An Examination of Socio-Economic Rights and the Judicial Process in Nigeria

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Abstract
There has been a cacophonous clamour for the judicial enforcement of socioeconomic rights in several regions of the world including Nigeria. Socio-economic rights are enforceable and/or justiciable in jurisdictions such as South Africa and India. In Nigeria, however, the fundamental Objectives and Directive Principles of State Policy contained in Chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended), which in turn embodies detailed provisions on socio-economic rights, remains non-justiciable. Nigeria has equally ratified the African Charter on Human and People's Rights and has incorporated same into her *corpus juris* with ample provisions for socio-economic rights. The objective of this paper is to examine socio-economic rights and the judicial process in the context of advancing socio-economic rights to the status of legally enforceable human rights in Nigeria, specifically through constitutional amendment and the judiciary, by the courts taking centre stage and shedding the garb of judicial conservatism.

1. Introduction

Any discourse on the effective realisation of socio-economic rights in Nigeria, must of necessity, consider the place and role of the judicial process.[1] An assignment of a role for the judiciary in human rights implementation agenda ensures that states live out their positive obligations to fulfil socio-economic rights beyond what the political and administrative organs and/or structures are willing to concede on their

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[1] E Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 2 Journal of African Law 249

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own volition.[2] The concept of obligation may remain but a paper tiger, if there is no corresponding sanction in the event of failure to comply.[3] This paper submits that the judiciary as an institution and arm of government is saddled with the responsibility to address the large scale poverty, despondency and misery in Nigeria through context-responsive interpretations of relevant human rights instruments, both locally and internationally. It urges these institutions, nay, the various courts having juridictions over human rights guarantees and even quasi-judicial human rights institutions such as the African Commission on Human and Peoples' Rights to be more vociferous and volatile in advancing socio-economic rights.[4] Whether, however, these courts have the requisite skills to grapple with the complexities of resource allocations within a body polity and whether these institutions promote socio-economic rights without assuming the critical decisions that go to the heart of the political process is dependent, largely on the methodological approach for the interpretation of guaranteed rights.[5]

The political theory and constitutional principle of separation of powers, though a universally recognisable doctrine of socio-political governance, is still suffering from the malady of impracticality within the Nigerian socio-political landscape.[6] This doctrine anchors on the division of governmental powers through the scheme of allocation of authority amongst the three branches of government namely, the executive, legislature and the judiciary. The implementation, execution and formulation of laws and national development programmes is vested in the executive. The legislature is allocated the primacy responsibility of law making while the judiciary interprets the law in the course of adjudication of disputes.[7] This paper submits that the executive arm of government still wields the most influence and biggest powers amongst the three arms of government. In states that operate parliamentarianism, for instance, "ministers are members of the legislature and are thereby in

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[2] R Falk 'Affirming Universal Human Rights' (2003) 3 Human Rights & Human Welfare 77

[3] **J** Donnell, 'Human and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 The American Political Science Review 308

[4] N Haysom, 'Giving Effect to Socio-economic Rights: The Role of Judiciary' (1999) 4 ESR Rev II

[5] L Henkin, 'Rights: Here and There' (1981) 81 Columbia Law Review 1582; Y Khushalani, 'Human Rights in Asia and Africa' (1983) 4 Human Rights Law Journal 403

[6] K Kalu, 'Constitutionalism in Nigeria: A Conceptual Analysis of Ethnicity and Politics' (2004) 6 West African Review 11

[7] Sections 4, 5, and 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

a position to lead and control it," pointing to the end that the executive controls legislative initiative.[8]

The doctrine of separation of powers serves as an indirect limitation on governmental power.[9] It is an important pillar of democratic governance and the rule of law and even one that safeguards individual liberties.[10] In *Mayers v US*,[11] the Court, *per Justice Brandeis*, referring to the US Constitution of 1787 stated *viz*: "The doctrine of the separation of powers was adopted...not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident among the three departments, to save the people from autocracy."

As one of the cornerstones of government, the judiciary exercises judicial power which was defined in *Huddart Parker & Co. Ltd. v Moorhead*,[12] *per* Justice Isaacs, as "the power which the state exerts in the administration of public justice, in contradiction from the power it possesses to make laws and the power of executing them." Constitutionalism entails limitations on governmental powers and judicialism makes those limitations possible. The judiciary has "a separate procedure comprising a separate agency and personnel for an authoritative interpretation and enforcement of law."[13] One of its functions is to strike "a balance between the individuals freedom and the rights of the state to self-preservation."[14]

Judicialism is "the backbone of constitutionalism, the practical instrument whereby constitutionalism may be transformed into an active idea in government; it is our best guarantee of the rule of law and therefore of liberty."[15] Judicialism, requires judicial independence, nay, courage, which enables judges to speak truth to power, and to say "no" to whatever threatens or is likely to threaten constitutional guarantees whether from the executive or legislative arms of government.[16] Judicialism also serves as a legitimating force on governmental acts on

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[8] B Nwabueze, *Judicialism in Commonwealth Africa* (C Hurst, London, 1977) 49
[9] *Nwabueze* (n 8) 55
[10] F Strong, *Judicial Function in Constitutional Limitation of Governmental Power* (Caroline Academic Press, Durham 1997) 35
[11] 272 US 52 (1926)
[12] (1909) 8 CLR 330 383 *per* Isaacs J.
[13] B Nwabueze, *Constitutionalism in Emergent States* (C Hurst, London 1973) 18
[14] *Nwabueze* (n 8) 139
[15] *Nwabueze* (n 13) 21
[16] M Marshall, 'Speech: Wise Parents do not Hesitate to Learn from their children: Interpreting State Constitutions in an Age of Global Jurisprudence' (2004) 79 New York University Law Review 1633-1639

occasions when courts hold challenged governmental measures valid or constitutional or statutory interpretation, that is, "the determination of legislative intent in formulation of policy."[17] Second "is executive oversight, that is, "the bounding within rationality of discretion in the administration of law."[18]

2. Constitutional Interpretation

A constitution is the foundational norm of the legal system. It is a protocol of survival and continuity for any social grouping, ensuring that no one attains salvation or offers a programme of salvation, to the populace by another route. It provides a sense of citizenship, dignity and personality to all citizens and sets forth the general parameters of legislative, executive and judicial powers. A constitution embodies not only the fundamental principles of humanity, but also the fundamental rights under law. According to Nwabueze,[19] constitutional interpretation is "the most vital factor in constitutional government," but interpretation is a corollary of law-making, hence, the function of the political organs.[20] Courts engage in policymaking by interpreting vague constitutional and statutory provisions. However, they do so only in the exercise of their judicial functions and as a last resort "when impelled by the necessity of deciding ordinary adversary litigation between individual parties."[21] The rationale is to prevent an usurpation of the supreme role of the legislature[22] and arrogating to themselves the primary power to receive, review and revise all legislative acts.[23] This paper submits that this assumption, perhaps explains why the African Charter on Human and Peoples' Rights, which gives the African Commission the mandate to interpret its provisions, provides that the Commission's mandate must be exercised "at the request of a state party, an institution of the African

[17] *Strong* (n 10) 12
[18] *Strong* (n10) 14
[19] *Nwabueze* (n 8) 54
[20] M Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, Oxford 1998) 129
[21] *Hunt* (n 20) 131
[22] The interpretative function of the legislature is necessarily implied in its power to make laws. Every legislative act is an interpretative determination by the legislature that the act is within its powers under the Constitution.
[23] G Hazard, 'The Supreme Court a Legislature' (1978) 64 Cornel Law Review 1-2 where Hazard defines a 'legislature' to mean "a body whose chief function in government is to formulate general rules of law to primarily reflect the notions of utility and value held by its members."

Union or an African organization recognised by the African Union,"[24] therefore underscoring the political nature of interpretation.

