

## THE RIGHT TO LIFE AND THE RIGHT TO HEALTH : ANY NEXUS?

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### 1. INTRODUCTION

The current trend is that all human rights are indivisible, interdependent and interrelated. Civil and political rights, economic, social and cultural rights and the environmental rights are all interdependent upon one another and none of these rights is superior or inferior to the other.

However in most nations, civil and political rights are justiciable, while the economic, social and cultural rights which are termed “progressive in nature” are non justiciable Whereas, all nations’ municipal laws recognize the right to life as a fundamental human right, the right to health is not so recognized by most nations.

In recent times, the rampant incidents of foods and drugs contamination leading to death of citizens of such nations have led to an outcry for the justiciability of the ESC rights. One wonders, of what essence is the right to life when the citizens’ right to good health through food and drugs remain un-guaranteed?

This paper examines the nature of ESC rights. It focuses on the right to health and its direct incidence or impact on the right to life. The paper demonstrates that food and drug contaminations leading to the death of persons proves that the right to health is not inferior to the right to life and thus ought to be made justiciable.

The paper further draws a comparison between nations that deny ESC rights and those which uphold ESC rights. It concludes that nations of the latter stand are more developed than those of the former stand thus proving the point that there is a co-relation between the justiciability of ESC rights, good governance and sustainable development of nations.

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### II.THE NATURE OF ECONOMIC, SOCIAL AND CULTURAL (ESC) RIGHTS

The earliest sign of human rights dates back to thousands of years and has evolved through religious, cultural, philosophical and legal developments throughout the years. Several ancient documents including religious and philosophical reasoning included a variety of concepts that may be considered to be human rights.

Starting from the English Magna Carta of 1215 which is particularly significant in the history of English law, there is also the English Bill of Rights of 1689 which made illegal a range of oppressive governmental actions perpetrated by the Crown in the United Kingdom.

The United States adopted the United States Declaration of Independence in 1776 and France adopted the French Declaration of the Rights of Man and of the Citizen in 1789, Both declarations established certain legal rights as inalienable human rights.

Human rights and freedoms have come to be commonly thought of as of three genres and are classified as first, second and third generation rights. The first generation of rights are the civil and political rights, such as the right to life and liberty, freedom of expression, and equality before the law. There is the second generation rights also known as the economic, social and cultural rights, including inter-alia the right to food, the right to work, the right to education and of course the right to health . The third classification of rights is the third generation rights also called the group/collective rights which includes right to self development, right to healthy environment etc.

Current trends suggests that there is an interdependence and inter relatedness between human rights and that rights though categorised into three (3)

are not necessarily strictly compartmentalized in practice as there is a marked interrelatedness between these rights and that the attainment and/or enjoyment of each of these rights is dependent on one of or the other rights. Thus it is wrong to assume that the civil and political rights are superior to the economic, social and cultural rights.

The marked difference between these rights is that whereas the civil and political rights are of a negative nature the economic, social and cultural rights are positive in nature. This means that while the CP rights are immediately enforceable as they require only non intervention by the state, the ESC rights requires that the state plays a positive role in the attainment and enjoyment of the said rights. The argument has always been that whilst the CP rights are of achievable rights the ESC rights are achievable only progressively depending on the resources of each state. This has in turn led to nation not recognising the ESC rights as "rights" perse but as "needs". The effect is thus that CP rights are justiciable in all nations whereas only few nations have made the ESC rights justiciable.

### III. THE MEANING AND SCOPE OF THE RIGHT TO LIFE

The right to life is indeed the most fundamental of all rights, the absence of which makes all other rights unattainable. This right is recognised by all international, regional and domestic or municipal treaties, conventions and laws. The Universal Declaration of Human Rights, (**UDHR**) declared as follows: "Everyone has the right to life, liberty and security of person."<sup>1</sup>

The International Covenants on Civil and Political Rights (**ICCPR**) adopted by the United Nations in 1966; contains civil and political rights which are binding on all ratifying states. It declares the right to life as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"<sup>2</sup>.

European Convention on Human Rights (**ECHR**) was adopted by the Council of Europe in 1950. It entered into force on the 3<sup>rd</sup> of September 1953. This convention declared the right to life as follows: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".<sup>3</sup>

The Organisation of American States adopted the Inter American Convention on Human Rights (**IACHR**) at Costa Rica in 22<sup>nd</sup> of November 1969

and it entered into force on July 18, 1978. The IACHR also declare the right to life as follows: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life".<sup>4</sup>

The Organisation of African Unity (**OAU**) now known as African Union (**AU**) came together at Banjul, Dakar on the 27<sup>th</sup> of June 1981 to adopt the African Charter on Human and Peoples' Rights (**ACHPR**). The Charter entered into force on the 21<sup>st</sup> of October 1986.

The African Charter declares the right to life as follows:

"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."<sup>5</sup> Most nations recognize the right to life in their local charters. The 1999 Constitution of the Federal Republic of Nigeria<sup>6</sup> by virtue S. 33 guarantees the right to life. It provides thus: "Every person has a right to life and no one shall be deprived intentionally of his life save in the execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria."

The New Zealand Constitution Bill of Rights Act No 109 of 1990 declares: "No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice".<sup>7</sup>

The South African Constitution provides: "Everyone has the right to life"<sup>8</sup>

The Constitution of Republic of Ghana declares: "No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted".<sup>9</sup>

The Canadian Charter of Rights and Freedoms Schedule B to the Constitution Act, 1982 enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, which came into force on April 17, 1982 recognizes the right to life. It provides "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

<sup>4</sup> Article 4 of the IACHR

<sup>5</sup> Article 4 of the ACHPR.

