

ENFORCEABILITY OF SOCIO-ECONOMIC RIGHTS: SEEING NIGERIA THROUGH THE EYES OF OTHER JURISDICTIONS*

Abstract

Socio-economic rights are now enforceable in several countries. In Nigeria, the Fundamental Objectives and Directive Principles of State Policy which contains detailed provisions on socio-economic rights remain non-justiciable. Nigeria has equally ratified the African Charter on Human and People's Rights that provide for socio-economic rights which has been adopted into the Laws. However, the Policy is embedded in the Constitution which has primacy over the African Charter. Also, there are no specific provisions in the Constitution on socio-economic rights. Hence, these rights remain a mirage in Nigeria unlike the position in other jurisdictions. In countries like South Africa, India and some Latin American countries, the enforcement of these rights have been achieved by either merging constitutional provisions with socio-economic rights or the courts giving expansive definitions to the provisions of the Constitution. This author argues that for citizens of Nigeria to enjoy these basic rights, the judiciary must take the centre stage and shed the garb of conservatism. More importantly, the legislature and executive also have active roles to play.

1. Introduction

There are three broad classes of rights recognized in International Law. These are civil and political rights (first generation), socio-economic rights (second generation) and solidarity rights (third generation)¹. The enforceability of the civil political right has become a *fait accompli* in international law². However, the same cannot be said of the other categories of rights.

Several arguments have been posited against the enforceability of socio-economic rights. For example, that they are mere aspirations or pious wishes whose content and meaning are ill defined³. Furthermore, those socio-economic rights are said to be vague to connote directly binding legal obligations. Apart from this, it is argued that the courts cannot adjudicate on socio-economic rights because they invariably involve the allocation of resources which is purely an executive affair.⁴

However, in spite of these arguments, socio-economic rights have now been pushed above enforceable threshold in many countries⁵. This fact was noted clearly in the debate for an operational protocol to the International Covenant on Economic, Social and Cultural Rights. In one of the Advocacy kits on the issue, the following observations were made:

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¹ Imasogie, M. O. , "Socio-Economic Issues: Lessons from South Africa", **NJ PCL**, vol. 2 , 2001 pp1-27;

² Civil and political rights have always been regarded as "fundamental" rights. The arguments about lack of clarity, ill-defined core content and minimum content, unsuitability to judicial intervention, etc. no longer threaten the enforceability of civil and political rights.

³ Module 22, Strategies for Enforcing ESC Rights through Domestic Legal Systems in **Circle of Rights: Economic, Social & Cultural Rights Activism, A Training Resource** pp4-15.

<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/module22.htm>. (last accessed January 2009)..

⁴ For a detailed account of the various arguments against the justiciability of socio-economic rights, see **Report of the International Commission of Jurists** 30th November, 2001 Geneva, and Switzerland.

<http://www.icj.org>. (Last accessed January 2009).

⁵ See, **50 Leading cases on Economic, Social and Cultural Rights**, Working Paper, No.1, ESC Rights Litigation Programme, CENTRE ON HOUSING RIGHTS AND EVICTIONS, June 2003 www.cohre.org. Last accessed January 2009)

In recent years, a jurisprudence surrounding economic, social and cultural rights has gradually emerged. Domestic and regional courts have, in many instances, adjudicated issues related to the enjoyment of economic, social and cultural rights offering an adequate remedy to the victims. *Indeed, today, an increasing number of countries have incorporated judicial review of economic, social and cultural rights. These include South Africa, Finland, Argentina, Mauritius..., India, Bangladesh, Nigeria and most countries in Central and Eastern Europe.* (Emphasis mine). As such the existence of domestic and regional case law related to socio- economic rights bear witness to the direct justiciability of these rights.⁶

The reference to Nigeria in this document is rather curious. As it is open to serious question whether the current status of socio-economic rights in Nigeria is anywhere near what has been described. Admittedly, recently the Nigerian Government, particularly the Obasanjo's administration introduced several policies and programmes to improve a lot of the populace. For instance, the **Universal Basic Education Act (UBE)** was enacted to provide free, compulsory and basic education to every child of primary and junior school age, the benefit being that every child will have the opportunity to education for nine years. Also, the **National Health Insurance Scheme (NHIS)** was launched for parents and four kids where parents who are contributing to the scheme are entitled to free health services from hospitals registered for such purposes. The **Pension Act** was revised amongst others to secure future benefits for the working population.