3. Judicial Review

Judicial review 'is a self-imposed responsibility that is rooted in John Lock's philosophical creed. The partisan conflict, for instance, that culminated in Thomas Jefferson's election in the United States in 1800, provided the impetus for Chief Justice Thurgood Marshall to establish and institutionalise the ameliorative role of the judiciary. In *Marbury v Madison*,[25] the court *per* Marshall held that, "it is emphatically, the province and duty of the judicial department to say what the law is." Marshall justified federal courts' power to ignore enacted laws that were inconsistent with the constitution on the ground that such laws fell outside the delegation of authority by the people to the government, as expressed in the constitution.[26] Judicial review, therefore, removes issues of executive policy to the realm of adjudication.[27]

Judicial review has been criticised as an act of judicial usurpation or, at best, a bald effrontery[28] and that "given the principle of electorally accountable policymaking, all non-interpretative judicial review is illegitimate.[29] It has been argued that legislatures should legitimately resolve controversial issues, since courts are undemocratic and lacking in passive virtues.[30] In *Eakin v Raub,*[31] Justice Gibson in his dissenting judgment held that "the construction of the constitution in this particular instance belongs to the legislature which ought therefore to be taken to have superior capacity to judge of the constitutionality of its own acts." To

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[24] African Charter Article 45(3)
[25] 5 US (1 Cranch) 137 (1803)
[26] That the people have an original right to establish, for their future government, such principles as in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.
[27] L Hartz, *The Liberal Tradition in America* (Princeton University Press, Princeton 1993) 16 (Stressing that judicial review) "implies a prior recognition of the principles to be legally interpreted")
[28] *Strong* (n10) 21
[29] M Perry, *The Constitution, the Courts, and Human Rights* (Yale University Press, Haven 1982) 37; A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs Merril, Indianpolis 1962) 19 (Nothing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process is the distinguished characteristic of the system. Judicial review works counter to its characteristic.")
[30] A Bickel, 'The Passive Virtues' (1961) 75 Harvard Law Review 40
[31] 12 Seg & R (PA) 330 (1825)

Perry,[32] "if judicial review does not run counter to the principle of electorally accountable policymaking, it is at least in serious tension with it." This paper submits that judicial review is not only a feature of constitutional arrangement in Nigeria, it is also one of the most admired elements of Nigerian constitutionalism. Its overriding virtue and justification "is to guard against governmental infringement of individual liberties secured by the constitution."[33] The fruits of judicial review, quite sadly and regrettably have been as variegated as the types of regimes in which it has been institutionalised.[34] This paper submits that even those who invented the notion of judicial review have not always exercised good conscience in its application to advance the rights of minorities. Often times, those who most loudly agitate for liberty, scarcely ever grant it. *Scott v Sandford (The Dred Scott Case)*[35] was one of several examples where the power of justice review was of minimal assistance.

In the above mentioned case, the Supreme Court sanctioned the system of slavery and racism that existed until the civil war, abandoning the aspirational component of the US Declaration of Independence to the effect that all men are born equal. *Plessy v Ferguson*[36] which followed the *Dred Scott Case*, legitimised racial desegregation in schools, notwithstanding the American Bill of Rights. It took 58 years of struggle for the timorous decisions in *Scott v Sanford (Supra)* and *Plessy v Ferguson (Supra)* to pave way for the dawn of a new era as seen in *Brown v Education Board of Topeka,*[37] where the US Supreme Court recognised the legitimate rights claims of Blacks to equal educational opportunities.

4. Concerns and Justifications of Judicial Application of Socio-economic Rights

Debates on the constitutionalisation of socio-economic rights and their judicialism have continued to rage on in human rights law and

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[32] *Perry* (n 29) 9

[33] **J** Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Supreme Court* (University of California Press, Los Angeles 1980) 64

[34] G Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton University Press, Princeton 1993) 113 (Stressing, "a critical factor in any comparative assessment of the institution of judicial review will be the extent to which a consensus may be said to exist with respect to a society's defining political principles")

[35] 60 US 393 (1856)

[36] 163 US 5370 (1896) (Legitimising racial desegregation); L Ackermann, 'Constitutional Protection of Human Rights: Judicial Review' (1989) 21 Columbia Human Rights Law Review 59

[37] 348 US 886 (1954)

jurisprudence.[38] The debates remain unabated, notwithstanding the acknowledgement that human rights are interdependent and indivisible, and that some states have gone ahead not only to consitutionalise, but have made socio-economic and cultural rights justiciable.[39] Those who advocate against the constitutionalisation and judicialisation of socio-economic rights opine that the process only favours civil and political rights.[40] Davis[41] is of the view that socio-economic rights are "choice sensitive" matters that are appropriately left to political rather than judicial determination. The political organ in implementing socio-economic rights has to make a choice based on resources or policy. The judiciary is said to be ill-suited to deliberate on socio-economic rights, which unlike civil and political rights, are not "negative" but "positive" in nature.[42]

The above means that socio-economic rights are incapable of immediate realisation because their implementation requires positive action on the part of the state.[43] They are seen as being indeterminate, expensive to realise and achievable only progressively. Civil and political rights, because of their negative nature, place restraint on the state and when their violations are proved, remedies are immediately realisable.[44] The argument that socio-economic rights are not amenable to judicial enforcement, has "been widely discredited" and "adequately rebuffed."[45] This paper submits that the contention that the courts lack the skill set to determine or enforce socio-economic rights, which by their nature raise the problem of polycentricity is flawed. The term "polycetricity" as used, denotes decision that are capable of having effect on indeterminate persons or class. Matters with budgetary implications are thought to

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[38] A Oyeniyi, 'Realisation of Health Rights in Nigeria: A Case for Judicial Activism' (2014) 14 Global Journals Inc. US 4 23-24

[39] W Egbewole and T Alatise, 'Realising Socio-economic Rights in Nigeria and the Justiciability Question: Lessons from South Africa and India (2017) 8 International Journal of Politics and Good Governance 14-22

[40] S Ngwuta, 'Legal Framework for the Protection of Socio-economic Rights in Nigeria' (2011) 10 Nigerian Judicial Review 24

[41] D Davis, 'The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 South African Journal of Human Rights 475

[42] *Davis* (n 4) 510

[43] *Egbewole* and *Alatise* (n 39) 25

[44] **J** Crawford, 'Responsibility to the International Community as a Whole' (2000) 8 Indiana Journal of Global Legal Studies 303

[45] M Dennis and D Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaint Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 93 American Journal of International Law 462

require special expertise which the courts lack. Judicial enforcement of civil and political rights equally has resource, financial, economic or budgetary implications or consequences. However, the fact that socio-economic rights have budgetary consequences, the court has held, is not enough to bar their justiciability.

In *August v Electoral Commission*,[46] the South African Constitutional Court, reacting to the charge that the vindication of socio-economic rights presents the problem of polycentricity held: "we cannot deny strong claims timeously asserted by determinate people because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate group." Daniel[47] notes that:

> In reality, degree of judicial involvement in polycentric matters must vary depending on the context of every specific case. In any event, there are polycentric elements to virtually all disputes before the courts. Certainly, civil and political rights matters are no less polycentric than socio-economic ones…One should not lose sight of the fact that several features of the judiciary make it well-suited to vindicate socio-economic rights. Unlike the legislature and executive, courts are able to provide individualised remedies to aggrieved claimants, and offer a comparatively speedy solution in the face of legislature or executive tardiness. Courts are experts at interpretation and are thus ideally suited to lend content to social rights and the standards of compliance that they impose.

This paper aligns with the submission above to the end that a court should never be reluctant to adjudicate a claim simply because other indeterminate persons who are affected or are likely to be affected are not part of the parties before the court. This may result in determinate aggrieved persons suffering unnecessarily because of the tardiness, lack of interest or ignorance of indeterminate others.

