

PRO-JUSTICIABILITY APPROACH TOWARDS ENFORCING THE PROVISIONS OF CHAPTER II OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999*

Abstract

Chapter II of the Constitution of Federal Republic of Nigeria 1999 contains what are captioned the “Fundamental Objectives and Directive Principles of State Policy”, which, prima facie, are guidelines to the government of Nigeria to promote democracy, social justice and order. The said fundamental objectives and directive principles appear to encompass social inclusiveness with a view at reducing socio-economic and political inequality in status and opportunities in Nigeria. In other words, economic, social, and cultural benefits/rights are found in Chapter II of the Constitution. However, it is found by the researcher that despite the “Fundamental Objectives and Directive Principles of State Policy” which ought to induce a legal duty from the State to provide economic, social, and social benefits/rights, these provisions appear unfortunately to be unenforceable by the Courts in Nigeria in the light of the ouster clause in Section 6 (6) (c) of the Constitution of Federal Republic of Nigeria 1999. This Paper enquires into the legal viability and posits the legal possibility of a pro-justiciability approach towards enforcing the provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999. It is recommended inter alia that there should be an urgent review and alteration of the extant Constitution of Nigeria for the purpose of casting out every contradiction and provision which hinders or obscures the smooth justiciability of those commendable provisions contained in Chapter II of the said extant Constitution of Nigeria.

Keywords: Pro-Justiciability, Ouster Clause, Socio-economic, Legal, Viability, Possibility.

1. Introduction

Today human rights issues have not only attracted a global concern; it has also become instructive that beyond attraction of global concern, significant interest aimed at protecting and promoting universal fidelity and homage to human rights has continually commanded attention and occupied fundamental or constitutional positions at the international, regional and national levels as the case may be.¹ Human rights ‘are regarded as those fundamental and inalienable rights which are essential for life as a human being.’² The issue of human rights, in the recent past, has obviously penetrated the international dialogue, become an active element in interstate relations and has even taken a voyage boldly beyond the ancient landmark and sacred bounds of national sovereignty.³ Omo, J.S.C, [as he then was] declared elsewhere⁴ that:

human rights is now a very important subject both nationally and internationally.

It is also a fact that no governance in the world is now acceptable without an observance of human rights. Even a powerful nation such as China has had its

* **Odinakachukwu E. OKEKE, LLB, BL, LLM, PhD**, is a Lecturer in the Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University Awka, Anambra State, Nigeria. His email address is oe.okeke@unizik.edu.ng while his telephone number is 08066740136.

¹ Justice Muhammad Haleem has argued that, “the quest for human rights and human dignity is a phenomenon of contemporary life of universal dimensions and immense significance. See M Haleem, ‘The Domestic Application of International Human Rights Norms’ in *Developing Human Rights Jurisprudence, The Domestic Application of International Human Rights Norms* (London: Commonwealth Secretariat, 1988) p. 93 cited in JA Dada, ‘Human Rights under the Nigerian Constitution: Issues and Problems’, Vol. 2 No. 12, 2012, p. 33.

² *ibid* 34.

³ TW Wilson Jnr., ‘A Bedrock Consensus of Human Rights Dignity’ in A H Henkin (ed) *The Internationalization of Human Rights* (New York: Aspen Institute For Humanistic Studies, 1979) p. 47.

⁴ Extra-judicially.

membership of the World Trade Organization [WTO] delayed for several years because of violation of human rights in its domain⁵

The formation of the United Nations Organization⁶ and the promulgation and adoption of the Universal Declaration of Human Rights (UDHR)⁷ provided a positive and firm foundation for the historical developments and globalization of human rights. The Universal Declaration of Human Rights, 1948 represents a bold attempt by the UN to elaborate on and give concrete and authoritative expression to the imprecise and ambivalent definition of human rights contained in the UN Charter.⁸ The UDHR has served as a template for subsequent human rights instruments and has had a positive impact on the legal framework, political, and cultural evolutions of nations and remains the mirror by which every individual and every organ of society reflects on human rights.⁹ Since the adoption and promulgation of the UDHR 1948, the United Nations has not wavered in its commitment to the promotion and protection of human rights.