In the same vein, when President Yaradua was sworn in 2007, he came up with a 7- Point Agenda. Two of such are relevant to this paper. First, is adequate provision of food to ensure food security. The emphasis is on development of modern technology, research, production and development inputs that will revolutionize the agricultural sectors leading to five to ten fold increase in yield and production. The second is provision of education for all with minimum acceptable international standards. Strategic education development plan will encourage learning in science and technology by students who will be seen as future innovators and industrialist. This will be attained through massive injection of fund into education.⁷ It is glaring that two years after, the foregoing have not been actualized.

However, for the purpose of this paper, the germane issue is whether Nigerians perceive these policies, programmes and agenda as rights? Are these rights *per se* in Nigeria? Have Nigerians attained that level of awareness where they can access the courts to enforce these so-called rights as is the case in other jurisdictions? Also, in line with the above assertion, are these rights in reality enforceable in Nigeria as in other jurisdictions? This paper evaluates the issue of enforceability of socio-economic rights in Nigeria against the background of the position in other jurisdictions.

⁶ Coalition for an OP to the ICESCR Advocacy Kit, Challenging misconceptions Fact Sheet No 9 www.iwraw-ap.org/documents/OP-to-ICESCR-Advocacy-Kit. (Last accessed January 2009)

⁷ The Yaradua's 7-Point Agenda. Available at http://nigeriaworldpages.com/index.php?option=com_content&task=view&id=70&Itemid=9. (Last accessed August 2009).

2. Enforceability of Socio-economic Rights: An Assessment of the Nigerian Situation

Three main sources of socio-economic rights in Nigeria have been identified. These are the International Covenants to which Nigeria is a signatory⁸, the African Charter on Human and Peoples Rights⁹ and the Constitution of the Federal Republic of Nigeria.¹⁰

The International Covenant on Social and Economic Rights is the key instrument concerning socio-economic rights. It provides *inter alia* for the right to work; right to just and favourable working conditions; right to social security; right to adequate standard of living including adequate food, clothing and housing; right to enjoyment of highest attainable standard of physical and mental health and right to education.¹¹ This Covenant has been replicated in Chapter 2 of the Nigerian Constitution. However, as in many other jurisdictions, chapter 2 of the Nigerian Constitution is described as Fundamental Objectives and Directive Principles of State Policy.

A close examination of this chapter of the 1999 Constitution will show that it contains lofty provisions on economic, social, educational and related developmental issues.¹² Section 16 of the Constitution declares the economic objectives of the government. It shall control the national economy in such a manner as to secure maximum welfare, freedom and happiness of every citizen. It shall also direct its policy towards ensuring that suitable and adequate shelter; suitable and adequate food; reasonable national minimum living wage, old age care pensions, sick benefit and welfare of the disabled are provided for all citizens amongst others.

The social objectives are in section 17 of the Constitution. It states that Nigeria is founded on the ideals of freedom, equality and justice. The state shall also direct its policy towards ensuring *inter alia* that all citizens without discrimination have the opportunity to secure adequate means of livelihood as well as adequate opportunity to secure suitable employment and there are adequate medical and health facilities for all persons.

Section 18 of the Constitution implores that the government shall direct its policy towards ensuring there are equal and adequate educational opportunities at all levels. The government shall as when and practicable provide free, compulsory and universal primary education; free secondary education; free university education and free adult literacy programme.

Albeit, a review of the Obasanjo's administration policies shows that it has achieved some progress with regard to these objectives. For instance, it introduced National Economic Empowerment Strategy (NEEDS) and State Economic Empowerment Strategy (SEEDS) as poverty alleviation programmes; encouraged farmers by insisting on local content of cassava in flour and exportation of several farm produce; breastfeeding has been popularized and the United Nations Children Emergency Fund (UNICEF) and World Health Organization (WHO)

⁸ **International Covenant on Civil and Political Rights**, adopted 16 Dec 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI) and **International Covenant on Economic, Social and Cultural Rights**, adopted 16 Dec. 1966, entered into force 3 Jan 1976, G.A Res. 2200A (XXI). Nigeria ratified both covenants in 1993.

⁹ **African Charter on Human and Peoples Rights** adopted 27 June 1981, entered into force on 21 October 1986. O.A.U. Doc. CAB/LEG/67/3 Rev.5.

¹⁰ **1999 Constitution of the Federal Republic of Nigeria.**

¹¹ Articles 6, 7, 9, 11, 12 and 13.