This paper further submits that the contention that the courts lack expertise in respect of socio-economic rights and/or policy matters is unfounded. This is so because, under the Nigerian 1999 Constitution for instance, a person does not need to be a university graduate in order to occupy the exalted offices of the President, Vice President, Governor, Deputy Governor, member of the Senate or House of Representatives or Minister of the Federal Government. Only the positions of Attorney General of the State and/or Federation, Justice of the Supreme Court,

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[46] (1993) 35A 1(CC)

[47] B Daniel, 'Introduction to Socio-Economic Rights in the South African Constitution' in D Brand and C Heyns (eds), *Socio-economic Rights in South Africa* (Pulp, Pretoria, 2005)

Justice of the Court of Appeal, Judge of the Federal High Court or High Court of the State, require that a prospective appointee thereto be a lawyer who has so qualified having garnered a minimum of ten (10) years post call cognate experience. It therefore goes without saying that apart from the demand of good education and experience, judges come from diverse backgrounds. In fact, some were professionals in other fields before their dalliances with law. Socio-economic terrain therefore, cannot be unfamiliar to the judiciary for the purpose of enforcing socio-economic rights.

This paper concedes, however, that in making laws, the legislature may, during public hearings, draw from the views of experts. The executive arms of government can also benefit from the contributions of specialists in formulating and implementing government policies. Instructively, the courts are not left out too. Under Section 67 of the Evidence Act 2011, the opinion of experts are relevant in judicial adjudication in Nigeria. Consequently, a court can rely on the opinion of an expert in arriving at the determination of a case. Judicial vindication of socio-economic matters represent issues of politics and ideology. Consequently, that their determination and enforcement by the judiciary "politicise" judicial task. Having regard to the foregoing, Haysom[48] posits that "socio-economic rights thus politicise justice and judicialise politics. They allow the courts, by enforcing socio-economic rights, to stray onto the political terrain, at the expense of the democratic process and political life is inevitably impoverished."

This paper submits that judicial review of civil and political rights, like socio-economic rights, sometimes raise political issues whether directly or indirectly. For instance, in Nigeria, the Supreme Court, the Court of Appeal and Election Petition Tribunals sit over electoral matters. In the process, they sometimes invalidate the election of a person and in his place, declare another person duly elected. An entire election, therefore, as indeed an electoral calendar may be voided and/or altered and *ipso facto*, a fresh election ordered. A consequence hereof, is an invalidation of electoral mandate. There is, thus, scarcely a more political issue to be imagined in the wake of judicial task over socio-economic rights, than when the courts and tribunals exercise their jurisdiction over electoral matters. The argument that the judiciary should be politically neutral and in abstinence from decision that politicise justice as well as elimination of political values and matters

[48] H Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-economic Rights' (1992) 8 South African Journal on Human Rights 14-16

from adjudication is not just misplaced, it is also hardly feasible. This is in tandem with Pieterses's[49] submission viz:

> In truth, both constitutionalism and adjudication are inherently political. Courts, particularly in jurisdictions where judicial development of the common law is the norm, have always engaged in lawmaking, and society's moral/political values must necessarily intrude in this exercise. This same is true of constitutional interpretation.

5. The Role of Courts in the Justiciability Question

The emergence of the court system marked a great milestone in human journey.[50] The coming into being of the court system birthed a significant landmark in humanity's quest for justice.[51] It is axiomatic that the preponderating role of the judiciary is to administer justice, and this sacred responsibility is inextricably and inexorably linked to the courts.[52] Justice remains the master idea of the world, and the quest to realise it through the instrumentality of our courts have become an irresistible psychological force.[53] Today, the human instinct for justice now finds ready expression in the administration of law in our courts. The foundation of the courts' system is the confidence the society repose in judicial officers. Sikes,[54] quoting Warren Bunger, an erstwhile Chief Justice of the United States of America notes:

> A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society; that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have been exploited in the smallest transaction of daily life come to believe that courts cannot vindicate their legal rights from fraud and over reaching; that people come to believe the law in the large sense cannot fulfil its primary function to protecting them and their families in their home, at their work and on the public streets.

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[49] M Pieterse, 'Relational Socio-economic Rights' (2009) 25 South African Journal on Human Rights

[50] P Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and judicial Restraint' (1990) 3 JHRPLI - 15

[51] *Bhagwati* (n 50) 20

[52] O *Ogbu*, 'The Significance and Essence of the Fundamental Objectives and Directive Principles of State Policy' (2010) 5 Unizik Law Journal 276

[53] Ogbu)n 50) 283

[54] H Sikes, 'The Drowned Valleys on the Coast of Kenya' (1930) 38 The Journal of the East Africa and Ugenda Natural History Society 1-9

Stemming from the above submission by Justice Warren Bunger, is the fact that the success of the judicial process, hinges, largely, on the degree of confidence which the citizenry repose in the court system. The court system introduced a new foreboding in human historical folklore. Via the instrumentality of the courts, even human relationship now runs much more smoothly, just as the courts have also been ensuring that atrophied rules are looped off before putrefaction sets in.[55] The courts are often called upon to make constitutional or statutory declaration of the fundamental human rights of the citizens, as such, the justiciability question bordering on socio-economic rights within the Nigerian legal landscape is escapably pertinent.[56]

It is to the judicial process, nay the courts and no where else, that people look into for the protection and effective realisation of rights.[57] The importance of the courts in translating abstract rights to practical realities, therefore, cannot be overemphasised. It is the courts that give to these "airy nothing a local habitation and a name."[58] Oputa,[59] quoting Sir Jack Jacob, pungently observed viz:

> The equitable, effective and efficient administration of justice is of crucial, indeed of paramount value in the life and culture of a civilized community. It constitutes the torch-stone of the quality of justice enjoyed by its members. For the administration of justice is the life blood of the legal system of any country and at the same time, it is the life line of its citizens to secure justice. The administration of justice is therefore a major responsibility of the machinery of good government, an instrument of social justice and a tool in the age long quest for justice, which is one of the deepest, most inspiring and most abiding aspiration of the human spirit.

The deceased Cicero of the Nigerian Supreme Court, also elegantly captured the role of courts in the following words:

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[55] C Oputa, 'Legal and Judicial Activism in an Emergent Democracy: The Last Hope for the Common Man?' (11 December 2003) paper presented during a Symposium in memory of Hon. Justice Chike, Idighe at the Obafemi Awolowo University amphitheatre, Obafemi Awolowo University, Ile-Ife

[56] C Oputa, *Our Temple of Justice* (Friends' Law Publishers Ltd, Orlu 1993) 112

[57] *Oputa* (n 56) 120

[58] W Shakespeare, *A Midsummer Night's Dream (*Macmillan and Co., London 1993) last act

[59] C Oputa, 'Peace, Justice and Fairplay in a Democratic Nigeria' (31 January 2004) birthday lecture in Honour of His Grace, Most Rev. (Dr.) John O. Onaiyekan, CON., the Catholic Archdiocese of Abuja

> This presupposed and still presupposes courts to which men, when they are in doubt or anxiety or when they suppose that wrong has been done to them, may freely have recourse, in the guaranteed hope of obtaining redress. This again presupposed and still presupposes a court that is free and not tied to the apronstrings of extrinsic pressures and control from either the legislative or executive branches of government or from powerful multinationals or from any other concentration of power in society including mob pressures and hysteria. The court system further presupposes and still presupposes, courts which are not incapable (for reasons of the ignorance of the judge or his corruption, favouritism, prejudice fear or favour) of delivering a just verdict.[60]

The role of the courts in the justiciability question finds expression in the judicial application of socio-economic rights, and within the tenor, ambit and contemplation of this paper, considerations shall be given to the Indian, South African and Nigerian jurisdictions as shall be seen hereinafter.

6. Judicial Application of Socio-economic Rights in India

India, perhaps more than any other country, has through judicial review, developed the jurisprudence of directive principles and the domestication, justiciability and judicialisation of socio-economic rights. The development is gobsmacking, taking into cognizance, the fact that Article 37 of the Indian Constitution of 1950 expressly states that directive principles are non-justiciable, although they are fundamental in the governance of the country and the state has a duty to apply them in making laws. This paper submits that the judicial activism of the Indian Supreme Court has made a caricature of the conservatism of other national courts on the subject, though that acitivism was far from being achieved over night.

