



## Fundamental right to health': A nascent deconstruction of health right under the Nigerian legal milieu

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### Abstract

The right to health has always been a myth in Nigeria despite the effort of the international community in affirming health as a fundamental human right. Various international treaties on health, a number of which Nigeria is party to, have made provisions on health as a right, yet the legal regime has remained largely unchanged in Nigeria owing to which health has remained only a fundamental objective and directive principle of state policy with no enforceability by virtue of section 6(6)(c) of the 1999 Constitution (as amended). This work adopted the doctrinal research methodology in arguing a deconstruction of health right in Nigeria as a fundamental human right. The work attempts to justify the right to health by broad resort to various constitutional parameters including the constitutional right to human dignity, a broad interpretation of right to life, as well as the purport of Nigeria's domestication of the African Charter on Human and People's Rights. The aim and objective were to justify health as an enforceable right like other fundamental human rights. It was found that notwithstanding the normative position of health right under the Constitution, the constitutional stricture posed by s. 6(6)(c) of the 1999 Constitution (as amended) can be judiciously circumvented and health enjoyed as a fundamental human right. The work, while calling for constitutional amendment, concluded on the note that health is a natural corollary to life, and as such right to life cannot be actually enjoyed without guaranteeing the right to health.

**Keywords:** Fundamental, Nigeria despite, African Charter

### Introduction

The enjoyment of health as a fundamental human right is indispensable for the exercise of other human rights as want of a sound health essentially denies access to the enjoyment of all other rights. Thus, every human being is entitled to the enjoyment of the highest attainable health conducive for living a dignified life. The World Health Organization defined health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>[1]</sup> This is why it has become a common fact that the realization of these values is always demanded everywhere to ensure the fulfillment of the individual and collective wellbeing of the human. Nevertheless, these demands are denied in many countries of the world or met inadequately such that the demand for their adequate and satisfactory fulfillment continues to be resonated. This denial is seen in the spate of oppression, persecution and exploitation in some countries around the world <sup>[2]</sup>. These demands are the values or rights which every human being is born with and inalienably entrenched in his existence to ensure the enjoyment of a dignified life.

Health right, notwithstanding its importance to the actual enjoyment of life, has always been grouped under fundamental objective and directive principle of state policy alongside other socioeconomic rights under Chapter 2 of the 1999 Constitution of the Federal Republic of Nigeria (as Amended). The implication of this stratification is that proponents of health rights seem not to have a legal foundation for demanding this economic right section 6(6) (c) of the 1999 Constitution (as amended) provides that

*(c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution."*

The above provision of the Constitution has been upheld by the Court of Appeal in *Okogie v. A.G. Lagos* <sup>[3]</sup> where the court held that "while section 13 of the constitution makes it a duty and responsibility of the judiciary among other organs of government, to conform to, observe and apply the provisions of Chapter II, section 6(6)(c) of the same constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted" or is acting in conformity with the provisions of Chapter 2 of the Constitution.

Consequent upon this provision, access to healthcare in the country is poor. According to a Lancet report's ranking of health system's performance using healthcare access and quality as criteria, Nigeria is placed at 142 out of 195 <sup>[4]</sup>. The implication of this is that the country faces health related problems such as high maternal mortality rate, HIV/AIDs, among others. This sets the tone for the need to explore alternative constitutional approaches to achieving access to a standard of living adequate for the health of the citizenry. This study seeks to reconstruct the right to health in the light of enforceable human rights just like other fundamental human rights, while offering a legal justification for such construction. To achieve the foregoing the paper will examine the nature of fundamental human rights while attempting to deconstruct the right to health under other viable constitutional approaches, the prevailing

*"The judicial powers vested in accordance with the foregoing provisions of this section –*

legal milieu notwithstanding. The paper will conclude by arguing for reinterpreting health right in the light of enforceability like other fundamental human rights in the constitution.

