

RIGHT TO HEALTH: INTERFACING NIGERIA'S *NATIONAL HEALTH ACT* AND THE CONSTITUTION

By

Babafemi Odunsi* and Adebisi Raimi**

I. Introduction

Over the years, access of people in Nigeria to meaningful healthcare services has been an issue of serious concern. The issue has been particularly noticeable in the context of the unwholesome conditions of Nigeria's public health system.¹ Series of reforms by different governments have not appeared to achieve any significant improvement at any time.² The unwholesome state of public healthcare services in Nigeria can be simply attributed to lack of will and sincere commitment on the part of the government. Hence, the series of reforms ritually undertaken had been more of playing to gallery, evidently devoid of any honest desire to make practical improvements in the health sector. Thus, it has been observed:

The reason that we have needed health systems reforms all along is because the systems we had prior to that time were not working or producing the optimal health status possible and deserved by the people. The 2000 World Health Report ranked Nigeria as the 187th of the 191-member nations for its health systems performance. That speaks a whole lot about the fact that our health system is not working.³

The lack of sincere commitment and the failure on the part of government to entrench a meaningful public healthcare system Nigeria can be attributed to some factors. One is that Nigerian political leaders and the wealthy class, generally, do not patronize the Nigerian public healthcare services; they usually go abroad to seek medical treatments for

* **Associate Professor/Reader**, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria; **McArthur Fellow**, Faculty of Law, University of Toronto, Toronto, Canada; Formerly: **Research Associate**, Faculty of Law, University of Pretoria, Pretoria, South Africa, **Research Fellow**, Faculty of Law, University of the Free State, Bloemfontein, South Africa.

** **Senior Lecturer**, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria

¹ See 'Hope for Health in Nigeria' [editorial] *The Lancet* Vol. 377 June 4, 2011, 1891. See also e.g. 'Gov. Fashola, Lagos Hospitals need healing' *The Sun Newspaper*, online at <http://sunnewsonline.com/new/?p=70658> (accessed on 16/8/2014).

² M.C. Asuzu, 'The Necessity for a Health systems reform in Nigeria', *Journal of Community Medicine & Primary Health Care*, 16 (1), 1.

³ *Ibid.* See also *The Lancet*, *supra* note 1: "On May 29, many Nigerians celebrated again as Dr Goodluck Jonathan was inaugurated as President for the next 4 years. The zoologist succeeded President Umaru Yar'Adua after his death last year, and in April 2011, Jonathan was re-elected in what is widely considered the most transparent and legitimate election Nigeria has ever held. This is an exciting time for the country: it has a leader with a clear mandate, its economy is flourishing (it is predicted to have the highest average GDP growth of any country over the next 40 years) ... However, until now, health has been lamentably absent from Jonathan's declared priorities. Although progress has been made in poliomyelitis eradication and health-systems strengthening since he came to power in May 2010, these are only two of hundreds of indicators in dire need of improvement. Many societal groups grew concerned over his neglect of a health agenda. On May 18, thousands of women protested about the delay in the passage of the health bill outside the National Assembly. Their efforts were rewarded with the passing of the bill the very next day. At the time of going to press, all that remains outstanding is presidential assent to make the National Health Bill a federal law."

themselves and families.⁴ In essence, they are not really affected by the sordid state of the healthcare system. Thus, it is the poor and helpless people who willy-nilly must experience the dreadful services available in the Nigerian public healthcare domain.

A second factor for the lackadaisical attitudes of Nigerian government towards the healthcare system is the seeming lack of a legal duty on the Nigerian government to safeguard the health rights of citizens. Put differently, that right to health is not constitutionally justiciable in Nigeria, despite the series of international treaties that have guaranteed the right.⁵

The question of the justiciability of right to health and the concomitant duty on the Nigerian government to safeguard same remains open to debates. Interestingly, sound and logical arguments exist to support any position taken, whether for or against. By extension, the absence of a settled clear-cut position, ostensibly, has enabled the government to safely avoid legal accountability in this area. It was in this existing atmosphere that the *National Act* was signed into law in 2014. Among others, section 1(1) e of the Act unequivocally provides for a National Health System which shall “protect, promote and fulfil the rights of the people of Nigeria to have access to health care services.” The question arising is whether, by this provision, the *National Health Act* has laid to rest the disputations over legal enforceability of right to health in Nigeria. Related to this is whether the *National Health Act* has, through that provision, offered Nigerians a legal avenue by which they can challenge and compel the Nigerian government to put in place an effective and beneficial healthcare system for the people, unlike what has been the situation over the years. This paper will seek to address these posers and related issues in subsequent sections.

