed percentage of income, and these premiums go to a common fund. As a result, those who earn more pay more, effectively subsidizing those who earn less. Government funds cover those who do not work. See K G Young and Julieta Lemaitre (n 1158) 187
[1304] L. 100/93, 23rd December 1993, Official Diary, arts. 156(b)–(c), 162
[1305] K G Young and Julieta Lemaitre (n 1151) 188
[1306] ibid
[1307] L. 100/93, 23rd December 1993, Official Diary, arts. 177–84.
[1308] ibid
[1309] ibid
[1310] ibid

1997, the Colombian Constitutional Court attempted to limit its jurisprudence on the right to health and elaborated increasingly complex rules.[1311] This was a reaction in part to the rapid increase in *tutelas* during a time of economic crisis, and also because the Colombian Constitutional Courts developed a better understanding of the effects of the new healthcare system.[1312]

At this time, the Court's jurisprudence was still tied to the benefits and shortcomings of the healthcare system designed by Law 100, consequently, justiciability was granted on two bases. The first was when the claimant had been wrongly denied medicines and services, the Court in instances like this generally accepted the justiciability of the right to health, especially when there was urgency in receiving the medicine or service.[1313] The second type of claim was when medicines or services for high-cost illnesses such as HIV/AIDS, known as the 'excluded benefit' cases.[1314] In these cases, the court decided that the right to health was justiciable when there was a threat to life or dignity.[1315] For instance the court ordered a post-operative orthopaedic treatment for a disabled child that was excluded from treatment, the exclusion was considered a threat to life and dignity.[1316]

By 1998, the litigation profiles of the *tutela* actions reveal the unintended consequences of the Colombian Constitutional Court's devised rules; litigation for benefits included in the scheduled list by patients in the contributory regime became the major type of litigation, followed by litigation for excluded benefits.[1317]Part of the reason for this lay in the paucity of administrative mechanisms to resolve conflicts between patients and insurance companies, leading to tremendous use of the courts. However, it was also the result of attempts by the company to get additional compensation for providing services and medicines by getting courts

[1311] In 1997 the court limited right to health litigation with SU-111, which insisted that the court ordered protection had to be exceptional, and that the person had to prove he or she could not cover the costs. However, that same year, with SU-480, the court insisted that EPS recover costs for court-ordered medicines and treatments from the government, which might have limited litigation if the government had expanded the scheduled list. Constitutional Court, 25 of September 1997, Judgment SU-480, Gazette of Constitutional Court (vol. 9, p. 1077), available at <http://www.corteconstitucional.gov.co/relatoria/1997/SU480-97.htm.> Accessed 01/12/2019

[1312] A E Yamin and Oscar Parra-Verra (n 1003) 114

[1313] Decision T-760/08, Constitutional Court 31 of July 2008,

[1314] Constitutional Court, 25th of December 1993 Judgment T-597/93, <http://www.corteconstitucional.gov.co/relatoria/ 1993/t-597-93.htm> Accessed 01/12/2019

[1315] ibid

[1316] ibid

[1317] ibid

to order them.[1318] This mechanism created a litigation bias in favour of the middle class, as these patients were more competent at using the legal system.[1319]

Remarkably, in 2003, the Colombian Constitutional Court attempted to clarify its concept of the right to health, entrenching a 'minimum core' approach specifying under which specific circumstances there was a threat to the justiciable core of the right.[1320] This decision brought new clarity to the right to health. The Court explicitly adopted the right to health contained in CESCR's General Comment No. 14 and affirmed the State's obligation to actively provide health care. [1321]

The court held that the right to health contains a core nucleus (nucleo esencial), that is the core services doctrine, which must be guaranteed to everyone even though this core was not extensively explained. Cases claiming cosmetic surgery under the constitutional right to health was unsuccessful as it did not meet the core service doctrine.[1322] In the T-760/08 of 31 July 2008 case, the Constitutional Court emphasised the obligation of the state to ensure free health services are enjoyed by those in need.[1323]

5.4.3 The 2008 Decision T-760: Court-Ordered Transformation

By the year 2008, the Colombian Constitutional Court's focus was to clarify the justiciability of the right to health by addressing directly the healthcare system's overwhelming financial problems.[1324] While the previous right to health cases often had policy implications that affected the system as a whole, Decision T-760 in 2008 was the first decision to adopt structural litigation guidelines to specifically order the government to address the major problems in the healthcare system.[1325]

The court distinguished the legal issues and orders rendered regarding the particular cases and the general system-wide flaws, the general legal issue addressed by the Court was whether the regulatory failures detected in the cases represented a violation of the competent authorities'

[1318] Constitutional Court, 25th of December 1993 Judgment T-597/93 <http://www.corteconstitucional.gov.co/relatoria/ 1993/t-597-93.htm> Accessed 01/12/2019
[1319] ibid
[1320] A E Yamin & Oscar Parra-Vera (n 1003)
[1321] Ibid 117
[1322] ibid
[1323] ibid
[1324] Constitutional Court 22 of January 2007, Judgment T-016/07, available at <http://www.corteconstitucional.gov.co/relatoria/2007/T-016-07.htm> Accessed 28/11/2019
[1325] ibid

constitutional obligations to respect, protect and fulfil the right to health.[1326]The Court also held that the authorities violated their constitutional duties and orders.

The decision included a synthesis of the Colombian Constitutional case law on the right to health, the court previously allowed plaintiffs to enforce their right to health through tutela actions when (1) there is an identifiable nexus with 'fundamental rights', such as the right to life; (2) when the case is brought by a person representing a vulnerable group such as children, pregnant women, or the elderly; and (3) when the health service at issue is included in the national health policy, which defines the state's obligations with regards to the minimum core content of the right to health.[1327] The Court also reaffirmed the right to health as fundamental and examined the international legal obligations of the State regarding the right to health, especially General Comment No. 14 of the UN Committee on Social Economic and Cultural Rights.[1328]

Also, the court ordered the government to design non-judicial mechanisms to resolve disputes between patients and healthcare providers and create effective mechanisms to reduce both the promotion of unnecessary litigation and the denial of services and information by the EPS.[1329]The T-760 of 2008, ordered government organs to identify flaws that made the country's health system outdated and inequitable and to take correctional measures.[1330] In the years following this decision, the congress and the executive branch increasingly included a rights-oriented perspective in public policies. [1331]

The T-760/08 judgment examined systemic failures in the regulation of the health system, re-asserted the justiciability of the right to health, and called for significant restructuring of the health system based on rights principles.[1332]The T-760 decision of 2008 is a very significant decision is significant as the court deterred the health system from a path to financial un-sustainability and corrected the structural flaws that harm the users' access to health services was also innovative in innovative as it made general orders similar to public policies and even

[1326] Colombian Constitutional Court, Judgment T-760/2008 <http://www.escr-net.org/usr_doc/English_summary_T-760.pdf [accessed 27th July 2013]. This right is directly enforceable by the action of the tutela (guardian) in the Constitutional Court.
[1327] ibid
[1328] ibid
[1329] Constitutional Court, 31st of July 2008, Judgment T-760/ 08 available at <http://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm> Accessed 28/11/2019
[1330] ibid
[1331] K G Young and Julieta Lemaitre (n 1151) 191
[1332] ibid

included a follow-up mechanism.[1333] The structural reform litigation may be useful in the Nigerian case as the courts while remaining neutral may make orders to reshape and reform policies that affect the justiciability of the right to health.

Although decision T-760 ordered the government to address the many shortcomings of the healthcare system, the decision coincided with a significant increase in the right to health cases and with further instability of the health insurance system.[1334] As such by the end of 2008, it was clear the system needed reform.[1335] The court, following its structural litigation system, monitored the orders with a series of follow-up awards as an attempt to pressure the government into adopting reforms, especially increased regulation.[1336] Nonetheless, the Court's effort was overshadowed by the public protest that characterizes the third phase of the impact of the right to health in Colombia.[1337]

5.4.4The Protest and Crisis Phase: 2009–2010

In response to Decision T-760, the government adopted ten decrees that reformed the health system in January 2010.[1338] But, the decrees did not comply with the Colombian Constitutional Court's doctrine, instead, they focused on dealing with the budget crisis by limiting services and diverting tax revenues into the system.[1339] The decrees were controversial, it limited doctors' ability to order services and medicines, curtailing patients' access to specialists and restricted services to ordering medicines. It also allowed private insurance companies and hospitals to use external providers of health services and this caused serious violence problems and eventually, gave rise to an unexpected level of protest.[1340]

The protests were framed as a defence of the right to health and specifically addressed medicines and services that the Colombian Constitutional Court had identified as being covered by a justiciable right to health.[1341] The doctors and health care workers, national workers union and organizations perceived these decrees as an attack and they protested against the

[1333] Colombian Constitutional Court, Judgment T-760/2008 http://www.escr-net.org/usr_doc/English_summary_T-760.pdf [accessed 27th July 2013]. This right is directly enforceable by the action of the tutela (guardian) in the Constitutional Court.
[1334] Arrieta-Gómez & Aquiles Ignacio (n 132)
[1335] ibid
[1336] ibid
[1337] ibid
[1338] K G Young and Julieta Lemaitre (n 1151) 193
[1339] ibid
[1340] ibid
[1341] ibid

privatization of healthcare.[1342] The protests exerted pressure that forced the government to back down on what was believed by the people to be a regressive health reform.[1343] The government insisted that there was a need for the reform and argued that the goals of the decrees were to limit non-mandatory health insurance plan expenses to life-threatening illnesses and to generally increase tax revenue to pay for the health system.[1344]

The court finally declared the ten decrees to be unconstitutional, this was after the national protests that forced the government to recant on some reforms and revealed enormous grassroots support for the court's prior decisions on the right to health.[1345]However, the court deferred the unconstitutionality of the increased taxation until the end of 2010, this was to enable the government to fund health sector debt while congressional reforms were adopted.[1346]

5.4.5 Post Protest and Crisis Phase

In 2011, Colombia adopted Law 1438, which addressed the criticisms of the healthcare system and avoided the types of reforms that sparked so much protest in 2010.[1347] Law 1438 established procedures for the gradual unification of benefits for the contributory and the subsidized regimes as ordered by the Constitutional Court in 2008, earmarked resources for primary and preventive care and ordered the updating of the mandatory insurance plan every two years.[1348] It also ordered full, free healthcare coverage for children.[1349]

Colombia experienced an intense level of litigation, adjudication, and enforcement in its evolution of the right to health.[1350] The court played a very significant and vital role towards the realisation of health rights, the Columbian experience reveals how judicial intervention serves as a legitimate way to exert pressure on the government to act according to constitutional boundaries.[1351] Although there is still a long road ahead, public institutions responsible for health care are now on a constitutionally acceptable track.[1352]

[1342] K G Young and Julieta Lemaitre (n 1151) 193
[1343] ibid
[1344] ibid
[1345] Constitutional Court, 16 of April 2010, Judgment C-252/10, at s7.3, <http://www.corteconstitucional.gov.co/relatoria/2010/C-252-10.htm> Accessed 28/11/2019
[1346] K G Young and Julieta Lemaitre (n 1151) 199
[1347] Law 1438/11, 19th January 2011, Official Diary, arts. 18–19
[1348] ibid art 19
[1349] K G Young and Julieta Lemaitre (n 1151) 200
[1350] ibid
[1351] Arrieta-Gómez & Aquiles Ignacio, (n 132)
[1352] ibid

There are great lessons to be taken from the Columbian experience in Nigeria, the activism especially from organizations, the courts also the resistance and protests from the people all contributed to the progress so far made in the justiciability of the right to health. It is relevant to state that the activism also led to improved universal coverage. As of 2008, 83.26% of the population was affiliated with a health care provider and by 2016, it had reached 95.6% and of course, this progress reduced inequities resulting from wealth inequalities in the health system.[1353]

It must be noted that the transnational legal theory as a compliance theory applies to the Columbian experience. As explained by the theory in chapter 4 the interaction and interpretation processes triggered by the resistance of the people resulted in the legal internalization and social internalization of the right to health. The courts were able to compel the state to internalize policies of the right to health into its policies. Public policies aimed at protecting a fundamental right should ensure a reasonable policy design, implementation, and evaluation.[1354] As a matter of fact, Colombia's courts and judges still face many challenges in dealing with structural and complex orders, but they were still able constitutionally to control public policies and improve accountability in public governance.[1355]

5.5 Relevance of the Case Studies on the justiciability of the right to health to the Nigerian case

It can be said without an iota of doubt that the different jurisprudence of the Constitutional Court of South Africa, the Supreme Court of India, and the Constitutional Court of Colombia have offered unique responses to the objections levelled against justiciability of socio-economic rights with illuminating implications for constitutional legitimacy.[1356]

The South African, Colombia, and Indian Constitutions reflect concerted transformative projects developed during difficult transitions from oppressive regimes to open and democratic societies somewhat like Nigeria.[1357] The drafting projects of the Constitutions involved debates about how best to structure these transformative projects in their new constitutions to guarantee

[1353] Arrieta-Gómez & Aquiles Ignacio, (n 132)
[1354] ibid
[1355] M. Langford, C. Rodríguez Garavito, and J. Rossi, *Social rights judgments and the politics of compliance: Making it stick* (Cambridge, MA: Cambridge University Press).
[1356] Natasha G Menell (n 1005) 738
[1357] ibid

results, or at least oblige the state to seriously pursue the progressive realisation of socio-economic rights.[1358]

An assessment of the justiciability of the right to health in the three selected jurisdictions reflect to some achievement of socio-economic transformations in each country over the following decades. The South African and Indian Courts have achieved several concrete advancements for socio-economic rights,[1359] and the Columbian experience reveals judicial intervention as a legitimate way to exert pressure on the government to act according to constitutional boundaries.[1360]

The Colombian experience also shows how the power of the people to litigate can help secure the protection of their right to health.[1361] It also proves that judicial intervention can bring justice and equity to a health system when judges listen to both sides of the debate on aspects of the fundamental right to health.[1362] A major lesson Nigeria can learn from the case of the justiciability of the right to health in Colombia is that rights must be respected as a prerequisite for democracy, judges must ensure that authorities recognize and enforce the effective enjoyment of guaranteed rights.

