

THE ROLE OF THE COURTS IN THE JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS IN NIGERIA: LESSONS FROM INDIA*

Abstract

The international community has embraced the view that human rights are indivisible, interdependent and interrelated. However, socio-economic rights have not been given equal importance as civil and political rights. This can be seen in States where there is usually a constitutional guarantee of civil and political rights. While some countries like South Africa, Kenya and Zimbabwe have constitutionally guaranteed socio-economic rights, in some other jurisdictions like India and Nigeria, they are termed fundamental objectives and directive principles of state policy as opposed to justiciable rights. However, the Indian Supreme Court has overtime made socio-economic rights justiciable through its emphasis on the indivisibility of human rights. The position is different in Nigeria where the courts have manifested a considerable degree of reluctance in entertaining claims bothering on socio-economic rights or even adopting a progressive approach towards improving the status of socio-economic rights in Nigeria. Through the jurisprudence of the Indian courts, this paper considers the role of the courts in making socio-economic rights justiciable in Nigeria.

Keywords: *Justiciability; socio-economic rights; Nigeria; Constitution; role of the courts; socio-economic rights in India.*

1. Introduction

The right to a remedy is fundamental to the protection of all human rights, hence international, regional and national laws provide for the right to an effective remedy where a violation of a person's rights and freedoms occur. This right is however not always available for the protection of socio-economic rights (SERs) due to the lesser level of importance attached to it relative to civil and political rights (CPRs). An imaginary hierarchy has been created between CPRs and SERs which relegates the latter to the status of a mere aspiration. This dichotomy exists even at the national level as it is not uncommon to find CPRs being made justiciable¹ constitutional rights while SERs if included are regarded as directive principles of state policy; that is mere guidelines that cannot be claimed in court to the same extent as CPRs. Nigeria and India are such examples as the Indian constitution expressly makes SERs non-justiciable by the courts. In spite of that, the Indian courts in a good number of cases have creatively made SERs justiciable by emphasising the indivisibility and interdependence of rights.

The aim of this paper is to consider the role of the courts in making SERs justiciable even in the face of constitutional provisions to the contrary. In doing this, the crucial role of the court will be demonstrated through a comparison of the jurisprudence of the Indian and Nigerian courts in relation to the justiciability of SERs. The next section looks at the status of SERs in the international and regional human rights frame work. Section three looks at the applicability of SERs in selected national legal systems. Section four looks at the role of the court in making SERs justiciable with a focus on the jurisprudence of the Indian Supreme Court. In comparison with India, section five explores the status of SERs in the Nigerian legal system and how the courts have handled matters bothering it.

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¹Nwabueze has defined justiciability to mean a combination of judicial power and duty bestowed constitutionally on the courts to adjudicate violations of law. See BO Nwabueze *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (New York: St Martin's Press, 1977) 21. Where rights are justiciable, the right holders can legally enforce those rights when they are infringed. It however does not mean that the claim must be upheld, but simply that the case of violation of a right can be heard by a court or quasi-judicial body. See 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights' International Commission of Jurists Human Rights and Rule of Law Series No. 2 available at <www.humanrights.ch/upload/pdf/080819_justiziabilitt_esc.pdf> accessed on 28 June 2016, p.9. McLean has noted that there is a tendency to confuse enforceability with justiciability, but they are distinct though related. While enforceability refers to the ability of the court to provide a remedy to protect the interest or entitlements, justiciability concerns whether a matter is suitable for judicial resolution. See K McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (South Africa: Pretoria University Law Press, 2009) p.109.

2. The status of socio-economic rights

SERs guarantee that every person be afforded conditions under which they can meet their needs required for survival and enjoyment of life.² They include among others the right to education, food, health, housing, work, social security. They are especially relevant for vulnerable and disadvantaged groups in the society as they help to as much as possible bridge the equality gap between the rich and the poor.³ These rights are protected under international and regional human rights instruments requiring member states to respect, protect and fulfil them. A division exists in the categorisation of human rights as a result of the Cold War that existed between the West placing emphasis on CPRs on one hand, and the East showing a preference for SERs on the other. The arguments against accepting SERs rest upon the presumption that CPRs are qualitatively and significantly different from SERs.⁴ Following this distinction, CPRs regarded as negative rights are fulfilled when all members of the community exercise restraint from doing anything that might violate the freedoms of others. On the other hand, SERs termed positive rights require others to provide the material means of life to those unable to provide for themselves.⁵ In simpler terms, negative rights demands nothing more than forbearance achieved through passing laws that guarantee the freedoms, while positive rights demands a costly redistribution of resources.⁶ This dichotomy is reflected in the two main international instruments adopted in 1966 which are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In reality, though much more importance is placed on CPRs, there is actually no basis for the distinction. Arguments opposing the prioritisation of CPRs over socio-economic rights suggest that all human rights impose a combination of positive and negative duties.⁷ According to Shue, the demand for CPRs is not normally a demand simply to be left alone, but a demand to be protected against harm.⁸ Thus, the arguments that negative rights are free of cost overlook the necessity for state intervention in the name of protecting human rights, intervention such as taxation to fund the legislature, police, legal system, courts and prisons.⁹ Also, according to Garvison, the right to non-discrimination which is regarded as a CPR is employed to justify the admission of women and children into schools which was ordinarily closed to them.¹⁰