II. *An overview of Right to Health*

A key component of the right to health is the right of people to enjoy effective healthcare services. In this context, Article 12 of the *International Covenant on Economic, Social and Cultural Rights*⁶ provides that “[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Along the same line, Article 16 of the *African Charter on Human and Peoples’ Rights* (which Nigeria has domesticated as *African Charter on Human and Peoples Rights Act*)⁷ provides thus: “1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. State Parties to the present Charter shall take the

⁴ See e.g. Nigerian Monitor, ‘Patience Jonathan [Nigeria’s First Lady] flown abroad for medical treatment’, online at <http://www.nigerianmonitor.com/2014/02/16/patience-jonathan-flown-abroad-for-medical-treatment/> (accessed on 17/8/2014). See also, Uzoma Ben Gbulie, ‘Medical Care abroad for Nigerian Leaders – why not at Home? Nigeria world, online at <http://nigeriaworld.com/article....> (accessed on 17/8/2014)

⁵ The issue of justiciability of right to health in Nigeria is discussed in full detail in section V of this paper under the heading ‘Friends or Foes: Positions of the National Health Act and Constitution on Right to health.’

⁶*International Covenant on Economic, Social and Cultural Rights* Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 3 January 1976, in accordance with article 27

⁷*African [Banjul] Charter on Human and Peoples’ Rights*, 27 June 1981, OAU Doc. CAB/Leg/67/3 Rev. 5, 21 ILM 58 (1982), entered into force 21 Oct. 1986 (now domesticated in Nigeria as *African Charter on Human and Peoples’ Rights Act* Cap. A9 Laws of the Federation of Nigeria 2004)

necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

The Nigerian government has consistently expressed recognition of its obligation to safeguard the health of its people. For example, in the 2003 National HIV/AIDS Policy, the government declared, “Nigeria recognizes its responsibility to provide access to health care for all its citizens.”⁸ While Nigeria “recognizes” its responsibility to provide access to health care for its citizens, the state of the country’s health care system indicates that the government does not really regard health of the people as a major duty or important mission.⁹ Perhaps, this has to do with the fact the country’s government carries no legal duty to take care of the health of the people because the constitution does not make health a justiciable constitutional right.¹⁰ ‘Right to health’ only finds expression in the constitution as a non-justiciable ‘fundamental objective and directive principle of state policy’.¹¹

III. Hope of salvation in Nigeria’s Healthcare system: the National Health Act in perspective

Towards the end of 2014, President Goodluck Ebele Jonathan gave the constitutionally required presidential assent to the *National Health Bill*. By this constitutional ritual, the *National Health Bill* was transformed to the *National Health Act* which became an enforceable federal legislation binding on the government and citizens throughout the realm of the Federal Republic of Nigeria.

Before its emergence, the *National Health Act* experienced confounding turbulences in its odyssey through Nigeria’s bi-camera legislative processes. After its original presentation in that legislative chamber in 2006,¹² the Bill was initially passed by Senate, the upper arm of Nigeria’s legislature, on Thursday the 15th day of May, 2008.¹³ It was later ‘finally’ passed on May 19, 2011 having gone through the two arms of the Nigerian legislature.¹⁴ The passage of the Bill by the Senate in May 2011 was achieved by intense protests and agitations by various interest groups. Protesters besieged the Nigerian Senate, with women groups, at a point, threatening to go naked into the legislative chambers over the delay in passing the Bill.¹⁵

⁸ Federal Government of Nigeria, *National Policy on HIV/AIDS 2003*, 19

⁹ See *The Lancet* supra note 1, at 1891

¹⁰ See The ‘right’ is not listed among the rights guaranteed under the Nigerian Constitution –see generally, Chapter IV (sections 33-46) Nigerian Constitution 1999.