Also, the fulfilment of a right should be based on technically supported rational arguments, as well as on ethical grounds, principles, and values, it requires transparent decision-making processes open to public scrutiny and democratic participation. In which case judicial intervention does not become the 'rule of the judges' but instead a legitimate way to exert pressure on the government to act according to the rule of law and within constitutional boundaries.[1363]

The Nigerian Constitution provides for the right to health as a directive principle just like the Indian constitution and as such the preliminary lesson from the example of the Indian Court's enforcement of socio-economic rights is that constitutional language will not necessarily determine the scope and nature of judicial enforcement of socio-economic rights.[1364]

[1358] Natasha G Menell (n 1005) 738
[1359] Ibid 739
[1360] Arrieta-Gómez & Aquiles Ignacio, (n 132)
[1361] ibid
[1362] ibid
[1363] ibid
[1364] ibid

Most importantly, Nigeria can draw inspiration from Colombia, South Africa, and India jurisprudences and the judges who have been described as incapable or unwilling to entertain socio-economic rights claims must rise to the occasion by using their privileged positions to redress grievances regarding the violation of socio-economic rights in general.[1365]

It should be noted that justiciability is not the only means of enforcing socio-economic rights. A great number of the tasks required for the full realisation of the rights depend primarily on the actions of the executive and legislative branches of any State. But, denying judicial intervention in this field seriously reduces the remedies victims of socio-economic rights violations can claim and it also weakens the accountability of the State.[1366]

It must also be noted that these strategies to justiciability reveal that there are potentials to justiciability of the right to health and asserts that human rights agendas are indicative of each states commitments and compliance to human rights, the rule of law, court orders, and recommendations that foster the protection of the right to health.

5.6 Conclusion

It is argued that the experience of India, South Africa and Columbia has demonstrated that the right to health just like any other socio-economic and cultural rights can play a crucial role in the transformative agenda of societies emerging from oppression.[1367] Their experiences with constitutional socio-economic rights are symbolic and intended to contribute to social and economic transformation.[1368]

A comparison of the divergent ways in which these three countries framed their right to health and the jurisprudence of the courts provides lessons for societies considering amendments to more entrenched constitutions as well.[1369] The courts in these jurisdictions have adopted legal standards and developed practices that give the right to health the force and predictability of law while preserving plenty of space for democratic decision-making.[1370] Also, the inclusion of socio-economic rights in the laws and Constitution of these countries serve as a signal of the

[1365] Stanley Ibe (n 633) 225-248
[1366] ibid
[1367] Natasha G Menell (n 1005) 746
[1368] ibid
[1369] ibid
[1370] ibid

political commitment made by the framers to the just and principled use of social and economic policy for future growth.[1371]

Again, it must be added that courts have to be mindful of the extent to which their procedural practices and interpretative approaches render socio-economic rights litigation contingent on the existence and legal astuteness of social movements in a society.[1372] As long as individual members of society are discouraged from relying on rights and the law in their struggles for survival, the potential of the legal system to assist in these struggles will remain limited.[1373]

Also, it is argued that constitutional litigation is one of several democratic tools to guarantee the effective enjoyment of a fundamental right function when supported by, and carried out in collaboration with, other branches of power.[1374] Since courts by themselves cannot assure the total benefits of the enjoyment of any rights, the success of a structural remedy can be seen when the court is no longer needed.[1375] As long as the policymaking process respects constitutional boundaries, judges should take a step aside not when everything is perfect, but when policymakers take rights seriously and fully respect them.[1376]

Lastly, the justiciability of the right to health is therefore very essential especially for the poor and oppressed millions, most of whom are miserably toiling and languishing in a country like Nigeria.[1377] The possibility of judicial attentiveness to the needs of the people represents their best chance, the only legitimate hope and real means of accessing the most vital, yet basic, of human needs which is the right to health care. After all, as liberal theorists would argue, without good health, what value is life?[1378]

Finally, the experiences from these countries buttress the argument that compliance with human rights to health norms, laws and judgments is a fundamentally domestic and essentially a political process that requires a host of activities.[1379]

[1371] Natasha G Menell (n 1005) 746
[1372] Marius Pieterse (n 1275)
[1373] ibid
[1374] Arrieta-Gómez & Aquiles Ignacio (n 132)
[1375] ibid
[1376] Decision T-388 of 2013
[1377] Stanley Ibe (n 633)
[1378] ibid
[1379] Courtney Hillebrecht (n 806)

CHAPTER SIX: A CRITICAL ANALYSIS OF THE CONDITION OF SUCCESS FOR THE JUSTICIABILITY OF THE RIGHT TO HEALTH

6.0 Introduction

The principle of justiciability can be described as a chameleon because of its many attributes that have been discussed so far. But, it is a very important concept that sets forth the scope of judicial review and fundamentally the rule of law.[1380] In simple terms, 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.[1381]

Justiciability has been identified in this thesis as a means to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur.[1382] It also implies access to mechanisms that guarantee recognized rights. Hence, justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties.[1383] The existence of a legal remedy cannot be overemphasised. When a violation of a right has occurred or is imminent, the process of awarding adequate reparation to the victim is a defining feature of a fully-fledged right.[1384]

As discussed in chapter two, the characteristics of the right to health by its legal nature will make it easier to determine whether it is a justiciable right or not. The right to health is recognised as a social right and thus is deeply connected with state benefits.[1385] This means that a state is required to take measures, to act in a positive way for the right to health to be protected. And these state obligations are proportionate to the state's welfare.[1386]

It was emphasised in previous chapters that justiciability of the right to health relates to whether the right is open to interpretation by a judicial or quasi-judicial body and whether a complaint concerning an alleged violation can be lodged with a competent body.[1387] Also, part of the role

[1380] T Endicott, (n 82) 97
[1381] See generally Arambulo K (n 424)
[1382] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability (HUMAN RIGHTS AND RULE OF LAW SERIES: N0. 2, 2008)
[1383] Ibid
[1384] Katie Boyle, 'Models of Incorporation and Justiciability of Economic, Social and Cultural Right' (Scottish Human Right Commission Report 2015) <http://www.scottishhumanrights.com/media/1468/escrightskboyle2015.docx> Accessed on 5 August 2019
[1385] J.K. Mapulanga-Hulston, (n 64) p 29-48
[1386] ibid
[1387] See chapter 1.

of justiciability is to contribute to the further determination of the meaning of a right and therefore forms part of the strategy for the implementation, realisation and protection of the right.[1388] In the case of the right to health care, on several occasions, domestic and international courts held claims that the right to health care was justiciable, providing an effective remedy to enforce its realisation.[1389]

Again, the justiciability of socio-economic and cultural rights can either occur directly or indirectly. A typical example of direct justiciability is seen in the South African constitution, as discussed in chapter 5. The indirect justiciability ensues from the application or interpretation of civil and political rights, most commonly through the application of the right to life and dignity.[1390]

Usually, in countries where the right to health is contained in its directive principles as guidelines for human rights, the interpretation of the right to health falls under the indirect justiciability model, for instance, India and Colombia. The courts usually adopt strategies or judicial approaches like the minimum core approach, the reasonableness approach to interpreting the right to health.[1391]

This chapter synthesises the arguments so far to analyse the legal conditions of success of the justiciability of the right to health in Nigeria. It first examines the significance of the justiciability of the right to health, then sheds light on the role of justiciability in the compliance of economic socio and cultural rights, and then examines the effect and implication of justiciability of the right to health.

It also identifies the factors that impede the protection of the right to health in Nigeria as well as conditions that can foster the protection of the right to health in Nigeria and finally a discussion on the need to enhance the Nigerian Human Rights system for the effective protection of socio-economic and cultural rights in Nigeria concludes the chapter.

6.1 What is the Significance of the Justiciability of the Right to Health

Although international treaties reflect a contractual paradigm characterized by reciprocity between States which is an ‘exchange of obligations’ between states in relation to peace,

[1388] K. Arambulo (n 420) 111-123.
[1389] Andre Den Exter, (n 422)
[1390] Sandra Liebenberg (n 437)
[1391] ibid

disarmament, trade, and other international matters,[1392] when we talk about international human rights treaties, they do not conform to this paradigm because, as expressed by the UN Human Rights Committee, the treaties 'are for the benefit of persons within [the State's] jurisdiction.[1393] And According to Matthew Craven, 'it does seem that the overriding 'contractual' paradigm is largely (if not wholly) inappropriate in the case of human rights treaties'.[1394] This buttresses the point that the purpose of human rights is for the benefit of persons and the aim of this thesis is to determine whether justiciability of the right to health can promote the protection of the right on behalf of every individual in a State.

Litigation is a main component of justiciability of the right to health, this is evident from the examples in India, South Africa, and Columbia. Litigation can contribute towards holding governments accountable with respect to both policy gaps and implementation gaps. Policy gaps are best described as discrepancies between states' legal obligations under international law and national constitutions, and laws to respect, protect, and fulfil the right to health of their populations.[1395]

While implementation gaps are also discrepancies between stated policy and implemented policy. Therefore, health rights litigation may serve to hold governments accountable to their laws and policies and aid implementation by empowering individuals and groups to enforce the laws more directly.[1396]Litigation may play a role in bridging these gaps and in bringing national health laws and policies in line with the health rights obligations created by human rights norms.[1397]

In terms of the implication of the justiciability of the right to health, the right to health can be 'a claim, interest, need, or demand which is cognizable under the law and which proceeds from moral precepts necessary for respect for human dignity.'[1398] The clause 'which proceeds from

[1392]Human Rights Committee, General Comment No. 24, Issues relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in relation to Declarations under Article 41 of the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.6. 1994 paras. 8

[1393] Human Rights Committee, General Comment No. 24, Issues relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in relation to Declarations under Article 41 of the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.6. 1994 paras. 8

[1394] M Craven, 'Legal Differentiation and the concept of human rights treaty in international law,' (2000) 11(3), European Journal of International Law, 497.

[1395]S. Gloppen, (n 555)

[1396] ibid

[1397] ibid

[1398] S D Jamar, 'The International Human Right to Health' (1994-1995)22(1) Southern University Law Review 1, 38

moral precepts' focuses attention on a broader and deeper foundation than mere positivist enactments.[1399] That is, a human right is founded not on pure expediency or efficiency, but conceptions of proper conduct and understandings of human nature beyond the material, instrumental, functional realm. [1400]

Justiciability in its procedural form can be used to provide processes and forums for engagement and to suggest concrete approaches to reducing poverty and health inequity and this can lead to legal accountability in the health sector. International human rights instruments thus provide not only a framework but also a legal obligation for policies towards achieving equal opportunity to be healthy, an obligation that necessarily requires consideration of poverty and social disadvantage'.[1401] This procedure can occur through a direct and indirect manner of justiciability.

Also, from the examples in chapter 5, the justiciability of the right to health in most instances can be a means of clarifying and giving meaning to the right.[1402] That is where the justiciability of the right to health is guaranteed, the content of the right to health can be easily clarified by the interpretation of courts. The Commission on Human Rights Special Rapporteur on the right to health has declared that 'the legal content of the right to health is not yet well established.'[1403]

However, this does not mean that the right to health is not a human right properly so called; it only shows that there are still a lot of clarifications needed in determining the legal implications of most of the contents of the right to health.[1404] What this establishes is the fact that the legal content of the right to health can be further established through a justiciability mechanism.[1405] Justiciability helps clarify the content of the right because courts are expert legal interpreters and as such can elucidate the content of the right and apply the right in context.[1406]

Justiciability is a process through which the right to health can be realised. This can lead to the meaningful enjoyment of the right to health. For instance, in affording remedies, it can lead to

[1399] S D Jamar (n 1398)
[1400] ibid
[1401] ibid
[1402] JP Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 (2), Yale journal of law & the humanities 3
[1403] Paul Hunt, 'The right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Report of the Special Rapporteur submitted in accordance with Commission Resolution '2002/31, E/CN.4/2003/58) para 39
[1404] ibid
[1405] P Devidal, 'Trading away human rights? The GATS and the right to education: a legal perspective' (2004) 2 (2) The Journal for Critical Education Policy Studies, 22
[1406] Marius Pieterse (n 23) 25

a systematic institutional change to prevent violations of rights in the future.[1407] Since the duty falls on the State to ensure that rights are adequately protected from factors or determinants outside the influence of the individual.[1408] The right to health should be conceptualised as 'something which the State ought to defend individuals or citizens in the possession of' such that society ought to defend for an individual in possession of his rights because doing so would bring about the greatest aggregate utility summed across the members of that society.[1409]

It is noted that sustaining the effort to realise a right to health also requires individual and societal commitments[1410]This means treating the right to health as a justiciable right will involve not only legal instruments for enforcement, but also require individuals, states, and non-state actors to internalize practices to enhance implementation and compliance with a right to health in international human rights policy and law.[1411]

However, it must be recognised that factors like social and environmental factors are outside the control of the individual and thus the State holds the duty to ensure that these factors do not hamper the rights of individuals to enjoy good health, the argument is then that the determinants of health are not always within the control or influence of individuals, the State ultimately should guarantee the protection and fulfilment of their right to health through the justiciability.[1412]

Also, justiciability with specific regard to the right to health as access to medicines can lead to the protection of the social determinants of health such as the provision of essential drugs, and equitable access to health care.[1413] As health is not only a human right issue but also a fundamental building block of sustainable development, justiciability of the right to health will result in poverty reduction and economic prosperity.[1414]