¹² See Section 13 to 18 of the Constitution of the Federal Republic of Nigeria, 1999.

successful immunization have reduced childhood diseases and infant mortality¹³ and with the commencement of UBE, every child will have opportunity to education for nine years¹⁴.

However, the main issue raised in this part is whether or not these provisions are capable of being brought within the legal framework with the possibility of being invoked by an individual or a group as a cause of action before the courts leading to possible measure of enforcement or the provision of remedies.¹⁵ That is the only time that these provisions can be regarded as having passed the enforceability or justiciability test.

Unfortunately, the Constitution itself has imposed a bar on the enforceability of these provisions in defining the powers of the various arms of the government in sections 4, 5, and 6. Section 6 of the Constitution, dealing with judicial powers, provides in subsection 6(c) that the judicial powers shall not, “except as 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 2, of this Constitution.”¹⁶

These types of provisions in the Constitution and/or domestic enactments lend credence to the proposition that socio-economic rights are mere pious wishes or aspirations with no binding force. This was the position taken by the court in **Archbishop Olubunmi Okogie & Ors V Attorney General of Lagos state and Ors.**¹⁷ In that case, the Lagos State Government issued a circular dated 26th March, 1980 purporting to abolish private primary education in the state. The plaintiff challenged the circular as unconstitutional. One of the main issues which arose in the case was whether the circular was a violation of section 13 of the 1979 constitution. The court rejected this claim and explained the rationale as follows:

Whilst section 13 of the Constitution makes it the duty and responsibility of the judiciary amongst other organs of the government to conform to and apply the provisions of chapter two, section 6(6) (c) of the same constitution makes clear that no court has jurisdiction to pronounce any decision as to whether any organ of the government has acted or is acting in conformity with the fundamental Objectives and Directive Principle of the State Policy. It is clear therefore that section 13 has not made chapter two of the Constitution justiciable.¹⁸

Relying on the decision of the Indian Supreme Court in the case of the *State of Madras v Champakam*,¹⁹ the court concluded that “the arbiter for any breach and the guardian of

¹³ O.M. Onibokun, “Child Protection Measures: Review of Policies and Laws Protecting Children from Abuse in Nigeria” in **Child Protection in Nigeria, Summary of Research Findings on Protection and Violation of Children’s Rights** vol. 4, (a publication of United Nations Children’s Fund and National Child Rights Implementation Committee 1998).

¹⁴ Section 2, Universal Basic Education Act 2004.

¹⁵ J. Rossi, Strategies for Enforcing ESC Rights through Domestic Legal Systems, *supra* note 3 p.3

¹⁶ This provision was an innovation under the 1979 Constitution. It has been justified on the ground that government in developing countries are preoccupied with power with little regard to political ideals on how society can be organized and ruled to the advantage of all. See Akande Jadesola O., “Fundamental Objectives and Directive Principles of State Policy within the Framework of a Liberalised Economy: A Note” in Ayua, Guobadia & Adekunle, (eds) **Nigeria Issues in the 1999 Constitution**, Nigerian Institute of Advanced Legal Studies, Lagos, 2000, p.221.

¹⁷ (1981) 2NCLR p.337.

¹⁸ *Ibid*, at p.350.

¹⁹ (1951) SCR 252.

Fundamental Objective and Directive Principle of State Policy, subject to what I will say here after is the legislature itself or the electorate.”²⁰

It is difficult to understand why the court, in this case, placed so much reliance on the Indian position (as contained in a 1951 case). As we shall see later, the position in India as at 1981 when the Okogie’s case was decided had changed considerably. But the court, with due respect, lost a golden opportunity to give Nigerians the benefit of positive developments around the world on the enforceability of socio-economic rights.²¹

The Organization of African Unity (now African Union) of which Nigeria is a member adopted the African Charter on Human and People’s Right. Nigeria incorporated the treaty in 1983 when the National Assembly enacted African Charter on Human and People’s Right (Ratification and Enforcement) Act,²² 1983.

The African Charter provides for a plethora of rights for Nigerians. Specifically, right to property is guaranteed; right to work; right to enjoy the best attainable state of physical and mental health and right to education.²³ The issue then is since the African Charter has been domesticated, can an aggrieved citizen proceed to court and enforce such right under the African Charter? In other words, can the provision of the Charter override the non-justiciability under the Constitution?