¹¹ See Chapter II, section 17(3) c& d of the 1999 Constitution: “The State shall direct its policy towards ensuring that (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.

¹² Lagun Akinloye, Nigeria’s National Health Bill: Delayed, Disputed and Desperately Needed, *Think Africa Press* online at <http://www.thinkafricapress.com/nigeria/nigerias-national-health-bill-brave-new-world> (accessed on 16/11/2013)

¹³ See The Senate, Federal Republic of Nigeria, *National Health Bill*, 2008 (Sb.50) A Bill for an Act to provide a Framework for the Regulation, Development and Management of a National Health System and set Standards for rendering Health Services in the Federation, and other Matters connected therewith.

¹⁴ *The Lancet*, supra note 1. With this act, the only remaining action for the Bill to become an enforceable law was the President’s signature or assent.

¹⁵ Michael Sunday, ‘The National Health Bill Controversy’ *Nigerian Orient News*, online at http://nigerianorientnews.org/?attachment_id=254 (accessed on 16/11/2013). See also *The Lancet* supra note 8: “On May 18, thousands of women protested about the delay in the passage of the

Ironically, almost immediately after passing of the Bill on May 19, 2011, an uncanny war broke out among stakeholders, particularly healthcare professionals and religious leaders, over some provisions in the Bill.¹⁶ The house of stakeholders and potential beneficiaries became utterly divided over the Bill. Benumbing acts of mud-slinging, threats, blackmailing, names-calling and so on became the norms in debates over the Bill.¹⁷ People that should ordinarily be united in pursuit of realizing the ideals of the Bill became disunited and distrusting adversaries in a morbid showcasing of ‘cat and mouse’ mentality.

In the throes of the squabbles among stakeholders, National Health Bill and, with it, some hope of improvement in the Nigerian healthcare system suffered another round of about three years delay. It was eventually passed again in largely acceptable format by the Nigerian Senate on Wednesday, 19th day of February 2014.¹⁸ The Bill as passed ultimately received presidential assent and transformed it into a federal law later that year, as earlier noted. In all, from its presentation in Senate in 2006 to the time of presidential assent in 2014, the *National Health Act* took about eight years to emerge. During the years, the Nigerian healthcare system continued to operate in an unsatisfactory state with the poor and helpless masses left bearing the brunt.

The *National Health Act* holds out some lofty promises of significant improvement in Nigeria’s healthcare sector.¹⁹ At a general level, the Act provides for the country a *National Health System* in whose framework, among others, there would be provisions “for persons living in Nigeria the best possible health services within the limits of available resources.”²⁰ The Act also provides that the government would undertake the protection, promotion and fulfillment of the rights of the people of Nigeria to have access to health care services.²¹ For the realization of its objectives, the Act provides for the injection of significant funds into the healthcare system, especially, primary health care, and human resources.²² Furthermore, the Act holds out the promise of facilitating and promoting the provision of health services for the management, prevention and control of communicable and non-communicable diseases, and in a related vein, ensuring comprehensive vaccination for children between the ages of zero and five years as well as pregnant women.²³ In a related

health bill outside the National Assembly. Their efforts were rewarded with the passing of the bill the very next day. At the time of going to press, all that remains outstanding is presidential assent to make the National Health Bill a federal law.”

¹⁶ . Michael Sunday, *ibid*.

¹⁷ *Ibid*

¹⁸ See The Senate, Federal Republic of Nigeria, *National Health Bill*, 2014 (Sb.215) A Bill for an Act to provide a Framework for the Regulation, Development and Management of a National Health System and set Standards for rendering Health Services in the Federation, and other Matters connected therewith, 2014. See also Nigerian Senate, ‘Nigeria’s’ online at <http://www.healthnewsng.com/2014/02/nigerias-national-health-bill-2014.html> (accessed on 7/8/2014)

¹⁹ Discussion in this segment is as adapted from Babafemi Odunsi & IfeOluwa Bamidele, ‘Right to Health, Bickering Stakeholders and the Embryonic Promises of Nigeria’s National Health Bill’ *Ife Journal of International and Comparative Law* Vol. 1, No. 1, 2014, pp.14-36