When a challenge of the primacy of fundamental rights over directive principles of state policy came up for the first time before the Supreme Court in 1951 in the case of *State of Madras v Champakam Dorairajan*,[61] the court unequivocally held that "the directive principles have to conform to and run subsidiary to the chapter on fundamental rights." Between 1975 and 1977, India under Indira Ghandhi was under internal emergency. The after math was the wanton violation of the rights to life, liberty and freedom of expression among others. The courts in

[60] C Okeke (ed), *Towards functional Justice: Seminar Papers of Justice Chukwudifu A. Oputa* (Gold Press Limited, Ibadan 2007) 37-38
[61] (1951) SCR 525

India, particularly the Supreme Court appeared helpless. It was unable to provide remedies to victims of the emergency rule, even as its image was gravely battered. When the state of emergency came to an end, there was political re-alignment. A popularly elected civilian government that was in place then, was weak and by 1978/1979, it was on the cusp of collapse. Significantly, that period invariably marked the advent of public interest litigation (PIL) movement in the judiciary which radically re-shaped the Indian jurisprudence on socio-economic rights for good. The period following the emergency,

> provided the right environment for the judiciary to redeem itself as a protector and enforce of the rule of law. Judges woke up to this heed and public interest litigation was the tool the judiciary shaped to achieve this end. Public interest litigation was entirely a judge-led and judge dominated movement.[62]

Public Interest Litigation was aimed at liberalising, popularising and democratising access to the justice system. Complex and sometimes confusing procedure for invoking the jurisdiction of the Supreme Court was deconstructed and simplified. The rules governing *locus standi* were equally relaxed so much so that a postcard or ordinary letter could be treated as petition to the Supreme Court for it to commence judicial determination. Judicial formalism was forced to take the backstage.[63]

The aftermath occasioned an attitude of the court towards interpreting Article 21 (the right to life and personal liberty) of the Constitution, to compass a gamut of other ancillary and integral rights which included many socio-economic rights and this resulted in a foundation, for social justice. The remedies that resulted from public interest litigation were said to be "unorthodox and unconventional and were intended to initiate affirmative action on the part of the state and its authorities,"[64] but they were hugely successful.

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[62] S Muralidhar, 'Justiciability of Economic, Social and Cultural Rights – The Indian Experience in 'Circle of Rights, Economic, Social and Cultural Right Activism: A Training Resource' International Human Rights Internship Programme and Asian Forum for Human Rights and Development 2000 436-37

[63] U Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' In **J** Kapur (eds), Supreme Court on Public Interest Litigation (Valsep, New Delhi 1998)

[64] **J** Kothari, 'Social and the Indian Constitution' (2004) 2 Law, Social Justice and Global Development Journal (LGD) <http://www.go.warior.ac.uk/elj/igd/2004_2/kpthari> accessed 2 May 2023

The radical break from the liturgy of the past came to the fore with the landmark decision in the case of *Maneka Gandhi v Union of India*.[65] In this case, after Mrs. Indira Gandhi lost power as Prime Minister of India, the passport of her daughter-in-law, Maneka Gandhi was confiscated by the new government. Maneka was setting out to travel abroad on a speaking engagement but could no longer do so on account of her passport being impounded. Maneka petitioned the Supreme Court relying on Article 32 of the Indian Constitution which entitles a person to file a petition directly to the Supreme Court if the fundamental right of that person has been infringed upon. She contended *inter alia*, that the seizure of her passport violated the principles of natural justice. The government on their part, raised a preliminary objection, arguing that the right to travel abroad was not a fundamental right, and that Article 32 of the Constitution was inapplicable and that the petition was incompetent before the Supreme Court. The contention of the government was also that the principles of natural justice were inapplicable.

The right to travel abroad was not specifically guaranteed by the constitution but the petitioner relied on Article 21 which guaranteed the right to life and personal liberty. The Supreme Court adjudged that in a wide connotation, "personal liberty" included all aspects of personal liberty, the right to travel abroad, was therefore held to have been accommodated within the purview of "personal liberty" and that it was protected under Article 21. The Supreme Court further held that no one could be deprived of the right to go abroad except by procedure established by law. Also, that to pass judicial scrutiny, an executive, quasi-judicial or legislative action would satisfy the just, fair and reasonable test.

The socio-economic rights jurisprudence of the Indian Supreme Court encompassing the right to life, the right to food, the right to work, the right to education, the right to shelter and the right to health shall also fall within the purview of this discourse. The Indian Supreme Court's stance, is namely, that directive principles which are fundamental to the governance of the country are complementary to and cannot be isolated from fundamental rights. Through creative, interpretative skill and the need to dispense social justice, the Indian Supreme Court expanded the provisions of right to life to include some concomitant social and economic rights. That way, "the court overcame the difficulty of justiciability of those economic and social rights, which were hitherto in their

[65] (1978) 1 SCC 248

manifestation as Directive Principles of State Policy, considered unenforceable."[66]

In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*,[67] the court stated *viz*:

> The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on, such functions and activities as constitute the bare minimum expression of human self.

It could be deduced from the above quotation, that the right to life is not considered as an end in itself, but include the bare necessities of life which cannot be isolated from economic needs. Much as the Supreme Court of India has held in some cases that the right to life encompasses the basic right to food, shelter and clothing,[68] a special and specific right to food was never canvassed before the court until the case of *Kishen v Pathnayak v State of Orissa*.[69] Until then, the Supreme Court merely gave direction to the government to take macro level measures such as irrigation projects to reduce the drought in Orissa, one of the poorest states in India, where due to starvation, some people were forced to put their biological children up for sale. The court declined to recognise as urged, that a distinct right to food as an integral part of the right to life, was being infringed upon.

In 2001, there was massive outcry on the heels of the droughts and several cases of starvation to death in the same poor state of Orissa. Paradoxically, there were excess stock piles of grains in the stores of the central government which were actually wasting away. This unfortunate state of affairs captured national attention and constituted the basis for a full campaign for the right to food in India. A Non-governmental Organisation, People's Union for Civil Liberties (PUCL) in April 2001, commenced a public interest litigation at the Supreme Court vide *People's*

[66] (1951) SCR 525
[67] (1981) 2 SCR 576
[68] Chameli Singh v State of UP 1996 (2) SCC 549; *Paschim Sanity & Ors v State of West Bengal* 1996 (4) SCC 37
[69] AR 1989 SC 677

Union for Civil Liberties v Union of India & Ors.[70] This case sought for the enforcement of the right to food of the thousands of families that were starving to death in the drought affected state like Orissa, among others. The Supreme Court was disturbed by the sprawling cases of deaths through starvation and on its own enlarged the scope of the petition by the People's Union for Civil Liberties (PUCL) from the initially stated six drought affected states to include all the Indian States and Union Territories. The court held that it was the responsibility of the government to prevent hunger and starvation.[71] The court specifically recognised a right to food within Article 21 of the Constitution and had to broaden the scope of the right to include the right to be free from starvation. It held that it is the responsibility of government to provide food to the aged infant, persons with disabilities, destitute men and women who are in danger of starvation, pregnant and lactating women and destitute children.

The lesson emanating from the Indian experience is that in developing and advancing the jurisprudence on directive principles and socio-economic rights, the Supreme Court relying on those rights, enlarged and evidenced the scope of fundamental rights, particularly the right to life and personal liberty contained in Article 21. Directive principles are seen as being enforceable when they supply content to fundamental rights. The right as expanded through judicial decisions, now contains such ancillary and complementary socio-economic rights like the rights to livelihood, shelter, health, clothing, food, adequate nutrition and education. Rather than have a rigid dichotomy between directive principles and fundamental rights, the court considers them to be complementary to each other and in deserving cases, it harmonised the two, treating certain rights under the directive principles as integral parts of fundamental rights.

This paper submits that by liberalising and simplifying the public interest litigation process, the court made it possible for the poor, illiterate, disadvantaged and most vulnerable people who ordinarily would be inhibited from accessing the court, to petition the court with no difficulty. The court has also developed far reaching methods of granting remedies and making positive orders in respect of socio-economic rights against government, its agencies and even private bodies. Sometimes, the orders or directions are given in stages and the implementations are monitored through post judgment procedure which in turn has

[70] Writ Petition (Civil) No 196 of 2001, decided on 2 May 2003
[71] *Ibid*

encouraged the progressive realisation of socio-economic rights. Muralidhar[72] succinctly albeit instructively enthused: "The experience of Indian judiciary bolsters the vision of the Constitution as a dynamic and evolving document and not merely an expression of desired objectives in an open-ended time frame."

