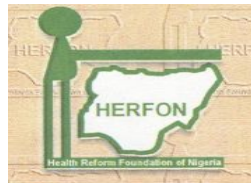


MEMORANDUM

FOR THE INCLUSION OF

THE RIGHT TO HEALTH INTO THE BILL OF RIGHTS FOUND IN
CHAPTER FOUR OF THE CONSTITUTION

SUBMITTED BY



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THE BASIS FOR THE INCLUSION OF THE RIGHT TO HEALTH AS A JUSTICIABLE RIGHT IN THE CONSTITUTION

(Promotion of Democracy, Rule of Law, National Unity, Due Process, Peace, Order and Good Governance in Nigeria)

1. INTRODUCTION

The right to health (“RtH”) is a human right and belongs to the category of economic and social rights (“ESR”). The historical marginalisation of ESR has led in many quarters to doubts about their status as rights properly so called. The 1999 Constitution did not provide for claims and entitlements of citizens on the right to health in Chapter 4 containing the Bill of Rights. The provisions of Chapter 2 of the Constitution where a few sections mentioned health cannot found a claim of rights. The realisation of the RtH may be pursued through numerous complementary approaches such as the formulation of health policies, the implementation of health programmes or the adoption of specific legal instruments¹. However, providing for the right to health in a constitutional Bill of Rights sends a strong message of the commitment of the country to protect, promote and facilitate the health of its citizens.

2. THE BASIS FOR THE INCLUSION OF THE RIGHT TO HEALTH AS A JUSTICIABLE RIGHT IN THE CONSTITUTION

A. Resolving Social Conflicts

Nigeria has been witnessing agitations of various component units of the Federation alleging marginalization and underdevelopment. What is at stake? – vital livelihood resources including health, access to communal and social infrastructure. There is the Boko Haram saga, the relatively abated Niger Delta crisis, the Eastern part of the country states that it is marginalized and the North is underdeveloped; yet Nigeria has been blessed with hundreds of billions of dollars realised from the sale of petroleum in the last 48 years. If education, housing, health and social security etc have been constitutionally guaranteed and fully implemented, these problems would have abated.

B. Setting Constitutional Responsibilities and Giving Citizens a Voice in the Determination of Expenditure Priorities

Nigeria’s health indicators particularly in Millennium Development Goals (MDGs) 4 and 5 which seek to reduce child mortality and improve maternal health are frightening;

¹ General Comment No.14 of the United Nations Committee on Economic, Social and Cultural Rights on the Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights - ICESCR).

Infant Mortality Rate of 75 per 1000 live births; Child Mortality Rate of 88 per 1000 live births; Under 5 Mortality Rate of 157 per 1000 live births and a Maternal Mortality Rate of 545 per 100,000 live births. Nigeria contributes 10% to the global burden of Maternal and Under 5 mortality².

Yet, there are untapped resources lying idle at various tiers of government. The decision on how to spend available resources is left to the executive and the legislature. Empirical evidence has shown that uncontrolled power and unguided decision making in the expenditure of public resources have led Nigeria to its present sorry state. There is therefore the need to set definite constitutional responsibilities for the legislature and the executive³. It is better for the commonwealth of Nigeria to decide priority areas than for its leaders to be left to imagine what our priorities are. It is the view of the Report of the National Political Reform Conference that the state and its agencies lack sufficient commitment to honour obligations and responsibilities to citizens⁴ and this has led to human rights violations. It therefore recommended the merger of Chapters II and IV of the Constitution and its designation as a justiciable bill of rights⁵.

Information emerging from the probes set up by the National Assembly, the cases filed by Economic and Financial Crimes Commission against former public office holders and the monies so far recovered by the EFCC and the ICPC show that resources that should have been constitutionally delimited have been frittered away. The Fiscal Responsibility Act grounds itself in the Fundamental Objectives and Directive Principles of State Policy. However, it is set to achieve fiscal prudence while there are few laws specifically enacted to achieve social responsibility as envisaged by the Fundamental Objectives.

C. Reflecting the Popular Will

The constitution of every nation is supposed to be the product of the popular will, reflecting the wishes and aspirations of the people, the notion of the people of the concept of a basic document to guide them and their government. In the words of a jurist, do the provisions of the 1999 Constitution on the RtH and ESR reflect the spirit of the nation on the subject?⁶ If democracy is still guided by one person one vote, it is projected that if a poll were to be taken on the question of constitutional guarantee of RtH, it would surely be returned in the positive. The Constitution should be a social

² See FSHDP at page 20.

³ A government with so much constitutional responsibilities would not indulge in such wasteful spending and monumental corruption as revealed in legislative probes since the return to civil rule in 1999.