²⁰ Section 1(1) c

²¹ Section 1(1) e

²² Section 11

²³ Section 5 (1) h & i

vein, the Act pledges free medical care for comparatively vulnerable citizens such as women, children, older persons and persons with disabilities; in another dimension the Act assures that “all Nigerians shall be entitled to a guaranteed minimum package of services.”²⁴

In addressing some peculiar problems affecting access to emergency healthcare services, the Act has provided for the removal of barriers to prompt emergency healthcare services with an injunction that healthcare providers must not, for any reason, withhold emergency treatment to a patient.²⁵ To underscore the level commitment on this, the Act prescribes sanctions for anyone who contravenes the provision.²⁶ In addressing the serious problem of brain-drain and shortage of skilled healthcare personnel which has severely affected the Nigerian healthcare service system, the Act makes wide-ranging provisions to facilitate the availability of competent and productive human resources for the Nigerian healthcare system.²⁷ In summation, the Act, in outlook and nature holds out a lofty hope that, with its emergence, Nigerians would begin to enjoy notable improvement in access to healthcare services through enhanced healthcare system and facilities.

IV *Effectuating the promises of the National Health Act*

Effectuating the promises and hopes embedded in the *National Health Act* invariably depends on how well the government as the lead player willingly, or by legal compulsion, carries out the tasks fundamentally necessary to bring about a beneficial healthcare system in Nigeria. Adequate funding is a central component in the required tasks. Based on past experiences, there is a legitimate fear that the Nigerian government may not willingly perform its role, especially funding. Moreover, as noted earlier, health of the people appears not to be of primary concern of Nigerian leaders,²⁸ despite government’s flowery statements to the contrary.²⁹ The concern becomes more pertinent when it is considered that the *National Act* came into effect at a period of economic downturn for Nigeria, which the government may embrace as excuse for failure to perform.

In the event of government’s unwillingness, legal compulsion would be the more likely and workable option to get the government to play its expected role in the realization of the promises and hopes of the *National Health Act*. However, the issue of legal compelling can only be possible if the *National Health Act* has imposed an undeniable legal duty on the Nigerian government to safeguard the health rights of citizens which by extension calls for the provision of an effective healthcare system. Put differently, the question of legal compellability of the government would operate if the *National Health Act* has conferred an inviolable *right to health* on citizens which imposes a concomitant legal duty on the government to promote, respect and fulfill. Such conferment would offer a legal platform for citizens to take legal actions, if necessary, to compel the government to act appropriately. The pertinent question that arises in this context is whether the *National*

²⁴ Section 3(3)

²⁵ Section 20(1)

²⁶ Section 20(2)

²⁷ Sections 41- 44

²⁸ See Lancet, *supra* note 1

²⁹ See note 8 together with accompanying text.

Health Act has indeed conferred an inviolable right to health on Nigerians which in turn imposes an infallible, undeniable and unchallengeable legal duty on the Nigerian government to safeguard the right. The issue can only be resolved through an examination of the jurisprudence that underlies the working of the *National Health Act* and the Nigerian Constitution on the issue of right to health. This is done in the following section.

IV. Friends or Foes: Positions of the National Health Act and Constitution on Right to health

To reiterate, the issue arising from the discussion in section IV above is whether citizens, as a matter of *right*, can legally compel the government to take measures required for the improvement of Nigeria's healthcare system in the spirit of the *National Health Act*. Resolution of this issue inevitably dovetails into a discussion of whether *right to health* is a *justiciable* right in Nigeria or, to put more contextually, whether the *National Health Act* has made the right justiciable.