7. Judicial Application of Socio-economic Rights in South Africa

The South African Bill of Rights is generally considered as one of the most progressive in the African continent, nay the world. This is because it contains all categories of human rights that are ordinarily included in most international human rights instruments, namely, the so-called first generation rights (which consist of the traditional civil and political rights) and the rather controversial second and third generation rights (which consist of social, economic and cultural rights). For that reason, many scholars[73] view South Africa as a benchmark in terms of the constitutional protection and judicial enforcement of socio-economic rights. The constitutionalisation of socio-economic rights in South Africa, was preceded by various debates and arguments on the wisdom and desirability of entrenching socio-economic rights in the constitution.[74]

The central theme in the debates was whether the realisation of socio-economic rights is not more of political and policy for the executive and legislative arms of government than a judicial matter.[75] Several years after the consitutionalisation of the rights was achieved, the debates are

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[72] S Muralidar, 'Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary' First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi 1 – 3 November 2002 5

[73] W Egbewole and T Alatise, 'Realising Socio-economic Rights in Nigeria and the Justiciability Question: Lesson from South Africa and India'(2017) 8 International Journal of Politics and Good Governance 14-18; P O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 Modern Law Review 532 – 554; **J** Mubangizi, 'The Constitutional Protection of Socio-economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 African Journal of Legal Studies 1-19

[74] M Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-economic Rights' (2004) 20 South African Journal on Human Rights 383; D Davis, 'The Case Against Inclusion of Socio-economic Rights in Bill of Rights Except as Directive Principles' (1992) 8 South African Journal on Human Rights 475; A Sachs, 'Towards a Bill of Rights in Democratic South Africa' (1990) 6 South African Journal on Human Rights 1; S Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 Univ. Penn LRI, 26-42; N Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-economic Right' (1992) 8 South African Journal on Human Rights 451-63; E Mureinik, 'Beyond a Chapter of Luxuries: Economic Rights in the Constitution' (1992) 8 South Africa Journal on Human Rights 464-74.

[75] *Mureinik* (n 83) 476

still on.[76] Though much of the debates x-ray the role of the South African judiciary in the vindication or enforceability of the rights. To underscore the point that the debates still rage on, Yacoob enthused "the question is therefore not whether socio-economic rights are justiciable under our constitution, but how to enforce them in a given case. The very difficult issue which must be carefully explored on a case-by-case basis."[77]

Section 7(2) of the 1996 South African Constitution enjoins the state to "respect, protect, promote and fulfil the rights in the Bill of Rights" Iles[78] argues that to "respect, protect, promote and fulfill":

> impose on the state a mixture of both positive and negative obligations. The duty to respect a right involves an immediate obligation on the state to refrain from legislative or other action, which interferes with enjoyment of the right. The duty to protect the right, requires the state to take measure to prevent the right from being interfered with by other non-state actors. Promoting and fulfilling the right requires positive action on the part of the state to take legislative and other measures to assist individuals and groups in obtaining access to the right.

This paper submits that the foregoing also repudiates the argument that socio-economic rights impose positive rather than negative obligations on the state. Michelman[79] in assessing the irony in the judicial vindication of socio-economic rights noted *viz*:

> By constitutionalising social rights, the argument often run, you force the judiciary to a helpless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. The other way lies the judicial choice debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies of an unreviewable privilege.

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[76] P De Vos, 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 South African Journal on Human Rights 67, 74

[77] *Government of the Republic of South Africa v Groutboom* (2001) 1 CHR 261 at 283 paras A-B

[78] K Lles, 'Limiting Socio-economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 South African Journal on Human Rights 459

[79] F Michealman, 'The Constitution, Social Rights and Liberal Political Justification'(2003) 1 International Journal of Constitutional Law 13, 15

For the South African judiciary, there is hardly any choice other than upholding and enforcing the socio-economic rights duly guaranteed by the constitution. In the discharge of that constitutional role, the South African inherited legal culture would seem to hinder a free flow of that assignment. The South African legal culture has to a considerable extent, been influenced by Anglo-Saxon legal culture of classical liberalism and the result is unfavourabble disposition towards socio-economic rights.[80] Further to that is the conservatism of the South African judiciary; its abiding faith in legal positivism and a culture of almost total deference to the executive until 1994. Pieterse[81] opines that having regard to the fact that "a large proportion of South Africa's legal fraternity were schooled in the legal culture" above described, one can then appreciate why the judges are certain "to feel ideological discomfort with enforcing socio-economic rights and to attempt instinctively to it by deferring to the legislative and executive branches in social/political matters." This paper submits that caution seems to be the golden thread that runs through the gamut of cases decided by the South African Courts, particularly the Constitutional Court.[82]

Mubangizi[83] notes that the constitutional protection of socio-economic rights in South Africa has to be seen in the context of the debate that has often characterised the justiciability of such rights. It is important to note that the inclusion of socio-economic rights in the South African Bill of Rights was not contested. Some argued that socio-economic rights were inherently non-justiciable and not suited to judicial enforcement.[84] It was further argued that the protection of such rights ought to be a task for the legislature and executive, and that constitutionalising them would have the inevitable effect of transferring power from these two branches of government to the judiciary, which lacks the democratic legitimacy necessary to make decisions concerning

[80] Z Motala, 'Socio-economic Rights, Federalism and the Courts: Comparative Lessons for South Africa' (1995) 112 South African Journal on Human Rights 68
[81] *Pieterse* (n 83) 399
[82] Such cases include *Soobramoney v Minister of Health, Kwazulu Natal* (1992) 1 SA 765 (CC) and *Government of the Republic of South Africa v Grootboom* (2001) 1 CHR 26; 2001 (1) SA 46(CC).
[83] **J** Mubangizi, 'The Constitutional Protection of Socio-economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 African Journal of Legal Studies II
[84] **J** De Waal, I Currie and G Erasmus, *The Bill of Rights Handbook* (4th edn Juta & Co. Ltd, Kenwyn 2001) 433

allocation of social and economic resources.[85] Devenish[86] however, on his part, argues that there was no principled objection to the inclusion of socio-economic rights in a justiciable bill of rights and that the vital issue was the extent and nature of their inclusion.

The above contentions were considered in the *First Certificate Judgment*[87] in which the Constitutional Court held that although socio-economic rights are not universally accepted as fundamental rights, they "are at least to some extent justiciable; and at the very minimum can be negatively protected from invasion."[88] The Court conceded that socio-economic rights might result in courts making orders that have direct budgetary implications, but hastened to point out that the enforcement of certain civil and political rights would often also have such implications.

The other aspect of the socio-economic rights debate revolves around the fact that the protection of such rights is dependent on the availability of resources. It is further argued that it is meaningless to provide for such rights without the resource capacity to ensure their protection. It is therefore no surprise that the issue of availability of resources has been raised in all cases that have come before the Constitutional Court involving socio-economic rights. Suffice it to say that although the court initially stuttered in its decision in *Soobramoney v Minister of Health, Kwazulu Natal*,[89] it was later to redeem itself in the subsequent decisions in *Government of the Republic of South Africa v Grootboom*,[90] *Minister of Health and Others v Treatment Action Campaign Others*[91] and *Khosa v Minister of Social Development*.[92]

In all the aforementioned cases, the Constitutional Court consistently jettisoned the State's argument of resource constraints. In so doing, the court aligned with the United Nations Committee on Economic Social and Cultural Rights which on its part noted that:

> In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to

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[85] *Mubangizi* (n 92) 119
[86] G Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, London 1999) 358
[87] *Exparte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* (1996) 1996 (4) SA 744 (CC)
[88] Ibid paragraph 78
[89] 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696
[90] 2001 (1) SA 46 (CC)
[91] 2002 (5) SA 703 (CC)
[92] 2004 (6) SA 505 (CC)

> use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[93]

This paper submits that in the light of the decisions of and the pronouncements by the Constitutional Court, the socio-economic rights debate in South Africa has therefore now been settled.