CPRs as well as SERs are interrelated in that the fulfilment or denial of any could have a ripple effect on the enjoyment of other rights. For example, the right to housing is linked to the right to life, dignity, non-discrimination, expression, association, participation in public decision making, privacy, health, work, education and personal security.¹¹ Where a person is denied his right to housing, his health will be in danger and that puts his life at risk. The right to food has an impact on health and also life. Any attempt at creating a landmark differentiation between the CPRs and SERs would result in a great difficulty when construing the content of the rights.¹²

² D Brand, 'Introduction to socio-economic rights in the South African constitution' in D Brand & C. Heynes (eds) *Socio-economic Rights in South Africa* (South Africa: Pretoria University Law Press 2005) p.1.

³ A T Shehu 'The enforcement of social and economic rights in Africa: The Nigerian experience (2013) 2(1) *Journal of Sustainable Development Law and Policy*, 102.

⁴T Evans 'A human right to health?' (2002)23(2) *Third World Quarterly*, 200.

⁵ A negative right imposes duties on others not to act in ways that infringe upon it while a positive claim imposes duties on others to act in ways that protect or promote it. See R Garvison 'On the relationship between civil and political rights, and economic social and cultural rights' in Jean-Mark et al (eds) *The Globalization of Human Rights* (Tokyo: United Nations University Press 2003) p.33-34.

⁶T Evans (n.4) p.200.

⁷ R Garvison (n.5) p.34-35.

⁸ H Shue *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2 ed New Jersey: Princeton University Press Princeton, 1996).

⁹ T Evans (n.4) p.204.

¹⁰ R Garvison (n.5) p.35.

¹¹ Committee on Economic, Social and Cultural Rights General Comment No. 4 The Right to Adequate Housing (Article 11(1) of the Covenant) 13 December 1991 EC/1992/23 para 9.

¹² A T Shehu (n.3) p.108

The indivisibility, interdependence and interrelatedness or equality of importance¹³ of both CPRs and SERs has been reaffirmed on several occasions. In the Proclamation of Teheran, it was stated that ‘since all human rights and fundamental freedoms are indivisible, the full enjoyment of CPRs without SERs is impossible.’¹⁴ According to Nickel, indivisibility means that countries do not have a right to ‘pick and choose among rights’.¹⁵ The resolutions affirming the indivisibility of rights were aimed at defending SERs such that countries are committed to endorsing both CPRs as well as SERs.¹⁶

Later international instruments have to a large extent bridged the gulf by expressly making provision for both CPRs as well as SERs. For instance, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) amongst others contain both CPRs and SER provisions. Measures have also been put in place to ensure that States comply with their socio-economic rights obligations. The ICESCR has a monitoring body which is the Committee on Economic Social and Cultural Rights (CESCR) tasked with the supervision of compliance with the ICESCR by state parties. The Committee receives regular reports from states parties on the realisation of SERs. It has issued a number of General Comments providing a useful guide to the interpretation of rights in the ICESCR. In its General Comment No.9, the Committee noted that in the domestic legal order, appropriate means of redress must be made available to any individual or group.¹⁷ Also, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986, the Maastricht Guidelines on Violations on Economic, Social and Cultural Rights of 1997 provide useful guidelines to states on the implementation of SERs. Other regional instruments that deal with SERs are the European Social Charter¹⁸ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).¹⁹

On the African scene, the African Charter took a leap from the ideological differences that created an imaginary hierarchy making SERs subordinate to civil and political rights. Paragraph 8 of the preamble to the African Charter, unequivocally states that “it is essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality, that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.” This paragraph has been interpreted as meaning that CPRs are dependent on SERs without a reverse statement.²⁰ This trend has been followed by the African Charter on the Rights and Welfare of the Child (ACRWC)²¹ as well as the

¹³ D J Whelan ‘Untangling the indivisibility, interdependency and interrelatedness of human rights’ (2008) Working Paper 7 Economic Rights Working Paper Series Human Rights Institute, University of Connecticut p.5.

¹⁴ The Proclamation of Teheran, Final Act of the International Conference on Human Rights (Teheran, 23 April to 13 May 1968) UN Doc. A/CONF.32/41 para 13; See also The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 UN Doc. A/CONF.157/23 para 32, where it was stated that: ‘All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis’; UN General Assembly World Summit Outcome adopted by the General Assembly on 24 October 2005, A/RES/60/1 para 13.