In Nigeria, many people now freely exercise and enjoy the fundamental rights recognized and guaranteed in Chapter IV of the Constitution of Federal Republic of Nigeria 1999 and in ratified agreements or charters. However, the same cannot be said of socio-economic rights.

‘Socio-economic rights are those human rights that aim to secure for all members of a particular society a basic quality of life in terms of food, water, shelter, education, health care and housing’.¹⁰ Socio-economic rights aim to ensure that everyone has access to resources, opportunities and services essential for an adequate standard of living. In accordance with international agreements, governments have the following obligations: to create an enabling environment within which people can gain access to these benefits/rights and improve their quality of life and wellbeing; to remove barriers and limitations that prevent citizens and residents from accessing and claiming these benefits/rights; and to adopt special measures to assist the disadvantaged and vulnerable to gain access to these benefits/rights. Such access is achieved over a period of time and depends upon the availability of resources. Socio-economic rights and civil and political rights both originate from the UDHR, and were only subsequently split.

Chapter II of the extant Constitution of Nigeria¹¹ contains what are captioned the “Fundamental Objectives and Directive Principles of State Policy”, which, *prima facie*, are guidelines to the government of Nigeria to promote democracy, social justice and order. The said objectives appear to encompass social inclusiveness with a view at reducing socio-economic and political

⁵ U Omo, ‘The Role of The National Human Rights Commission in the Promotion of Human Rights in Nigeria’ in CC Nweze & EO Nwankwo, eds, *Current Themes in the Domestication of Human Rights Norms* (Enugu: Fourth Dimension publishing Co. Ltd, 2003) p. 2. See also HJ Steiner & P Alston, *International Human Rights in Context, Law, Politics, Morals* (Oxford: Clarendon Press, 1996) p. v.

⁶ UNO Charter, 1945.

⁷ Adopted and proclaimed by General Assembly resolution 217 A (111), UN Doc A/810, 71 of 10 December 1948.

⁸ R Schifer, *Forty Years of the Universal Declaration of Human Rights, Bulletin of Human Rights* (New York: United Nations, 1988) p. 92.

⁹ BVD Heijden & B Tahzib-Lie (eds), *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (The Hague: Martinus Nijhoff Publishers, 1998) p. 28.

¹⁰ G Erasmus, ‘Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments’ (2004) 32 *International Journal of Legal Information*, 243, 252.

¹¹ The Constitution of the Federal Republic of Nigeria 1999. Herein also referred to and/or cited as the “1999 Constitution of Nigeria” or the extant Constitution of Nigeria.

OKEKE: Pro-Justiciability Approach towards enforcing the Provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999

inequality in status and opportunities in Nigeria. In other words, economic, social, and cultural benefits/rights are found in Chapter II of the Constitution. However, despite the “Fundamental Objectives and Directive Principles of State Policy” which ought to induce a legal duty from the State to provide economic, social, and social benefits/rights, these provisions appear unfortunately to be unenforceable by the Courts in Nigeria in the light of the ouster clause in *Section 6 (6) (c) of the 1999 Constitution*. Section 6 (6) (c) of the Constitution of Federal Republic of Nigeria 1999 provides that the judicial powers vested in the Courts by that section 6 of the Constitution,

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

This provision appears to largely curtail or somewhat forbid judicial enforcement of the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution. Put differently and *simpliciter*, the aforesaid section 6 (6) (c) of the Constitution of Nigeria embodies an ouster clause which is largely perceived and believed to have rendered useless the beauty and legal strength of Chapter II of the Constitution.

However, in another twist, the same Constitution appears to have placed the viability of the enforcement of the “Fundamental Objectives and Directive Principles of State Policy” under the legislative competence of the National Assembly vide Item 60(a) of the Exclusive Legislative List. These constitutional concerns¹² have attracted our attention to inquire into, and interrogate the justiciability or otherwise of the provisions of Chapter II of the Constitution of Federal Republic of Nigeria 1999.