The problem of primacy between the African Charter and Nigerian laws has generated heated debates, but the Supreme Court finally resolved the issue in **Fawehinmi V Abacha**²⁴ when it held, *inter alia*, that no doubt Cap 10 is a statute with international flavour. Where there is a conflict between it and another statute, its provision will prevail because it is presumed that the legislature does not intend to breach international obligation but that is not to say the Charter is superior to the Constitution. The conclusion is that the Constitution supersedes the African Charter; hence socio economic rights remain unenforceable before the courts.

At this juncture, it must be pointed out that some cases on the direct application of socio-economic rights in Nigeria have been adjudicated by the African Commission on Human and Peoples Right with very positive consequences.²⁵ One of such cases involved the **Ogoni Community, NNPC V Shell Petroleum Development Corporation**.²⁶ The Social and Economic Rights Centre (SERAC) filed the action on behalf of the Ogoni people alleging that toxic wastes were deposited into the local environment and water ways by the oil consortium leading to water, soil and air contamination. As a result, the people had been subjected to short and long term health problems. The African Commission found that the Nigerian Government has condoned and facilitated these violations by placing legal and military powers at the disposal of the oil companies thereby destroying the right to clean environment by directly contaminating the soil and air. Also, that the right to a clean and safe environment is critical to

²⁰ *Ibid* at p.350.

²¹ A different position was taken in **Adewole & Ors vs Jakande & Ors** (1981) 1 NCLR 337; but the case was based on sections 32, 36, 37, 38, 39 & 40 of the constitution; not on Directive Principles of State Policy.

²² CAP 10 Laws of the Federation 1990.

²³ Articles 14, 15, 16 and 17.

²⁴ (2000) 4 SC (part II) 1.

²⁵ A landmark case involving the rights of children living with HIV/AIDS was filed recently by SERAC against the Federal Government of Nigeria at the African Court on Human Rights.

²⁶ Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria, Communication No 155 of 1996 decided on the 30th ordinary session, Oct,2001.

the enjoyment of economic and social rights. The Commission finds the Federal Republic of Nigeria in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. It therefore appeals to the government to ensure the protection of the Ogoni people as well as provide adequate compensation amongst others. Although this case has been hailed as ground breaking,²⁷ it must be stressed that it has no binding force on the Nigerian government.

Interestingly the Supreme Court in **Attorney General of Ondo State V Attorney General of the Federation & 35 Ors**²⁸ was asked to determine the validity of Corrupt Practices and Other Related Offences Act 2002 enacted by the National Assembly. The court considered section 15(5) to the effect that the state shall abolish corrupt practices and items 60(a) of the Exclusive Legislative List on the establishment and regulation of authorities to promote and enforce the observance of the Fundamental Objectives and Directives Principles contained in this constitution. It held *inter alia* that courts cannot enforce any of the provisions of Chapter II of the Constitution until the National Assembly has enacted specific laws for their enforcement, has been done in respect of Section 15(5) of the constitution by the enactment of Corrupt Practices and Other Related Offences Act 2002.

This writer submits that in view of the above reasoning of the highest and final court in Nigeria, the Child Rights Act (2003) and Universal Basic Education Act (2004) though relating to children contain provision such as right to food; health, education etc are capable of enforcement since they have been made enforceable by legislation. Only time will determine the stance of the court.

3. Enforceability of Socio-economic Rights: Lessons from Other Jurisdictions

As noted above, the reference to Nigeria as a leader in the adjudication and enforceability of socio-economic rights is questionable. In this part of the article, we shall examine the status of this subject matter in some other jurisdictions to illustrate the notable advancement already achieved. Our examples are drawn from South Africa, Latin America and India.²⁹

3.1 South Africa

Chapter 2 of the **South African Constitution** provides for a composite Bill of Rights – covering political and civil rights, environmental rights, and socio-economic rights.³⁰ The unique approach of the South African Constitution is that the same chapter of the constitution guarantees these rights – without any form of discrimination whatsoever. Consequently, the same approach has been adopted by the South African courts whilst adjudicating on the constitutionality or otherwise of civil and political rights on the one hand and anti economic, social and cultural rights issues/legislations on the other.

²⁷ Danwood Chirwa, A Fresh commitment to implementing ESC Rights in Africa. <http://communitylawcenter.org.2a-africa.php.p.3>. (Last accessed January 2009).

²⁸ (2002) 9 NWLR (pt772) 222.

²⁹ The Indian experience is very relevant to us in Nigeria especially because of the prevalent view that chapter 2 of the Nigerian constitution is derived from the Indian Constitution. “The fundamental objectives and Directive Principles in our constitution were derived from the Indian Constitution”.