<sup>6</sup> Cap C23 LFN 2004

<sup>7</sup> Section 8 of the New Zealand Bill of rights of 1990

<sup>8</sup> Section 11

<sup>9</sup> Article 13(10).

<sup>1</sup> Article 3 of the UDHR.

<sup>2</sup> Article 6(1) of the ICCPR"

<sup>3</sup> Article 4 of the IACHR }

The Fifth Amendment to the American Constitution provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**”( Emphasis mine).<sup>10</sup> [http://www.bill\\_of\\_rightforums.org/compilations\\_of\\_bill\\_of\\_rights\\_constitutions](http://www.bill_of_rightforums.org/compilations_of_bill_of_rights_constitutions)).

One common thread that runs through these human rights instruments’ provisions on the right to life is that there could be exceptions to or derogations from the right to life. The derogations are made for situations where there are lawful excuses for taking the human life. Such exceptions include executions of persons convicted of crimes for which the punishment is the death penalty. Executions occasioned by self-defense, arresting a fleeing suspect, and suppressing riots and insurrections etc.

It is pertinent to note here that none of the various human rights instruments aforementioned permits the derogations from the right to life on the basis of the denial of the right to good health. This leads us to the determination of the status of the right to health under international, regional and local human rights instruments as mentioned above.

#### IV. THE MEANING AND SCOPE OF THE RIGHT TO HEALTH

Historically, civil and political rights were the first set of rights to have dominated human rights concerns. The focus has been on the negative obligation of the state to refrain from action as opposed to its positive obligation to intervene and provide citizens with their resources needed for sustaining their private life. The state was expected to refrain from interfering in the private sphere. The emphasis on constraints of state power meant that the ESC rights have fallen under the categorization of “private needs” rather than as part of the state’s affirmative human rights obligations.<sup>11</sup>

By and by the Esc rights became recognized as rights; the attainment of which will lead to economic, social and cultural wellbeing of peoples and of the nations as well.

<sup>10</sup> [http://www.bill\\_of\\_rightforums.org/compilations\\_of\\_bill\\_of\\_rights\\_constitutions](http://www.bill_of_rightforums.org/compilations_of_bill_of_rights_constitutions)).

<sup>11</sup> “Developing a rights based approach on ESC rights.”: [http://www.umn.edu/humanrts/edu\\_IHRIP/circle/part\\_2/Module\\_2\\_page\\_2](http://www.umn.edu/humanrts/edu_IHRIP/circle/part_2/Module_2_page_2).

The UDHR became the first international instrument to recognize the right to health.

It provides: “Everyone has the right to a standard of living adequate for the health and well-being 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.”<sup>12</sup>

The International Covenant on Economic, Social and Cultural Rights (**ICESCR**) was adopted in 1966 and entered into force in 1976.<sup>13</sup>

It states: The States Parties ... recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.

The ICESCR provides among other things that state parties to the covenant should take steps to utilise to the maximum of its available resources to “*achieve progressively the full realisation of the rights*” recognised in the covenant by all appropriate means including particularly the adoption of legislative measures.

This means that the covenant recognizes the difference between developing and developed countries; in that the developed states may have more resources at its disposal than the developing ones. The ICESCR also elaborates ways in which states can ‘achieve the full realization of this right’, including improving all aspects of environmental and industrial hygiene, preventing, treating and controlling diseases. The three regional levels’ human rights instruments recognize the right to health. The European Social Charter guarantees the right to health:<sup>14</sup>

The American Convention on Human Rights and the Additional Protocol also known as the **San Salvador Protocol** to the **IACHR** recognises the right to health and the state’s concomitant obligation to protect and improve health.<sup>15</sup>

The African Charter on Human and Peoples Rights:<sup>16</sup> At the municipal or state level:

1. The South African Bill of rights<sup>17</sup> guarantees health care, food, water and social security to all citizens. It provides: (1). Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents,

<sup>12</sup> Article 25(1))

<sup>13</sup> Article 12

<sup>14</sup> Article 11

<sup>15</sup> Articles 10 and 11

<sup>16</sup> Article 16.

<sup>17</sup> Section 2

appropriate social assistance. (2). The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights. (3). No one may be refused emergency medical treatment.

The Constitution of the Peoples Republic of China<sup>18</sup> provides: "Citizens of the People's Republic of China have the right to material assistance from the state and society when they are old, ill or disabled. The state develops social insurance, social relief and medical and health services that are required for citizens to enjoy this right. The Constitution of Ghana does not make provision for the right to health of all citizens. It however makes provision for the right to health of Ghanaian children. Article 29(4) provides: "No child shall be deprived by any other person of medical treatment, education or any other social or econ or economic benefit by reason only of religious or other beliefs". Article 17(4) however provides: "Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to provide for the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society"; This means that the right to adequate health facilities for Ghanaian children is guaranteed.