8. Judicial Application of Socio-economic Rights in Nigeria

The first Nigerian Constitution to make provision for Fundamental Objectives and Directive Principles of State Policy was the 1979 Constitution of Nigeria in its Chapter II. The draft Constitution that was a precursor to the 1979 Constitution was the result of a work by a Constitution Drafting Committee. When the Committee concluded its assignment in 1976, the Daily Times, a foremost newspaper in Nigeria, at the time sponsored debates and symposia on the Draft Constitution which took part in several centres all over the country from December 1976 to May 1977. The outcome of the exercise was later published.[94] Chapter II of the Draft Constitution made provision for what it described as the "Fundamental Objectives and Directive Principles of State Policy."

A bit of history behind Chapter II is found in the report of the sub-committee on National Objectives and Public Accountability of the Constitution Drafting Committee (CDC). The sub-committee as chaired by Ben Nwabueze had the first three articles which stated as follows:[95]

> Article 2: Any person may apply to a court of competent jurisdiction for a declaration whether any law or action of an organ or authority of the State or of a person performing function on behalf of the organ or authority of the state is in accordance with the Directive Principles of State Policy.
> Article 3: A declaration by the Court that a law or other action is not in accordance with the Directive Principles shall not render the law or other action in question invalid to any extent whatsoever and no other action shall lie against the state, any organ or authority of the state or any person on this ground.
> Article 4: A declaration by the court that the state or any organ thereof is not complying with the Directive Principles shall nevertheless be ground for the impeachment of the appropriate

[93] General Comment 3, The Nature of States parties obligations (Article 2 paragraph 1 of the CESCR) (5th Session, 1990)
[94] W Ofonagoro, A Ojo and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 19760-1977* (Daily Times of Nigeria, Lagos 1977)
[95] Report of the Constitutional Drafting Committee Volume II, (1976) 38

> functionaries in accordance with the provisions of the Constitution in that behalf.

The sub-committee claimed that the provisions in the Indian and Pakistani Constitutions had served as their models and that they derived assistance from the United Nations Charter and the International Convention on Economic, Social and Cultural Rights.[96] The provisions recommended by the sub-committee were far-reaching than that of the Indian and Pakistani Constitutions. They were novel and radical. Article 2 thereof clearly provides for the justiciability of Chapter 2 of the Draft Constitution on Directive Principles. Article 4 provides for sanctions, albeit the impeachment of the appropriate functionaries against whom a declaration was made for not complying with the Directive Principles. The impeachment was to be in accordance with the provision of the Constitution in that behalf. Interestingly, rather than the above recommendation of the said sub-committee being adopted as such, a watered-down version found its way into the Draft Constitution as Section 7(2) and it states *viz*:

> Section 7(2), subject to the provision of subsection[97] of this section, no court of law shall have the power to determine any issue or question as to whether any action or omission by any person or authority, or as to whether any Law or any judicial decisions is in conformity with this Chapter of the Constitution.

The chapter on directive principles in general, and Section 7(2) in particular, were the subject of intense debates by Nigerians. According to Jinadu,[98] "the provisions of the Draft Constitution in Fundamental Objectives and Directive Principles of State have elicited the most acrimonious and intellectually stimulating discussion." The Student Union of Ahmadu Bello University, Zaria contended that the non-justiciability clause was "undemocratic and open to abuse."[99] The students' body suggested that Section 7(2) should either be deleted or the whole chapter expunged from the constitution. Awolowo[100] described the

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[96] Ibid

[97] Section 7 (3) of the Draft Constitution exempts the application of section 7(2) from sections 13 and 17 which deal with Directive on Local Government System and Prohibitions of State Religion.

[98] *Jinadu* (n 106)

[99] *Ojo* (n 106) 403-41

[100] O Awolowo, 'My Thoughts' in W Ofonagoro, A Ojo and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977)

chapter as "a radical and enlightened innovation." The sage went on to argue that "the quality of the social objectives is destroyed and the provisions under Chapter II for those objectives are reduced to worthless platitudes by Section 7(2)(3) of the Draft."[101]

Ojo[102] opined that the inclusion of the directive principles in the Draft Constitution had compromised the seriousness of the constitution, thereby unwillingly inviting cynicism. He advocated that they be expunged and left to where they appropriately belong, that is, party political manifestoes. Nwabueze,[103] however, in reaction to what he called "this whole bogey about the objectives not being judicially enforceable" argued that: "a constitutional duty has an inherent sanction by the mere fact that it is commanded by the constitution. It has moral, educative and psychological force for both the rulers and the governed, which is perhaps more important than the sanction of judicial enforcement."[104]

If that is so, then this paper wonders why the sub-committee under Nwabueze recommended limited justiciability in the first place. This paper submits that in so far as the rulers and the governed know that a constitutional duty is bereft of any enforceability or justiciability, it will neither command any inherent sanction nor any moral or psychological force. The tendency will be to treat it as a mere declaration, pious wish and cosmetic emblem. The Nigerian Tribune commented that the non-justiciability clause has rendered "the entire chapter useless to both the government and the people."[105] Sani[106] considered the chapter "one of the most striking and commendable innovations," although he thought that the title was clumsy. He noted that the "chapter no doubt attempts to spell out the ideological goals of this nation but regrettably does so in a rather evasive and half-hearted manner presumably because of the morbid fear held in some elitist quarters for any declarations of social values that have Marxist semblance or socialist exhortations."[107] For

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[101] Ibid 43
[102] *Ojo* (n 106) 48
[103] B Nwabueze, 'Where Dr. Ojo Misfed' in W Ofonagoro, A Ojo and Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977) 54
[104] Ibid
[105] Nigerian Tribune 'Tribune Comment on Fundamental Objectives' in W Ofonagoro, A Ojo and Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977) 55
[106] H Sani, 'Fallacies of the Nigeiran Draft Constitution' in W Ofonagoro, A Ojo and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977) 59
[107] *Sani* (n 106) 61

Emovon,[108] the chapter "constitutes a bold step to planned economy and stability."

A constituent assembly whose membership was party appointed and partly elected was set up to deliberate on the Draft Constitution. It was further mandated to receive and collate public comments and debates on the Draft Constitution on 29 August 1978. The Assembly made no fundamental changes to the Draft Constitution.[109] The Supreme Military Council, the principal organ of the ruling military junta, on receipt of the Draft Constitution, arbitrarily inserted several new provisions before it took effect on 1 October 1979 as the Constitution of the Federal Republic of Nigeria. Section 6(6)(c) of the 1979 Constitution was to the effect that:

> The judicial powers vested in accordance with the foregoing provisions of this section –(c) shall not, except as otherwise provided in 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 judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.[110]

The above provision has been retained in the present 1999 Constitution also as Section 6(6)(c). Ojiaku [111]uncharitably described the above clause as "a sermon from the pulpit to be listened to and observed or regarded as mere rhetorics according to the dictates of one's conscience." Section 4(2) of the 1999 Constitution confers on the National Assembly the power to make laws for the peace, order and good governance of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative list set out in Part I of the Second Schedule to the Constitution. Item 60(a) in the Exclusive Legislative List prescribes "the establishment and regulation of authorities for the Federation or any part thereof –(a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution." After referring to the said item 60(a), Uwais strenuously canvassed as follows:

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[108] E Emovon, 'Fundamental Objectives and Directive Principles and Public Accountability'in W Ofonagoro, A Ojo and Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977) 62

[109] V Motton-Migan, *Constitution Making in Post-Independence Nigeria: A Critique* (Spectrum, Ibadan 1994) 67

[110] Section 7(2) of the Draft Constitution was replaced with this provision by the Constituent Assembly

[111] G Ojiaku, *In the Name of Justice* (African Perspective publishing, Lagos 1997) 10

> The breathtaking 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. The utilization of this power would ensure the creation of requisite bodies to oversee the needs of the weak and often overlooked and neglected society. It would also provide a unique and potent opportunity for our legislators to monitor and regulate the function of these bodies, where Executive, for reasons best known to it, fails or neglects to prioritise and implement the provisions of chapter I and by extension, the welfare of all Nigerians.[112]

This paper aligns with the submission of Uwais above. This paper submits that besides the legislature in Nigeria scarcely ever being productive as a result of being a rubber-stamp of the executive arm of government, members of the Nigerian parliament, whether at the state or national level, only sponsor Bills that advance their selfish objectives as opposed to those that will advance the welfare, interest as well as command the attention of the generality of the Nigerian populace.