³⁰ For a detailed account of socio-economic rights in South Africa, see Imasogie, *op.cit* n.1.

Despatch Municipality v Sunridge Estate and Development Corporation (property) Limited³¹ is a case in point. In that case, one of the main issues for determination was the constitutionality of the **Illegal Squatting Act**,³² which permitted the demolition of unauthorized buildings or structures without a court order. The court held that the Act was inconsistent with S. 26(3) of the Constitution which provides as follows:

No one may be evicted from their home or have their home demolished, without an order of the court made after considering all the relevant circumstance. No legislation may permit arbitrary evictions.

Accordingly, the court declared that the Act was invalid.

Over the years, the South African court has consistently upheld the principle that socio-economic rights are justiciable. In the celebrated case of **Minister of Health v TAC and Ors**,³³ involving the right to health, the constitutional court of South Africa declared unequivocally that: “The question in the present case, therefore is not whether socio-economic rights are justiciable, clearly they are”. However, that the applicants still had an obligation to show that the measures adopted by government to promote access to healthcare services for HIV - positive mothers and their new born babies fall short of its obligations under the Constitution.

In several other cases, South African courts have affirmed and reaffirmed the justiciability of socio-economic rights. In **Grootboom v Oostenberg Municipality and Ors**³⁴, the applicant - adult and children squatters had moved from one squatter settlement to “New Rust” which was regarded as “*bona vacantia*.”³⁵ An application was brought to remove the applicants from “New Rust” which eventually led to their eviction. In an action to compel the local authority to provide adequate shelter for them and their children, the question of enforcement of right to housing came to the fore. The court, of first instance held that the application as far as it relates to housing or adequate housing for adult must fail; however, that section 28(1) (c) of the Constitution imposed an obligation on the state to provide shelter for the children; if their parents could not.

On appeal to the Constitutional Court, it was held that the issue as to whether socio-economic rights are justiciable at all in South Africa was put beyond question by the text of the constitution as construed in **Exparte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa**.³⁶ The court noted that Section 26 of the constitution imposed a negative obligation on the state and other persons/authorities not to impair/restrict the right to adequate housing, but that the conduct of the local authority in the case was a violation of that obligation-having regard to the manner in which the eviction was carried out.³⁷

Another important area in which this issue has found expression before the South African Courts is in respect of the right to education. Section 29 (1) (b) of the South African

³¹ (1997) 8 B.C.L.R. 1023.

³² Act 52 of 1951.

³³ 2002(10) BCLR 1033.

³⁴ 2000(3) BCLR 277(c).

³⁵ “property of nobody”.

³⁶ 1996(4) S.A.46 (C.C.)

³⁷ *Ibid*, para 66 G/H.

Constitution provides that everyone has a right to basic education including adult basic education. However, the state must, through reasonable measures, make further education available and accessible, progressively. A similar provision of the interim constitution was examined by the Constitutional Court in *Re the School Education Bill, 1995 (Gauteng)*.³⁸ It was held that the right imposed positive obligations on the state, to provide a particular standard of education for every person. Thus, the provision went beyond a negative obligation on the part of the state to allow each person to pursue his/her education without any let down or hindrance.

Apart from the direct enforcement or “hard protection” of socio-economic rights by the courts, the South African Constitution also provides for “soft protection” by non-judicial institutions; in particular the **South African Human Rights Commission (SAHRC)** and **Non-Government Organizations (NGOs)**.³⁹ Of special significance is the provision of section 184(3) of the constitution which states that:

Each year, the SAHRC must require relevant organs of state to provide the commission with information on the measures they have taken towards the realization of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment.

The SAHRC occupies a unique position on the issue of enforcement of socio-economic rights in South Africa. Apart from its constitutional obligation to monitor the realization of the rights provided for in the constitution, the SAHRC is empowered to investigate and report on the observance and/or violation of human rights. In case of the latter, it may institute an action or make appropriate recommendations to the relevant government authority. In relation to the “human tissue” controversy consequent upon single women being prohibited from in-vitro fertilization and married women needing their husband’s consent for such, the SAHRC intervened in the complaint of some women that the **Human Tissue Act** contained discriminatory provisions against them. The intervention of the SAHRC led to necessary amendments to the Act.⁴⁰

3.2 India

Unlike South Africa, the Indian Constitution distinguishes between civil and political rights on the one hand, and economic and social rights on the other. The latter are provided for as **Directive Principle of State Policy (DPSP)** – in Part IV of the Constitution. A consequence of this distinction is the notion that only the civil and political rights qualify as “fundamental rights.” The Directive principles of state policy are therefore, not enforceable as provided by Article 37 of the Constitution, which states that:

The Directive principle of state policy shall not be enforceable by any court, but the principles laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

³⁸ 1996(4) BCLR 537.