The pivot of human rights protection in Nigeria is the 1999 Constitution.³⁰ Chapter IV of the constitution sets out the human rights to which the people are *constitutionally* entitled and which the government has an indisputable legal duty to protect, promote and fulfill, and which the people can legally enforce. *Prima facie*, right to health is not a justiciable fundamental right in Nigeria, as it is not listed among the constitutionally guaranteed rights.³¹ The 'right' only finds expression in the constitution as a non-justiciable 'fundamental objective and directive principle of state policy'.³² Along that axis, 'right to health' in Nigeria, stands as a fundamental objective and directive principle of state policy that cannot be legally enforced in the country. There have been tacit judicial endorsements of the non-justiciability of right to health in Nigeria.³³

However, the fact that right to health is not enforceable under the Nigerian Constitution does not mean that it has absolutely no legal basis in Nigeria. In one vein, the right is integrated in the *International Covenant on Economic, Social and Cultural Rights*³⁴ to which Nigeria is privy. One limitation to the operation of the *Covenant* as a basis for legal enforcement of right to health in Nigeria is that the treaty is yet to be domesticated in the country.³⁵ Furthermore, based on the doctrine of *privity of contract*, only parties to a contract or a treaty can legally compel another party to the contract or treaty to perform under the contract.³⁶ In that light, inasmuch as Nigerian citizens, as individuals, are not

³⁰ Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as 'Nigerian Constitution').

³¹ See generally, Chapter IV (sections 33-46) Nigerian Constitution 1999.

³² See Chapter II, section 17(3) c& d of the 1999 Constitution: "The State shall direct its policy towards ensuring that (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.

³³ See e.g. *Festus Odafe & Ors v Attorney-General of the Federation and Ors*. Suit No. FHC/PH/CS/680/2003

³⁴ *Supra* note 6. Article 12 of the *International Covenant on Economic, Social and Cultural Rights*³⁴ provides that "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

³⁵ That is, it has not been incorporated into Nigerian legal system as a part of the country's domestic laws.

³⁶ In simple terms the doctrine of privity of contract connotes that generally no one would be entitled to or be bound by the terms of a contract to which he is not a party. See the cases of *Price v Easton* (1833) 4 B & Ad. 433, and *Tweedle v Atkinson* (1861) 1B&S 393. For a further reading on the doctrine of privity of contract, see M. Furmston, *Cheshire and Fifoot's Law of Contract* (10thed.) (London: Butterworth & Co. Publishers Ltd., 1981) 404-420.

parties to the *Covenant*, they cannot make any claim under the treaty vis-à-vis right to health; it is only the other countries who are signatory to the treaty can seek a performance of the treaty obligation.

Apart from the *International Covenant on Economic, Social and Cultural Rights*, right to health is also entrenched in the *African Charter on Human and Peoples' Rights*. This Charter, as earlier noted, has been domesticated as a Nigerian legislation by means of the *African Charter Act*.³⁷ The *African Charter Act* stands on a level higher and above other statutes in the Nigerian legal system, being subject to only the constitution.³⁸ This legal arrangement essentially puts the right to health on a formidable legal footing in Nigeria and creates a legitimate pedestal to assert a claim to health right in Nigeria.

However, a fundamental legal issue makes the justiciability of right to health under *African Charter Act* uncertain, if not totally impossible. As an Act of the Nigerian legislature, the *African Charter Act* is subordinate to the Nigerian Constitution, which is supreme and would prevail over *any* other law in the event of conflict or inconsistency on an issue.³⁹ Flowing from this, in the face of conflict between the *African Charter Act* and the Constitution on the justiciability of the right to health, the Constitution, inevitably, would prevail. Enforceability of the right to health under the provisions of *African Charter Act* would be improbable due to the Constitution's contrary or inconsistent position.

In summation, up till the emergence of the *National Health Act* the justiciability of right to health in Nigeria was manifestly improbable. It is against this background that the *National Health Act* seems to present a pedestal for justiciability of right to health. This flows from section 1(1) e of the Act which provides for a *National Health System* which, *inter alia*, shall "protect promote and fulfil the rights of the people of Nigeria to have access to health care services." Indeed, the feeling that the *National Health Act* has come to integrate a justiciable right to health in Nigeria, ostensibly by the provision of section 1(1) e, has been strong among stakeholders and observers. For example, the *Lancet* had observed: "Its promises will not change everything for Nigerians, but the [National Health] bill⁴⁰ *does allow them to finally hold the government to account for their right to health, including equitable access to care*. Never before has there been such momentum towards making a real commitment to improving health in this country."⁴¹

Considering what Nigerians have suffered over the years in the face of an unwholesome healthcare system, the sentimental expectation of a jurisprudential messiah that would make the government accountable for health is natural. With the messianic tone and phraseology of the *National Health Act*, it is also natural that the Act should be perceived as the long-expected deliverer of the Nigerian health sector from governmental neglect and

³⁷See note 7 together with accompanying text. Article 16 of the *African Charter on Human and Peoples' Rights* provides: "1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

³⁸ See generally, *Abaribe v Abia state House of Assembly* [2000] 9 W.R.N 1 together with *Abacha v Fawehinmi* 2 SCQR 489.