In the State of Indonesia, there is a constitutional guarantee for the right to health. Article 34 provides that the state has the responsibility to provide proper medical and public service facilities for its citizens. It provides further that impoverished persons and abandoned children are to be taken care of by the state. Further that the state develops a social security system for everybody and empowers the weak and underprivileged in society in accordance with their dignity as human beings. The right to health also contains certain "composite-rights". These "composite-rights", include: the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health; the right to prevention, treatment and control of diseases and access to essential medicines<sup>19</sup>

The Nigerian constitution however did not make any guarantee for the right to health of its citizens. Under Chapter Two of the 1999 Constitution however, one of the fundamental objectives and directive principles of state policy is the objective of providing adequate medical and health facilities for all persons. This provision however does not avail the Nigerian citizen of the right to health. This is so because by the provision of S.6(6) of the Nigerian constitution it is

clear that no right whatsoever is guaranteed under Chapter Two. The rationale being that the provisions of that chapter are mere directive principles which are to be progressively attained within the letters and spirit of the ICESCR.

On the other hand, the provision of the ACHPR however guarantees the right to health.<sup>20</sup> We submit that Nigeria being a signatory to the ACHPR has committed itself to the protection of its citizen's rights to health.

The Supreme Court of Nigeria has however held in the case of *Abacha v. Fawehinmi*<sup>21</sup> that although the African Charter Cap. 10 is a statute with international flavour, it is not by that fact superior to the Nigerian constitution and thus any of its provisions which is contrary to the constitutional provision shall to that extent be null and void.

We submit that even though the above decision is a pronouncement of the highest court of the land; we note also that it was delivered in the era of a military dictatorship when the rule was that of the gun and not that of the law.

It is ironic however that whereas the Nigerian constitution does not recognize the right to health; it however recognizes the right to life. One wonders therefore if there is any nexus between the right to life and the right to health or vice versa?

#### V. THE LINK BETWEEN THE RIGHT TO LIFE AND THE RIGHT TO HEALTH: FOOD AND DRUG CONTAMINATION IN NIGERIA AS A CASE STUDY

Traditionally health was seen as falling within the private, rather than public realm. The evolution towards defining health as a social or public issue led to the founding of the World Health Organization (WHO) in 1946. With the emergence of health as a public issue, the conception of health changed. WHO developed and promulgated the understanding of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>22</sup>

With the establishment of WHO, for the first time the right to health was recognized internationally. The WHO Constitution affirms that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

Over time, this recognition was reiterated, in a wide array of formulations, in several international and

<sup>18</sup> Article 45

<sup>19</sup> Fact Sheet No. 31 issued from the office of the United Nations Office of the Human Rights Commissioner accessed at <http://www.unm.edu/humanrights> on the 23<sup>rd</sup> of May 2009.)

<sup>20</sup> See Article 16 of the ACHPR.

<sup>21</sup> 2000 6 NWLR Pt. 2 pg. 2

<sup>22</sup> : Constitution /Basic document /official document of WHO No. 240 in 1994 accessed at <http://www.umn.edu/humanrts> on the 24<sup>th</sup> of May 2009.

regional human rights instruments, as has been seen above.

While the right to life is usually considered to be offering protection against killing by state actors, the right to health of citizens in countries such as Nigeria whose Bill of Rights is yet to recognise the right to health remains largely unprotected. The resultant effect is that whereas such countries such as Nigeria guarantees the protection of their citizens' right to life, the citizen are unprotected against deadly diseases such as HIV/ AIDS, infants mortality and such other epidemics that continues to threaten their citizenry. In recent times the greatest challenge that faces such countries is the issue of food and drug contamination leading to the death of several citizens especially of children.

The rampant incidences of food and drug contamination continues to pose serious concern for human rights activist in such countries which are yet to recognise the right to health of citizens in their country. Nigeria offers such a fertile ground for cases of drug contamination. For example in 1989, the University of Jos Teaching Hospital and the University College Hospital, Ibadan reported the death of at least 109 children whose cause of death was traced to ingestion of a contaminated paracetamol syrup which contained "diethylene glycol"<sup>23</sup>

In November 2008, a Nigerian newspaper, reported that at least, twenty five (25) children aged between four months and three years, had so far died in some parts of Nigeria after taking an allegedly contaminated drug.<sup>24</sup>

The agency responsible for certifying of food and drugs' safety for use by Nigerian citizens is the National Agency for Food and Drug Administration and Control (NAFDAC), a federal government agency which was established in December 1992.

NAFDAC confirmed that fifteen (15) children died at the Lagos University Teaching Hospital, (LUTH) Idi-Araba, Lagos, while eight (8) and two (2) children died in the Ahmadu Bello University Teaching Hospital (ABUTH), Zaria and the University College Hospital, Ibadan (UCH) respectively.

After all said and done, eighty four (84) children were confirmed dead. The affected children presented common symptoms such as fever, diarrhoea, vomiting, kidney failure leading to inability to pass urine and they eventually died. The agency admitted that it discovered quiet belatedly the cause of those children's ailments and eventual death. It discovered that those children's "sweet mothers",

had lovingly given their children; a baby teething mixture called "My Pikin".<sup>25</sup>

The drug "My Pikin", carried the NAFDAC insignia or certification of fitness for human consumption. It was as such considered by the Nigerian public, especially the mothers of those poor children to be safe for human consumption.

Although NAFDAC claimed it duly tested the drugs before it was registered and approved, a belated laboratory analysis of the suspected drug revealed that the drug contained a poisonous chemical called "diethylene glycol". Diethylene glycol is an organic solvent chemically related to ethylene glycol which upon consumption and metabolic conversion, becomes oxalic acid, which is toxic to the kidney and leads to renal failure and eventual death.

The questions that naturally agitate every mind are: Was this drug tested by NAFDAC at all as it claimed? What process of testing did the drugs go through? Are drugs not normally manufactured in batches? How many batches of the drug were tested before it was approved and registered? How does the NAFDAC number that is quoted on the container of the drug identify the batch as having been tested?