³⁹ N. Ntlama, “Monitoring the implementation of socio-economic Rights in South Africa: Some lessons from the international community”, **Law, Democracy and Development, Journal of the Faculty of Law of the University of the Western Cape**, pp.207 – 220.

⁴⁰ Human Tissue Amendment Act 51, 1989.

The ordinary meaning of this article is that the **DPSP** provided for in the Indian Constitution are not enforceable in any court of law. The only obligation of the state is to “apply the principles” in exercising its legislative powers. Thus, the Directive Principles were regarded as inferior to the civil and political rights. This position was upheld by the Indian Supreme Court in the early cases on the subject matter brought before it. **In State of Madras v Champakam**,⁴¹ the Supreme Court noted that “The Directive principles have to conform to and run subsidiary to the chapter on fundamental rights.

But this position has since changed. The Indian Courts have now taken the position that fundamental rights and DPSP are complementary, “neither part being superior to the other”⁴². Indeed, that “In building a just social order, it is sometime imperative that the fundamental rights should be subordinated to directive principles.”⁴³

In arriving at the present position, the Indian Judiciary has adopted two broad approaches; first, by expanding the limits of some civil and political rights to incorporate socio-economic rights. For example, in the case of **Francis Mullin v The Administrator, Union Territory of Delhi**⁴⁴, the Supreme Court interpreted the right to life (article 21) to include the right to health (article 12). Hence, that the right to health was justiciable. The court explained the basis of its decision as follows:

The right to life includes to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. The magnitude and component of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include they have necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.⁴⁵

Also, in **Mukti Morcha v Union of India**,⁴⁶ the issue was whether the government was violating the dignity of bonded labourers at a quarry in breach of **Bonded Labour (Abolition) Act** amongst others. The issues centered around Article 42(DPSP) which provides for just and humane conditions and Article 39(e)(DPSP) which enjoins the state to direct its policy towards ensuring that citizens are not by economic necessity forced into vocations unsuited to their age and strength.

The court observed that the right to live with human dignity enshrined in Article 21 of the Constitution “derives its life breath from the Directive Principle of State Policy and particularly clauses (e) & (f) of Article 39 and articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop a healthy manner and in conditions of freedom and dignity”.... These “are the minimum requirements which

⁴¹ (1951) SCR 525.

⁴² **State of Kerata v N.M. Thomas** (1976)2 SCC 310 at 367, per Krishna Iyer,J.

⁴³ **Keshavananda v State of Kerala** (1973) 4 SCC 225 at 879, para 1707.

⁴⁴ (1981) 2 SCR 516.

⁴⁵ *Op.cit* at p.529.

⁴⁶ (1984) 3 SCC 161.

must exist in order to enable a person to live with human dignity and no state has the right to take any action which will deprive a person the enjoyment of those essentials.”

In respect of the claim before the court, the court upholding the rights of the bonded labourers held that though the Directive Principle of State Policy and particularly clauses (e) & (f) of Article 39 and articles 41 and 42 are not enforceable but since legislation was already enacted by the state providing these basic requirements to the workmen, the state can be obligated to ensure the observance of that legislation, for inaction on the part of the state would amount to a denial of the right to live with human dignity enshrined in Article 21 of the Constitution.⁴⁷

This “expansionist” approach was extended to various socio-economic rights in India – such as right to shelter, right to health and right to education. The right to education for example, as contained in Article 45 of the Directive Principles of State Policy came up for consideration before the Supreme Court in **Unnikrishan J.P v State of Andhra Pradesh**.⁴⁸ Some private Medical and Engineering Colleges challenged a statute which regulated the charging of “capitation” fees from students seeking admission. Rejecting the notion that Directive principles of state policy are unenforceable, the court observed, *inter-alia*, as follows:

The right to education further means that a citizen has the right to call upon the state to provide educational facilities to him within the limit of its economic capacity and development. By saying so, we are not transferring Article 41 from part IV to part III – we are merely relying on Article 41 to illustrate the content of the right to education flowing from Article 21.

In a subsequent case,⁴⁹ the case of **Unnikrishan** was described as having given Article 45 the status of a fundamental right.