The case of *Attorney-General, Ondo State v Attorney-General of the Federation and Others*[113] presented the Supreme Court of Nigeria, with the first opportunity to examine the provisions on the Fundamental Objectives and Directive Principles of State Policy in the 1999 Constitution of Nigeria as well as the attitude of the Nigerian Supreme Court thereto. The Corrupt Practices and Other Related Offences Act No. 5 of 2000 came into force on 13 June, 2000. This legislation sought to prohibit and prescribe punishment for corrupt practices and other related offences throughout the Federal Republic of Nigeria. To implement its aims, the Act established a body known as Independent Corrupt Practices Commission (ICPC).

By an originating summons filed in the Supreme Court on 16 July 2001, invoking the apex court's original jurisdiction under Section 232(1) of the 1999 Constitution, the plaintiff, the Attorney General of Ondo State sued the Attorney General of the Federation. The Chief Law Officer joined other 35 Attorneys-General of the States as parties because their fights

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[112] M Uwais, 'Fundamental Objectives and Directive Principles of State Policy: Possibilities and Prospects' in C Nweze (ed), *Justice in the Judicial Process: Essays in Honour of Honourable Justice Engene Ubaezonu* (Fourth Dimension Publishing Company, Enugu 2002) 179

[113] (2002) 9 NWLR (Pt. 772) 222

were likely to be affected by the action. He asked for certain reliefs, principally that in Nigeria. The plaintiff's main contentions summarily, were that the Act is not in respect of a matter or matters either in the Exclusive Legislative List or the Concurrent Legislative List and as such, unconstitutional. Also, that the National Assembly had no power to make laws with respect to the criminal offences contained in the Act, and that sections 26(3), 28, 29, 35 and 37 of the Act are unconstitutional, void and of no legal effect whatsoever.[114]

Section 15(5) of Chapter II of the 1999 Constitution of Nigeria on Fundamental Objectives and Directive Principles of State Policy, states that the State shall abolish all corrupt practices and abuse of power. The provision of item 67 of the Exclusive Legislative List provides that: "Any other matter with respect to which the National Assembly has power to make law in accordance with the provisions of this Constitution." Item 68 on its part provides: "Any matter incidental or supplementary to any matter mentioned elsewhere in this list." Section 4 deals with the legislative power of the National Assembly.

The Court held that reading the above provisions of the Constitution together and construed liberally and broadly, it can easily be seen that the National Assembly possesses the power both "incidental" and "implied" to enact the said Act to enable the State, which for this purpose means the Federal Republic of Nigeria, to implement the provisions of Section 15(5) of the Fundamental Objectives and Directive Principles of State Policy. Under the provisions of Section 3 of the Corrupt Practices and other Related Offences Act, the Independent Corrupt Practices Commission (ICPC) was established with the powers to implement the provisions of the Act, both penal and otherwise.

What the National Assembly did by the promulgation of the Act was geared towards the eradication of corruption and corrupt practices in Nigeria. It was also an effort aimed at promoting and enforcing the observance of the provisions of Section 15(5) of the 1999 Constitution.[115] Uwaifo JSC in his lead judgment, held that having cognizance of item 68 of the Exclusive Legislative List:[116]

> ...it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Hence the enactment of the Act contains provisions in

[114] Ibid
[115] (2002) 9 NWLR (Pt 772) 222, 312 paragraphs F-H, *per* Wali JSC
[116] Ibid 305 paragraphs E - F

> respect of both the establishment and regulation of ICPC and the authority for ICPC to enforce the observance of the provisions of Section 15 subsection 5 of the Constitution. To hold otherwise is to render the provisions of item 60(a) idle and leave the ICPC with no authority whatsoever.[117]

Uwaifo JSC furthermore, in his concurring judgment, extensively dealt with the issue of Fundamental Objectives and Directive Principles of State Policy *viz*:

> As to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of our Constitution, section 6(c) says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of state organs if they acted in clear disregard to them, the nature of the consequences of which having to depend on the aspect of the infringement and in some cases the political will of those in power to redress the situation. But the Directive Principles (or some of them) can be made justiciable by legislation.

Uwaifo JSC went on to point out that not every section under Chapter II is suitable for legislative input which would result in sanctions, whether penal or compensatory for its breach.[118] He referred to the Indian case of *The State of Madras v Champakam*[119] wherein the Indian Supreme Court held that "the Directive Principles of State Policy have to conform to and run subsidiary to the Chapter on Fundamental Rights. That is the correct way in which the provisions found in parts III (Fundamental Rights) and IV (Directive Principles) have to be understood."[120] Having regard to the Indian situation as represented in *the State of Madras v Champakam(supra)*,Uwaifo JSC then said:

> Whatever was necessary was done (in India) to see that they (Directive Principles) are observed as much as practicable so as to give cognizance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the

[117] Section 15(5) of the Constitution Provides that the state shall abolish all corrupt practices and abuse of power.
[118] (n 125) 383 paragraph G
[119] (1951) SCR 525
[120] Ibid 531

> Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly working together, to give expression to anyone of them through appropriate enactment as occasion may demand. I believe that this is what has been done in respect of section 15(5) by the present Act.[121]

In the final result, the claim was only partially successful and/or sustainable because the Supreme Court struck down as being unconstitutional, Section 26(3) of the ICPC Act which placed a time limit within which to conclude the prosecution of an offence. The court meted out the same fate to section 35 for violating the constitutional provisions on personal liberty. On the whole, the ICPC Act was saved as it is a legislative enactment that gives force to Section 15 (5) of the Fundamental Objectives and Directive Principles of State Policy. This paper submits that there are some salient issues arising from the Supreme Court judgment above, particularly Uwaifo JSC's concurring judgment which ought to be herein examined. The reference to *Champakan Case* in order to capture the Indian situation, it is hereby submitted with the greatest respect, is not quite appropriate. This is so because *Champakan Case* which was decided in 1951 does not quite represent the current state of affairs in India. This paper earlier on considered several Indian cases[122] that were decided in the 1970s when the Indian judiciary initiated the jurisprudence of Public Interest Litigation (PIL).

9. Conclusion

It is the contention of this paper that it is possible and practicable for Nigerian Courts to accommodate the notion of a strong interpretative obligation which is namely to construe municipal law consistently with international law, including unincorporated conventional approaches. The liberal attitudes of the African Commission and such municipal judicial institutions like the South African Constitutional Court as well as Indian Supreme Court are inspirational catalysts especially in the light of a country like Nigeria where there are no constitutional guarantee of socio-economic rights or put differently, where these rights are relegated to the mere appellation of fundamental objectives and directive principles of state policies.

This paper submits that even when allowances have been made for judicial creativity, problems yet remain on the application of judicial

[121] *Ibid* paragraphs E-H

[122] They are as captured in VI of this paper.

remedies to socio-economic rights including questions of judicial competency and accountability. Judicial decision with large scale budgetary effects are problematic, creating tensions with democratic self-governance. Decisions about healthcare funding involve difficult decisions at the political level and functional levels – fixing the health budget and deciding what priorities should be met. Lester and O'Cinneide[123] share in this concerns to wit:

> There are limits to what can be achieved by the judicial process in implementing fundamental rights. Courts cannot provide a remedy for every injustice. Judges lack the constitutional authority as well as the expertise to make political decisions about the raising and disposition of public revenue, or as to how public programmes should be designed and executed. The judicial branch cannot arrogate to itself the roles of the legislature or executive branches without usurping their separate and distinct public powers.