The answers to these questions are not far fetched.. A statement credited to the then Director-General said that the agency only tested a sample of the drug presented and that not all the batches were tested.<sup>26</sup>

One is rather amazed that an agency responsible for matters of such a great importance as that of the life and death of innocent citizens can fall into this error.

The reaction of the Federal Ministry of Health to the issue is rather appalling, the then Minister of Health, ordered an investigation into the incident after the thirtieth case of deaths of children at various teaching hospitals across the nation had been confirmed!<sup>27</sup>

The apathy of the Nigerian government is so apparent in the fact that it was not until the 2<sup>nd</sup> of March 2009 that the drug manufacturers were arrested and arraigned before a Federal High Court on the offence of drug contamination "intent to cause death or grievous bodily harm to members of the public."<sup>28</sup> As at date (30<sup>th</sup> May 2010), the trial of the culprits is yet to be concluded. We submit that the fact that the right to health is not justiceable under the Nigerian Constitution accounts for such uncaring attitude on the part of the state agency responsible for the monitoring of drug manufacturers. It is arguable that the Nigerian state adopted such a slack mind-set to health related issues since the Nigerian state does not recognize the duty to protect its citizen right to health. It is ironic that a state which recognizes the

<sup>23</sup> . NAFDAC home page accessed at <http://en.wikipedia.org/wiki/NAFDAC> on the 23<sup>rd</sup> May 2009.

<sup>24</sup> Punch Newspaper of Wednesday, the 26<sup>th</sup> November 2008 pg 2.

<sup>25</sup> "pikin" is the word for children in the Nigerian colloquial English.

<sup>26</sup> Punch Newspaper of Wednesday, the 26<sup>th</sup> November 2008.

<sup>27</sup> Punch Newspaper of Friday 28<sup>th</sup> November 2008.

<sup>28</sup> Punch Newspaper of 3<sup>rd</sup> March 2009 pg. 8.

right to life however not recognize the right to health. One wonders how do citizens of a state enjoy the right to life without the means of achieving same through the right to good and qualitative health?

#### VI. THE RIGHT TO HEALTH IN PROGRESSIVE JURISDICTIONS: FOOD AND DRUG CONTAMINATION IN CHINA AS A CASE STUDY

As noted above other jurisdictions which we term the progressives have recognized the right to health as one of its main obligations to its citizens the reverse is the case includes South Africa, China and the United States of America. In such states there is a marked difference between the way and manner in which citizens' rights are being treated and the way in which the Nigerian government has treated its drug contamination issue.

In China, an infant milk formula contamination occurred in November 2008. It was found by the Bureau of Food and Drug (BFAD) that the milk formula was contaminated with melamine a whitish substance which closely resembles milk in physical presentation but which is a raw material for the production of melamine wares and plastic. The substance is highly poisonous to the human organs as it causes kidney stones and could lead to kidney failure consumption. Indeed six children died as a result of ingestion of the said milk formula and about three hundred children were hospitalized as a result of the said contaminated milk ingestion.<sup>29</sup> The government however promptly swung into action. Its watchdog agency, BFAD (the Nigerian equivalence of NAFDAC) recalled all the milk formula in a spate of days. The search was not confined to the milk formula manufactured by the Sanlu Group Co. but tests were also conducted on other milk products. It was found that the manufacturing company had laced the said milk with melamine with the intention of boosting profits. BFAD arraigned twenty one persons in ? By November 2009, the trial was concluded. Two of the accused persons were sentence to death having been found guilty of producing toxic food for public consumption and endangering public safety. The remaining nineteen accused persons were convicted of lesser offences ranging from life sentences and other jail terms.<sup>30</sup>

<sup>29</sup> Christopher Bodeen, "China Executes Two Over Tainted Milk Scandal" The Huffington Post, 24/ 11/09 at pg 1, accessed at [http://www.huffingtonpost.com/2009/11/24/china-executes-two\\_o\\_n\\_368657.html](http://www.huffingtonpost.com/2009/11/24/china-executes-two_o_n_368657.html) on 30<sup>th</sup> May 2010.

<sup>30</sup> See further Christopher Bodeen, "China Executes Two Over Tainted Milk Scandal" The Huffington Post, 24/ 11/09 accessed at [http://www.huffingtonpost.com/2009/11/24/china-executes-two\\_o\\_n\\_368657.html](http://www.huffingtonpost.com/2009/11/24/china-executes-two_o_n_368657.html) on 30<sup>th</sup> May 2010.

Whilst we do not advocate for death penalty as punishment for almost all offences as the Chinese government were wont to do, we however salute the agile and prompt manner in which the Chinese government rose to the occasion on matters bordering on the health of its citizenry which indeed borders directly on their right to life. We make bold to say that such is the progressive manner of nations which have recognized the right to health as being the right to life and more.

We also hail the decision of the Chinese government to pay the affected victims' families compensation ranging from 2,000 Chinese yuan to 200,000.00 Chinese yuan depending on the severity of the affliction on individual victims. This is far from the Nigerian situation where it is unlikely that any offer of compensation will be made to the families of the victims of the "my pikin" drug contamination. This is so because the Nigerian criminal law is yet to imbibe the "victim compensational scheme" in its operational system. We submit that the non justiciability of the right to health under the Nigerian constitution is a pointer to the fact that the right to life is not guaranteed.

The Constitution of the United States of America recognizes the right to health as an integral part of the right to life. Thus its judiciary has been able to develop strong judicial precedence or rules for the recognition of the right to health as having a close affinity or link with the right to life.