The second approach adopted by the Indian Courts is by “infusing the spirit of social justice into constitutional provisions”. This is illustrated by the case of **Daily Rated Casual Labour Employed under P & T Department v Union of India**⁵⁰ – concerning the regulation of the employment of casual workers in the P & T department. The court directed that their appointments be regularized hinging its decision on the enforceability of Directive Principles of State Policy – in spite of the provisions of Article 37 of the Constitution. The court said:

Even though the above principle may not be enforceable as such by virtue of Article 37.... it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination.... The Government cannot take advantage of its dominant position and compel any worker to work even as a casual labourer on starvation wages. It may be that the casual labourer has agreed to work for such wages. That he had done because he has no other choice. It is poverty that has driven him to that state. We are of the view that on the facts and circumstances of this case, the classification of employees into regularly recruited employees and casual employees for the purpose of paying

⁴⁷ **In People’s Union for Civil Liberties (Supreme Court of India) 2001**, unreported, 2nd May 2003, the Supreme Court ordered national and state governments to implement a range of existing nutritional and food schemes to prevent starvation. (1993) 1 SCC 645.

⁴⁸ **Melita v State of Tamil Nadu** (1996) 6 SCC 772, para 31).

⁵⁰ (1988) 1SCC 122.

less than the minimum wage payable to employees in the corresponding regular cadres is not tenable... It is true that all these rights cannot be extended simultaneously. But they do indicate a socialist goal⁵¹.

It is clear from the above that the Indian judiciary has been able to overcome the constitutional bar to justiciability of socio-economic rights by means of the two approaches stated above. The courts actively ensure that the state fulfill its obligations to the citizens – as enshrined in the Directive Principles of State Policy contained in the Constitution.

3.3 Latin America

It has been observed that the wave of democratization in the 1980s and 1990s led to positive development on the justiciability of Socio-economic rights in Latin America.⁵² In Argentina, Columbia, Venezuela, e.t.c. the courts have adjudicated on basic socio-economic rights and in several cases upheld their enforceability. *Defensoria de Menores v Poder Ejecutivo Municipal*⁵³ is a case from Argentina. This case was filed on behalf of the Children of a rural colony whose only water was polluted with hydrocarbons. Affirming the right to water, the court ordered the state government to provide one hundred liters of water per day to each individual member of the families living in the colony. The court further ordered that it must be implemented within 48hours.

The right to health was affirmed in another case from Argentina.⁵⁴ In that case, an action was instituted against the government to compel it to take protective measures against dangerous specie of fever by producing vaccines and improving ecological system that facilitated the spread of the disease. In upholding the right of citizens to health, the court stated that the government was legally obligated to provide healthcare when the health of the individual cannot be guaranteed either by themselves or the private sectors.

In Columbia, the courts have also pronounced on a range of socio-economic rights including the right to education which came up for consideration in the case of *Mora v Bogota District Education Secretary & Ors.*⁵⁵ In that case, a five year old child of a low income family was placed in a public school in a different neighbourhood from where her family was living. The court held that if the right to education of a child is affected because of quota restriction within schools near the home, the guarantee of the right is not effective. Accordingly, the court ordered the government to relocate the girl to a school close to her home.

In Venezuela, the right to health came up for consideration before the Supreme Court of Justice in the case of *Cruz Bermudez et al v Ministerio de Sanidad y Asistencia Social (Supreme Court of Justice of Venezuela)*.⁵⁶ This case concerned an *amparo* action⁵⁷ brought by over 170 people living with HIV/AIDS who alleged that the Ministry had failed to supply prescribed anti-retroviral drugs to them. It was claimed that this failure amounted to a violation of the petitioner's right to life, health, liberty and security of the person, equality and benefits of

⁵¹ *Ibid.*

⁵² **50 Leading Cases on Economic, Social and Cultural Rights**, note 5 at p5.

⁵³ Agreement 5, Superior Justice Court, Neugert – March 2nd, 1999.

⁵⁴ **Viceconti v Ministry of Health & Social Welfare** (Poder Judicial de la Nacion, Causa no.31.777/96, of 2nd June, 1998.

⁵⁵ Columbian Court, Decision T-170/03 of 28th February, 2003.

⁵⁶ Case No 15.789, Decision No.916 15 July, 1999.