¹⁵ J W Nickel ‘Rethinking Indivisibility: Towards a theory of supporting relations between human rights’ (2008) 30(4) *Human Rights Quarterly* 984.

¹⁶ J W Nickel (n.15) p.985.

¹⁷ UN Committee on Economic Social and Cultural Rights General Comment No.9 ‘The Domestic Application of the Covenant’ 1998 UN Doc. E/C.12/1998/24 para 2.

¹⁸ Council of Europe European Social Charter 3 May 1996, ETS 163.

¹⁹ Organisation of American States Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) 16 November 1999.

²⁰ C Mbazira ‘Enforcing the economic, social and cultural rights in the African Charter on human and peoples’ rights: Twenty years of redundancy, progressive and significant strides’ (2006) 6 *African Human Rights Law Journal* 333.

²¹ Unlike the CRC, the ACRWC does not distinguish the state obligation in fulfilment of children’s socio-economic from their civil and political rights. The CRC in Article 4 requires state parties to take appropriate legislative, administrative and other measures for the implementation of the rights recognised in the covenant.

African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).

The African Commission through communications has broadened the scope of SERs in the African Charter to include those not expressly provided through emphasising the indivisibility of human rights. In the case of *Socio-economic Rights Action Centre v Nigeria*,²² the commission has read in the right to housing²³ and food²⁴ as implicitly protected in the Charter. The working group on economic, social and cultural rights also developed the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (Nairobi Principles) in 2010. The principles explain in detail the obligation of states to realise SERs particularly minimum core obligations, national frameworks and action plans.

3. Socio-economic Rights in National Legal Systems

SERs are stated to lack universality and are not completely available on the basis of one being a human being as their realisation is subject to a number of conditions. These conditions include the realisation of the rights progressively and subject to available resources. The reason for states reluctance in making these rights enforceable is because of the cost implication of their fulfilment as it requires appropriate budgeting of available resources. Article 2(1) of the ICESCR states that 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. Article 2(1) is included to bring the discourse surrounding the realization of SERs in tune with the reality that a state cannot do more than its resources can permit.²⁵ However, the CESCR has noted in its general Comment No. 3²⁶ that it is not an excuse for states to neglect their obligations towards the realization of the rights. In this provision, 'within the minimum of available resources' does not majorly look at what amount a state has but rather at how the resources immediately available is prioritized or budgeted to take care of the needs of the vulnerable and marginalized in the society. The fact that SERs can be realised progressively is not also an excuse for the state to unnecessarily delay the fulfilment of its obligation as it is required to move as expeditiously and effectively as possible towards the realisation of the rights.²⁷ The means through which the state is expected to realise these socio-economic obligations includes taking steps through appropriate means including the adoption of legislative measures. The CESCR has however noted that beyond legislation, other reasonable measures include educational, administrative, financial, and social measures²⁸ as well as judicial and other effective remedies for the violation of rights.²⁹ The legal guarantee of the SERs could be through either the constitution or in legislations. It is thus possible for the constitution to be silent on SERs like the USA Constitution or make broad provisions for socio-economic rights like South Africa, Kenya and Zimbabwe. Some other countries could prefer to take a middle ground by including SERs as directive principles of state policy. Nigeria and India belong to this category

The drafters of the South African constitution believed that CPRs will be of no great significance to majority of South Africans especially the previously oppressed who did not have enough food to eat,

However, with respect to children's socio-economic rights, it should be to the maximum extent of available resources.

²² *SERAC v Nigeria* (2001) AHRLR 60. On the right to housing, see also *Centre for Minority rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council v Kenya* Communication 276/2003 ACHPR, 4 February 2010.

²³ *SERAC v Nigeria* para 60-64

²⁴ *SERAC v Nigeria* para 65-66.

²⁵ C Heynes & D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) 2 *Law, Democracy and Development* 159.

²⁶ CESCR General Comment No. 3: The Nature of States Parties Obligation (Article 2 para 1 of the covenant) 14 December 1990 E/1991/23.

²⁷ General comment 3 para 2

²⁸ General comment 3 para 7

²⁹ General comment 3 para 5

decent houses to live in and could barely send their children to school.³⁰ Hence, the Bill of Rights in the South African Constitution³¹ guarantees the right of access to adequate housing, healthcare, food, water and social security. Section 26(2) and 27(2) requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of the rights. In section 28, children have the right to³² basic nutrition, shelter, basic healthcare services and social services.³³ In section 29, everyone has an unqualified right to basic education including adult basic education³⁴ and the progressive availability of further education.³⁵ According to Heynes and Brand, where in the Constitution the qualification as stated in article 2(1) of the ICESCR is not included as a qualification in the fulfilment of socio-economic rights, the obligation upon the state could be much more immediate and could be termed priority obligation.³⁶ The provision in section 28(1) (c) with respect to children as well as section 29(1) (a) can thus be termed priority obligations. SERs in the South African Constitution have been affirmed by the court in several cases.³⁷