### **Nature of Fundamental Human Rights in Nigeria**

Fundamental human rights are not privileges in the sense that they cannot be alienated or withdrawn at the whims and caprices of the government of the day. They are rights which the legislature, executive and judiciary must protect. Where an injury has been occasioned by a violation of the rights, same must be amenable to compensation in financial terms<sup>[5]</sup>. The procedure for amendments of the bill of rights section of the constitution is usually made very stringent so as to protect it from arbitrariness<sup>[6]</sup>. It is noteworthy that there has never been a successful attempt to alter any of the provisions since their inclusion in the Nigerian Constitution. Fundamental human rights accrue to a person by virtue of being a person. In contemporary human rights regime, the right to life, freedom from slavery, and the right to basic human needs such as food, clothing, shelter, and medical care are known as 'fundamental human rights' different from other subjective rights<sup>[7]</sup>. These rights are inalienable i.e. they are not given and need not be earned. They are simply inherent by virtue of being human. Fundamental human rights are universal and cut across territorial boundaries and are of great importance to individual and state<sup>[8]</sup>.

Nevertheless, there are still contestations as to what are and should be universally accepted as constituting human rights and what should not. Two views have grown out of these contestations: universalism and culturalism. Universalism represents the aspirations of international government like the United Nations which refers to the general position of every human being irrespective of territorial, cultural, political or religious inclinations. They are born out of the concept of international morality. Universalism is concerned with the rights of individual. On the other hand, culturalism is concerned with the state and believes that the right of individual cannot be guaranteed without recourse to the nature of his or her society or prevailing realities<sup>[9]</sup>. Typically many social economic rights like right to health come under this consideration.

In most African Constitutions, there is a marked absence of socio-economic rights. This is due to the fact that economic rights require states to provide resources for their enjoyment. This understanding by the constitution drafters of the various Nigerian constitutions heralded a bill of rights that was consisted of civil and political rights, ensuring to keep social economic rights only as fundamental objectives and directive principles.

Following this trajectory, health has always been conceived as an economic right which is crippled by the intrinsic limitation of unenforceability by dint of section 6(6)(c) of the 1999 Constitution (as amended) which makes the entire content of Chapter 2 non justiciable. Many writers and scholars<sup>[10]</sup> have proffered argument in favour of this position. One of their main contentions is that health and other economic and social rights are not suitable for judicial enforcement because they are vague<sup>[11]</sup>, opaque and normative in content<sup>[12]</sup>. They also contend that health right is resource-intensive and costly in nature as it imposes irrepressible financial burdens upon states<sup>[13]</sup>.

However, it has been argued that in reality the realization of all human rights demands the allocation of resources. J. Donnelly stated as follows:

*All human rights however, require both positive action and restraint by the state itself if they are to be effectively implemented. Some rights, of course, are relatively positive. Others are relatively negative. But the distinction does not correspond to the division between civil and political rights and economic social and rights<sup>[14]</sup>.*

R. O. Abdullahi<sup>[15]</sup> argued that all human rights have a negative action component requiring few to no resources<sup>[16]</sup>, a regulatory action component requiring some resources<sup>[17]</sup>, and a positive action component requiring, to varying degrees, significant resources<sup>[18]</sup>. It is submitted that all rights are interdependent. Most of the rights under Chapter 4 of the Constitution require some form of dependence on right to health for its actual enjoyability. This puts a new spin on the construction of health as a right.

### **Deconstructing Health as a Fundamental Right**

The question of whether health is a right or a privilege has erupted in debates focused on the scale of the benefits of a rightist view of health and the consequential cost it involves. Yet the critical question may be how widely these benefits and cost should even out each other. The Oxford political philosopher, Shue<sup>[19]</sup>, observed that our way of viewing rights is quiet incomplete. People are used to thinking of rights as moral trump cards, near absolute requirements that we all can demand. Rather, rights are much about our duties as they are about our freedoms. Shue views basic rights to include security, water, shelter and healthcare<sup>[20]</sup>. While it seems to be a little more settled under the international legal regime that health is a fundamental human right, it is statutorily restricted by provisions inserted to ensure limitation of applicability. Section 6(6)(c) of the 1999 Constitution (as amended) ensures that under the Nigerian Constitution. It is our argument that through certain carefully deployed constitutional parameters and broad interpretative approaches, health can be rightly construed as a fundamental human right.