It is important to note here that the justiciability of the right to health at domestic fora may include a claim against private actors before a court even though non-State actors are not

[1407] Marius Pieterse (n 23) 25
[1408] Ronald Dworkin, 'Rights as Trumps' in *Theories of Rights* (J Waldron (ed) Oxford University Press, 1984) 153- 167
[1409]Mariarosaria Taddeo, 'Politics and Individual rights' (2012) Political Philosophy: From Plato to NATO <http://taddeo.philosophyofinformation.net/ppfptn/ppfptn-class%2010.pdf> accessed on 12 February 2018
[1410] ibid
[1411] ibid
[1412] ibid
[1413] *Treatment Action Campaign* 2002 (5) SA at 18 paras. 49–51, *Minister of Health v New Click South Africa (Pty*) Ltd 2006 (2) SA 311 (CC)
[1414] K G Young and J Lemaitre (n 1151) 180-216

charged with specific obligations under the CESCR or general international law. To the extent that they can effectively discharge economic and social rights in substitutions for the State, they have been viewed by some courts as legitimate duty-holders and have accepted the justiciability claims brought against them.[1415]

In the case between *Etcheverry v Omint*,[1416] the applicant who was an HIV sufferer was provided membership to a private health plan by his employer. When he later became redundant, he sought to continue his membership through private funds, but the insurance company refused. The Argentine Supreme Court held that private health providers were under a duty to protect the right to health of their customers and that their special relationship was not simply of a contractual nature.[1417]

Notably, some conceptual and practical developments originating from the international, regional and domestic human rights law shows how ESC rights generally offer a range of possibilities for justiciability.[1418] Examples of these developments include the distinction between negative and positive obligations, the different levels of State duties (duties to respect, protect and fulfil and the interconnection between civil and political and ESC rights as discussed earlier.[1419] It also includes the concept of reasonableness, minimum core content and the difference between duties of immediate effect and duties subjected to a progressive realisation which has also been discussed.[1420]

6.2 The Role of Justiciability in Socio-Economic Rights Compliance

The implementation and compliance with international socio-economic and cultural rights depend to a large extent on the political will and economic capacity of a state to comply with international standards.[1421] The effective implementation of the international standards and norms of these rights requires an array of activities.[1422] These activities improve compliance by the states themselves, such as enacting national laws or administrative practices to comply

[1415] K G Young and J Lemaitre (n 1151) 180-216
[1416] *Etcheverry v Omint Sociedad Anonima y Servicos, Judgment* (13 March 2001)
[1417] ibid
[1418] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights; Comparative Experiences of Justiciability (Human Rights and Rule of Law Series: N0. 2, 2008)
[1419] ibid
[1420] See chapter 2 of thesis
[1421] C Chinkin, 'The Protection of Economic Social and Cultural Rights Post-Conflict' (2008) OHCR available at <https://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> accessed on the 03 June 2019
[1422] ibid

with human rights standards, educating the population, establishing national human rights institutions, improvement of minimum health standards, increasing participation in government and other actions.[1423]

Justiciability of socio-economic and cultural rights which is the focus of this thesis forms part of the strategy for the compliance, implementation, realisation and protection of the rights.[1424] Justiciability can serve as an important and motivating force for legislators, inspiring them to push for compliance and the courts can hold the executive accountable for their human rights abuses. [1425]

A justiciable socio-economic and cultural rights guarantee that a judicial, quasi-judicial or related body can seek a remedy whenever there is a violation of any of the socio-economic and cultural rights.[1426] As such justiciability ensures the protection of these rights when violated by giving access to mechanism that can protect the rights as provided in a legal instrument of a particular state.[1427]

The judicial body generally is an independent, impartial body and the hope of the ordinary person in any society, with expertise in solving disputes and balancing competing interests.[1428] Therefore the exercise of the power of judicial review can enhance deliberative and participatory democracy, by holding the legislature and executive accountable for meeting their constitutional commitments and by forcing them to respect and protect the rights of the people in a particular state.

The guarantee of an independent domestic judiciary is crucial to the justiciability of socio-economic rights, because the judiciary in a state is arguably the body that plays the most important role in the compliance and enforcement of international human rights in a state.[1429] In carrying out its duties, they guarantee individual rights, enable citizens to challenge the government's inaction legally and have the authority to review whether the government's action is in compliance with the existing laws of the state.[1430] An independent judiciary can

[1423] C Chinkin (n 1421)
[1424] ibid
[1425] Harmen Van der Wilt (n 858)
[1426] JM Moreno 'The International Covenant on Economic, Social, and Cultural Rights' in *International protection of human rights: Achievements and Challenges* (FG Isa and K Feyter eds, 2006) 159.
[1427] ibid
[1428] ibid
[1429] ibid
[1430] ibid

give its decisions based on legal principles rather than government preference and can trump government policies that are considered as pulling countries away from human rights compliance.[1431]

Justiciable rights enable people to insist that due attention be paid to their needs and to hold the State accountable for how it carries out its obligations to fulfil, protect and respect their needs.[1432] Therefore the justiciability of the right to health as well as other socio-economic rights has the potential to enhance State accountability and participatory democracy which enables meaningful participation in democratic life and consequently empowers people to make more effective claims for social goods. [1433]

It can be argued that the theory of justiciability of socio-economic rights should be concerned with State duties and obligations as well as remedy the injustices faced by individuals enjoyment of their rights.[1434] The rights would only be beneficial to the right -holders only when the rights bring about positive change in their lives otherwise the whole purpose of a human rights based discourse on socio-economic rights would be purposeless. It must be stated that in accordance with the theory of transnational legal process theory, justiciability serves as means to achieve compliance with international law through interpreting the socio-economic and social rights that leads to the internalization or domestication of norms.

6.2.1 The Direct role of courts in the Justiciability of Socio-Economic and Cultural Rights

The role of courts is crucial towards human rights compliance.[1435] Courts can be responsible for making sure that states respect, protect and fulfil their obligations towards the realisation of socio-economic rights. Then, judicial and quasi-judicial bodies not only protect but also promote the socio-economic rights by guaranteeing and enforcing these rights.[1436]

Since, the justiciability of a right renders the state accountable for action or inaction according to international, regional and national legal norms, judicial enforcement of these rights has a role in granting remedies in cases of violation of the rights. More so, a finding of a violation of

[1431] JM Moreno (n 1426)
[1432] Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co. Ltd., 2010) 66-71
[1433] Nikki Stein, 'A better life for all': using socio-economic rights litigation to enforce the principles governing public administration', (2018) 34(1), South African Journal on Human Rights, 91-111
[1434] ibid
[1435] ibid
[1436] ibid

socio-economic rights in any individual case can have a large impact and lead to systematic institutional change and consequently benefit other victims and it can also effectively prevent future violations of the right in question.[1437] For example in the South African TAC case explored in chapter 5, the case and its activities bear much of the credit for the protective reach of the right to health into the government's HIV/AIDS policy in South Africa.[1438]

Secondly, judicial bodies play a viable role in the clarification of the scope and the content of socio-economic and cultural rights and the specification of the different rights available to individuals.[1439] Therefore, to ensure the enjoyment and, provision of people with shelter, education, health and other basic socio-economic rights, states and governments are usually called upon to become involved in a 'positive' manner.[1440] Thus, through the justiciability of these rights, the courts when called upon can ensure that governments take positive action having put the availability of resources into consideration to make delicate and financial policies for the benefit of the people in the state.[1441] Also, this was demonstrated in the South African case between *Lee v Minister of Correctional Services.*[1442]

Thirdly, the role of courts can give a voice to the marginalised group in a democratic society which often neglects their interests.[1443] Indeed, the distinctive nature of the South African Constitutional court's approach is that it is respectful of democratic prerogatives and the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.[1444] For instance, as discussed earlier in chapter 5, the court held in *N v Government of the Republic of South Africa* that lack of access to anti-retroviral medication at Westville Prison by the Department of Correctional Services' was a violation of their obligations under sections 27 and 35(2)(e) of the Constitution and

[1437] Nikki Stein (n 1433)
[1438] *Treatment Action Campaign 2002* (5) SA at 18 paras. 49–51; 22 Para. 71
[1439] International Commission of Jurists (ICJ), Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability, 2008, Human Rights and Rule of Law Series No. 2, p. 75.; Key concepts on ESCRs - Can economic, social and cultural rights be litigated at courts? <http://www.ohchr.org/EN/issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx> last visit on 10 December 2014
[1440] Christian Dustmann & Albrecht Glitz, 'Migration and Education', Norface Migration, (2011) Discussion Paper, Handbook of the Economics of Education, Edited by E. A. Hanushek, S. Machin and L. Woessmann.
[1441] Gerhard Erasmus, 'Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments' (2004) 32 Int'l J Legal Info 243
[1442] *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC
[1443] ibid
[1444] Sunstein C., 'Social and economic rights? Lessons from South Africa', Public Law and Legal Theory Working Paper No. 12, University of Chicago in Design Democracy, *What constitutions Do* (, Oxford University Press 2012) p.221-37.

notwithstanding the prisoners' status, the court ordered the Department to provide the applicants, as well as all similarly situated prisoners at Westville prison, with immediate access to the required treatment at an accredited public health facility.[1445] More so, a judgment of a court on any socio-economic and cultural rights issue can bring a state's violation of a right in the public eye and potentially attract the media's attention.[1446]

An innovative judicial remedy can equally occur in a constitutionally legitimate manner in the adjudication of economic social and cultural rights.[1447] This is because the courts are well equipped to deal with difficult and complex legal issues with socio-economic implications.[1448] This point was also validated as follows:

> 'Courts are… generally acutely conscious of the limitations of their competence, of the democratic legitimacy which attends policymaking by Parliament and by an executive accountable to Parliament, and of the subsidiary and limited role which the Courts may accordingly properly play in checking executive and legislative action. It does not follow that the Courts can or should play no role. We might not wish the Courts to decide which is the best means of securing progressive implementation of economic or social rights; but we might, at the same time, decide that it would be useful to allow them, for example, to adjudicate on whether the government has addressed itself to the question of how best to secure that progressive implementation, and whether or not, in doing so, it has discriminated in a manner incompatible with the Covenant...'[1449]

Therefore, when an issue on socio-economic rights is brought upon the court, it allows a state or government to prove and show that it is making progress towards the full realisation of such rights.[1450] By doing so the courts ensure that a particular state justifies its use of the public resources at its disposal.[1451] This is vital towards the implementation of socio-economic and

[1445] *N v Government of the Republic of South Africa* 2006 (6) SA 543 para 30
[1446] Katie Boyle (n 1384)
[1447] ibid
[1448] ibid
[1449] Gerhard Erasmus (n 1380)
[1450] ibid
[1451] ibid

cultural rights, the courts intervene and impose decisions that will benefit the applicants or the general public[1452]

Similarly, the court as an accountability mechanism in the implementation of socio-economic and cultural right can offer an effective remedy for a violation of the rights if the legislature and executive have failed to comply.[1453] The adjudication of economic social and cultural rights and the legal enforcement of the rights can occur through a 'myriad of forms' some of which offer greater protection than others.[1454]

For example, the jurisprudence of the Constitutional Court of South Africa as analysed in chapter 5 employs the reasonableness test as the means through which to assess constitutional compatibility as initially set out in the popular *Grootboom* case.[1455] In this case, the court identified that the difficulty in giving substance to the ESC rights in the constitution related to how best to enforce the rights in any given case:

> Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state 'to respect, protect, promote and fulfil the rights in the Bill of Rights' and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.[1456]

This excerpt takes us beyond the role of courts in the implementation of the socio-economic rights in its local context to the remedial issue. Thus, when courts grant a remedy, it can be instrumental in ensuring the enforcement of the remedy by making an order.[1457] For instance, in the same *Grootboom*'s case, the Constitutional Court in a detailed judgment held that it was necessary and appropriate to award a declaratory order. The order set out the shortcomings in the state's housing policy and declared that steps must be taken to remedy these shortcomings.[1458] It suggested certain means to achieve this result and required the state to

[1452] Gerhard Erasmus (n 1380)
[1453] Malcolm Langford (n 440)
[1454] ibid
[1455] *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169
[1456] ibid
[1457] ibid
[1458] ibid

devise and implement, within its available resources, a comprehensive and coordinated program for the progressive implementation of the right to access to adequate housing.[1459]

Also, the Court appointed the Human Rights Commission to monitor the implementation of this order. An important implication of this type of order is that a yardstick is then provided to the applicants which makes it easier for them to monitor the implementation and, if necessary, to ensure the implementation of the judgments through subsequent litigation.[1460] The Constitutional court, in this case, has demonstrated the important role of courts in the implementation of the socio-economic rights and thus refined the meaning of a justiciable right.