⁴ At page 70 of the Report.

⁵ Ibid, at page 72 of the Report.

⁶ Von Savigny - *On the Vocation of our Age for Legislation and Jurisprudence* (1831) Haywood Transl, p.27 of the historical school of jurisprudence.

document that aims at satisfying social wants - the claims, demands and expectations involved in the existence of a civilized society, by giving effect to as much demands of the people as possible. The Constitution should re-order human and institutional conduct through political organized society⁷. A constitution without a proper social engineering role is a worthless document.

D. Indivisibility, Interdependence and Inseparability of all Human Rights

Human rights are indivisible, interdependent and inseparable. You cannot separate the realisation of one right from the others. Separating Chapter Four from the core provisions of Chapter Two does not augur well for human development. The RtH is closely related to and dependent upon the realisation of other human rights and fundamental freedoms including the rights to life, food, education, housing, human dignity, freedom from torture, etc. In protecting the right to life, Nigeria is under obligation to adopt positive measures to reduce infant and adult mortality, to increase life expectancy, eliminate malnutrition and epidemics, etc⁸.

Owing to the pre-eminent role of health, good health for all people is a right and not a privilege. The right to life (already guaranteed in Chapter Four of the Constitution) and the right to health cannot be separated. For without the enjoyment of the highest attainable standard of physical and mental health, life would be imperiled. If the right to health is not treated as part of the constitutional right to life, the easiest way of depriving a person of his life would be to deprive him of access to health supporting facilities to the point of abrogation⁹. Such a deprivation would make the right to life empty and hollow. Part of what living a life of dignity and freedom requires is the deference and assertion of the right to health for all people including the poorest of the poor.¹⁰

E. To implement Treaty Obligations

Nigeria has ratified a plethora of international treaties that contain provisions on the right to health. The treaties include the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), the Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”), Convention on the Rights of the Child (“CRC”), etc. It has also ratified the African Charter on Human and Peoples’ Rights which it domesticated in Chapter A9 in the Laws of the Federation of Nigeria, 2004. Despite these ratifications, the provisions of the Fundamental Objectives and Directive

⁷ See Dean Roscoe Pound of the social engineering jurisprudence school of thought in the *Philosophy of Law* (1954) p, 47. See further Rudolf von Jhering who asserted that the state exists to achieve social purposes which cannot be achieved by the free interplay of individuals and groups in *Law as a Means to an End* (Transl by 1 Husik) 1924.

⁸ See paragraph 5 of General Comment No.6 of the Human Rights Committee.

⁹ This sentence is adopted from Justice Ghagwatti’s postulations in **Olga Tellis v Bombay Municipal Corporation** (1986) AIR Sup. Ct 180.

¹⁰ J. Achor in *Immunisation Guide for the Family* (1998) Shelter Rights Initiative, page 3.

Principles of State Policy which reflect the socio economic aspirations of the Nigerian people including the RtH are by s.6(6) (c) of the 1999 constitution non justiciable and cannot found legal claims in law. This has constituted a stumbling block to the protection of the RtH in Nigeria. A State party to a treaty is barred from invoking its domestic law to defeat its international obligations in a treaty – Article 27 of the Vienna Convention on the Law of Treaties. If the rules were otherwise, the simplest way of avoiding treaty obligations is to enact domestic law which is inconsistent with the obligations - exactly what Nigeria has done in her Constitution.

Nigeria is expected to bring her domestic law in conformity with her international obligations either shortly before or immediately after ratification of a treaty. It is also expected to take progressive legislative, administrative and policy actions to ensure the realization of the intentions of treaty obligations as against retrogressive measures of the type found in Chapter 2 of the Constitution. S.12 of the Constitution worsens matters by making cumbersome provisions for the implementation of treaties¹¹. The failure of Nigeria to domesticate international treaties was noted as one of the challenges of human rights implementation by the National Political Reform Conference¹².

Nigeria is under obligation to modify her domestic law to give effect to treaty obligations and this chance has been offered by the constitution review process. It is against the principles of the common law doctrine of estoppel to approbate and reprobate at the same time - ratify treaties, domesticate same and make domestic laws that negate them.

F. Other African Countries Have Done It!

The following African Constitutions have made provisions on the right to health.

(i) Algeria: The constitutional bill of rights of Algeria provides the following in **Article 54**

All citizens have the right to the protection of health. The state assures the prevention of and the fight against epidemic and endemic diseases.

(ii) Angola- Article 47

(1) The State shall promote the measures needed to ensure the right of citizens to medical and health care, as well as child, maternity, disability and old age care, and care in any situation causing incapacity to work

¹¹ No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly and it needs the ratification of a majority of state legislatures before it is presented for presidential assent.