Several countries whose socio-political and economic milieu is similar to Nigeria's have routinely interpreted right to life in a way that gives recognition and enforceability to right to health whether personal or environmental. The Indian Supreme Court in *Sunil Batra v. Delhi Administration*<sup>[21]</sup> held that the "right to life" included the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions. It would even include the right to protection of a person's tradition, culture, heritage and all that gives meaning to a man's life. It includes the right to live in peace, to sleep in peace and the right to repose and health<sup>[22]</sup>. In the case of *Dr. Mohiuddin farooque v. Bangladesh*<sup>[23]</sup> the Supreme Court (SC) of Bangladesh extended the term right to life specifically in two cases. Firstly, it extended to the protection of health, and secondly, it extended to the normal longevity of the ordinary human being. Here, the court observed if right to life under Articles 31 and 32 of the Constitution means right to protection of health and normal longevity of an ordinary human being endangered by the use of or possibility of any contaminated foods, deeds, etc. then it can be said that fundamental right of right to life of a person has been

threatened or endangered. It thus appears from this interpretation that the provision guaranteeing right to life is suggestive of at least among others, a) providing the protection of health; b) stabilizing the normal longevity of an ordinary human being; and c) ensuring a dignified life where the persons are entitled to the state of dying with dignity.

This means that it should be conceived not just as a universal human right to which all human beings are entitled, but as an essential right indispensably enjoyed by every citizen of a country irrespective of their slant <sup>[24]</sup>. The basis for this argument is that health is inherently connected with other rights. A citizen with an unsound health will invariably lack the resources to access numerous other human rights <sup>[25]</sup>. This conception can better be appreciated by considering the interpretation of health right under the following headers in order to argue for its justiciability as a fundamental human right:

- a. Deconstruction under Constitution
- b. Deconstruction under the African Charter on Human and People's Right
- c. Deconstruction under the FREP Rules
- d. Deconstruction under the Proviso to Section 6(6)(c) of the 1999 CFRN

#### a. Deconstruction under the Constitution

Perhaps the first point of deconstruction of the right to life lies in the protection of life and dignity afforded by the constitution, hence the need to look into how far the courts have been willing to broadly interpret them.

#### 1. Broad Interpretation of Right to Life

Judicial activism has seen a new surge in many countries <sup>[26]</sup> where health is a non-justiciable right, such that the interpretative stance of the courts is increasingly correlating right to life with right to health. This judicial attitude is slowly testing its feet on the Nigerian grounds, albeit rather too slowly, *Gbemre V. SPDC* <sup>[27]</sup> being a relevant case in view. In *Gbemre v. SPDC*, applicants who were residents of Iwherekhan community in Delta State applied for an order enforcing or securing the enforcement of their fundamental rights to life and dignity of human person as provided by sections 33(1) and 34(1) of the 1999 Constitution of the Federal Republic of Nigeria, as well as articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 vol 1, Laws of the Federation of Nigeria, 2004. The reliefs sought by the applicant in their subsequent motion on notice filed on 29<sup>th</sup> July, 2005 included a declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to a healthy environment – one free from gas flaring. Justice Nwokorie of the Federal High Court Benin City, relying on sections 33 and 34 of the constitution, held that the constitutionally guaranteed rights to life and dignity of human person inevitably included the right to a clean poison-free and healthy environment and as such granted the prayers of the applicant.