The Supreme Court of the United States had cause to examine the full meaning and intent of the right to health in relation to the right to life in the case of *Munn v. Illinois*<sup>31</sup>. In that case Field J as follows: *...By the term "life" as used here; something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life but of whatever God has given to everyone with life or its growth and enjoyment is prohibited by the provision in question if its efficacy be not frittered away by judicial decision.*

Drawing from the above dictum of Field J; one may infer that the right to life does not mean only the right not to be deprived of one's life but also the right not to be deprived of any of the organs, limbs and senses

<sup>31</sup> 94 U.S.133 (1877) culled from UN treatise on the right to health accessed at <http://www.ohchr.org> the 24<sup>th</sup> of May 2009.

which each and every human being has been endowed with by the Almighty Creator.

In factual terms or words, the right to life means that every citizen of a state is owed the right to maintain all his organs, limbs and senses and to prevent these from being destroyed or maimed. It is apparent therefore that for a state such as Nigeria to maintain and sustain the right to life which it has guaranteed to its citizenry, the state must provide affordable amenities for the protection of the organs, limbs and senses of its citizenry.

It is trite that human rights are interdependent, indivisible and interrelated. This means that violating the right to health may often impair the enjoyment of other human rights, such as the rights to education or work, and vice versa. The importance given to the "underlying determinants of health", that is, the factors and conditions which protect and promote the right to health beyond health services, goods and facilities, shows that the right to health is dependent on, and contributes to, the realization of many other human rights especially the right to life.<sup>32</sup>

Therefore, it is clearly the duty of any state which has guaranteed its citizen the right to life to provide health facilities such as hospitals, clinics, maternity centres, laboratories and all such facilities that are necessary for the use of its citizenry to safeguard their physical and mental health. It is our considered opinion that the right to health can be linked directly to the right to life. Judicial decisions abound in progressive jurisdictions on this issue of justiciability of the right to health. A few of such decisions will however be cited here to further illustrate the point.

**In the case of *Rosario Congo v. Ecuador***<sup>33</sup> Mr. Congo, a person suffering from mental illness was charged with robbery and assault and placed in a detention centre, the Social Rehabilitation Center in Machala. While in detention, Mr. Congo was subjected to physical and moral assault by staff of the Rehabilitation Center and he received no medical care to treat his wounds. Moreover, although he was diagnosed as mentally ill, he was kept in isolation and his basic physical needs were disregarded in the knowledge that he was in no condition to care for himself.

While still in detention, Mr Congo died of malnutrition, hydroelectrolytic imbalance, and heart and lung failure. The Inter-American Commission on Human Rights found that the state of Ecuador breached its duty to protect the right to life of an

inmate of a mental institution by not providing health facilities to the inmate and thus leading to his death through dehydration and malnutrition.

Similarly, the UN Human Rights Committee applied the right to life to protect the health and well-being of detainees and prisoners. Thus in *Lantsova v. The Russian Federation*<sup>34</sup> where one Mr Lantsova was placed in a pre-trial detention centre in March 1995 and died one month later. It was found that the prison was overcrowded and conditions were inhuman because of inadequate ventilation, food and hygiene. The Human Rights Committee found a violation of the right to life since the state had failed to take steps to ascertain Mr Lantsov's health and provide adequate medical assistance and conditions of detention. It was held by the Committee that the duty to take adequate measures to protect the health of individuals held in state custody is an adjunct to the right to life.

Furthermore in the case of *McGlinchey et al. v. The United Kingdom*<sup>35</sup> a certain Judith McGlinchey, a heroin addict, died while in prison because of the failure of the prison authority to take effective measures when confronted with her serious weight loss and dehydration. The European Court on Human Rights found the United Kingdom guilty of a violation of Article 3 of the ECHR and Article 11 of the European Social Charter.

The case of *Paschim Banga Khet Samity v. State of West Bengal*<sup>36</sup> is perhaps another illustration on state responsibility for the protection of its citizens' right to life vis-a-vis the protection of the right to health. In that case the petitioner fell off a train at Mathurapur Station in West Bengal suffering serious head injuries and brain haemorrhage. He was denied treatment in all six government-owned hospitals which he was rushed to. The reason adduced being non-availability of facilities including bed space. The issue before the Supreme Court of India was whether the non-availability of hospital facilities to a person suffering serious injuries resulted in the denial of his right to life guaranteed under Article 21 of the Constitution of India. The court's response was in the affirmative and it held that there was a clear breach of the said right of the petitioner as guaranteed under Article 21 when he was denied treatment at the various Government hospitals which were approached even though his condition was very serious at that time and he was in need of immediate medical attention.

<sup>32</sup> United Nations treatise on the right to health accessed at <http://www.ohchr.org> on the 24<sup>th</sup> of May 2009.

<sup>33</sup> Inter-American Commission on Human Rights Case 11.427, Report No. 63/99, Decision of 13 April 1999 accessed at <http://www.iceshr.org> on the 3rd of June 2009 pg. 23

<sup>34</sup> United Nations treatise on the right to health accessed at [icehr@humanrights.is](mailto:icehr@humanrights.is) pg 25

<sup>35</sup> human rights cases accessed at [icehr@humanrights.is](mailto:icehr@humanrights.is) pg.26

<sup>36</sup> Supreme Court of India Case No. 169, Judgement of 6 May 1996 accessed at [icehr@humanrights.is](mailto:icehr@humanrights.is)

The court ruled that since the said denial of the right of the petitioner guaranteed under Article 21 was by officers of the State in hospitals run by the State, the State cannot avoid its responsibility for such denial of the constitutional right of the petitioner.