South African courts have played significant roles by giving judgments in favour of parties they believe that their constitutionally guaranteed rights have been denied, disrespected and unfulfilled by the government.[1461] It is necessary to mention the case of *Certification of the Constitution of the Republic of South Africa*, the Constitutional Court, mindful of financial implications of justiciability of socio-economic rights stated thus:

> It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits... The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise ... [the Court said] many of the civil and political rights entrenched in the [Constitution] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.[1462]

[1459] *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169
[1460] ibid
[1461] *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26
[1462] See paragraphs 77 and 78 of the case of *Certification of the Constitution of the Republic of South Africa,* 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

This case has been described as a pillar for all other socio-economic and cultural rights cases that have been decided in South Africa.[1463] The Courts in most of the South African cases always made sure that the government fulfilled its duties to ensure the progressive realisation of socio-economic rights.[1464] Therefore that the government must have plans in place to ensure that people's guaranteed socio-economic rights are realised, in progression and not regression.[1465]

However, it must be stated that the direct justiciability of the socio-economic and cultural rights does not guarantee that the government must ensure that every person has access to all the socio-economic and cultural rights at the same time.[1466]All that is required is that the government fulfils its duty by taking reasonable steps in providing and also making sure that there is a progressive realisation of socio-economic and cultural rights. For instance, in the case of *Mazibuko v City of Johannesburg*, the Constitutional Court of South Africa noted thus:

> The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the state would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.[1467]

The inclusion of socio-economic rights in a Constitution is a step towards ensuring respect, promotion, and protection of the rights. It is suggested that when including socio-economic rights in the constitution, it should be crafted in a language that imposes an obligation on the

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[1463] *Minister of Health and Others v Treatment Action Campaign and Others, Khosa & Others v The Minister of Social Development and others, Mahlaule & others v The Minister of Social Development & Others, Soobramoney v Minister of Health KwaZulu-Natal and Government of the Republic of South Africa and Others v Grootboom and Others.*

[1464] Gerhard Erasmus (n 1380)

[1465] ibid

[1466] ibid

[1467] See the case of *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC), paragraph 40 where it is stated that '[the concept of progressive realisation recognizes that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved'.

state to act, and prescribes remedies in the event of the violation of the obligations.[1468] Fombad has validated this point by quoting thus ' a constitutionally entrenched right is only potentially effective if it is formulated in a language that creates a sense of obligation on the State and is backed by a credible mechanism for ensuring that the State discharges its obligations'.[1469]

6.2.2 The Indirect role of courts in the Justiciability of Socio-Economic and Cultural Rights

As discussed earlier, indirect justiciability occurs where the socio-economic and cultural rights are not expressly provided as being justiciable in a constitution, but the courts can through an expansive interpretation of other human rights protect these rights for example the Indian and Columbian cases analysed in chapter 5. It is important to mention another case, the *Francis Coralie Mullin's* case where the Indian Supreme Court explicitly declared that: [1470]

> [t]he right to life includes the right to live with human dignity and with all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. [1471]

The Indian experience shows that the constitutional dilemma of declaring socio-economic and cultural rights can be dealt with by courts in such a way that the people are still guaranteed their ESC rights, this judicial activism is a dynamic role of justiciability of the socio-economic and cultural rights.[1472] The Indian judiciary has, through creative interpretation, pioneered a process of interpreting civil and political rights in a manner that would help give a dynamic legal character to economic socio and cultural rights.[1473] The Indian judiciary succeeded in

[1468] C M Fombad, 'Cameroon's Emergency Powers: A Recipe for (Un)Constitutional Dictatorship?' (2004) 48 (1) Journal of African Law, pp. 62–81
[1469] ibid
[1470] *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516 at 529.
[1471] *ibid*
[1472] N T Okiyr, 'Toward a Progressive Realisation of Socio-economic Rights in Ghana: A Socio-legal Analysis' (2017)25 (1) African Journal of International and Comparative Law, pp. 91-113
[1473] ibid

dispelling the perceived constitutional dilemma brought about by the Directive Principles of State policy.[1474] Through their expansive interpretation of these principles, the courts in that country have shown that the law can be used to fight for the masses.[1475]

Also, another role of justiciability in the implementation of the economic socio and cultural rights is that treaty bodies like the Human Rights Committee can protect social and economic rights through their task to afford international protection to those rights explicitly covered by the treaties in question. [1476] This means that, under the integrated approach, civil and political rights are instrumental for the effective protection of economic, social and cultural rights as a violation of these rights may in certain circumstances give rise to a breach of a classical civil and political rights instrument.[1477]

Furthermore, the Human Rights Committee and the European Court of Human Rights have proffered two ways through which an integrated approach can be adopted, the first is by the indirect way in which elements of economic, social and cultural rights are considered when dealing with the substantive provisions of the International Covenant on Civil and Political rights and the European Convention On Human Rights (ECHR) respectively.[1478] The second way of adopting the integrated approach is said to be a direct integrated approach.[1479] This is done under Article 26 of ICCPR and Article 1 Protocol No. 12 ECHR.

Article 26 of the ICCPR provides as follows;

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[1480]

[1474] N T Okiyr (n 1411)
[1475] ibid
[1476] M. Scheinin (n 423) 18
[1477] ibid
[1478] International Covenant on Civil and Political Rights (adopted 16 December. 1966) and European Convention on Human Rights as amended (ECHR)
[1479] ibid
[1480] International Covenant on Civil and Political Rights (ICCPR) art 26 and European Convention on Human Rights as amended (ECHR) art 1 (12)

This article which is similar to the Article 1 Protocol No. 12 ECHR provides an autonomous prohibition clause and so can be applied directly when enforcing socio-economic and cultural rights, it does not require a link to a substantive provision enshrined in the ICCPR or ECHR.[1481] Both provisions can be applied directly to rights protected by other human rights instruments.[1482] The advantage of the integrated approach adopted is that elements of economic, social and cultural rights can be subject to adjudication by human rights bodies that can provide for stronger protection of these rights.[1483] Also, this approach provides the treaty bodies with the possibility to make complex assessments and to get a step closer to the proper and holistic protection of the entire palette of human rights.[1484]

Finally, it must be noted that the implementation of the economic social and cultural rights in a given society can only be realised over time.[1485] Without undermining the importance of justiciability, other factors have to exist alongside justiciability to guarantee the implementation of socio-economic and cultural rights. Justiciability with other factors like the political will to enforce the right and genuine commitment on the part of the government to implement the right would lead to the realisation of the right to health as conceived under human rights law. Justiciability as a concept is not absolute, it is usually considered on a sliding scale.[1486]

6.3 Critical Analysis of the Effect and Implication of the Justiciability to the Right to Health

It is important to reemphasise that the enjoyment of the right to health is an obligation on all States.[1487] Human rights protection is not a simple announcement, it is an obligation, the infringement of which is meant to carry legal consequences.[1488] This statement sums up the need for the justiciability of economic, social and cultural rights generally. Justiciable rights will ensure that when violations have occurred, there exists a right to an effective remedy that

[1481] International Covenant on Civil and Political Rights (ICCPR) art 26 and European Convention on Human Rights as amended (ECHR) art 1 (12)
[1482] ibid
[1483] V. Mantouvalou, (n 572) 583
[1484] ibid
[1485] Jenifer Sellin, (n 1281) 445-464
[1486] ibid
[1487] Daniel Tarantola et al (n 57).
[1488] ibid

provides an opportunity to hold violators to account, deters others from violating fundamental human rights, and discourages impunity.[1489]

The effect and implication of justiciability of the right to health is such that the justiciability is instrumental just as mentioned on the roles of the justiciability on socio-economic rights would clarifying the scope of the right to health and provides innovative ways to adjudicate on issues concerning the right.[1490] The justiciability of the right to health in a given state can help other states to understand how economic, social, and cultural rights can be adjudicated to better meet their obligations under international law.[1491]

It cannot be over-emphasised that if a state is serious about genuine enforcement and enjoyment of the right to health then it must take steps to ensure that effective judicial remedies are available, at least as a means of last resort.[1492] If the right to health is justiciable, only then can courts and other bodies ensure that States are held accountable for their actions, in accordance with the international, regional, and domestic standards.[1493]

In Colombia for example, there has been significant progress in the recognition and protection of the right to health.[1494] Through litigation, many people have had to fight to enjoy effective access to health care and this indicates the great impact of justiciability of the right to health has a great impact on the enjoyment of the right.[1495] If the right was non-justiciable then the people would not have been able to fight successfully for their rights.[1496]

The impact of constitutional jurisprudence on the protection of the right to health in Colombia is noteworthy as thousands of people are said to now live with dignity because a decision has granted them access to a medication or medical service; indeed, many of these people would have died without such judicial intervention.[1497] Thus, the structural remedies turn of the Colombian constitutional jurisprudence has embraced a new way to deal with the progressive realisation of a fundamental right.[1498]

[1489] Daniel Tarantola et al (n 57).
[1490] JP Ruger (n 1402) 3
[1491] ibid
[1492] Katie Boyle and Edel Hughes, 'Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights' (2018) 22 International Journal of Human Rights, 43-69
[1493] Ibid
[1494] Arrieta-Gómez & Aquiles Ignacio (n 132)
[1495] ibid
[1496] ibid
[1497] ibid
[1498] ibid

Also, the effect of the structural decision T-760 in Colombia is such that it enabled an analysis of health system controversies as part of a broader political system. It moved beyond the facts of individual cases to promote solutions that would overcome larger issues, such as the opportunity costs that regulatory policies allowed for several years without effective controls (for example, not providing timely health services to people with high-cost diseases, such as HIV/AIDS, to prevent them from getting worse). The court sought to go beyond protecting access to necessary medicines to ensure the effective enjoyment of a higher standard of health for all Colombians.

Most significantly, decision T-760 had at least three positive impacts: it helped establish the constitutional roots of the right to health and its justiciability (a living reform of the Constitution); it guaranteed better access to necessary health services; and it ensured that public health policies are rights-oriented, including through the promotion of reasonable limits and public participation in decision making.[1499] The Colombian case reveals judicial intervention as a legitimate way to extend pressure on the government to act according to constitutional boundaries.[1500] This is a commendable effect of justiciability of the right to health and should inspire the Nigerian judiciary.[1501]

Also, the South African *TAC* case provides a good example of how the justiciability of the right to health can play an important role in ensuring that accessibility and affordability of medicines are taken seriously by the state as part of an enforceable right.[1502] The political impact of the judgment in the *TAC* case was immense that one may argue that the impact of individual socio-economic rights victories may extend beyond their immediate benefit for successful litigants, to also influence social and political processes which will then, as a result, produce both individual and more systemic socio-economic gains over time.[1503] As such, it may inspire other developing countries like Nigeria to deal with similar public health problems.

Justiciability of the right to health can also lead to the protection of the right to health on a preventive stage. Based on the legal obligations and the general principles of international law, that ensures the enjoyment of the right to health, a state will adopt a national strategy to respect, fulfil and protect the right to health once it knows that the violation of this right could raise

[1499] Decision T760 of 2008
[1500] Arrieta-Gómez & Aquiles Ignacio (n 132)
[1501] ibid
[1502] *Treatment Action Campaign 2002* (5) SA at 18 paras. 49–51; 22 para. 71
[1503] Sandra Liebenberg (n 1432) 66-71

claims in front of courts.[1504] Thus most of the case laws analysed in chapter 5 brought about better protection of the right for the enjoyment of the people.[1505]

Justiciability of the right to health can create effective remedies when a violation occurs. As analysed in chapter 5, courts can employ a variety of different types of judicial review in the determination of rights to health matters including reasonableness, progressive realisation, minimum core obligation, policy/implementation gap test, legality, proportionality, and procedural fairness.[1506] And courts are well equipped to develop innovative remedies to identify the most appropriate way of determining a case.[1507] There are lots of case law examples from different jurisdictions that have been mentioned in support of the view that courts can give remedies that are effective in a case of violation of socio-economic rights.[1508]

Also, the courts in affording remedies in cases of clear violations can cause a systematic institutional change to prevent violations of rights in the future.[1509] Although litigation can, in some instances motivate people to take action in case of violation, it is believed that litigation is somehow complex in effect.[1510] For instance, the judgment in *Grootbooms*' case ensured a fundamental change occurred in the state's approach to the law but the individual rights of the plaintiff were not enforced.[1511]

Justiciability plays a very important tool for judges to fulfil their role in democracy.[1512] As stated earlier, the implementation of laws, rules and policies towards the realisation of health rights is political and majorly rests on the activities of all State actors.[1513] Therefore, the effective protection of human rights requires a strong legal culture, which provides procedural

[1504] Sandra Liebenberg (n 1432) 66-71
[1505] The Indian, South African and Columbian cases as discussed in chapter 5 reveal that courts are mostly interested in ensuring that health rights are protected and that states fulfil their obligations as anticipated by the laws creating them.
[1506] Jonathan R. Siegel, 'A Theory of Justiciability', (2007) 86 Tex. L. Rev. 73
[1507] ibid
[1508] The Supreme Court of Appeal in *Minister of Health and Others v Treatment Action Campaign and Others* stated with effect that the courts have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.
[1509] ibid
[1510] ibid
[1511] *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169
[1512] R J de Beer and S Vettori, 'The Enforcement of Socio-Economic Rights' (2007) 10 Potchefstroom Elec LJ 1
[1513] ibid

venues for allocating responsibility for the violations of such rights. This enables people to consider every act and omission as a potential legal dispute that is actionable in the courts.[1514]

Justiciability creates an avenue for judges to bridge the gap between the law and society and for protecting the constitution and democracy.[1515] The courts usually maintain their role in a democracy without fear or tension from the government and as such can create effective remedies in the form of orders and reliefs in cases of socio-economic rights.[1516] However, it is worthy to note that courts may not always be the best institution to resolve disputes. Litigation comes with its complexities such as strict rules, non- flexibility, time-consuming, and usually not cost -efficient.[1517]

Lastly, it must be noted that the justiciability of the right to health can bring the opportunity for the reforming of every element that is inconsistent with the content of the right to health.[1518] This is a repressive effect of justiciability and it is evident from the different stages and reforms that occurred towards the road to the justiciability of health rights as discussed in chapter 5.