³⁹ Section 1 (1) and (3), 1999 Constitution.

⁴⁰ Now National Health Act

⁴¹ The *Lancet*, supra note 1 [emphasis added]

nonchalance. The pertinent question, however, is whether the *National Health Act* by its section 1 (1) e has indeed made right to health justiciable in Nigeria. The answer to this would be in the negative; the simple and trite reason for this is the supremacy of the Nigerian Constitution which similarly affects any claim of justiciable right to health under the *African Charter Act*.

Whatever may be the promises and beneficence of the *National Health Act*, as an Act, its operation remains subject to the operation and supremacy of the Constitution. As stated earlier, right to health is not a guaranteed and justiciable right under the Nigerian Constitution. By simple logic, any guarantee of justiciable right to health under section 1(1) e of the *National Health Act* would be in conflict with non-guarantee of such under the Constitution. It is a predictable and trite fact that the position of the Constitution would prevail over that of the *National Health Act*.

Moreover, the *National Health Act*'s position on right to health is revolutionary in any way. The earlier existing *African Charter Act* has had similar provision in its article 16. The position of the *African Charter Act* is even stronger than that of the *National Health Act* because of the precedence of the *African Charter Act* over and above all other Nigerian legislations apart from the Constitution.⁴² Thus, if the African Charter could not make right to health justiciable due to the supremacy of the Nigerian Constitution, it would be preposterous to hold that the *National Health Act* which stands on a lower pedestal would fare better.

What can be inferred from the foregoing discussion is that the realization of the hopes of the *National Health Act* still rests on a voluntary element of integrity and commitment on the part of the Nigerian government. This is because *National Health Act*, manifestly, has not offered Nigerians a right to health outside the scope of the Constitution. Put simply, a government that is unwilling to perform its role, especially adequate funding, may seek to escape liability by relying on non-justiciability of right to health to frustrate any legal action set in the framework of the *National Health Act*.

Whatever may be the jurisprudential implication of the *National Health Act* operating in the shadow of the Nigerian Constitution, it can be hoped that the Nigerian government would show good faith in respecting the letter and spirit of the Act. Presumably, the Act could not have been intended as a mere window-dressing to give false hope to Nigerians. In that regard, it can be legitimately expected that the government would not renege on the promises and assurances given in the *National Health Act* under the guise of constitutional non-justiciability. Therefore, instead of seeing the *National Health Act* and the Constitution as competing rivals on the issue of access to meaningful healthcare for Nigerians, the Act should be seen as complementing the Constitution on its expressed aspiration for the good health of the people.

In the 'fundamental objective' provisions, the Constitution has expressed a *strong* intent to ensure the overall good health of citizens with an aspiration that "there are adequate medical and health facilities for all persons".⁴³ In this respect, *National Health Act* vis-à-vis its guarantee of right to

⁴² See note 38 together with accompanying text,

⁴³ The government has also expressed similar sentiments in policy declarations, e.g. the Nigerian HIV/AIDS Policy (2003): "Nigeria recognizes its responsibility to provide access to health care for all its citizens."

health should be seen as a positive development in Nigeria's drive towards healthcare being a *right* rather than a mere *privilege* obtainable at the mercy of the government. Therefore, the *National Health Act* provision on access to healthcare translates to expressing in clear statutory terms an aspiration that has been expressed in the Constitution. Inferably, the issue of conflict or inconsistency in positions can hardly thereby arise as the *National Health Act* and the Constitution share related ideals on the utmost importance of good health for the people.