Zimbabwe adopted a new Constitution in 2013, which guarantees the protection and judicial enforceability of SERs. This was shown in the case of *Farai Mushoriwa v City of Harare*³⁸ where the High Court in protecting the right to water as guaranteed in section 77 of the Constitution barred the municipal authority from arbitrarily disconnecting the supply of water which deprives people of the enjoyment of their right to water. The Constitution of Kenya 2010 for the first time in Section 43 guarantees a justiciable right to health care³⁹, adequate housing,⁴⁰ adequate food,⁴¹ clean and safe water in adequate quantities,⁴² social security⁴³ and education⁴⁴ which imposes an obligation on all organs of state to respect, protect, promote and fulfil the rights.⁴⁵ Article 21(2) provides for the progressive realisation of socio-economic rights contained in section 43. Children's right to compulsory and free basic education as well as basic nutrition, shelter and healthcare are guaranteed without qualification. Section 2(6) of the constitution makes any treaty or convention ratified by Kenya part of the law in Kenya under the constitution. Hence, SERs in Kenya is further strengthened by international and regional instruments such as the ICESCR, CRC, African Charter, African Women's Protocol, and CEDAW to which Kenya is a party. They also serve as a useful guide for the courts in the interpretation and application of SERs in the constitution.⁴⁶ In countries where the constitution provides for justiciable

³⁰ R J Goldstone 'A South African perspective on socio-economic rights' (2006) Vol.13 Issue 2 Article 2 Human Rights Brief 1.

³¹ Constitution of the Republic of South Africa 1996.

³² Distinguished for the 'right of access to' in section 26 and 27 of the constitution. In explaining the meaning of access, Heynes and Brand used the right to food as an example. Right of access to food does not require the government to provide food for everyone but to create the necessary conditions under which people can get food for example ensuring the availability of quality food at affordable prices. In other words, there is no absolute entitlement to the social goods free of charge or on demand. See C Heynes and D Brand (n.25) p.159.

³³ Section 28(1)(c).

³⁴ Section 29(1)(a)

³⁵ Section 29(1)(b); See Fiske EB & Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (2004) 10.

³⁶ C Heynes & D Brand (n.25) p.161.

³⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (housing); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (health); *Re The School Education Bill of 1995* (education); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) (social security); *Mazibuko v City of Johannesburg* 2009 (3) SA 592 (SCA) (water).

³⁸ [HC4266/13] [2014] ZWHHC 95

³⁹ Section 43(1)(a).

⁴⁰ Section 43(1)(b).

⁴¹ Section 43(1)(c).

⁴² Section 43(1)(d).

⁴³ Section 43(1)(e).

⁴⁴ Section 43(1)(f).

⁴⁵ Section 21

⁴⁶ Orago NW 'Limitation of socioeconomic rights in the 2010 Kenyan constitution: A proposal for the adoption of a proportionality approach in the judicial adjudication of socio-economic rights disputes' (2013) 16(5) *PELJ* 175. See also *John Kabui Mwai v Kenya National Examination Council* High Court of Kenya, Nairobi Petition

SERs, the people can boldly seek to enforce their rights in cases of infringement. The reverse is the case where there is no such provision or SERs are stated to be directive principles just like the Indian and Nigerian constitution. The enjoyment of SERs is therefore left to what institutions of government make of it. The jurisprudence of the Indian Supreme Court has demonstrated that in the absence of a constitutional guarantee of justiciable SERs, the court has a crucial role to play in ensuring the justiciability.

4. The Role of the Courts in the Justiciability of SERs: Perspectives from India

According to Whelan the language of interrelationships between human rights is really about how they have been expressed institutionally. This is in terms of institutions to promote SERs, and making them as similar as those for CPRs.⁴⁷ Considering that a court is an agency charged with the function of exercising the judicial power of the State, only a court as thus defined has the power to authoritatively determine what the law is, and therefore what the legal meaning of a relevant enactment is.⁴⁸ According to the International Commission of Jurists, courts and quasi-judicial bodies have an important role to play in the legal enforcement of SERs which can directly or indirectly result in substantial changes in domestic law and policy.⁴⁹ In other words, courts create law as they adjudicate. The CESCR has noted in its general comment 3 that the appropriate means by which states can realise their socio-economic obligations goes beyond legislative measures to include judicial and quasi-judicial measures in case of violation. In General Comment No. 9, it also noted that any other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.⁵⁰ It has been noted that the lack of enforcement of SERs in some jurisdictions is not inherent in the nature of the right, rather it is the lack of competence or unwillingness of the adjudicating body to entertain such claims.⁵¹