Notwithstanding, the need and significance of the justiciability of the right to health, it must be stated that this thesis recognises that there are limits to the justiciability of the right to health.[1519] The Colombian constitutional jurisprudence recognized the existence of reasonable limits to the right to health, which was established through a participatory and transparent process. This led to the constitutional court adopting a deliberative and self-reflection process.[1520]

Thus, within the Colombian legal framework, the Ministry of Health undertakes a public and open process to decide what services to exclude from the benefits plan. Therefore, the limits are acknowledged and in an equitable manner and the health system can deny observing requests for including certain health care services where necessary. [1521] That means the health system can say 'no' to requests for including certain health care services based on fairness and respect for human dignity.[1522]

[1514] A A Agbor, 'The Role of the Judiciary in the Promotion of Democracy and Human Rights in Cameroon', (2015) 8(1-2), African Journal of Legal Studies, 145-173.
[1515] R J de Beer (n 1512)
[1516] ibid
[1517] Lorna McGregor et al, 'Should National Human Rights Institutions Institutionalize Dispute Resolution?' (2019) 41 (2) Human Rights Quarterly, p. 309-339.
[1518] ibid
[1519] ibid
[1520] See Resolutions 5267 of 2017 and 687 of 2018).
[1521] Arrieta-Gómez & Aquiles Ignacio (n 132)
[1522] ibid

It is important to note that courts due to the legal standards and principles that transpire from judgments on the right to health matters have the effect of reining in policymakers.[1523] This occurs as a result of the regulatory processes in that a Court's interpretation of the constitutional principles of legality or procedural fairness delineates how future policies must be formulated and to their substantive content.[1524] In effect, judgments may significantly restrict regulatory possibilities, which could be problematic in a range of conceivable instances.[1525] Courts are therefore advised to often avoid articulating substantive standards in their judgments on the right to health cases unless this is necessary.[1526]

Again, judgments vindicating the right of access to health care services may sometimes have the effect of derailing, disrupting, or retarding state efforts at health system transformation, even as they protect the health-related interests of vulnerable citizens. However, it has been argued that this is not primarily due to any substantive feature of the health right judgments themselves, but rather how they are received and appropriated by the political bodies towards which they are directed and by the movements and pressure groups within the external political environment to which they relate.[1527]

For instance, in South Africa where socio-economic rights, including the right to have access to health care services, are justiciable under the Constitution. The Constitution prescribes that these rights should be realised progressively, within the available resources of the state.[1528] Budgets and other resource-related dimensions of social service delivery must inevitably feature in almost all instances of socio-economic rights adjudication.[1529]

Having discussed the effect and implication of the justiciability of the right to health, it is necessary to redirect our focus back to Nigeria and analyse how justiciability can foster the justiciability of the right to health in Nigeria.

[1523] J Berger & A Hassim 'Regulating private power in health' (2010) 11 ESR Review 6
[1524] ibid
[1525] ibid
[1526] ibid
[1527] Marius Pieterse (n 23) 25
[1528] P Lenta 'Democracy, rights disagreements and judicial review' (2004) 20 South African Journal on Human Rights 1 3
[1529] Constitution of the Republic of South Africa 1996, secs 26(2) and 27(2) of the

6.4. How can Justiciability foster a Better Protection of the Right to Health in Nigeria

As discussed in chapter 2 of this thesis, the obligations to respect, protect and fulfil the right to health is a responsibility upon States and they have the duty to move as expeditiously and effectively as possible towards the full realisation of the right. This is in accordance with the principle of progressive realization which anticipates that states prioritize the implementation of the rights in the CESCR to the fullest extent of its capacity, within a reasonable time, and the minimum core obligation of States to ensure the satisfaction of at the very least, minimum essential level of the right to health.[1530]

Also, the Nigerian Constitution states that the national resources of the country shall be deployed to the attainment of the maximum welfare and happiness of every citizen.[1531] The main obstacles that hinder the realisation of health rights in a State are poor allocation, distribution or efficiency in the management of available resources. It is averred that justiciability of the right to health can foster better protection of the right to health and guarantee the right to access in a healthcare system where resources are distributed according to a fair process, there is transparency and there is adequate use of evidence and principles of justice, the participation of stakeholders, accountable decision-makers and ultimately the respect for the rule of law.[1532]

The rule of law is expected to be the guiding principle of governance since it is the foundation of good governance and it describes a situation where the law rules or reigns,[1533] this presupposes a situation where everything is done in accordance with law thereby excluding any form of arbitraries.[1534] The rule of law is usually adopted by democratic societies, where the citizens in relationship amongst themselves are equal before the law and with the government bodies and their agencies are beholden unto the law which shall not be ignored by anyone except at his peril, and if by the government, this will promote anarchy and executive indiscipline capable of wrecking the organic framework of the society.[1535]

[1530] There are exceptions to this rule as discussed in chapter 2.3.6 where the realisation of rights cannot be achieved and may even be restricted or derogated from.
[1531] Constitution of the Federal Republic of Nigeria, 1999, s 16(1)(2)
[1532] Sam Foster Halabi (n 205)
[1533] Mohammed Mustapha Akanbi and Ajepe Taiwo Shehu, 'Rule of Law in Nigeria' (2012) 3 JL Pol'y & Globalization 1
[1534] ibid
[1535] ibid

It is important to reemphasise that justiciable health rights would also guarantee easy access to Courts. Access to justice implies access to social and distributive justice and the extent to which one can have distributive justice in any system is largely determined by the level and effectiveness of social justice in the country.[1536] It is argued that without access to justice, it is impossible to enjoy and ensure the realisation of socio-economic and cultural rights. It involves the substantive and procedural mechanisms existing in a society designed to ensure that citizens have the opportunity of seeking redress for the violation of their legal rights within that legal system.[1537]

Also, access to justice is an important tool for assessing the rule of law in society, the quality of governance in a society as well as the democracy in society. When there is access to justice, there must be some element of fairness and equity in the system and this leads to the guarantee and realisation of human rights.[1538] The relationship between access to justice and human rights protection is unique and it is only when individuals have access to the courts that they can espouse and seek the protection of their human rights.

In the case of Nigeria, there appears to be a lot of factors that lead to a systemic inability of the legal order to guarantee access to justice in the country.[1539] Also, the poor management of socio-economic state of the country has made the conditions of existence extremely difficult for people to live and therefore issues concerning human rights protection are taken as unnecessary and secondary. Professor Claude Ake put the importance of these obstacles in their proper context and perspective when he observed thus:

> For reasons which need not detain us here, some of the rights important in the West are of no interest and no value to most Africans. For instance, freedom of speech and freedom of the press do not mean much for a largely illiterate rural community completely absorbed in the daily rigors of the struggle for survival ... if a Bill of Rights is to make sense, it must include, among others, a right to work and to a living wage, a right to shelter, to health, to education. That is the least we can strive for if we are ever going to have a society which realises basic

[1536] Mohammed Mustapha Akanbi and Ajepe Taiwo Shehu (n 1533)
[1537] ibid
[1538] I. Gwangudi, 'Problems Militating against Women's Access to Justice in Nigeria' (2002)5 University of Maiduguri Law Journal pp. 13-14.
[1539] Nlerum S. Okogbule (n 745)

> human rights ... in Africa, if liberal rights are to be meaningful in the context of a people struggling to stay afloat under very adverse economic and political conditions, they have to be concrete. Concrete in the sense that their practical import is visible and relevant to the conditions of existence of the people to whom they apply. And most importantly, concrete in the sense that they can be realised by their beneficiaries[1540]

Indeed, the right to health as well as other socio-economic and cultural rights are important in Nigeria and must be given its effect in compliance with international human rights law. To a large majority of citizens, issues of human rights protection appear to be luxuries that they can hardly afford.[1541] The result is that it is often seen as an elitist past time designed to attract attention, even when the underlying objective is for the good of the people. There must be a way to strike a beneficial balance between the desire to maximize human rights protection and the importance of enhancing greater access to justice in Nigeria.[1542]

As explained by the compliance theory there is a link between democracy and the implementation of human rights. Democracy deals with how a country's values and practices conform to a given human rights standards and also with how it complies with international human rights norms.[1543] Democracy set values or preferences over rights, which are enshrined in human rights treaties or constitutions.[1544]It is also considered as a mechanism or tool that can be used as a means of holding leaders to account for their human rights compliance.[1545]

There are also mechanisms through which democracy can ensure compliance of human rights treaties and norms in a state, they are the guarantee of an independent judiciary, a vibrant civil society protection and through democratic elections, these elements are intertwined with the principles of rule of law in a state.[1546]

[1540] T. Akinola Aguda, *Human Rights and the Right to Development in Africa* (Lagos: Nigerian Institute of International Affairs, 1989), p. 26
[1541] Nlerum S. Okogbule (n 745)
[1542] ibid
[1543] Amy Street, 'Judicial Review and the Rule of Law; Who Is in Control?' (The Constitution Society, 2013) <www.consoc.org.uk/wpcontent/uploads/2013/12/J1446_Constitution_Society_Judicial_Review_WEB-22.pdf > Accessed on 17th February 2019
[1544] ibid
[1545] ibid
[1546] ibid

The state of Nigeria's democracy has unfortunately been constantly described as ailing and some sectors of the institutions that ought to protect our democracy that is the executive, the legislature, the judiciary, and civil society groups are not doing enough for the people.[1547]

There are barriers to strong democracy in Nigeria at all levels of government, conflict triggered by political competition and communal, ethnic, religious or resource allocation rivalries is rampant and poses a major threat to democracy. Corruption is still a huge problem and government institutions do not adequately engage with citizens or the private sector and lack the capacity to carry out their obligations. Civil society also lacks both the capacity and the resources to effectively engage with government and advocate for change. [1548]

Corruption, mismanagement and misappropriation of resources have been identified as a major factor that has affected the enjoyment of human rights generally. The UN Committee on Economic, Social and Cultural Right identified that the effective implementation of human rights is dependent on good governance and that a national health strategy and plan of action should be anchored on the principles inter alia of 'accountability' and 'transparency'.[1549]

Bad governance, in terms of accountability, transparency, corruption, economic mismanagement can have a devastating impact on human rights especially socio-economic rights.[1550] This is because the realisation of socio-economic rights has financial implications and it is wholly dependent on availability, proper allocation and efficient utilization of resources. Misuse often results in severe hardship and deprivation for those on the receiving end.[1551]

Good governance can bring about equity in healthcare and further lead to better protection of the right to health in Nigeria. Nigeria is home to one of the largest stock of human resources for health (HRH) in Africa only comparable to Egypt and South Africa.[1552] However, there are

[1547] Nlerum S. Okogbule (n 745)
[1548]--Democracy, Human Rights and Governance in Nigeria <https://www.usaid.gov/nigeria/democracy-human-rights-and-governance> September 2020 Accessed 20 October 2020
[1549] Anne Peters, 'Corruption as a Violation of International Human Rights', (2018) 29(4), European Journal of International Law, pp 1251–1287
[1550] UN Commission on Human Rights (UNCHR), Questions of the Violation of Human Rights and Fundamental Freedoms in any part of the world: Situation of Human Rights in Nigeria, report submitted by the special rapporteur of the commission on human rights, Soli Jehangir Sorabjee, E/CN/4/1999/36, 14 January 1999, at para 59.
[1551] Anne Peters (n 1549)
[1552] Human Resources for Health Strategic Plan 2008-2012 Federal Ministry of Health, Abuja (HRH Strategic Plan)

inequities in the distribution of health care infrastructures, facilities and human resources.[1553] Most of the health facilities are located in the urban communities thereby leaving people in the rural communities with lack of emergency services and care and suffer also communication difficulties such as distance to health care, transportation problems and all.

Also, by virtue of CESR, States Parties 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 realisation of this right includes those necessary for a. The provision for the reduction of the stillbirth-rate and infant mortality and 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 all medical service and medical attention in the event of sickness.[1554]

Given the responsibilities of the government in providing adequate healthcare for the people, the Nigerian government needs to increase its attention towards the realisation of the right to health and put health impact assessments before implementing any policies and decisions that undermine the right to health.[1555] A renewal of governmental commitment and investment of appropriate human and financial resources towards the realisation of the right to health is necessary.[1556]

The justiciability of the right to health in Nigeria can act to hold governments accountable to their laws and policies and aid implementation by making enforcement orders. Justiciability can play a significant role in bridging the policy and implementation gaps and bring national health laws and policies in line with the health rights obligations created by human rights norms.[1557]

Justiciability has a significant role to play in the protection and enjoyment health rights in Nigeria. It is the argument of this thesis that there are avenues and useful strategies to make health rights justiciability. These approaches are: the reasonableness test applied by South African courts, the integrative approach adopted by Indian courts and the intervention by the

[1553] 'Human Resources for Health Country Profile for Nigeria Africa Health Workforce Observatory Retrieved on 22/01/14' <www.unfpa.org/sowmy/resources/docs/library/R050_AHWO_2008_Nigeria_HRHProfile.pdf > Accessed on the 09 August 2019
[1554] B Toebes (n 150)
[1555] Manisuli Ssenyonjo, (n 91) 354
[1556] ibid
[1557] ibid

courts to extend pressure on the government to act within constitutional boundaries in the Columbia. The right to health as well as other socio-economic rights in Nigeria are gaining momentum but the pace is lethargic and the need for the justiciability of socio-economic rights is urgent.[1558]

Justiciability will also mean more judicial activism in Nigeria. Judicial activism is described as a necessary tool for growing the law and nurturing justice as it serves as an instrument for the effective social and economic engineer.[1559] It is used to describe a situation where the judges interpret laws to meet the demands of substantive justice notwithstanding the letters of the law including the Constitution.[1560] Thus, through justiciability of health rights in Nigeria, judges can interpret the laws in such a way as to better protect the human rights victims in society.[1561]

The integrated or indirect justiciability of the right to health as applied in the Indian and Columbian cases proves that the Nigerian courts notwithstanding the constitutional bar can offer a vibrant and proactive approach towards the interpretation of the right to health as meaningful and realistic rights.[1562] The courts can develop innovative means of adjudicating socio-economic and cultural rights cases by creating a broader interpretation of the right to life and the right to dignity to advance a positive right to health care.[1563]

It is relevant to state that justiciability can have an impact on healthcare policies. Health care policies are aimed at improving the efficiency, equity, and effectiveness of the health sector. Studies of health sector reform experiences in Nigeria have focused primarily on efficiency and design of reforms, largely neglecting equity and the frequent experience that reforms are not fully implemented.[1564] The reasons why implementation stalls remain unexplored in the health sector.