Having seen the position in developed and progressive countries, the question now turns on the issue as to whether or not it is too much for the Nigerian citizens to expect that the right to health be made justiceable in the nation. Nigeria may make a case for itself that it is a developing nation (sadly so after nearly fifty (50) years of independence!)<sup>37</sup> It may contend further that it lacked the resources for the provision of the amenities being the vehicular means to the right to health or that its teeming population is overwhelming and that it will not be convenient for it to adequately provide for such an overwhelming population of its citizenry (within its limited resources) the means of achieving good and qualitative health care.

We are of the firm mind that such claims by are at best mere excuses. We submit that even though the ICESCR agrees and allows state parties to “*achieve progressively the full realisation of the rights*”<sup>38</sup> recognised in the covenant for their citizen the ICESCR also advocates that state parties shall take steps towards such progressive achievement. The question now is what steps have the the Nigerian nation as a state party to the ICESCR taken in its quest for the progressive achievement of the ESC rights especially the right to health?

#### **VII. JUSTICIABILITY OF THE RIGHT TO HEALTH UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS (ACHPR)**

Upon a random search within the African continent, we discover that nations which gained their independence after Nigeria and nations whose resources are less in quality and quantity than that of the Nigerian state (as based on the liberal view of this author) have taken progressive steps towards the achievement of all ESC rights including the right to health. Apart from taking the legislative steps by enshrining the right to health in their Bills of Rights, these nations have also been held liable to uphold the right to physical and mental health of citizens as a vehicular road leading to the right to life both under their municipal laws and under the AHCPR.

Indeed the official African human rights watchdog the African Commission on Human Rights in the

case of *Purohit and Moore v. The Gambia*<sup>39</sup> recognised that the right to health under the African Charter includes the right to health facilities, access to goods and services. In this case, the complainants who are mental health advocates, submitted a communication on behalf of existing patients detained at Campama, (a Psychiatric Unit of the Royal Victoria Hospital, Gambia) and also on behalf of ‘future’ mental health patients detained under the Mental Health Acts of the Republic of The Gambia.

The African Commission dealing with the issue of the right to mental health also acknowledged the right to life and defines clearly that the obligations of states parties with regard to mental health patients relates or corresponds with their right to life. The African Commission stated that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.

The commission thus held that the enjoyment of the human right to health as it is widely known is vital to all aspects of a person’s life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.

We submit that this decision is in direct agreement with the fact that the right to health has an unbreakable link with the right to life. The principle of state responsibility is to the effect that a state owes the rights which it has guaranteed and for which it must endeavour to protect at all times. The state’s responsibility also includes the fact that all such rights as are ancillary to the guaranteed right must also be maintained in the attainment of the said right. We submit that the principle of state responsibility presupposes that a state will take all necessary steps towards the achievement of not only the guaranteed rights but also all such rights as are ancillary to the guaranteed rights.

#### **VIII. TOWARDS THE JUSTICIABILITY OF ESC RIGHTS IN NIGERIA**

Having established that the right to health is directly linked to the right to life, can one say that such states such as the Nigerian state which have continually allowed its agency (NAFDAC) to breach its duty to protect the right to life of those poor children who

<sup>37</sup> Nigeria gained Independence from its British overlords on the 1<sup>st</sup> October 1960.

<sup>38</sup> See Article 2(2) of the ICESCR.

<sup>39</sup> African Commission on Peoples’ and Human Rights Communication No. 241/2001 Sixteenth Annual Report 2002/2003, Annex

VII; accessed at <http://www.iceshr> on the 3rd of June 2009 pg 19.

were murdered by the “my pikin baby teething mixture”. In other words does the Nigerian state owes the children any duty to safeguard their health. We submit that the Nigerian state owes the children who are citizens of Nigeria the duty to ensure that every child shall enjoy the best attainable state of physical, mental and spiritual health as guaranteed under the Child’s Right Act.<sup>40</sup>

We submit that the ingestion of the my pikin baby teething mixture by those hapless children leading to their eventual death is a direct negation of the right to best attainable health and the guarantee of the Nigerian government to endeavour to reduce infant and child mortality rate in Nigeria.

We submit further that the the failure of NAFDAC to effectively perform its statutory role or duty owed to the Nigerian citizen is also a breach of the duty owed by the Nigerian government to protect the right to life of its citizen. We submit further that the breach by the state agency is a breach by the state itself and the liability of the agency (both in civil and criminal law) may be visited on the Nigerian State as it is the enabling or parental authority of NAFDAC. In other words we submit that the Nigerian government is vicariously liable for the death of those hapless children<sup>41</sup>.

Having submitted this far, what then are the remedies open to the parents or guardians of these innocent children? We submit that in a situation such as this; the victims’ families are entitled to a number of reliefs against the Nigerian government/ its agencies and the manufacturer of the my pikin baby teething mixture.

First, the manufacturers of the drug are in liable in civil law especially in torts and under the head of negligence to the victims’ families. We submit that the “neighbourhood principle” postulated in the locus classicus *Donoghue v. Stevenson*<sup>42</sup> is as relevant here as it is in England. The general question in that case was whether or not a manufacturer of a product owes a duty of care to the ultimate user of that product. The answer was a resounding yes! Happily the Nigerian courts have toed the same line in a line of cases.<sup>43</sup>

We submit that Barewa Pharmaceuticals Limited owes the Nigerian citizen the duty of care in the manufacture of the drugs which it presents to the whole world and to which it procured the approval of the Nigerian agency. We submit that the

contamination of the the drug by “diethylene glycol” (as shown by NAFDAC’s belated test) was the direct cause of the death of the children who ingested same. Thus we submit that the said manufacturing company has breached the duty of care owed by it to the Nigerian citizens. The damage caused by the breach is thus not remote and the manufacturer is damnifiable to pay damages to the victims’ families.