The role of the judiciary in the realization of SERs cannot be overemphasised. This can be inferred from the jurisprudence of the Indian courts. According to Ibe, lessons from countries such as India suggest that clear linkages can and should be established between CPRs, which are justiciable, and SERs which are not. Beyond legal creativity, there is the need for some level of judicial activism without which the expected result will not be achieved.⁵² India presents an interesting discourse with respect to the justiciability of SERs as the Indian Supreme Court has creatively made them enforceable through its emphasis on the interrelatedness of human rights. The Constitution of India in Article 36-51 contains directive principles of state policy which are explicitly stated to be non-justiciable.⁵³ However, through the expansion of the scope of Article 21- the right to life- in the case of *Maneka Ghandi v Union of India*,⁵⁴ the court set the stage for a further expansion of the right that would embrace socio-economic principles as justiciable rights.⁵⁵ In the case of *Francis Coralie v Union Tertiary of India*⁵⁶ the Supreme court held that the right to life includes the right 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 and writing and expressing one's self in diverse forms. In *Olga Tellis v Bombay Municipal*

No. 15 of 2011; *Mitu-Bell Welfare Society v Attorney General High Court of Kenya at Nairobi* Petition No 164 of 2011 15 ; *Okwanda v The Minister of Health and Medical Services High Court of Kenya at Nairobi*, Petition No 94 of 2012.

⁴⁷ DJ Whelan (n.13) p 6

⁴⁸ FAR Bennion *Statutory interpretation: codified, with a critical commentary* (London: Butterworths, 1984) p.50.

⁴⁹ International Commission of Jurists 'Judicial Enforcement of Economic, social and Cultural Rights' Geneva Forum Series number 2.

⁵⁰ Committee on Economic Social and Cultural Rights General Comment No. 9 'The Domestic Application of the Covenant' 1998 E/C.12/1998/24 para 3.

⁵¹ Economic, Social and Cultural Rights – Handbook for Human Rights Institutions (2005) Office of the United Nations High Commissioner for human Rights <<http://www.ohchr.org/Documents/Publications/training12en.pdf>> accessed 8 June 2016 p.26.

⁵² S Ibe 'Beyond Justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *AHRLJ* 233.

⁵³ Article 37.

⁵⁴ (1978) 1 SCC 248.

⁵⁵ R Abeyratne 'Socio-economic rights in the Indian Constitution: Towards a broader conception of legitimacy' (2014) 39(1) *Brooklyn Journal of International Law* 40.

⁵⁶ (1981) 2 S.C.R 516, 529.

*Council*⁵⁷ the court held that the right to life included the right to livelihood. The Supreme Court of India has equally linked the right to health with the right to life in the case of *Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor.*⁵⁸ In this case, the court held that the right to life enshrined in article 21 imposes an obligation on the state to ensure the preservation of human life. Hence, the denial of timely medical treatment necessary to preserve human life in government-owned hospitals amounts to a violation of the right to life. In *Mohini Jain v State of Karnataka*⁵⁹ the court held that the state has a duty to provide education so that the citizens can enjoy their right to education. In *Unni Krishnan JP v State of Andhra Pradesh & Others*⁶⁰ the court held that a child deprived of the right to education can issue a writ of mandamus against the appropriate authority for the enforcement of the right. The court has also held the right to food,⁶¹ shelter,⁶² and health⁶³ as justiciable SERs. The court thus converted non-justiciable directive principles into justiciable rights by invoking the wide sweep of the enforceable article 21.⁶⁴ The *Unnikrishnan* case resulted in the inclusion of an enforceable right to education in Article 21 of the Indian constitution through the 93rd Amendment in 2002.⁶⁵

The success of the Indian Supreme Court in the area of SERs can be attributed to its emphasis on the indivisibility of CPRs and SERs which played out in its expansion of the right to life to include the bare necessities as stated in *Francis Coralie's* case. In effect the Indian Supreme Court emphasised the indivisibility of fundamental rights on one hand, and directive principles on the other hand. It was equally possible through encouraging public interest litigation by allowing easy access to judicial remedies by those who have been subjected to social or economic disadvantage.⁶⁶ This it achieved through relaxing the rules on locus standi.⁶⁷ However, the jurisprudence of the Nigerian courts tilts towards a contrary position as the courts have manifested a lukewarm attitude in entertaining SER claims.

5. Socio-economic rights in Nigeria

Like the Indian constitution, the Nigerian constitution contains among others socio-economic principles in Chapter Two of the constitution termed Fundamental Objectives and Directive Principles of State Policy. In addition to other political, foreign policy, economic and political objectives, socio-economic rights directives are contained in sections 16, 17, 18, 20 and 21 of the Constitution. Section 16 enjoins the state to direct its policy towards ensuring a planned and balanced economic development,⁶⁸ suitable and adequate shelter, food, reasonable minimum living wage, old age care and pensions, unemployment as well as care for the disabled.⁶⁹ Section 17 enjoins the state to direct its policy towards ensuring equal opportunity for securing adequate means of livelihood and suitable employment; ensure just conditions

⁵⁷ (1985) 2 S.C.R Supp. 51, 83.

⁵⁸ (1996) 4 SCC 37.