¹² Main Report of the National Political Reform Conference at page 71.

(2) Private and cooperative enterprises in health, social welfare and social security shall be exercised in accordance with the law.

(iii) Seychelles

29. Right to health care

The State recognizes the right of every citizen to protection of health and to the enjoyment of the highest attainable standard of physical and mental health and with a view to ensuring the effective exercise of this right the State undertakes-

- (a) to take steps to provide for free primary health care in state institutions for all its citizens;*
- (b) to take appropriate measures to prevent, treat and control epidemic, endemic and other diseases;*
- (c) to take steps to reduce infant mortality and promote the healthy development of the child;*
- (d) to promote individual responsibility in health matters;*
- (e) to allow, subject to such supervision and conditions as are necessary in a democratic society, for the establishment of private medical services.*

(iv) South Africa

The Constitution of South Africa makes provisions for the following the Rth.

24. Environment

Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being; and*
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –*
 - (i) prevent pollution and ecological degradation;*
 - (ii) promote conservation; and*
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

26. Health care, food, water and social security

- (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 dependants, 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.*

G. Development of Jurisprudence

In matters of justiciability of RtH, it is imperative that the judiciary is allowed to develop jurisprudence which will ultimately improve the good governance and welfare of the people. The prevalent approach of shutting out violations of the RtH from judicial determination has obvious limitations and bottles up individual and social grievances.

There is nothing inherent in the nature of the RtH that makes it ineligible for constitutional protection as a right that can be enforced through the judicial process. Examples from the South African jurisdiction show this to be true. The respect and protection bound obligations of the RtH do not require progressive realization and can be made justiciable while the fulfillment bound obligations would require progressive realization and can also be justiciable. Statutory steps have already been taken for the fulfillment of some aspects of RtH; they need elevation to fundamental constitutional guarantees.

3. THE FRAMEWORK FOR THE INCLUSION OF THE RIGHT TO HEALTH IN THE CONSTITUTION

In devising a framework for identifying aspects of the RtH that will be candidates for justiciable constitutional recognition, it is important to understand the concept of state duties in ESR particularly, the concept of the minimum core obligation which is in essence the basic nature and essence of the RtH - the essential elements without which the RtH loses its *riphood* and substantive significance. It is the floor below which conditions should not be permitted to fall. Below this floor, Nigeria will be deemed to be in violation of its RtH obligations.

The recommendation is that the minimum core state obligation which crystallises as the minimum core content of the RtH should be presented for constitutional recognition. This provision should be reconciled with the availability of resources based on a costing of what it would take to pay for the minimum content vis-à-vis the commitments of instruments such as Vision 2020 and the African Leaders 15% commitment. The available resources will also project the resources to be realised from new approaches such as compulsory health insurance for all citizens and 2% of the Consolidated Revenue Fund provided in the National Health Bill. The minimum core obligations should also be reconciled with the prevalent disease conditions as demonstrated by epidemiological data and health indicators in the Nigerian society. Within this context, primary health care, maternal and child health will be automatic candidates for constitutional recognition.

The state duties are to respect, protect and fulfill the RtH and the ensuing obligations of conduct and obligations of result. The duty to respect enjoins states to refrain from interfering with the enjoyment of already entrenched rights. The obligation to protect

requires States to prevent violations of such rights by third parties. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of the right. The above three obligations are further subdivided into obligations of conduct and obligations of result. Obligations of conduct require action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires states to achieve specific targets to achieve a detailed substantive standard. With respect to the right to health, for example, the obligation of results requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference of Population and Development and the 1995 Beijing Fourth World Conference on Women¹³.

The obligation to respect implies that the state should not interfere to destroy or impede access to already existing aspects of the RtH, for instance through pollution of air, water and soil which will deleteriously impact on health. The obligations to respect may not require the expenditure of resources and are negative obligations. As such, they can be categorized as part of the minimum state obligations. Both obligations of conduct and obligations of result related to the respect obligation are as such candidates for constitutional recognition. The duty to provide a judicial remedy in the event of a violation of entrenched RtH is apposite here.

Non discrimination has almost assumed the status of *jus cogens*, as a peremptory norm of customary international law. Therefore, issues of non discrimination in access and enjoyment of government health facilities will also be part of the basic state obligations and deserve constitutional recognition.