In 2012 in the case of *Georginia Ahamefule vs. Imperial Medical Center & Dr. Alex Molokwu*, <sup>[28]</sup> the plaintiff

challenged the termination of her employment as an auxiliary nurse by the defendants based on her HIV-positive status. The Court found that the Defendant's decision to refuse the Plaintiff medical treatment because of her HIV-positive status constituted a flagrant violation of her right to health as guaranteed by articles 16 of the African Charter on Human and People's Rights (Ratification and Enforcement), Act CAP 10 of the Federation of Nigeria's laws, and article 12 of the International Covenant on Economic, Social, and Cultural Rights (ratified in Nigeria in 1993). The Court made an order of 5 Million Naira in general damages for the wrongful termination of the Plaintiff's employment and an order of 2 Million Naira in compensation for unlawful HIV testing without the Plaintiff's informed consent and the Defendant's negligence.

While this judgment is highly commendable and symbolic for its clear pronouncement on the right to health, it still awaits the blessings of the Supreme Court.

#### 2. Broad Interpretation of Right to Human Dignity

Dignity has been understood in a variety of ways but always to recognize the existence of some status in a person and how that status is honoured <sup>[29]</sup>. What is imperative is that dignity which is ascribable to all human beings simply because they are humans.

At its most basic, the concept of human dignity is the belief that all people hold a special that is tied solely to their human dignity <sup>[30]</sup>. This value has nothing to do with their class, gender, race, capability or any other consideration besides the fact that they are human beings.

Healthcare presents some form of challenge for observing human dignity as ill health restricts a person's ability to express his or her dignity. The inherence of human dignity in an individual merits certain treatment by others; also it includes some characteristic ways of acting that befit dignity. Although what counts as dignified will vary between cultures but in general it will be a balanced, healthy and well controlled behavior. Thus, the loss of that control will be rightly perceived as a threat to the ability to acknowledge one's own dignity.

Ill health results in loss of that control. In the first place, ill health may naturally lead to loss of one's ability to exercise that control over the carriage of his physical body. Beyond this, he may have less or no control over his emotional life or his mental facility. Loss of this control is perhaps better appreciated in case of physical incontinence where, owing to ill health, one's physical organs lack the ability to restrain discharges of their contents. Similarly, is the case of mental illness and dementia. They all challenge the recognition of one's own dignity.

This analysis associates loss of health – disability and dependence – with the invidious consequences of indignity which the constitutions of all democratic nations, including Nigeria, abhor. Therefore, respecting dignity in healthcare puts a new demand on how we should relate healthcare with the legal regime of non justiciability of health under the 1999 constitution of the Federal Republic of Nigeria. Section 34 of the 1999 CFRN provides that:

1. Every individual is entitled to respect for the dignity of his person, and accordingly -
  - a. No person shall be subject to torture or to inhuman or degrading treatment;
  - b. No person shall be held in slavery or servitude; and

- c. No person shall be required to perform forced or compulsory labour.

Their Lordships, in the case of *Andee Iheme v. Chief of Defence Staff & 4 Ors* <sup>[31]</sup>, held that “The purport of Section 34 (1) (a) of the Constitution is that no one should be inflicted with intense pain on his body or mind nor subjected to physical or mental cruelty so severe that it endangers his life or health.”

### 3. Deconstruction under the African Charter on Human and People’s Right

Since the ratification of the African Charter on 22<sup>nd</sup> June, 1983 by the African Charter on Human and People’s Rights (Ratification and Enforcement) Act, it has become incorporated into Nigeria’s body of laws. The simple argument here is that since Nigeria has ratified and adopted the treaty into her body of laws, the provisions of the Charter, including the explicit right to health are applicable in their entirety. Nigeria operates a dualist approach to international treaties and as such have to further domesticate them by legislation in accordance with Section 12 <sup>[32]</sup> of the Constitution. Thus, where a piece of international treaty has been so passed it becomes part of the country’s laws.

Nigeria’s domestication of the Charter is to localize the piece of treaty for the promotion and protection of human rights within the framework of the AU (then OAU) into Nigeria. The Charter recognizes a wide range of rights transcending civil and political, social, economic and cultural, individual and collective rights. The right to health is vividly provided for under Article 16 and 18:

#### Article 16

1. *Every individual shall have the right to enjoy the best attainable state of physical and mental health*
2. *States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.*

#### Article 18

1. *The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.*
4. *The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.*

The locus classicus on the status of the African Charter is the case of *General Sani Abacha & Ors v. Chief Gani Fawehinmi* <sup>[33]</sup> where the defendant challenged his arrest and detention by the military government as illegal and unconstitutional on the ground that it contravened his human rights as enshrined in the relevant provisions of the African Charter. According to the Supreme Court, our courts must uphold the Charter because it is a component of Nigerian law.