⁵⁹ (1992) 3 SCC 666.

⁶⁰ (1993) SCC (1) 645.

⁶¹ *Peoples Union of Civil Liberties (PUCL) v Union of India* Writ Petition (Civil) No. 196 of 2001.

⁶² *Olga Tellis v Bombay Municipal Council* (1985) 2 Supp. SCR 51, *Shanti Star Builders v Narayan K Totame* (1990) 1 SCC 520.

⁶³ *Consumer Education and Research Center v Union of India* (1995) 3 SCC 42.

⁶⁴ Circle of Rights: Economic, Social and Cultural Rights Activism 'Justiciability of ESC rights: The Indian experience' University of Minnesota Human Rights' Resource Centre <https://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (accesses 7 June 2016).

⁶⁵ See Article 2 of The Constitution (Eighty-Sixth Amendment) Act 2002.

⁶⁶ S Muralidhar 'Implementation of Court Orders in the Area of Economic Social and Cultural Rights: An overview of the Experience of the Indian Judiciary' being a paper presented at the First South Asian Regional Judicial Colloquium on Access to Justice on 1-3 November 2002, New Delhi IELRC Working Paper 2 (2002) <<http://www.ielrc.org/content/w0202.pdf>> accessed 8 June 2016.

⁶⁷ See *Fertilizer Corporation Kamager Union v Union of India* 1981 AIR (SC) 344 where it was held that restrictive rules on locus standi are in general inimical to the growth of the law. Also, turning away a litigant with a good cause just because he has not been sufficiently affected personally could mean that some government agency is left free to violate the law.

⁶⁸ Section 16(2)(a).

⁶⁹ Section 16(2)(d).

of work and ensure health, safety and welfare of all persons in employment.⁷⁰ The state is also to ensure that there are adequate medical and health facilities for all persons.⁷¹ Section 18 requires the government to direct its policy towards the provision of equal and adequate educational opportunities. Section 6(6) (c) states that these rights are non-justiciable before the courts. It specifically states that the judicial powers of the courts shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution. In *Okogie v. Attorney General of Lagos State*,⁷² the court stated that issues relating to the provisions of Chapter Two must conform to and run as subsidiary to the fundamental rights and that the obligation of the judiciary is to observe the provisions of Chapter Two or any other statute in such a way that the provisions of the chapter are observed, but that is subject to the express provision of the Constitution. This case is a judicial authority restating the provisions of section 6(6) (c) of the Constitution which prohibits the courts from entertaining socio-economic rights claims in Nigeria. Also in the case of *Badejo v Federal Ministry of Education*,⁷³ the applicant claimed that as a result of the discriminatory conduct of the respondents, she was denied of her right and the chance to be considered for admission into one of the Federal Government Colleges in Nigeria. Her application as well as appeal was dismissed by the High Court and also by the Court of Appeal.

The jurisprudence of the Nigerian courts with regard to making SERs justiciable has shown firstly an attempt to place reliance on the African Charter which has been made part of Nigerian laws and secondly a judicial approval of an enactment giving effect to the provisions of Chapter Two of the Constitution in line with section 13 and Item 60(a) of the Exclusive Legislative List.

5.1. Reliance on the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act

The CFRN 1999 in section 12 provides that no treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.⁷⁴ This is exactly what the National Assembly has done with the enactment of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act. This is one instrument currently in force in Nigeria that guarantees socio-economic rights and some courts have made efforts to grant claims based on it. However, the relevance of these decisions is questionable for reasons that will be discussed below. In the case of *Gbemre v Shell Petroleum Development Company Nigeria Limited and 2 others*,⁷⁵ the applicants claimed that by virtue of articles 4 (right to life), 16 (right to health) and 24 (right to a generally satisfactory environment) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development. The Federal High Court in Benin City granted the reliefs claimed by the applicants based on the provisions in addition to the right to life and human dignity as guaranteed by section 33 and 34 of the Nigerian Constitution respectively. In the case of *Odafe and Others v Attorney General of the Federation and Others*,⁷⁶ the applicants who were confirmed HIV/AIDS patients claimed they were denied proper medical treatment while in prison custody contrary to section 34 and 42 of the constitution and article 5 of the African Charter. The Federal High Court, Port Harcourt Division held that Article 16 of African Charter is part of our laws and places a duty on the state to take the necessary measures to protect the health of their people and to ensure that

⁷⁰ Section 17(3) (a)(b)(c).

⁷¹ Section 17(3) (d).

⁷² (1981) 2 NCLR 350.

⁷³ (1990) 4 NWLR (Pt 143) 354.

⁷⁴ See *Abacha v Fawehinmi* (2000) 6 NWLR (pt. 660) 228; *Registered Trustees of National Association of Community Health Practitioners of Nigeria and Others v Medical and Health Workers Union of Nigeria and Others* (2008) LPELR-3196 (SC) 35 para F, (2008) 1 FWLR (part 410).