Apart from the civil liability the pharmaceutical pharmacy by the facts of the case are also liable at criminal law. We submit that the manufacturers are liable to be charged with the offence of manslaughter under both the Criminal Code<sup>44</sup> or culpable homicide punishable under the Penal Code<sup>45</sup> respectively.

As noted earlier, the manufacturers of the contaminated drug were subsequently arraigned at the Federal High Court, Lagos upon charges of manslaughter. The Nigerian state unlike its Chinese however has not issued any official statement or policy on the modality of payment of compensation of the victims’ families.

We submit that having established that it is the responsibility of the Nigerian state to protect the health of the Nigerian citizenry it behoves on the state to reach out to the victims’ families to pay compensation to them.

Having submitted that cases of drug contamination leading to illness and eventual death of Nigerian citizens is a glaring breach of the right to life of the citizens, and having observed that the failure of the state to provide an effective regulatory agency in the delivery of the health care and allied matters of the citizens of Nigeria is a result of the non justiceability of the right to health under Nigerian municipal law; it is apposite to recommend that the Nigerian state take urgent steps to legislate on the right to health by bringing same to the status which it deserves namely as a right which is as justiceable as the right to life.

This we believe is the best catalyst for the prevention of future occurrence(s) of drugs contamination in Nigeria. We believe and recommend that a review of the current position of the Nigerian Law on the issue of the right to health is a matter of necessity. We believe that a state which guarantees the right to life without the right to health is only toying with the life of its citizens.

Indeed the current trends suggest that "the enjoyment of the highest attainable standard of health" which WHO describes as "one of the fundamental rights of every human being"<sup>46</sup> is now the focus of every state

<sup>40</sup> Cap C50 LFN 2004. S. 13(1) & (2).

<sup>41</sup> See the case of Cassidy v. Ministry of Health {1951} 2 K.B. 343, See also Buildwell Plants Equipment Nigeria Ltd v. Roli Hotels Limited 2006 All FWLR pt 314 pg.238.

<sup>42</sup> {1932} A.C. 562.

<sup>43</sup> See the case of Okwejinor v. Gbakeji 2008, All FWLR. pt 409, pg. 405. (S.C) . See also Nigerian Bottling Company Plc. v. Olanrewaju 2007 All FWLR. Pt 364 at pg. 360 (C.A)

<sup>44</sup> S.317 Cap C38 LFN 2004.

<sup>45</sup> S.222 Cap P3 LFN 2004

<sup>46</sup> WHO Report 2008 accessed at <http://www.who.int> on the 2<sup>nd</sup> of June 2009.

whose interest is in its economic advancement. The goal of every progressive country or state is to be able to provide good healthcare facilities for its citizenry in order to achieve the long term effect of macro economic boom since it is believed that the citizenry's health is commensurate to the state's wealth generation mechanisms.

If that is accepted to be a truism as the saying goes that "health is wealth", we believe that the Nigerian government ought to be alive to a legal reform and review of its current law as relates to the right to health. We shall advocate that the right to health is directly connected and related to the right to work, the right to education and the right to life and thus all economic social and cultural (ESC) rights are indispensable and as such ought to be entrenched in the Nigerian constitution as state guaranteed rights instead of its present status under Chapter Two of the constitution. We advocate that the said chapter i.e the Fundamental Objectives and Directive Principles of State Policy which the 1999 Constitution declared as non-justiciable<sup>47</sup> ought to be brought under Chapter Four of the 1999 Constitution and thus made justiciable.

Creating a link with above submission, we submit that the Nigerian State can no longer sustain the argument of non justiciability of the ESC rights as the State is signatory to four different regional and international human rights instruments (mentioned above) which recognizes these rights as interdependent, interrelated and indivisible from the civil and political rights which are protected and are justiciable under Chapter Four of the Nigerian constitution. We have our reasons.

Firstly, international law provides that a state party to a treaty cannot plead its domestic law to circumvent its international obligations. Having signed and ratified the ICESCR, Nigeria has an obligation to bring her domestic law to conform to the covenant. Second, it has been noted above that Nigeria has domesticated the ACHPR. It is thus a contradiction for Nigeria to domesticate the Charter and still refuses to make ESC rights non-justiceable under her constitution.

Playing the devil's advocate, the Nigerian state may argue that economic, social and cultural rights are supposed to be progressive in nature since the ICESCR provides among other things that the state parties to the covenant should take steps to utilise to the maximum of its available resources to achieve progressively the full realisation of the rights recognised in the covenant by all appropriate means including particularly the adoption of legislative measures.

Again as noted above, the implication of this provision is that the covenant recognises the differences in wealth and resources available to different countries in the world. States are however obligated regardless of economic development to ensure respect for minimum substance of rights for all. If for any reason, a state fails to meet its obligations on ESC rights due to lack of resources, it must show that every effort has been made to use all the resources at its disposal to satisfy the minimum ESC rights obligations.