VI Conclusion

The *National Health Act* came into existence towards the end of the administration of President Goodluck Jonathan.⁴⁴ Substantive implementation of the Act in its nascent stages thereby falls on President Muhammadu Buhari who took over as Nigerian president on May 29, 2015. Perhaps, it is significant that the Act which promises important changes in the Nigerian health sector should stand for implementation by a president and political who won the presidential election on a reverberating mantra and promise of 'change'.

It bears re-emphasizing that adequate funding is crucial in the turn-around venture of the Nigerian health sector. Thus, the attitude of the present government to funding of the health sector would be a crucial determinant of its commitment to the implementation of the ideals of the *National Health Act*. The 2016 budget, named "the Budget of change",⁴⁵ is the first 'full' budget to be prepared and presented by the government of President Buhari.⁴⁶ The nature and scope of the budgetary allocation to health would thus be a measure of the level of the government's commitment to the *National Health Act* and the aspiration to change and improve Nigeria's public health system.

Ominously, perhaps, commentators have raised concern that the allocation to health in the 2016 budget does not indicate serious commitment to the ideals of the National Health Act.

After the euphoria of the final passage of the National Health Act into law in 2014, it is most disappointing, from all analysis, that the 2016 budget proposal has not taken into consideration the funding of such an important policy, probably one of the best pieces of legislation to come out Nigeria since independence. It begs the question, does our government really care about the health of our pregnant women, who are dying every day? Does it want the best for our children, our elderly, those living with disabilities, those affected by AIDS, NTDs?...[The Nigerian government] has the law, but does it have the will to do what the law provides for? Does it have the will to do what is right?⁴⁷

Fears or doubts over the commitment of the government vis-à-vis adequate funding, as stated above, have some basis. In 2001 Nigeria and other African countries signed the Abuja Declaration by which they pledged to commit 15% of their respective national budgets to the health sector. While some other countries with less resource have honoured this pledge, Nigeria over the years has been non-compliant.⁴⁸ It could have been argued

⁴⁴ President Jonathan left office in May 2015, about 5 months after signing the Bill into Law in December 2015.

⁴⁵ See punch

⁴⁶ President Buhari took office in May 2015; by then the year's budget had already been passed by the administration of President Jonathan.

⁴⁷ Edwin Ikhuoria, 'Will the 2016 Budget fund the 2014 National Health?' *Nigerian Healthwatch*, online at <http://nigeriahealthwatch.com/will-the-2016-health-budget-fund-the-2014-national-health-act> accessed on 25/05/2016.

⁴⁸ *Ibid.*

that the nonexistence of a legal and enforceable obligation in respect of health informed the government's persistent disregard of the Abuja Declaration since its emergence. The expectation was that the current budget would have honoured the Abuja Declaration benchmark as a symbol of its sincere commitment to the ideals of the *National Health Act*. However, the allocation to health in the budget is about 4.23% of the total budget which still falls far short of the commitments made under the Abuja Declaration.⁴⁹

The foregoing scenario takes the discourse back to the earlier flagged question of enforceability of the *National Health Act* in the shadow of the Nigerian Constitution. A matter arising in this context is whether the provisions of the *National Health Act* can be invoked to compel the government to commit not less than 15% of the national budget to the health sector on the basis of citizens' collective or individual *right to health*. Generally, this seems doubtful. For as long as the *National Health Act* remains subject to the Nigerian Constitution, any guarantee of right under it necessarily remains subject to the constitutional position. From the analysis, it is inferable that the hope of citizens' access to meaningful healthcare services in Nigeria, especially in relation to adequate funding, still depends on a show of integrity and sincere commitment on the part of the government. It is thereby hoped that, despite the jurisprudential supremacy of the Nigerian Constitution, the ancient legal maxim, *salus populi suprema lex* (the health of the people is the supreme Law)⁵⁰ would guide the thoughts of the government in its evaluation and implementation of the ideals of the *National Health Act*.

⁴⁹ *Ibid.*

⁵⁰ See Hygiecracy, 'The Health of the People Should Be the Supreme Law' online at <http://hygiecracy.blogspot.com/2013/07/the-health-of-people-should-be-supreme.html> (accessed on 12/8/2014)'