Worthy of note is that the Charter, like all other domestic laws, is subject to the Constitution of the Federal Republic of Nigeria. This is by virtue of Section 1(3) of the Constitution (as amended). This position has been affirmed by the Court in *General Sani Abacha & Ors v. Chief Gani Fawehinmi* <sup>[34]</sup>.

### 4. Deconstruction under the FREP Rules

The Fundamental Rights Enforcement Procedure (FREP) Rules 2009 were made to inject more tonic into the process of prioritizing human rights in Nigeria. The 2009 FREP Rules, unlike its 1979 predecessor which operated for 20 years, minimizes technicalities and emphasizes substantial justice. Because the Rules were created in accordance with Section 46 (3) of the 1999 Constitution, they are regarded as being equally powerful and forceful as the Constitution’s provisions, and therefore superior to other laws in the event of conflict <sup>[35]</sup>.

In accordance with its Preamble 3, the FREP Rules state that one of their main goals is to increase access to justice for all kinds of litigants, particularly the underprivileged, the illiterate, the uneducated, the defenseless, the jailed, and the unrepresented. The CFRN is the municipal bill of rights, the African Charter is the regional bill of rights, and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights are the international bills of rights. Order 1(2) of the FREP Rules defines human rights to include fundamental rights which are defined as rights provided for in Chapter IV of the CFRN and those provided for in the African Charter on Human and People’s Rights. What is apparent is that the Rules intends a broad conception of human rights thereby adding value to the human rights regime in Nigeria. It has been noted that the FREP Rules have finally made indubitable the justiciability of the socio-economic provisions of the Constitution including the right to health by expressly defining fundamental human rights as including “any of the rights stipulated in the African Charter on Human and People’s Rights (Ratification and Enforcement) Act”. The Supreme Court has given judicial teeth to this position in the case of *Ogugu v. State* <sup>[36]</sup> where Bello JSC held that the provision of the African Charter is enforceable in the same manner as those of Chapter IV of the Constitution <sup>[37]</sup>.

Therefore, an applicant’s rights are not limited to those provided for in Chapter IV of the Constitution, but extend to the socio-economic rights in the African Charter on Human and People’s Rights which he is entitled to <sup>[38]</sup>.

### 5. Deconstruction under the Proviso to Section 6(6)(c) of the 1999 CFRN

Section 6(6)(c) of the 1999 Constitution (as amended) while making Chapter II of the Constitution non justiciable, added a proviso or exception to wit, “... *except as otherwise provided by this Constitution...*”. Thus, in the case of *Federal Republic of Nigeria vs. Aneche & 3 Ors.* <sup>[39]</sup>, Niki Tobi (JSC) observed as follows:

*In my humble view section 6 (6) (c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words “except as otherwise provided by this Constitution”. This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the courts*

In the light of the exception contained in section 6(6)(c), there are three ways by which the Fundamental Objectives and Directive Principles of State Policy (FODP) chapter under which the right to health is provided for, can be made justiciable under the 1999 Constitution (as amended).