2. Two Schools of Thought vis-à-vis the Ouster Clause

There are, in the main, two schools of thought vis-à-vis the justiciability or otherwise of the Fundamental Objectives and Directive Principles of State Policy provided under Chapter II of the Constitution of the Federal Republic of Nigeria 1999 to wit:

1. The pro-justiciability school: this school of thought does not quarrel heavily with the ouster clause contained in *Section 6 (6) (c) of the 1999 Constitution*. This school of thought posits and contends that Chapter II should, even in the light of the said ouster clause, be held to be judicially enforceable, that is to hold that the provisions under the said Chapter II are enforceable by the court, and
2. The non-justiciability school: this school opines that the ouster clause contained in *Section 6 (6) (c) of the 1999 Constitution* constitutes a heavy hindrance to the justiciability of Chapter II of the Constitution.

This voyage of research focuses on the pro-justiciability school of thought.

3. Interrogating the Legal Viability of the Pro-Justiciability School of Thought

3.1 The Room for Exception in section 6(6)(c) of the extant Constitution of Nigeria

A perusal of section 6(6)(c) of the Constitution of Federal Republic of Nigeria, 1999 would reveal that there is room for exceptions. This room for exception is built upon that part of the opening phrase of the said section which says ‘except as otherwise provided by this

¹² Basically, the ouster clause in section 6 (6) (c) of the Constitution of the Federal Republic of Nigeria, 1999 and the somewhat contradictory provision in Item 60(a) of the Exclusive Legislative List.

Constitution'. It goes therefore without saying that the constraint or restraint cast upon the judicial powers of courts as intended by section 6(6)(c) of the Constitution is not total.

Section 6(6)(c) of the 1999 constitution does not absolutely foreclose justiciability of chapter II and allows its enforcement if it is so provided in any other section of the Constitution. The court, in *Federal Republic of Nigeria v Anache*,¹³ has upheld this position, stating that since section 6(6)(c) of the Constitution is qualified by the phrase, 'except as otherwise provided by this Constitution', the justiciability of Chapter II is not entirely foreclosed. Also, in *Olafisoye v Federal Republic of Nigeria*,¹⁴ the court was asked to determine whether or not the National Assembly is competent to make laws for the peace, order and good governance of Nigeria, pertaining to abolishing corrupt practices and abuse of power as provided in section 15(5) – a section under Chapter II of the 1999 Constitution. In this particular case, the Supreme Court gave judicial affirmation and certification to the likelihood of justiciability of the provisions of Chapter II of the 1999 Constitution where the same Constitution vide another section thereof makes any [subject] matter under Chapter II justiciable. The apex court did not mince words when it stated *inter alia* that:

The non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words, 'except as otherwise provided by this Constitution'. This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the Courts.¹⁵

For example, the federal character principle is provided for under Chapter II of the Constitution of Nigeria but by the provisions of Section 147 of the Constitution, the President is bound to apply the principle in the appointment of ministers. In *Musa Baba-Panya v President, Federal Republic of Nigeria & 2 Ors.*,¹⁶ wherein the provisions of section 14(3) of Constitution alongside the provisions of some other sections including *Sections 147(1), (3) and 299* of the said Constitution were interpreted, the Court of Appeal of Nigeria¹⁷ stated *inter alia* that:

...The contention of the appellant...is that by the combined effect of all these provisions, the indigenous inhabitants of the FCT, Abuja are entitled to be appointed Ministers in the Federation, like all other indigenes of other States of the Federation ...*The wordings of Section 14(3) are also clear and unambiguous and therefore should be given their plain and evident meaning. The purport of Section 14(3) is to ensure equality or fairness in the representation of each state in the conduct of the affairs of the Government of the Federation so that no one State or ethnic group will be deprived of participation in running the affairs of the Federal Government. The wordings of Section 147(1) and (3) are also crystal clear and simple. They specifically express the need for the reflection of Federal Character in the appointment of Ministers so that each State has at least one Minister who shall be an indigene of the State. The proviso to Section 147 (3) is very crucial...The proviso in Section 147(3) further qualifies and emphasizes the importance of the mandatory requirement that each State of the Federation must be represented in ministerial appointments by the President...The raison d'etre for this proviso is to promote national unity and sense of belonging by all*

¹³ (2004) 14 WRN.

¹⁴ (2005) 51 WRN 52.

¹⁵ *Federal Republic of Nigeria v Aneche & Ors.* [2004] 1 SCM p. 36 at 78.

¹⁶ (2018) LPELR-44573(CA) pp 30 – 46, paras. A – C.