⁵⁷ This is a Spanish term. It is a specific judicial remedy with the exclusive purpose of protecting rights and freedoms. <https://coursewebs.law.columbia.edu>. (Last accessed April 2009).

science and technology. The court dismissed the claim based on the right to liberty, security of the person and equality. However, it stated that the right to health and the right to life of the petitioner were closely linked to the right to access the benefits from science and technology. Accordingly, the court ordered the Ministry to provide anti-retroviral medication necessary for treating opportunistic infections and diagnostic testing free of charge for all Venezuelans.

4. Conclusions and Recommendations

It is clear from the above that there is still a wide gap between the Nigerian situations on socio-economic rights given the position in other jurisdictions, including developing countries. The Nigerian courts, unlike their counterparts in India and Latin America have failed and/or neglected to adopt a progressive or activist approach to the question of enforcement of socio-economic rights. The little progress made in this country has been largely due to the advocacy of some Non-Governmental Organizations. Only recently, the **Socio-Economic Rights and Accountability Projects (SERAP)** petitioned the Independent Corrupt Practices and other Related Offences Commission (ICPC) on ₦54.78 billion allocations to the Universal Basic Education Commission (UBEC). The investigation by the ICPC has resulted in the recovery of stolen 3.4 billion meant to improve the quality of education and access to education of every Nigerian child.⁵⁸ It also issued an open letter to the Police Authorities to recall twenty-six police recruits that were expelled for testing positive to HIV/AIDS. They were recalled within the 14 days ultimatum.⁵⁹

However, in order to achieve accelerated progress on the realization of socio-economic rights in Nigeria, a new approach to the question of justiciability is necessary and desirable. Consequently, we want to make the following suggestions:

1. It is suggested that Chapters 2 and 4 of the 1999 Constitution should be merged as is the case in South Africa. Alternatively, the bar on justiciability of Directive principles of State Policy in section 6(6) (c) of the constitution should be removed by the Legislature. It is submitted that the view of Professor Claude Ake encapsulate the reality. To him

If a Bill of Right is to make sense it must include amongst others right to work and to a living wage, a right to shelter, to health, to education. That is the least we can strive for if we are ever going to have a society which must realize basic human rights.⁶⁰

2. In our humble view our courts should pursue a development-oriented approach to cases of socio-economic rights emanating from Chapter 2 of the Constitution and related instruments. Uwaifo J.S.C. in **Attorney General of the Ondo State V Attorney General of the Federation**⁶¹ ventilated this thought when he said “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 means all the Executive Principles need not remain mere or pious declarations. In fact, a similar enactment can possibly be made...to ensure that suitable and adequate shelter; suitable and adequate food; reasonable national minimum living wage, old age care pensions, sick benefit and welfare of

⁵⁸ Information about SERAP's Work and Impact, SERAP Office, 4, Akintoye Shogunle Street, Off Unity Road, Off Obafemi Awolowo Way, Ikeja, Lagos, Nigeria.

⁵⁹ *Ibid.*

⁶⁰ **Professor Claude Ake**, “The African Continental Human Rights”. A paper presented at the International Conference on Human Rights in African Context held at Port-Harcourt, June 9-11.

⁶¹ *Ibid.*

the disabled are provided for all citizens.” Legislative reform may be the only way to ensure that the Nigerian masses benefit from the constitutional “guarantee” of socio-economic rights.

3. Government must urgently seek measures that would create employment opportunities for the nation’s teeming job seekers, pay living wages to workers as demanded by organized labour, prompt payment of pensioner’s entitlement. Provision of quality health care services, education, portable water, good roads and housing amongst other peoples’ rights that had hitherto been grossly abused must be addressed with sincerity on the part of the government.

4. A system of “soft” enforcement of socio-economic visits should be formalized. This could be achieved by institutionalizing participation of Non-Governmental Organizations in monitoring the implementation of socio-economic rights in Nigeria. **The National Human Rights Commission** should also be empowered to play a greater role as the **South African Human Rights Commission**. A situation whereby the Nigerian body is like an appendage of the government is unhealthy.⁶²

5. The NGOs should be encouraged and supported to play greater advocacy roles on this issue. The citizens need to be more aware about the existence of these rights and the awareness open to them to seek redress in cases of violation.

⁶² The Executive Secretary of the National Human Rights Commission was removed unceremoniously by the Government. As a result, Human Rights activists and NGOs have called on the government to reaffirm its commitment to UN Paris Principles which guarantee full independence to National Human Rights Commission and provide framework for the effective operation of these institutions. Available at http://www.zoominfo.com/people/Ajoni_Kehinde_1035607925.aspx (Last accessed August, 2009).