⁷⁵ 2005 AHRLR 151 (NgHC 2005); Suit no. FHC/B/CE/53/05, Federal High Court, Benin 14 November 2005.

⁷⁶ (2004) AHRLR 205 (NgHC 2004); Suit No: FHC/PH/CS/680/2003 23 February 2004.

they receive medical attention when they are sick. The court noted that as all the respondents are federal agents, they are under a duty to ensure that the applicants receive medical treatment.

The African Charter makes no distinction between CPRs and SERs even in terms of realization unlike the ICESCR where its realisation is made progressive and dependent on available resources. Against this background, it could be inferred that notwithstanding the provisions of section 6(6)(c) of the Constitution, SERs are justiciable in Nigerian courts since the African Charter (Ratification and Enforcement) Act is deemed an Act of the National Assembly having been made part of Nigerian laws by virtue of Decree 107 of 1983 and as such SERs claims based on the Charter can be successfully adjudicated. As much as this seems plausible, it is not the case in reality. The reason is that these decisions emanated from the Federal High Court and a decision to the contrary exists at the Supreme Court. In the case of *Abacha v Fawehinmi*,⁷⁷ the Supreme Court relied on the decision of the Privy Council in the case of *Higgs and Another v Minister of National Security & Others* where the Council noted that Treaties formed no part of domestic law unless enacted by the legislature. Domestic Courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizen's right and duties in common or statute law. They might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its affecting them, would observe the terms of the treaty. The Supreme Court thus held that this is the position not only in England but also in Nigeria. In this case, the issue bothered on the enforcement of the applicant's fundamental right guaranteed under the 1979 Constitution which was suspended during the military era in Nigeria. The applicant brought his action under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁷⁸ It was held that the African Charter which is incorporated into our laws becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of our courts. The court noted that the African charter despite being a domestic legislation has an international flavour and in case of conflict with another statute it will prevail as it is presumed that the legislature will not want to breach an international obligation. The court however held that the provisions of the African Charter are not superior to the Constitution. Going by this decision, SERs in the African Charter cannot be justiciable in our courts since the constitution says so. Any other interpretation will conflict with the provisions of the constitution and its supremacy must prevail.⁷⁹

5.2. Enacting Legislations that Guarantee Socio-Economic Rights

In line with section 13 and item 60(a) of the Exclusive Legislative List, organs of government have the responsibility of giving effect to the provisions of Chapter Two of the Constitution. The Supreme Court has thus held that the provisions of Chapter Two are justiciable where statutes based on their actualisation are in issue. In *A.G Ondo State v A.G Federation*,⁸⁰ the enactment of the Corrupt Practices and other Related Offences Act was challenged. Taking a clue from the Indian courts, Justice Uwaifo of the Supreme Court stated:

[Every] effort is made from the Indian perspective to ensure that the Directive Principles are not a dead letter. What is necessary is to see that they 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 Directive Principles need not remain mere or pious declarations.

⁷⁷ (2000) 6 NWLR (pt. 660) 228.

⁷⁸ Cap 10 Laws of the Federation of Nigeria 1990. This is the law that domesticated the provisions of the African Charter in Nigeria through Decree 107 of 1983.

⁷⁹ Section 1(3) of the CFRN 1999 provides that if any other law is inconsistent with the provisions of the constitution, the constitution shall prevail and that other law shall to the extent of its inconsistency be void. See the case of *Odebunmi and Another v Oladimeji and Others* (2012) LPELR 15419 (CA) where the court equally noted that the African Charter (Ratification and Enforcement) Act is inferior to the constitution.

⁸⁰ (2002) NWLR (Pt. 772) 222.

It is for the Executive and the National Assembly, working together, to give expression to any one of them through appropriate enactment as occasion may demand.⁸¹

In line with this decision the Supreme Court in *A.G Lagos State v A.G Federation*⁸² held that the National Assembly was competent to enact the Federal Environmental Protection Agency Act in furtherance of Chapter Two. In summary, these cases support the contention that the contents of Chapter Two can be the subject of legislative enactments and when this happens, the courts can enforce the provisions of such a law notwithstanding the limitation contained in section 6(6)(c).⁸³ As much as this seems to be a forward looking decision, it still leaves the enjoyment of SERs at the mercy of the executive and the legislature who are in most cases very reluctant to ensure its justiciability as they are the greatest violators.