¹⁷ Abuja Judicial Division.

OKEKE: Pro-Justiciability Approach towards enforcing the Provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999

Nigerians...Section 147 of the Constitution brings to fore the intent of promoting social equilibrium in our society, by ensuring the balance in the composition of the governance of the Federation hence the issue of Federal character is engraved in our Constitution. Thus, failure of the President to comply with the provisions of Section 147(3) is tantamount to a derogation of the Constitution...¹⁸

Section 224 of the Constitution of Federal Republic of Nigeria 1999 firmly prescribes and requires that 'the programme as well as the aims and objects of a political party shall conform with the provisions of Chapter II of this Constitution'. This very section is also another section of the Constitution which could be safely accommodated under the shelter of the 'exception room in section 6(6)(c) of the 1999 Constitution.

3.2 The Supremacy Clause in section 1(1) of the Constitution of Federal Republic of Nigeria 1999

It would be recalled that section 1(1) of the Constitution of Federal Republic of Nigeria 1999 proclaims the supremacy and binding force of the Constitution over all persons and authorities. Accordingly, it is declared that the Constitution 'is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria'¹⁹. The provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999 form part of the Constitution of the Federal Republic of Nigeria 1999 and thus should enjoy the supremacy and binding force of the Constitution as ascribed by and declared in section 1(1) of the Constitution of Federal Republic of Nigeria 1999.

3.3 The command in section 13 of the Constitution of Federal Republic of Nigeria 1999

Observe that section 13 of the Constitution of Federal Republic of Nigeria, 1999 commands that all authorities and persons exercising legislative, executive or judicial powers 'shall' conform to, observe and apply the provisions of Chapter II of the Constitution. Thus, it is commanded that

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter [i.e. Chapter II] of this Constitution.²⁰

It is submitted at this juncture that section 13 is another section of the Constitution which could safely be accommodated under the shelter of the 'exception room in section 6(6)(c)' which exception has been earlier highlighted in this chapter of this work. It is also observed quickly that section 6(6)(c) of the 1999 Constitution appears to have put a constitutional constraint or restraint on the judicial powers of courts vis-à-vis the fundamental objectives and directive principles of state policy set out in Chapter II of the Constitution and not on the entire provisions of the said Chapter II.

Without expectation of controversy, it is submitted further that though Chapter II is generally titled and contains 'Fundamental Objectives and Directive Principles of State Policy', it is not all the provisions in the Chapter that are in the class of fundamental objectives and directive principles of state policy. For example, sections 13 and 24 of the Constitution contain declaratory provisions on the obligations of the government and duties of the citizens

¹⁸ Per Tinuade Akomolafe-Wilson, JCA.

¹⁹ Constitution of the Federal Republic of Nigeria, 1999, s. 1(1).

²⁰ Emphasis mine.

respectively, these provisions, in the researcher's opinion, are not in the class of fundamental objectives and directive principles of state policy. It is therefore viewed that the room for exception which was gleaned from the opening phrase of section 6(6)(c) of the 1999 Constitution can fly to the patronage of section 13 of the Constitution. It is pertinent to keep in view that in construing a statute, the rule of beneficial construction requires that the words must not be so strained as to include cases or circumstances plainly omitted from the natural meaning of the language.²¹ Thus the ouster clause contained in section 6(6)(c) of the Constitution should not be strained to relate to sections or provisions such as section 13 which, on the face, do not fall into the class of fundamental objectives and directive principles of state policy. It is submitted that if the Constitution has intended to have the ouster clause extended to all the sections or provisions in Chapter II of the Constitution, it would have so stated in clear language.

In a similar breath, another rule of interpretation posits that in circumstances where alternative constructions are equally open, that alternative that is consistent with the smooth working of the system is to be chosen which the statute purports to be regulating and that alternative is to be rejected which would introduce uncertainty, friction or confusion into the working of the system.²² This is apparent in the construction of the Constitution. It is opined here that in view of the attractive provisions in Chapter II of the Constitution, absolute non-justiciability of Chapter II of the Constitution would only introduce corruption, uncertainty, friction, agitation, and or even confusion into the working of the system. It is therefore the researcher's opinion that this rule of construction can therefore be leaned upon and explored by the Courts to salvage Nigeria from possible corruption, uncertainty, friction or confusion.