The Nigerian government is expected to at least use the minimum core obligation approach as a matter of principle and adopt state social policies that are geared to the progressive development of the conditions necessary to maximize the enjoyment of the health rights and

[1558] O Nnamuchi (n 551)1
[1559] P I Iweoha,' Judicial Activism in a State of Legislative Depression' (2010) 2 (1) Legislative Practice Review, 4
[1560] ibid
[1561] ibid
[1562] K Srinath Reddy et al (n 1083)
[1563] ibid
[1564]P F Omonzejele, (n 665)

not to backslide on its international human rights commitments.[1565] Failure to adopt a national strategic health policy for the progressive realisation of the right would be contrary to the overall objective of the human rights goals of attainment and enjoyment of rights for the benefit of people.[1566]

The National Health Policy (NHP) 2014 aims to meet the needs and aspirations of Nigerians to fulfil their health needs.[1567] The NHP describes the 'goals, structure, and strategy and policy direction of the health care delivery system in Nigeria.'[1568] The overall objective of the policy is 'to strengthen the National Health System such that it would be able to provide effective, efficient, quality, accessible and affordable health services that will improve the health status of Nigerians through the achievement of the health-related Millennium Development Goals (MDGs).'[1569] The policy is relevant towards the enjoyment of health and essential for the obligations to respect, fulfil and protect the right.

The NHP in Nigeria is also based on Primary Health Care (PHC) which is 'promotive, protective, preventive, restorative and rehabilitative to every citizen of the country within the available resources.' This is in line with the Declaration of the Alma Ata of 1978[1570] to which Nigeria has committed, the Alma Ata Declaration reaffirms that health is a fundamental human right and governments should be responsible for the health of the people.[1571]

The PHC is the first contact of individuals, the family and the community with the national health system bringing health care as close as possible to where people live and constitute the first element of a continuing health care process.[1572] The Nigeria national health care system pays greater care to the PHC. Tentatively, there are about 18,250 registered PHC in Nigeria, 3,275 secondary and 29 tertiary health facilities in Nigeria. [1573] This is inadequate and incapable of catering to health needs of a population of over two hundred million (200,000000). The PHC system suffers many challenges, from fragmented services, weak referral systems, poor

[1565] I A Noriega (n 320)
[1566] ibid
[1566] ibid
[1567] National Health Policy 2014, para 3.3
[1568] ibid
[1569] ibid para 3.6
[1570] The Declaration of Alma Ata adopted by the International Conference on Primary Health Care (PHC) jointly sponsored by WHO and UNICEF in 1978 via http://www.who.int/publications/almaata_declaration_en.pdf Accessed 01 April 2018
[1571] ibid
[1572] P F Omonzejele, (n 665)
[1573] ibid

infrastructure, shortage of essential and critical medicines and commodities, the poor linkage between the different levels of care, and there are serious gaps in access to basic health services.[1574]

The NPH 2004 in an attempt to fulfil its obligations of achieving 'health for all' provided for a health system which is delivered through a three-tiered system that is the federal government, the state government and the local government. This is also because health is on the concurrent legislative list in the Constitution.[1575] The Federal Government through the Federal Ministry of Health (FMOH) is responsible for coordinating tertiary health facilities which include the university teaching hospitals, federal medical centres and also provides highly specialized services for specific disease condition for the specific group of persons and serves as referral centres for patients from secondary and primary health centres.[1576]

Secondly is the state and the Federal Capital Territory (FCT) tier under the State Ministries of Health (SMOH). They are responsible for coordinating healthcare delivery and share the responsibility of planning for the organization of health in the state and also support the local health system.[1577] And lastly is the local government, the health care at this stage is the responsibility of the Local Government Authority (LGA) with the support of the SMOH within the overall National Health Policy.[1578]

It is important to state that the decentralization of the health system into three tiers has caused more harm than good as it has led to weakness in coordination between the three tiers of government. This makes it difficult for the FMOH to be responsible overall for the health of the nation as provided by the National Health Policy.[1579] Also, the policy itself does not provide specific guidelines or responsibilities of how these priorities are to be met within or outside of the health sector. The lack of specificity leaves the policy open to violations and misinterpretations. Consequently, it is difficult for the government to actualize its obligations to respect, protect and fulfil health rights.

[1574] B S C Uzochukwu, 'Primary healthcare Systems (PRIMASYS) Case study from Nigeria' (2017) Geneva: World Health Organization; 2017. Licence: CC BY-NC-SA 3.0 IGO. Cataloguing-in-Publication (CIP) data. CIP data <https://www.who.int/alliance-hpsr/projects/alliancehpsr_nigeriaprimasys.pdf?ua=1> Accessed 09 June 2019
[1575] The 1999 Nigerian Constitution, Second Schedule
[1576] ibid
[1577] ibid
[1578] ibid
[1579] ibid

The PHC system in Nigeria is appalling with only about 20% of the said PHC facilities working across Nigeria.[1580] The majority of the PHC facilities cannot provide essential health-care services and also have problems like poor staffing, inadequate equipment, poor distribution of health workers, poor quality of health-care services, poor condition of infrastructure, and lack of essential drug supply.[1581] In 2001, heads of state of African Union countries met and pledged to set a target of allocating at least 15% of their annual budget to improve the health sector.[1582] At the same time, they urged donor countries to 'fulfil the yet to be met target of 0.7% of their GNP as Official Development Assistance (ODA) to developing countries'.

However, many African countries, including Nigeria, fall short of the Abuja Declaration of 2001.[1583]Twelve years after African governments pledged to allocate at least 15% of their annual budgets to healthcare, it was reported in 2015 that just six countries had met this goal.[1584]However, the 2018 Nigerian Budget proposal, allocated N340.45 billion representing 3.9 percent of the N8.6 trillion expenditure plan to the health sector.[1585] The allocation is less than the 4.16 percent and 4.23 percent made to the health sector by the administration in the 2017 and 2016 budgets. This is way below the 15 percent target set.[1586] Sadly in 2021 , the allocation for health in the budget is only 7 percent and this includes funds for managing the Covid pandemic in Nigeria.[1587]

The inability of the National Health Policy to fulfil its purpose is not farfetched, because, in Nigeria, the right to health is still not recognised as a fundamental human right by policymakers. There is inadequate political commitment to health, leading to poor funding of health in general, and primary health care, the gaps in stewardship and governance as evidenced by lack of clarity of the role of government, at all levels in financing health care and also the inability of the health policy to clearly spell out how funds are to be allocated and spent at different levels of the health sector.[1588]

[1580] O Enabulele and J E Enabulele (n 688)
[1581] B S C Uzochukwu (n 1574)
[1582] ibid
[1583] ibid
[1584] Aloysius Ugwu and Gabriel Oke, 'We must bridge the funding gap for family planning in Nigeria's 2021 budget' (2021) <https://nigeriahealthwatch.com> Accessed on 02 February, 2021
[1585]ibid
[1586] ibid
[1587] ibid
[1588]Uzochukwu, Benjamin et al,' Health care financing in Nigeria: Implications for achieving universal health coverage' (2015)18 Nigerian journal of clinical practice

Perhaps there is a need for judicial control as well as an administrative body that has a firm constitutional basis to adjudicate over the financing of Nigeria's health sector to be able to ensure accountability on the part of the government officials who are saddled with the responsibility of providing and guaranteeing a good standard of health to the people. Thus, courts can apply the right to access a healthcare system in which resources are distributed according to a fair process, which includes duties of transparency, use of adequate evidence and principles of justice, the participation of stakeholders, and accountable decision-makers. This is a function of the justiciability of the right to health.[1589]

It must be re-stated that this thesis also argues that within the legal provisions of the right to health in Nigeria, the right to health can be justiciable by virtue of the African Charter which has been domesticated in Nigeria.[1590] The provisions, therefore, have the force of law in Nigeria and can be given full recognition and effect by courts in Nigeria.

It is relevant to examine at this stage the roles of certain bodies that can fit as quasi-judicial bodies to help stretch the justiciability of the right to health in Nigeria.

6.5 Are there Quasi-Judicial Bodies that can determine Health Rights issues in Nigeria?

At this stage, we analyse the bodies that have the features akin to the ones performed by quasi-judicial bodies in the determination of issues of health rights. As discussed in chapter 2 quasi-judicial bodies can play a great role in ensuring the justiciability of the right to health. To determine the extent of the justiciability of health rights in Nigeria, it is necessary to examine the role of the National Human Right Commission, the National Agency for Food and Drug Administration and Control and the Nigerian Medical and Dental Practitioners Council, all these bodies are in one way or the other relevant in regulating the health right sector in Nigeria. The National Health Insurance Scheme is also briefly discussed in this section as a mechanism that promotes equitable health right in a country.

6.5.1 The National Human Rights Commission

National Human Rights Institutions (NHRI) are generally defined as independent bodies with a specific mandate to promote and protect human rights and their institutional design varies

[1589] Uzochukwu, Benjamin et al (n 1588)

[1590] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap.10, Laws of the Federation of Nigeria 1990 with a commencement date of 17 March 1983.

from country to country.[1591] Also NHRI as an element of domestic constitutional culture, advance state compliance with ESC rights by negotiating tensions between the international, national and local levels.[1592] This a quasi-judicial body in Nigeria that is capable of determining issues on health rights.

The Nigerian National Human Rights Commission ('NHRC') was established by the National Human Rights Commission Act 1995 as amended by the NHR Act 2010[1593] in accordance with the United Nations resolution which enjoined all member states to establish human rights institutions for the promotion and protection of human rights.[1594] The Act established the Human Right Commission and empowers the Commission to amongst others 'undertake studies on all matters pertaining to human rights and assist the Federal, State and Local Governments where it considers it appropriate to do so in the formulation of appropriate policies on the guarantee of human rights.'[1595]

The Commission aims at creating an enabling environment for the promotion, protection and enforcement of human rights. It also provides avenues for public enlightenment, thesis and dialogue to raise awareness on human rights issues through its various departments and units.[1596] To carry out its duties, the Commission partners with local and international organizations working in the area of the promotion, and protection of human rights. This includes various communities and faith-based organizations as well as other civil society organizations, ministries, departments, and agencies of Government, and the Diplomatic Community.[1597]

By virtue of section 6(j) of the Act, the Commission receives and investigates complaints of alleged violations of human rights and makes an appropriate determination as deemed necessary based on the facts of each case.[1598] In discharging this task, the Commission receives and treats complaints on human rights violations or abuses from individuals, groups of persons, or communities for redress. Besides receiving complaints from the public, the Commission

[1591]Eibe Riedel et al, Economic, *Social and Cultural Rights in International* Law (1st edn Oxford 2014) 474
[1592] Ibid 488
[1593] The National Human Right Official Website <http://nigeriarights.gov.ng/> Accessed 20th March 2018
[1594] The UN Resolution 1992/54 of 1992 and General Assembly Resolution 48/134 of 199
[1595] The Human Right Commission Act 1995 as amended s 1
[1596] The National Human Right Annual Report 2016 <http://nigeriarights.gov.ng/downloads/NHRC%202016%20ANNUAL%20REPORT.pdf >accessed on the 30th March 2018
[1597] ibid
[1598] The Human Right Commission Act 1995 as amended s 6(j)

also proactively takes up investigation of cases of human rights violations/ abuses on its own and is empowered to make enforceable awards based on her findings. It is noteworthy that not all complaints received are admissible in the Commission.[1599]

It is noticeable that most of the complaints received by the Commission are complaints on civil and political rights; however, the Commission has increased its awareness through public enlightenment and other ways to state that it also handles socio-economic rights including the right to health.[1600]

Nevertheless, due to the constitutional limitation regarding the legal status of socio-economic rights in Nigeria, the enabling legislation fails to confer an express socio-economic rights mandate on NHRC.[1601] The effect is that the NHRC lacks a concrete domestic legal foundation to advance socio-economic rights in the country. For Beredugo and Viljoen, the NHRC has been hiding under the lack of legal foundation and failed to advance the protection and promotion of ESC rights as it does with civil and political rights.[1602]

It is important to state that there are lots of challenges to the effectiveness of NHRI ranging from the limitation of resources, mandate, capacity, and independence. These limitations have led suggestions that NHRI can be double-edged phenomenon, a label that reflects that NHRI as not sufficiently empowered to meet the social demands they generate.[1603]

In Nigeria, the NHRC has faced the challenge of taking effective proactive action on ESC rights generally. The key challenge being the lack of policy or action plan aimed at addressing the widespread violation of the ESC rights and the big issue of resource allocation which is fundamental to the progressive realisation of Esc rights and socio-economic policy. So, unless it decides to include ESC rights whether directly or indirectly, it cannot be considered as an avenue for the justiciability of the right to health in Nigeria.