- a. First, when a specific portion of Chapter II of the Constitution was directed to be followed in order to carry out the justiciable sections. Section 197(3) for instance requires compliance with section 14(4) which is an FODP when the Governor is carrying out certain types of appointments.
- b. The National Assembly is given the authority to use legislation to carry out Chapter II of the Constitution's requirements by the Constitution's justiciable parts, which is the second method. Item 60 of the Exclusive Legislative List under Part 1 of the Second Schedule to CFRN, 1999, which gives the National Assembly the authority to pass laws governing the establishment and regulation of authorities for the Federation or any part of it to encourage and enforce the observance of the Fundamental Objectives and Directive Principle contained in this Constitution, is one illustration of this. Commenting on the above item 60 (a), Justice Mohammed L. Uwais, CJN (as he then was), in an article titled *Fundamental Objectives and Directive Principles of State Policy: Possibilities and Prospect* <sup>[40]</sup>, observed that
- “Item 60 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria specifically empowers the National Assembly to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles, and to prescribe minimum standards of education at all levels, amongst others. The breath-taking possibilities created by this provision have sadly been obscured and negated by non-observance. This is definitely one avenue that could be meaningfully exploited by our legislature to assure the betterment of the lives of the masses of Nigerians, whose hope for survival and development in today’s Nigeria have remained bleak, and is continuously diminishing.”* <sup>[41]</sup>.

Therefore, if the National Assembly decides to make any legislation for the preservation of the health of the citizens, especially where same is vested with the garb of “rights”, it will be a valid legislation.

- c. The third way is where the implementation of the justiciable provisions of the Constitution will necessarily occasion the implementation of the non-justiciable provisions under Chapter II. Item 68 of the Second Schedule to the Constitution, which contains the exclusive legislative powers of the National Assembly, is an omnibus provision and it provides thus; “Any matter incidental or supplementary to any matter mentioned elsewhere in this list”. Safeguarding of health is part of the matter mentioned under item 60(a) <sup>[42]</sup> in this list (i.e. the Exclusive Legislative List), this list being justiciable pursuant to section 4 of the Constitution. So, if the National Assembly comes under this provision to make a law for the preservation of health in Nigeria as a right, same cannot be ignored by other arms of government.

## Conclusion

Despite the fact that right to health is a non justiciable right, it has been shown that through a scrupulous exploration of some of the provisions of the Constitution, health right can

be constitutionally accessible for the citizenry on par with other fundamental rights entrenched in Chapter two of the Constitution. In view of these, some constitutionally viable channels have been suggested. Admittedly, these channels have not been rigorously developed through considerable judicial interpretations and as such the position of non-justiciability still holds sway and yet to be upturned. Regrettably, other climes such as India with similar constitutional constraint on health right have been more pragmatic by way of expansive interpretations of their constitutions, and invariably vesting justiceability on health right notwithstanding the position of their constitutions. Moreover, the enjoyment of the right to health, as already pointed out, is implicitly linked with the right to life such that the actual enjoyment of the latter rests on the former. We have argued too that the enjoyment of all other rights is hinged on a sound health. Importantly, therefore, there is the need for constitutional amendment to incorporate health right into Chapter two so that it will become more easily accessible to citizenry.

The standard of healthcare an individual is entitled to must not be accessed on the basis of one’s ability to pay. Hence it is immaterial whether the individual is rich or poor to be able to enjoy right to health. A country’s difficult financial situation does not release it from the duty to ensure that the health, safety and welfare of her citizenry is guaranteed. State must continue to guarantee the right to health to the maximum of their available resources even if these are tight.

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37. *Ibid* at 27
38. Onyekachi Duru, ‘An Overview of the Fundamental Rights Enforcement Procedure Rules, 2009’ *National Open University* <http://ssrn.com/author=1874278> accessed 26<sup>th</sup> October, 2019.
39. (2004)1 SCM page 36 at 78
40. M. L. Uwais, “Fundamental Objectives and Directive Principles of State Policy: Possibilities and Prospect” in *Essays in Honour of Honourable Justice Eugene Ubaezeunu JCA*, ed. C.C. Nwaeze, 179 (Enugu: Fourth Dimension Publishers, 2002).
41. This was quoted with approval by the Supreme Court in *Federal Republic of Nigeria v. Anache* (2004) 17 N.S.C.Q.R. 140; (2004) 1 SCNJ 1 SC. 316/2001 per Niki Tobi JSC at 195 – 196.
42. The obligation to promote good health is a fundamental objective and directive principle under Chapter II of the 1999 Constitution (as amended).