The protection bound obligations are to an extent negative and may be notionally cost free - to prevent violations of the RtH by third parties. However, in most instances, states need to create a policy, legislative, regulatory, policing, judicial and enforcement mechanisms to ensure that third parties do not violate RtH. In the real world, these interventions cost money and other resources. But most of them form part of the core functions of government in the sense of maintaining law and order and securing lives and property. Thus creating standards, enforcing them and preventing third parties from violating the RtH and other protection bound obligations appear to be good candidates for constitutional recognition. Preventing harmful traditional health practices such as female genital mutilation will be a candidate for recognition. Providing a judicial remedy in the event of violations by third parties is a basic component of this obligation. This is so both in terms of the ensuing obligations of conduct and obligations of result.

¹³ See the Maastricht Guidelines.

The fulfillment bound obligations appear more problematic because of the need for resources as they are seen as positive obligations. They require states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of the rights. It has some semblance with the protection bound obligations in the sense of policy, legislative, regulatory, policing, judicial and enforcement mechanisms needed for the fulfillment of rights. It is submitted that all fulfillment bound obligations that are part of the fundamental duties of government should be candidates for constitutional recognition. It is further submitted that from Nigeria's resource profile, aspects of the RtH demanding positive state intervention can be constitutionally protected. For instance, preventive and environmental health rights, essential primary health care including free consultation in government hospitals, emergency treatment, immunization for preventable diseases, free maternal and reproductive health care, etc. A framework law for the implementation of the RtH will also be obligatory on the state.

In selecting rights that will be candidates for constitutional recognition, it is imperative to include rights that the State has already set as targets under the MDGs and other time bound targets, for instance in Vision 2020 and its First National Implementation Plan – health rights encapsulated in MDGs 4,5 and 6.

Resources for the fulfillment of the Rth need not come from existing government sources alone; new taxes can be raised, existing taxes can be increased, for instance, increasing Value Added Tax from 5% to 10%, private sector actors may be under obligation to pay some costs, contributory schemes can be devised, etc. Budget leakages can be plugged and corruption minimized to free resources towards the fulfillment of these rights.

On a procedural issue, for the enforcement of the RtH, access to the courts should be liberalized by the Constitution as against the present restrictive *locus standi* rules adopted by the courts. Finally, selected aspects of the RtH can be constitutionally protected, particularly those bordering on the minimum core obligations of the state and the obligations to respect and protect the RtH.

4. THE SPECIFIC RECOMMENDATIONS

The following specific recommendations are made for the inclusion of the RtH into the justiciable Bill of Rights in Chapter Four of the Constitution.

Proposed Right to Health	Justification and Feasibility
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<p>(1) Every person is entitled to the right to health and accordingly, the State shall provide:</p> <p>(a) free medical consultation in government medical institutions;</p> <p>(b) free access to primary health care services including maternal and child health and reproductive health services;</p> <p>(c) free medical care for children under the age of five and persons over sixty five years old;</p> <p>(d) Free medical treatment for all persons in detention.</p> <p>(2) No person shall be denied emergency medical treatment in any medical institution.</p> <p>(3) A person who by reason of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment by reason only of religious or other beliefs.</p> <p>(4) Every person shall be</p>	<p>This can be provided within the context of available resources and will facilitate the diagnosis of disease and their eventual treatment.</p> <p>This can also be provided within the context of available resources and to brighten our deplorable maternal and child health indicators.</p> <p>This can also be provided within the context of available resources, taking cognizance of the rights of the child and of older persons.</p> <p>This is linked to the right to life and the fact that detainees are not in a position to provide medical care for themselves.</p> <p>This can be linked to the need to secure the right to life over and above financial and economic considerations.</p> <p>This can be justified by the fact that all other rights revolve around the right to life. There is the need to save life over and above any other consideration.</p> <p>This is a negative obligation and it is also linked with</p>
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<p>entitled to full information about his medical condition and records.</p> <p>(5) The State shall take all appropriate steps, to the maximum of available resources with a view to achieving the progressive realization of the RtH including;</p> <p>(a) compulsory medical insurance for all citizens;</p> <p>(b) preventive and environmental health interventions;</p> <p>(c) enact a framework law for the progressive realisation of other aspects of the right to health not covered by these provisions.</p>	<p>free medical consultation in government hospitals.</p> <p>In accordance with our international obligations under the International Covenant on Economic, Social and Cultural Rights.</p> <p>This will facilitate raising resources for the funding of the right to health obligations.</p> <p>To limit the spread of diseases and thereby reduce the resource outlay on curative health services considering that the environment is an important influential factor in epidemiological analysis.</p> <p>This takes care of matters not covered by the Constitution and which need to be fleshed out to guarantee the RtH. For instance the National Health Bill which if signed into law dedicates 2% of the Consolidated Revenue Fund for primary health care.</p>