[1599] The National Human Right Annual Report 2016 <http://nigeriarights.gov.ng/downloads/NHRC%202016%20ANNUAL%20REPORT.pdf >accessed on the 30th March 2018

[1600] ibid

[1601] A J Beredugo& F Viljoen, 'Towards a greater role and enhanced effectiveness of national Human Rights Commissions in advancing the domestic implementation of socio-economic rights: Nigeria, South Africa and Uganda as case studies' (2015)48(3) The Comparative and International Law Journal of Southern Africa, 401-430

[1602] ibid

[1603] The NAFDAC official website via< http://www.nafdac.gov.ng/> Accessed 01 April 2018

6.5.2 National Agency for Food and Drug Administration and Control (NAFDAC)

National Agency for Food and Drug Administration and (NAFDAC) was established by Decree 15 of 1993 as amended by Decree 19 of 1999 and now the NAFDAC Act Cap N1 Laws of the Federation of Nigeria, 2004.[1604] The Act mandates NAFDAC to regulate and control the manufacture, importation, exportation, distribution, advertisement, sale and use of food, drugs, cosmetics, chemicals, detergents, medical devices and other products.[1605]

The importance of such an agency cannot be understated in this discussion as access to medication is a fundamental element to realising the right to health and under international law; countries are expected to pursue policies that ensure the availability, accessibility and affordability of pharmaceutical products and medical technologies necessary for the treatment of diseases.[1606] States should also adopt and implement legislations and positive measures in accordance with international law and international agreements acceded to in order to safeguard access to pharmaceutical and medical technologies from any limitations by third parties.[1607]

It was noted in chapter 3 that Nigeria has an issue of geographical access to health including medicine. To guarantee the accessibility of health facilities throughout Nigeria would mean that the rural areas have health facilities available to them just like the people living in the urban part. As stated in chapter 2, the General comment No. 14 sets a standard that of the available health care to be scientifically and medically appropriate and of good quality.[1608] This principle states that the right to health includes the provision of unexpired drugs as well as trained health personnel.[1609] States would therefore have to monitor the proper administration and utilisation of medicine. It must be ensured that the drugs provided for people are safe and that they are not expired.[1610]

[1604] The NAFDAC official website via< http://www.nafdac.gov.ng/> Accessed 01 April 2018

[1605] NAFDAC Act 1993 as amended, s5

[1606]For instance, the Commission on Human Rights 'Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria' 56th session of the Commission on Human Rights E/CN.4/2003/L.33

[1607] ibid

[1608] E/C.12/2000/4, General Comment 14 (2000), 11 May 2000, The Right to the Highest Attainable Standard of Health, para. 12(d); E./C12/2008/2, 24 March 2009, Economic and Social Council. Guidelines on treaty-specific documents to be submitted by State parties under Articles 16 and 17 of CESR, paras. 56(c), 56(d).

[1609] C Onyemelukwe, (n 653) 474

[1610] ibid

Regarding the justiciability of the right to health, one will expect such an agency to serve as a quasi-judicial body in carrying out its very important roles and duties. It would function as a form of control and ensure the realisation of health rights especially in the aspect of access to medicine. However, the officers of the Agency work alongside other agencies like the Nigerian Police Force (NPF), National Drug and Law Enforcement Agency (NDLEA), and the Custom and Immigration. For Omojokun, it hampers its operations as there is neither law nor rules that guide the teamwork of these agencies to bring about effective control and regulations of fake food, drugs, and other products.[1611]

As provided by the Act, the punishment for violating the provisions of the Act appears not stringent enough to deter violations.[1612] Despite the recorded success of NAFDAC at its initial inception, fake and counterfeit drugs are still widely available and sold openly in the markets and other places across the country.[1613]

6.5.3 Nigerian Medical and Dental Practitioners Council

The Nigerian Medical and Dental Practitioners Act (MDPA) was established in 1963 to regulate the practice of Medical and Dental practitioners in Nigeria. Section 1 of the Act established the Medical and Dental Practitioners Council (the Council) whose responsibilities among other things include determining the standard of knowledge and skill to be attained by persons seeking to become members of the profession, preparing from time to time a statement as to the code of conduct which it considers desirable for the practice of the profession in Nigeria.

The Council in furtherance of its statutory functions codified the rules of professional conduct for medical and dental practitioners in its Code of Medical Ethics in Nigeria.[1614] There are two organs responsible for the discipline of doctors and dentists: They are, the Medical and Dental Practitioners Investigation Panel ('The Investigation Panel') which is saddled with the responsibility of conducting a preliminary investigation into any case where it is alleged that a registered person has misbehaved in his capacity as a medical practitioner or dental surgeon amongst other functions[1615]and the Medical and Dental Practitioners Disciplinary Tribunal ('the

[1611]Jane Omojokun, 'Regulation and Enforcement of Legislation on Food Safety in Nigeria' (2013) Via <https://www.intechopen.com/books/mycotoxin-and-food-safety-in-developing-countries/regulation-and-enforcement-of-legislation-on-food-safety-in-nigeria> Accessed 01 April 2018
[1612] NAFDAC Act, s 25 (1) and (2)
[1613] Jane Omojokun (n 1611)
[1614]Medical and Dental Practitioners Code of Medical Ethics in Nigeria 2008
[1615] Medical and Dental Practitioners Act, s 15(3)

Disciplinary Tribunal') charged with the duty of considering and determining any case referred to it by the investigation panel.[1616]Also, the Code of Conduct for Medical Practitioners in Nigeria re-emphasises the need for them to exercise the several parts of their profession to the best of their knowledge and ability for the good, safety and welfare of all persons committing themselves to their care and attention.[1617]

Rule 29.4 of the Code outlines examples of what acts or omissions constitute professional negligence such as failure to attend promptly to a patient requiring urgent attention, manifesting incompetence in the assessment of a patient, making an incorrect diagnosis;[1618] failure to advise, or proffering wrong advice to a patient on the risk involved in a particular operation or course of treatment, especially if such an operation or course of treatment is likely to result in serious side effects like deformity or loss of organ or function; failure to obtain informed consent of the patient, making a mistake in treatment, failure to refer or transfer a patient in good time; failure to do anything that ought reasonably to have been done under any circumstance for the good of the patient and failure to see a patient as often as his medical condition warrants.[1619]

The function of the Disciplinary Tribunal is akin to that of a quasi-judicial body. This can be directed towards the realisation of health rights and lead to the guarantee of equitable health rights for everyone. Nigeria has a lot of ethical challenges in terms of health rights. For instance, the conduct of clinical trials in the development and licensing of drugs is also an important aspect of the medical sector which a state must secure.

When conducting clinical trials, there are several ethical considerations a stakeholder must meet. For instance, in1996 Pfizer brought in a team to conduct a thesis on its test drug Trovafloxacin quinolone antibiotic following an outbreak of meningitis in Kano, Nigeria, the study was criticized severely as falling short of the ethical standard, 11 children died, and dozens were left disabled. After a fierce legal battle, Pfizer agreed out of court to pay compensation to Nigerian families affected by the drug trial, it paid as much$175,000(£108,000) each to four families in the first of a series of payments.[1620]

[1616] Medical and Dental Practitioners Act s15(1)
[1617]Code of Ethics for Medical and Dental Practitioners in Nigeria
[1618]Surgeon Captain *C.T Olowu v. The Nigerian Navy*(2011)18NWLR(Pt.1279) 659S.C
[1619]Code of Ethics for Medical and Dental Practitioners in Nigeria,Code29.4
[1620]Patrick Okonta,'Ethics of Clinical Trials in Nigeria' (2014)55(3) Niger Med J, 188-194

This thesis further argues that all these bodies can function effectively to foster better protection of the right to health in Nigeria. It is realised that they have some form of powers that are quasi-judicial in nature and hence can function to make the right to health justiciable.

It is important to examine the National Health Insurance Scheme as a means of guaranteeing equitable and easy access to healthcare to Nigerians.

6.5.4 National Health Insurance Scheme (NHIS)

The National Health Insurance Scheme (NHIS) was established under Act 35 of 1999 Constitution and re-enacted as the National Health Insurance Scheme Act Cap N42, Laws of the Federation of Nigeria 2004 by the Federal Government of Nigeria to improve the health of all Nigerians at an affordable cost through various prepayment systems.[1621] The Scheme is aimed at providing easy access to healthcare for all Nigerians at an affordable cost through various prepayment systems.[1622] NHIS is committed to securing universal coverage and access to adequate and affordable healthcare to improve the health status of Nigerians, especially for those participating in the various programmes of the Scheme.[1623]

The goal of the NHIS is to provide social health insurance in Nigeria where health care services of contributors are paid from the common pool of funds contributed by the participants of the Scheme.[1624] The goals of the Scheme as stated in the Act are thus:

> (a) ensure that every Nigerian has access to good health care services;
> (b) protect families from financial hardship of huge medical bills;
> (c) Limit the rise in the cost of health care services;
> (d) Ensure equitable distribution of health care cost among different income groups;
> (e) Maintain high standard of health care delivery services within the scheme;
> (f) Improve and harness private sector participation in the provision of health care services;
> (g) Ensure equitable distribution of health services within the federation;
> (h) Ensure patronage of all levels of health care, and

[1621] The National Health Insurance Scheme website < https://www.nhis.gov.ng/About%20us/> Accessed on 01 April 2018
[1622] ibid
[1623] National Health Insurance Scheme Act, s5
[1624] ibid

(i) Ensure the availability of funds to health sector for improve services.[1625]

These objectives are all-embracing but the question remains how possible is it for the scheme to ensure equitable distribution of health care costs among different income groups.[1626] The NHIS has been described as a laudable effort to boost the health-care system in Nigeria.[1627] Importantly, the government funding for the vulnerable groups is a commendable social responsibility initiative.[1628] The involvement of private health-care providers also provides a wider choice for patients and brings health-care services closer to the people.[1629]

In health rights, the accessibility principle involves affordability and thus requires countries to provide what may be necessary for the enjoyment of the right to health for people who are incapable of providing it for themselves.[1630] It is thus obligatory for countries to put in place health insurance schemes to enable their citizens to pay for health services.[1631] This is particularly important in developing countries like Nigeria, where many people cannot afford to pay for health services or make out of pocket spending, It is necessary to take steps to at the very least subsidize same.[1632]However, the Scheme has been criticised for not being an alternative to proper funding of the health sector. The scheme is also discriminatory as it does not apply to the majority of the members of the society who do not benefit from government funding.

It is relevant to mention that when discussing the justiciability of the right to health, a health insurance scheme could be used as a mechanism for justiciability. It has been argued that the incorporation of the approach introduced by the Patient Protection and Affordable Care Act passed by the government of the United States of America in 2010 can be a way towards the realisation of the right to health.[1633] This was also affirmed by the country's Supreme Court in the case of *National Federation of Independent Business v. Sebelius*,[1634] the Supreme Court

[1625] National Health Insurance Scheme Act, s5
[1626] F N Monye, 'An Appraisal of the National Health Insurance Scheme of Nigeria' (2006) 43(3) Commonwealth Law Bulletin, 415-427
[1627] ibid
[1628] ibid
[1629] ibid
[1630] ibid
[1631] ibid
[1632] ibid
[1633]The Act was passed in 2010 and was immediately challenged on federalism grounds. However, The United States Supreme Court validated the Act on the primary ground that it was justified by the constitutional power of the Federal Government to levy tax.
[1634]*National Federation of Independent Business v. Sebelius* No. 11-393, 567 U.S. (2012)

affirmed as a valid exercise the Federal Government's taxing powers.[1635] The legislation does not by itself confer a specific right to health care on every American but mandates them to purchase health insurance or be taxed for failure to do so, and grants an expanded range of subsidies for health care services through universal coverage under the existing Medicaid program.[1636]

Nigeria can adopt this legislation by establishing an authority to carry out similar measures pursuant to the provision of item 60(a) of the Second Schedule, Part I of the Constitution which permits the establishment and regulation of authorities to promote and enforce the observance of the chapter.[1637] The courts could then be in a real position to exercise judicial powers to give effect to such measures.[1638]

6.6 The Need to Enhance the Nigerian Human Rights System

To ensure justiciability of human rights, it is necessary to enhance the Nigerian human right judicial system and this can be achieved by the improvement of access to justice in Nigeria and other mechanisms such as judicial reforms and ensuring that litigants can resort to alternative dispute resolution discourage strict technical rules is, once this is achieved there will be a positive impact on the quest for better protection of human rights in the country.[1639]

To enhance the Nigerian human rights system, there is a need to ensure that the people have access to justice. Without it, it is very difficult to enjoy and ensure the realisation of any other right, whether civil, political or socio-economic. The relationship between access to justice and human rights protection stems from the fact that it is only when individuals have access to the courts that they can seek the protection of their basic rights. In other words, the legal and institutional structures existing in a system may be such as to preclude the citizens from having

[1635] *National Federation of Independent Business v. Sebelius* No. 11-393, 567 U.S. (2012)
[1636]The Medicare program requires that every older American shall have access to the 'best' medical care available without regard to his or her ability to pay; while the Medicaid program eliminates any barrier to access quality health care in the United States of America by providing financial support for the health care needs of certain categories of citizens not covered by the Medicare program
[1637]This is possible because item 60(a) of the Second Schedule, Part I (the Exclusive Legislative List) of the constitution permits the 'establishment and regulation of authorities for the Federation or any part thereof to promote and enforce the observance of the clause'.
[1638]E B Omoregie and D Momodu (n 644)
[1639] N S Okogbule, (n 745)

access to the courts, who are therefore unable to seek the enforcement or protection of their basic rights.[1640]

Also, the test for effective implementation of human rights requires incorporation to reach a sufficient threshold including ensuring that the international normative content is not diluted or undermined and that an effective remedy is available when a violation occurs.[1641] The broad definition of incorporation is helpful in terms of ensuring that rights can flourish within the legal regime in which they are embedded. In so doing it is legitimate for the state to further elaborate and prescribe more fully the normative content of the right at a domestic level, using international law as a reference point and important tool for interpretation, whilst also leaving room for domestic law to go further than the international framework.[1642]

The incorporation of international norms and international human rights decisions should be both derived from and inspired by the international legal framework and should at all times be coupled with an effective remedy for a violation of a right.[1643] In effect, the international human rights promotion, protection, and enforcement of rights transcend mere formal subscription to ideals that are realised.[1644]As Bhagwati noted;

> The language of human rights carries great rhetorical force of uncertain practical significance. At the level of rhetoric, human rights have an image which is both morally compelling and attractively uncompromising. But what is necessary is that the highly general statements of human rights which ideally use the language of universality, inalienability and indefeasibility should be transformed into more particular formulations, if the rhetoric of human rights is to have major impact on the resolution of social and economic problems in a country.[1645]

[1640] N S Okogbule, (n 745)
[1641] ibid
[1642] ibid
[1643] ibid
[1644] ibid
[1645] P. N. Bhagwati, Inaugural Address, in, Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms '(1988). Bhagwati's address was given at the Judicial Colloquium in Bangalore, held February 24-26, 1988.