3.4 The Legal Implication of Item 60(a) of the Exclusive Legislative List

Notably, Item 60(a) of the Exclusive Legislative List contained in Part I of Second Schedule to the Constitution of the Federal Republic of Nigeria 1999 places responsibility on the shoulders of the Federal Government to establish and regulate authorities for the Federation or any part thereof 'to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution'.²³ The implication of this especially in view of and in combined effect with section 4(2), (3) of the Constitution of the Federal Republic of Nigeria 1999 is that power is donated to the National Assembly to make laws with respect to 'the establishment and regulation of authorities for the Federation or any part thereof... to promote and enforce the observance of the Fundamental Objectives and Directive Principle contained in this Constitution....'²⁴ Commenting on the above item 60 (a), Justice Mohammed L. Uwais, CJN (as he then was), observed that:

"Item 60 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria specifically empowers the National Assembly to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles, and to prescribe minimum standards of education at all levels, amongst others. The breathtaking possibilities created by this provision have sadly been obscured and negated by non-observance. This is definitely one avenue that could be meaningfully

²¹ *Forsdike v Colquhoun* (1883) 112 B.D.71; *Savannah Bank v Ajilo* [1989] 1 NWLR (Pt 97) 305.

²² *Shanon Realties Limited v Villeda St. Michael* [1924] A.C. 185 at 192 – 193, per Lord Shaw.

²³ Item 60(a) of the Exclusive List, Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999.

²⁴ GN Okeke & C Okeke, 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria' (2013) 7, 6 *IOSR Journal of Humanities and Social Science*, 12.

OKEKE: Pro-Justiciability Approach towards enforcing the Provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999

exploited by our legislature to assure the betterment of the lives of the masses of Nigeria....²⁵

It is to be noted that Item 60(a) of the Exclusive Legislative list appears to have clothed the National Assembly with the legislative competence to establish and regulate authorities to promote and enforce the provisions of chapter II of the Constitution. Thus, the Constitution itself has voluntarily placed the entire Chapter II under the Exclusive Legislative List, it simply means that the provisions of that Chapter II need not remain mere or pious declarations. It is therefore left for the Executive and the National Assembly, working together, to give expression to any one of the provisions or principles through appropriate enactment as occasion may demand.²⁶ In pursuance of this position, in the case of *A.G Lagos State v A.G Federation*,²⁷ the Supreme Court upheld the legislative competence of the National Assembly to make the Federal Environmental Protection Agency Act for the purpose of protecting the environment in furtherance to *section 20* of the Constitution of Federal Republic of Nigeria, 1999. Similarly, in the case of *A.G Ondo State v A.G Federation & Ors.*,²⁸ the Supreme Court gave judicial credence to the National Assembly's legislative competence in respect of *section 15(5)* of the Constitution.

In summary, the foregoing cases and premises tend to support the opinion and contention that the contents of chapter II 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)* of the Constitution.²⁹

3.5 Ratification of the African Charter

The African Charter contains socio-economic rights, which include: right to work,³⁰ right to health,³¹ right to education,³² right to participate in the cultural life of one's community,³³ duty of state to promote & protect the moral and traditional values recognized by the community,³⁴ recognition of family as the natural unit & basis of a society,³⁵ right of the family to be assisted as the custodian of morals and traditional values,³⁶ protection of the rights of women and children,³⁷ and rights of the aged and disabled.³⁸ This Charter has been domesticated in Nigeria vide The African Charter on Human and People's Rights Act.³⁹

²⁵ M L Uwais, Fundamental Objectives and Directive Principles of State Policy: Possibility and prospect" in C.C. Nweze, ed, Justice in the Judicial Process (Essay in Honour of Honourable Justice Eugene Uba-Ezonu, JCA, Chapter 5, at P. 179.) cited in GN Okeke & C Okek, (n.26).

²⁶ *Attorney-General of Ondo State v Attorney-General of the Federation* [2002] LPELR-623(SC); [2002] 9 NWLR (Pt. 772) 222; [2002] 6 S.C (Pt. I) 1.

²⁷ [2003] 15 NWLR (Pt. 842) 113, 175.