#### **IX. THE LINK BETWEEN JUSTICIABILITY OF ESC RIGHTS, GOOD GOVERNANCE AND SUSTAINABLE DEVELOPMENTS OF NIGERIA**

It might further be argued that Nigeria is still a developing country and as such it should be allowed to take its time in deciding when these rights can become justiciable. We submit that this argument can no longer be sustained by the Nigerian state going by recent discoveries of the workings of the Nigerian ministries, agencies and parastatals.

A recent report<sup>48</sup> indicates that there are at least ₦78billion, first quarter votes belonging to some ministries, agencies and departments amongst which is the Ministry of Health lying idle in certain accounts with the Central Bank of Nigeria.

One wonders what projects these funds were intended for and why they were shelved. Ideally those projects would have been for the benefit of the Nigerian citizens and their wellbeing.

We note that but for the policy of the present government in respect of return of unspent funds; nobody would have been the wiser to the existence of such funds. In time past they would have ended up in some private pockets. We submit therefore that the return of these unspent funds does nothing for the average Nigerian citizen; rather what we believe would have been to the benefit of the Nigerian citizens will be using these funds for the needs of the citizen of this state especially in the provision of the ESC rights. We believe that the Nigerian hospitals are as of today are merely glorified health centres. Indeed the situation is such that the high and mighty in the Nigerian state, their families and cohorts will disdain to set their hallowed feet into any health facility in the Nigerian state. It is in the character of the Nigerian political class to traverse the continent seeking cures for various ailments ranging from common malaria to the serious ones like kidney diseases.

We submit that this is so because the state of the Nigerian hospitals are nothing to write home about and are best mere death traps. We believe that this is

<sup>47</sup> See s. 6(6) of the Nigerian constitution.

<sup>48</sup> Punch Newspaper of Tuesday 2<sup>nd</sup> June 2009.

so because the right to health is not justiciable under the Nigerian bill of rights. Flowing from the above, we submit that there is indeed a link between the social and economic wellbeing of a nation and the justiciability of ESC rights. This has been glaringly demonstrated by the Nigerian political class who hide under the non justiciability of the ESC rights to unjustly enrich themselves with the natural resources of the nation to the detriment of the Nigerian masses. We submit that the endemic corruption in the Nigerian nation can be linked to the non justiciability of ESC rights as the political class continues to feed fat on the resources which would have been well spent on the progressive achievement of the ESC rights were these rights justiciable.

We verily believe and we submit that the non justiciability of ESC rights have led to the social and economic regression of the Nigerian nation as opposed to nations such as China, United States of America and South Africa who by their entrenchment of the ESC as justiciable rights have been able to improve their social and economic spheres of life. The resultant effect is thus that the Nigerian elites now spend the Nigerian nation's forex reserve in pursuit of health care facilities in such countries aforementioned whilst leaving the health care facilities in their own nation in near non existent state. This we believe is the link the justiciability of ESC rights, good governance and sustainable development of nations.

#### X. CONCLUSIONS AND RECOMMENDATIONS.

The 1999 Nigerian Constitution like its predecessors does not recognize the right to health as a justiciable right but recognizes that the right to life is a justiciable one. We have seen however that the right to health remains one of the vehicles to the achievement of the right to life. This we submit is the link between these two rights. We also observe that the non justiciability of ESC rights in the Nigerian nation is one of the direct factors militating against good governance and sustainable development of the Nigerian nation. We submit that the Nigerian nation is ripe enough to accept its responsibility as a nation which has the wherewithal to meet its citizen's needs for the right to health.

To that end we advocate and recommend the following: (1) That the Nigerian nation should as a matter of urgency take legislative steps toward the achievement of the right to health rights and indeed all other ESC rights. We submit that the proposed amendment to the Nigerian Constitution cannot be complete without enshrinement of the ESC rights as a fundamental human right under the new Nigerian Constitution. (2) That there are adequate health facilities for the achievement of this right to health. (3) That the state agencies responsible for the delivery of the health facilities or allied services

relating to the health care delivery system are alert and responsive at all times towards the discharge of their duties. (4) That all the necessary appliances and apparatus, drugs and consumables for the carrying out of the services are functioning to the best of standard reasonably applicable to the standard of other progressive nation.

Finally we align ourselves with the reasons offered by the **Colloquim On The Justiceability Of the ESC Rights (2000)**<sup>49</sup> on : **“Why should ESC Rights be constitutionally guaranteed?”** The Colloquim states that all ESC rights ought to be made justiciable in order to: **(1)** Resolve the problems caused by agitation over marginalization as claimed by the people of the Niger Delta area of Nigeria and that as such underdevelopment and the wrestle for resource control will reduce. **(2)** Focus the attention of the executive and legislature on how to adopt legislative and enforcement steps in order to progressively achieve the ESC rights **(3)** Allow the judiciary to develop jurisprudence that will ultimately improve good governance and welfare of the people such as have been seen in the case of progressive nations such as China, South Africa and the United States of America. .

The conclusion drawn is that the justiciability of ESC rights is of paramount importance and as such ought to be elevated to the status of fundamental constitutional guarantees.<sup>50</sup>

Finally we conclude that it is only when ESC rights are fundamentally guaranteed that the Nigerian state shall usher in a new healthcare system that really cares for the Nigerian citizens thus proving the point that there is indeed a co-relation between the justiciability of ESC rights, good governance and sustainable development of nations.

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<sup>49</sup> A workshop on the Justiceability of ESC rights held in Abuja, Nigeria in 2000.

<sup>50</sup> accessed at <http://nigerian village square.com>. on the 20<sup>th</sup> of June 2009