Generally, there may be a need for reform of the extant laws and practice as well as a judicial reform in Nigeria in such a way as to advance the protection of human rights and especially the right to health.

6.6 Conclusion

Ensuring the availability of health care for the population is an essential obligation of the government and this can only be discharged by providing adequate health and other social measures.[1646] It is assumed that the UN Declaration on Universal Health Coverage (UHC) will inspire governments, particularly in developing countries, to consider this wisdom mobilising both resources and political commitment to make the slogan of 'Health for All' a practical reality.[1647]

Currently, according to the WHO, at least half of the world's population does not have access to essential health services, and about 100 million people are pushed into extreme poverty due to health-related costs.[1648] In 2017, over 800 million people, almost 12 percent of the world's population, spent at least 10 percent of their household budgets to pay for healthcare.[1649] The last time there was such global focus on providing healthcare to everyone was in 1978, when the WHO's 'Declaration of Alma Ata' identified primary healthcare as the key to attaining the goal of 'Health for All'.[1650]

The Declaration in the UN General Assembly links health investments to larger social development, arguing for instance that implementing the UHC will benefit a wide range of sectors from socio-economic development.[1651] The UN Declaration promotes the idea of health as both precondition for and an outcome and indicator of' achieving many key Sustainable Development Goals.[1652] This sums up the importance of the right to health in our society today.

[1646] O Nnamuchi, (n 551)7

[1647] Satya Sivaraman 'Why the UN Health for All Matters '(20019) <https://www.thehindubusinessline.com/opinion/why-the-uns-health-for-all-initiative-matters/article29501723.ece?utm_source=pushnotifications&utm_campaign=pushnotifications&utm_medium=ALL_USER> accessed 25/09/19

[1648] ibid

[1649] ibid

[1650] ibid

[1651] ibid

[1652] ibid

Surely, the call for human rights is universal, which is why the concept of human rights has gained remarkable recognition and significance in our world of pluralism, diversity, and interdependence.[1653] Unfortunately, the enjoyment of human rights in Nigeria just like most developing countries has been crippled by multifarious and multidimensional impediments.[1654] This is why terrible violations of human rights still exist in Nigeria today.[1655]

Many of the hindrances to human rights protection in Nigeria have been sustained and remain unabated due to the lack of genuine and practical commitment on the part of the government to ensure meaningful enjoyment of these rights amongst other factors.[1656] The need to enhance the human rights protection of human rights through holistic approaches is thereby crucial in Nigeria.

Having analysed the effect, roles and impact of justiciability, justiciability is identified as a tool that can improve the protection of the right to health in Nigeria, it is important to state that only through the collaborative efforts of the three arms of government, the executive, legislative and judicial as well as the role of civil society like the Nigerian and other interest groups, will the right to health as well as other economic, social and cultural rights be realised and sustained.[1657] In the words of Bhagwati J:[1658]

> The task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs to the legislature and the executive, but mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and it is only through multidimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective.

Finally, it can be said that the opportunity to develop the human rights legal framework has presented itself to Nigeria and if acted upon could place Nigeria as an example of good practice for other developing countries.

[1653] R Clayton and H Tomlinson (n 505)
[1654] 0 Nnamuchi (n 551)7
[1655] The recent killings of peaceful #EndSars protesters is a typical example of terrific violation of human rights in Nigeria. See chapter 3
[1656] 0 Nnamuchi (n 551)7
[1657] *Peoples' Union for Democratic Rights (PUDR) v Union of India* (1983) 1 SCR 456
[1658] ibid

CHAPTER SEVEN: CONCLUSION

7.0 Conclusion

This thesis has analysed the potential role of justiciability in fostering compliance with the right to health in Nigeria. The research analysed the protection of the right to health in Nigeria and it became clear that Nigeria is lacking in terms of its obligations to respect, protect and fulfil the right to health.[1659] The main objective of the research was to determine whether the justiciability of the right to health will lead to an increase in the enjoyment of the right. Justiciability is used to describe a process through which the right to health can be realised. Justiciability is also broadly defined in this thesis as an accountability mechanism that may be judicial (direct or indirect), quasi-judicial, administrative, or political.[1660]

The thesis further explains how justiciability can lead to the adoption of health policies that have a comprehensive framework that concentrates on the technical features of the content of the right to health and puts in place different ways of effective implementation for the benefit of the individuals in a state. The purpose of justiciability mechanisms is to ensure that governments are answerable for their actions or inactions regarding the right to health and that rights-holders have effective remedies whenever there is a violation.[1661]

In conducting this research, it was necessary to explore discussions on the nature of the right to health and the basis for the justiciability of the right to health. International human rights law imposes upon states both the duty to abstain from violating human rights worldwide and the positive duty to prevent violations of human rights within their jurisdictions.[1662]

In the wake of increasing economic globalisation and growing inequality within and between States, there is an urgent need for all stakeholders to recognise connections between continuing, localised struggles and to realise the human rights of all persons in practice.[1663] The right to health is closely interconnected with numerous other human rights, including the rights to food,

[1659] Oyeniyi Ajigboye (n 1)
[1660] Shengnan Qiu and Gillian MacNaughton, (n 20)
[1661] ibid
[1662] Wahab Egbewole, 'Realizing Socio-Economic Rights in Nigeria and the Justiciability Question: Lessons from South Africa and India' (2017) 8(3) International Journal of Politics and Good Governance, 3
[1663] ibid

water, housing, work, education, life, non-discrimination, privacy, access to information, the prohibition against torture, among others and hence considered very important.[1664]

The nature of a State's obligations, duties as provided by the international human rights laws was analysed. States have obligations to respect, protect and fulfil the right to health and are expected to provide the availability of health services, healthy and safe working conditions, adequate housing, and availability of safe drinking water, a pollution-free and healthy environment, and nutritious food for everyone.[1665] States must under a normal circumstance be seen to be taking relevant steps within the available resources to ensure the progressive realisation of the right or at least a minimum core standard towards the realisation of the rights.

This thesis addressed what has been emphasised by many authors that the right to health, like any other economic, social and cultural rights is justiciable. The debates over the justiciability of the right to health must be viewed from a human right perspective and the effects it has on the right holders. These are usually the voiceless who have no other alternative to enforce their rights and to hold the government accountable for their promises to the people.[1666] The court, therefore, becomes an avenue for the voiceless in terms of enforcing ESC rights.

The research also established that justiciability of the right to health is a possible means through which States can fulfil their main obligations towards the realisation of health rights Judicial recourse provides an effective means of protecting social rights and courts can act as a check on the exercise of public power ensuring that it is exercised in a manner consistent with the principle of rule of law and democracy.

Nigeria bears an international obligation to respect, protect and fulfil the right to health is a responsibility upon States and they have the duty to move as expeditiously and effectively as possible towards the full realisation of the right. as a state party to ICESCR and the African Charter which has been domesticated. Thus, it must take an urgent step towards the realisation of the right to health.[1667] The absence of an explicit justiciable right to health in the Nigerian Constitution does not bar the adjudication and enforcement of this right. The restrictive judicial

[1664] Wahab Egbewole (n 1662)
[1665] Philip Alston and Gerard Quinn (n 323)
[1666] O Nnamuchi (n 551)6
[1667] Oyeniyi Ajigboye (n 1)

attitudes, narrow constructions of standing, stringent judicial procedures limit the Nigerian courts in adjudicating right to health and other socio-economic rights claims.[1668]

By offering and introducing different perspectives of the compliance theory, this thesis laid a framework of analysis and argues that state compliance is a fundamentally domestic and inherently a political process that requires a host of activities.[1669] Also, an understanding of compliance with human rights law requires delving into domestic political actors and parsing out their motivations, capacities, and strengths.[1670]

In terms of compliance with court judgments, rulings, comments and recommendations, the executive in a state is vested with the agenda-setting powers that allow the State to carry on its duty effectively and all the role of government, the role of courts are all inter-connected in ensuring the full protection of rights.[1671] The focus of these theories was to explain the potential role of justiciability as a tool for improving compliance of states with international human rights obligations. It is concluded that justiciability also serves as a review mechanism for ensuring compliance with human rights and this is key to the realisation of human rights.

By examining the justiciability of the right to health in India, South Africa and Colombia, it is concluded that judges could render the right to health justiciable in Nigeria despite its constitutional limitation. Their experiences with constitutional socio-economic rights are both symbolic and intended to contribute to social and economic transformation.[1672] The South African and Indian Courts have achieved several concrete advancements for socio-economic rights.[1673]

The Indian experience reveals that the constitutional dilemma of declaring socio-economic and cultural rights can be dealt with by courts in such a way that the people are still guaranteed their ESC rights, this judicial activism is a dynamic role of justiciability of the socio-economic and cultural rights and Nigeria's judiciary should take a cue. The Nigerian judiciary should rethink its refusal to acknowledge justiciability as a choice rather than an obligation. Furthermore, such a choice would be one key step in a better critical overseeing of the activities

[1668] Oyeniyi Ajigboye (n 1)
[1669] Courtney Hillebrecht, (n 755) 959-985
[1670] ibid
[1671] ibid
[1672] Natasha G Menell (n 1005) 739
[1673] ibid

of the government and participate in an overall rethink of the protection of the right to health in Nigeria.

Also, the Columbian experience reveals judicial intervention as a legitimate way to exert pressure on the government to act according to constitutional boundaries.[1674] The impact of constitutional jurisprudence on the protection of the right to health in Colombia is noteworthy as thousands of people are said to now live with dignity because a decision has granted them access to a medication or medical service; indeed, many of these people would have died without such judicial intervention.

Whether as a result of the interpretation of the effect of the African Charter on health rights or by applying the reasonableness test, progressive realisation test, minimum core obligation test, the justiciability of the right to health can have a great impact on the protection and enjoyment of health rights in Nigeria.[1675] For the right to health to be meaningful in Nigeria, justiciability of the right to health is required to enable courts to deal with health care as a legal right and not as a political issue.[1676] This will give courts the ability to evaluate governmental health policy and resolve disputes between the individual and the states.

It is averred that justiciability of the right to health can be an effective means of ensuring compliance and implementation of the right in Nigeria and that the right to health being declared non-justiciable and left at the discretion of the political branch of government, devalues the right as a meaningful right. The non-justiciability of the right downgrades the span of mechanisms available for victims of rights violation and enables states who are under obligation to respect, protect and fulfil the right to neglect their duties. Lacking justiciability, governments remain unaccountable. This promotes impunity.[1677]

Nigeria has had a long history of experimenting with various healthcare initiatives, policies, and development plans.[1678] These policies, initiatives, and plans, including the more recent National Health Insurance Scheme, have done little to address the myriad of problems that confront the health system today. Systemic challenges such as a shrinking health budget, rising

[1674] Arrieta-Gómez & Aquiles Ignacio, (n 132)
[1675] Chidi A Odinkalu, (n 638)
[1676] ibid
[1677] K G Young and J Lemaitre, (n 1151)
[1678] Oyeniyi Ajigboye (n 1)

healthcare costs, and out-of-pocket healthcare expenditure continue to plague health services delivery.[1679]

This research ascertained that it is vital for victims of a violation of their human right to health to have the option of claiming their rights. The intervention of a judicial or quasi-judicial body and all the stakeholders involved in ensuring the protection of the right to health is necessary to remedy the inadequacies that often occur in an inequitable system of health as in Nigeria. Justiciability is vital for victims of a violation of their human right to health.[1680]

Finally, the unprecedented COVID 19 pandemic has reinforced the pre-existing challenge for the right to health to meet the health challenges of our time.[1681] More than ever we need to transform the right to health to meet the challenges of the moment and to push towards a far different understanding of the justiciability of health rights for the benefit of everyone who may be affected by the pandemic.[1682]

Efforts to contain the spread of COVID and end the pandemic would require developing and implementing public health interventions that take into consideration concerns about equity and social justice.[1683] It is key for the Nigerian government to develop policies to address health inequality and its social determinants.[1684]

7.1 Further Research

This research has clarified that justiciability of the right to health in Nigeria can serve as an important and motivating force to push for compliance with international human rights obligations on the right to health. However, it is established that even when the Nigerian government was held to have violated the health rights of the Ogoni people[1685] through the activities of a multi-national corporation that caused widespread contamination of soil, water, and air, the destruction of homes, the burning of crops and killing of farm animals, and the

[1679] I O Iyiola, 'Pathologies, Transplants and Indigenous Norms: An Introduction to Nigerian Health Law and Policy' (2015) < http://www.barakaconsult.com/uploads/Comparative-Health-Law-and-Policy-Ch1.pdf> Accessed o2 July 2017

[1680] J.K. Mapulanga, (n 64) 29-48

[1681] Obasesam Okoi &Tatenda Bwawa, 'How Health inequality affect responses to the COVID-19 pandemic in Sub-Saharan Africa' (2020)135 <https://www.sciencedirect.com/science/article/pii/S0305750X20301935> Accessed on 07 July 2020

[1682] ibid

[1683] ibid

[1684] ibid

[1685] Communication 155/96, Social and Economic Rights Action Center and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (15th Activity Report) (Ogoni Case) para. 52.

climate of terror to the Community. The African Commission consequently made orders for compensation as well as cleaning up the Niger Delta area where the Ogoni community is located, the government failed to take reasonable steps to ensure the implementation of the decision.

Further research is required to discover the effective means to ensure compliance with court orders in cases of violations of human rights to health. Another issue that needs to be researched is whether or not the international human rights law requires a strategy or mechanism through which nations are sanctioned for violations of health rights with the view of the realisation of the right.

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