Relying on the decision in *A.G Ondo State v A.G Federation*, it has been argued that Section 6(6)(c) does not to remove the right of the legislature to enact laws that make justiciable rights from the contents of Chapter Two giving the courts the competence to entertain cases bothering on the enforcement of such rights. This is no doubt a sound viewpoint. However, the extent of the applicability has not been felt even after the enactment of the Universal Basic Education Act (UBE Act) as well as the Child's right Act 2003 (CRA 2003) which guarantees the child's right to basic education. It is necessary to point out that in the case of *A.G Ondo State v A.G Federation*, the ICPC Act was in issue which bothered on corruption and not necessarily human rights related even though corruption can effectively hinder the realization of human rights.⁸⁴ With respect to the child's right to basic education guaranteed in the CRA 2003 and the UBE Act, the case of *Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)*,⁸⁵ (*SERAP v Nigeria*) was instituted in the ECOWAS court bothering on the mismanagement of funds meant for basic education in 10 states of Nigeria. Considering the non-justiciability of the right to education in the Constitution, the plaintiffs in that case relied on the provisions of the African Charter to claim that every Nigerian has an enforceable right to education. The plaintiffs in that case however factually based their claims on the CRA 2003 and the UBE Act. The court held that every child in Nigeria has an enforceable right to education under the African Charter. Put side by side with the case of *Abacha v Fawehinmi*, this decision does not have any positive implication for the right to education than it already had prior to it. The decision says nothing new as the case of *Abacha v Fawehinmi* noted that the courts can enforce the provisions of the African Charter but it is still subject to the Constitution. Flowing from that, the status of the child's right to education has not changed.

A combined reading of the provisions of section 13 and item 60(a) of the Exclusive Legislative List shows that the legislature can make laws to give effect to the provisions of the Constitution. The Supreme Court has held that the National Assembly is competent to enact a law in furtherance of Chapter Two.⁸⁶ It is left for the Nigerian courts to make an affirmative declaration of the extent to which an enactment such as the CRA 2003 and the UBE Act create a justiciable right to education for the Nigerian child since the opportunity was not utilised in the case of *SERAP v Nigeria*. A positive affirmation in this regard will be good but the full enjoyment of the various SERs will remain uncertain as it means Nigerians must wait for the National Assembly to pass laws guaranteeing each SER. A look at the decisions of the Nigerian courts shows a measure of unwillingness to create enforceable SERs through judicial activism. Judging by the decisions, Ibe rightly observed that the integrative approach

⁸¹ (2002) 9 NWLR (Pt 772) 222 at 391

⁸² (2003)15 NWLR (Pt. 842) 113.

⁸³ S T Ebobrah, The Future of Socio-Economic and Cultural Rights Litigation in Nigeria (2007) 1(2) *Review of Nigerian Law and Practice* 119 (109-124)

⁸⁴ Corruption and Human Rights: Making the Connection (2009) International Council on Human Rights Policy Switzerland http://www.ichrp.org/files/reports/40/131_web.pdf (accessed 20 June 2016).

⁸⁵ Suit No: ECW/CCJ/AAP/12/070808 Judgment No. ECW/CCJ/JUD/07/10 30 November 2010.

⁸⁶ *Attorney General of Ondo State v Attorney General of the Federation*

to enforcing SERs is highly unknown to Nigerian court's jurisprudence on SERs.⁸⁷ A look at the case of India shows a striking difference as the jurisprudence of the Indian courts created over time has placed emphasis on the interrelatedness of SERs with CPRs, which led to the creation of justiciable SERs and the eventual inclusion of the child's right to basic education in the Constitution. If the case of *SERAP v Nigeria* had been brought before the Nigerian courts, it would have been an opportunity to confirm the decision of the court in *A.G Ondo State v A.G Federation* as it relates to SERs. As such, the future of SERs in Nigeria is highly dependent on a more ingenious bar and a venturesome bench. The current conservative approach to the justiciability of SERs leaves its future very bleak in Nigeria.

6. Conclusion

According to Lord Denning in *Parker v Parker*⁸⁸ if something is not done just because it has never been done before, the law will not develop while the rest of the world moves ahead. This emphasises the importance of not allowing rules that need to be changed to remain a clog in the wheel of progress. India is an interesting case as socio-economic rights regarded as directive principles have seen a transformation through judicial activism. However, a look at the jurisprudence of the Nigerian courts in relation to SERs leaves much more to be desired. In any civilised society, it is the role of the courts to give an interpretation to constitutional provisions in such a way as to give effect to the provisions which are likely to foster SERs and wellbeing of the people. The non-justiciability of the fundamental objectives in the Constitution is not a reason for the Nigerian courts to adopt a lukewarm attitude in entertaining cases bothering on SERs. Rather, the intent and purpose of the objectives in Chapter Two should affect the reasoning of judges as to the possibility of having the constitutional provisions being interpreted differently and in a progressive way. It is therefore pertinent that Nigerian courts take a clue from the activism of the Indian Courts in the process of interpreting issues bothering on SERs. This will have the effect of elevating the SER provisions among the directive principles to the status of justiciable rights.

⁸⁷ S Ibe (n.52) p. 237

⁸⁸ (1954) All ER 15 at 22 cited in K Allan 'From Parker v Parker to Pirate Kings: the Legacy of Lord Denning – A Toast' (2010) Owen Dixon Society ejournal <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1005&context=odsej> (accessed 24 June 2016)