The limits of the judicial process *vis-à-vis* socio-economic rights also finds credence to the end that it is not the function of a court to govern a country like Nigeria. The courts, conscious of this limitation in deploying the judicial process to advance socio-economic rights, appear to be avoiding going into detailed determination of policy and practice. It therefore could be reasonably assumed that the courts could continue to define and observe appropriate parameters of the judicial function.[124] While being sensitive to separation of power concerns, the court in the *Minister of Health v Treatment Action Campaign* [125]reiterated the standard for judicial review thus:

> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging

[123] L Lester and C O'Cinneide, 'The Effective Protection of Socio-Economic Rights in Y Ghai and J Cottrell (eds), *Economic, Social and Cultural Rights* (Routledge, London 2004) 15

[124] A An-Naim, 'To Affirm Full Human Rights Standing of Economic, Social and Cultural Rights' in Y Ghai and J Cottrell (eds), *Economic, Social and Cultural Rights* (Routledge, London 2004) 7

[125] Tac Case (2002) 5 SA 721 (CC)

> budgets. In this way, the judicial, legislative and executive function achieve appropriate constitutional balance.[126]

In the *Soobramoney Case*, the issue was whether a public hospital had violated the South African Constitution for failing to provide renal dialysis services to a terminally ill man who suffered from diabetes, ischemic heart disease and cerebro-vascular disease. Soobramoney claimed that the hospital's refusal to treat him violated his right to health care and emergency medical treatment.[127] The South African Constitution provides that "everyone has the right to life" and that "no one maybe refused emergency medical treatment."[128] The hospital had produced evidence before the court that it prioritised treatment for non-terminal patients because dialysis was a scarce resource. The court jettisoned the claimant's "emergency" contention.[129] Relying on the *Unification Case*,[130] the court's reasoning was that the claim fell squarely under a more relevant sphere of access to healthcare facilities, also guaranteed in the Bill of Rights. It however noted that obligations imposed on the state with respect to those rights were dependent on available resources and that in the context of South Africa, an unqualified obligation "to meet the health care and other needs would not presently be capable of being fulfilled."

The court rejected the "broad construction" argument that emergency medical care included ongoing treatment of chronic illness. It was also the holding of the court that such a construction would make it "substantially more difficult for the state to meet its primary obligation under sub-section(1) and (2) to provide healthcare services to everyone within its available resources and that "it would reduce the resources available to the state for purposes of preventive healthcare and treatment of diseases." In his concurring judgment, Justice Sachs noted that rights, by their very nature, are shared and independent on available resources and that in the context of South Africa, an unqualified obligation "to meet the health care and other needs would not presently be capable of being fulfilled."[131]

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[126] Ibid
[127] Section 27 (3)
[128] Ibid
[129] (198) paragraph 2
[130] Ex-parte *Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744.
[131] (n 98) paragraph II

was also the holding of the court that such a construction would make it "substantially more difficult for the state to meet its primary obligation under subsection (1) and (2) to provide health care services to everyone within its available resources" and that "it would reduce the resources available to the state for purpose of preventive healthcare and treatment of diseases."[132] In his concurring judgment, Justice Sachs noted that rights, by their very nature, are shared and independent, meaning that a court is obligated to strike appropriate balances between the equally valid entitlements or expectations of a multitude of claims. Such an exercise, according to him, ought not be seen as imposing limits on those rights but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.[133]

After the *Soobramoney decision*, some scholars feared that the Constitutional Court would render the rights provisions in the South African Constitution ineffective.[134] Other scholars, however, argue that from the standpoint of judicial precedent, *Soobramoney* did not contribute much to the understanding of socio-economic rights, neither did it "lay down any guidelines that could be followed when interpreting socio-economic rights so as to illuminate and indigenise the jurisprudence on socio-economic rights."[135] This paper, however, submits that the court was simply balancing competing interests and in the process, dispelling fears about its inability to make policy choices in constitutional interpretation and its application to socio-economic rights. It is noteworthy that the court successfully blended consideration of benefits and costs and simple cost efficiency within a policy perspective with attention to its limited institutional competence to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[136] The state, the court stressed, must "manage its limited resources" in order to address the many claimants in need of access to healthcare, housing and social security as well as all aspects of the rights to human life.[137] *Soobramoney* illustrates that a constitutional court can satisfactorily navigate its way through socio-

[132] (n 98) paragraph 20

[133] (n 98) paragraph 54 arguing in relation to intervention by court on such matters that ("institutional incapacity and appropriate constitutional modesty require us to be especially cautious")

[134] E Bazelon, 'After the Revolution' (2003) 25 Legal Affairs 28; F Michelman 'The Constitution, Social Rights and Reason: A tribute to Etienne Mureinik (1998) 14 South African Journal of Human Rights 499

[135] *Ngwena* and *Cook* (n104) 135-7

[136] (n 98) paragraph 29

[137] (n 98) paragraph 31

economic rights claims without violating separation of powers and legislative competence.[138] Another self-limitation on the judicial process is the imperative of maintaining uniformity and predictability to enable litigants and advocates alike rely on the continued application of the same rules.

10. Recommendations

This paper hereby makes the following recommendations:

1. Since human rights are universal, indivisible, interdependent and interrelated, the separation of civil and political rights and economic, social and cultural rights in the Nigerian 1999 Constitution (as amended) ought to be removed through constitutional amendment. Such constitutional amendment would be with the view of bringing the provisions of Chapter II of the Constitution under Chapter IV of the same Constitution. Not only shall such an amendment accord socio-economic rights the same status, vigour, strength and vitality as civil and political rights, it shall also address the controversy about the non-justiciability of socio-economic rights in Nigeria.
2. To make socio-economic rights pragmatic and not esoteric, the courts must take up the gauntlet of adopting the ideology of a broad and progressive interpretative approach to the Constitution to the end of making Chapter II of the Nigerian 1999 Constitution justiciable. Judicial conservatism should pave way for judicial liberalism as far as the justiciability of socio-economic rights is concerned, not just because "there is nothing in law to conserve when the citizens are suffering from poverty, hunger, unemployment etc,"[139] but also because "a narrow interpretation straight-jacketed on the fear of a judge not being a legislator into the confines of words which might even be equivocal is with respect, a negation of the true essence of justice."[140]
3. The philosophical obscurantism about the nature of socio-economic rights which has accentuated the problem of justiciability of socio-economic rights by stunting the growth and pace of efforts at realising socio-economic rights can be checked through current global economic

[138] M Kende, 'The South African Constitutional Court's Embrace of Socio-economic Rights: A Comparative Perspective' (2003) 6 Chapman Law Review 137, 147.
[139] C Okeke (ed.), *Towards Functional, Justice: Seminar Papers of Justice Chukwudiju A. Oputa* (Gold Press Ltd., Ibadan 2007) 5
[140] *Per* Eso in *Fawehinmi v Akilu* (1987) 4 NWLR p. 848

realities which hint at the imperatives of pursuing a socio-economic agenda for the upliftment of the materially poor in societies.[141]

4. Minimum content rights principle should be applied to the enforcement of socio-economic rights as that would serve as a yardstick for the courts to adjudge the level of commitment and seriousness to socio-economic rights.
5. The successful enforcement of socio-economic rights does not automatically translate into a process of social transformation and as such, the judiciary should not run the risk of spreading its effectiveness and contribution too thin so as to threaten its already secured role in the enforcement of socio-economic rights.
6. The role of the judiciary should always remain effective in whatever it is conceived of as being legitimate and capable of doing. The judiciary should retain and build on its role in enforcing socio-economic rights. As long as this is achieved, it will keep the hopes of millions of vulnerable and marginalised communities and individuals in Nigeria and the world over alive.

There is an urgent need to challenge the popular belief amongst judges, jurists, lawyers and human rights crusaders that socio-economic rights are not justiciable in Nigeria. This can be achieved through adequate advocacy, sensitisation, re-orientation and capacity building among all the stakeholders involved.

[141] P O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7 Human Rights Law Review 483