²⁸ *ibid.*

²⁹ See especially the dictum of Uwaifo JSC in *A.G Ondo State v A.G Federation*, (n.28) at pp. 382, 383 – 385.

³⁰ Article 15.

³¹ Article 16.

³² Article 17(1).

³³ Article 17(2).

³⁴ Article 17(3).

³⁵ Article 18(1).

³⁶ Article 18(2).

³⁷ Article 18(3).

³⁸ Article 18(4).

³⁹ Cap 10, Laws of Federation of Nigeria, 1990.

The Supreme Court has held in *Abacha v. Fawehinmi*,⁴⁰ that: ‘...the African Charter which is incorporated into our municipal law becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts’. The implication of the above holding of the Supreme Court is that the socio-economic rights in Chapter II are enforceable under the African Charter.

4. Chapter II of the 1999 Constitution of Nigeria: A Window Dressing?

An inevitable implication of the non-justiciability school of thought on the justiciability of the provisions of Chapter II of the Constitution is that the provisions of chapter II of the constitution are merely declaratory. And this implication appear to have received judicial blessing in the case of *A.-G Ondo v A.-G Federation*,⁴¹ the Supreme Court held that those Objectives and Principles provided for under chapter II of the constitution remain mere declarations. In view of the foregoing, it is rather obvious that chapter II of the Constitution is believed to be non-justiciable.

The question now is: of what purpose is the inclusion of that Chapter in the Constitution of Nigeria whereas they are not enforceable against the government? Are those magnificent provisions in Chapter II of the Constitution all for fancy? It is viewed that if Chapter II of the Constitution is not judicially enforceable, then the Chapter stands in the Constitution as a mere window dressing and that inevitably renders the inclusion of the Chapter in the Constitution an intended fraud and or a constitutional deception. In this line, some authors had submitted eruditely that:

A literal interpretation of the above section 13 may mean that those exercising legislative, executive and judicial powers are obliged to conform, observe and apply the provisions of Chapter II. However, they observed immediately that a community reading of the said section 13 and section 6 (6) (c) will point to the position, contention, suspicion or opinion that the makers or drafters of the Constitution intended Chapter II of the Constitution to be non-justiciable. In reality, section 13 created responsibility without liability. A government that cannot be liable for its failure to carry out its constitutional obligations cannot be said to bear any responsibility. Such government cannot be accountable to the people who are the ultimate sovereign in a democratic system of government, which is purportedly in practice in Nigeria. Section 13 is an apparent publicity stunt by the makers of the Constitution to attract the applause of the people even though they know that what is given by sections 13 to 24, which contain the national ideals without which there can be no meaning national development, is taken away by section 6 (6) (c). This approbating and reprobating stance of the 1999 constitution of the federal republic of Nigeria with respect to Chapter II of the Constitution is a key to irresponsible governance and it is against this backdrop that men and women of goodwill from various quarters are calling for a constitutional amendment which will make Chapter II of the Constitution justiciable.⁴²

This appears as nothing but a constitutional fraud yet the preamble to the Constitution made bold to ascribe the making of the Constitution to the people. What? Could ‘WE THE PEOPLE

⁴⁰ [2000] 6 NWLR (Pt. 600) 228.

⁴¹ *ibid.*

⁴² GN Okeke & C Okeke, ‘The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria’ (2013) 7, 6 *IOSR Journal of Humanities and Social Science*, 13.

OKEKE: Pro-Justiciability Approach towards enforcing the Provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999

OF THE FEDERAL REPUBLIC OF NIGERIA'⁴³ so defraud ourselves and create room for our government to be irresponsible and or unaccountable? We strongly doubt if 'We the People of the Federal Republic of Nigeria' could have intended to 'MAKE, ENACT, AND GIVE TO OURSELVES'⁴⁴ a Constitution by which we have donated governmental powers to the state but which turns around to slavishly absolve the state (the government) of failure to conform to, observe, and apply what ought to be the fundamental obligations of the government.

It is this room for irresponsibility of the government that has been accommodating corruption in the country and or the misappropriation of the God-given resources and wealth of this great nation. We think not that WE THE PEOPLE OF NIGERIA could have intended to create such an oppressive room for corruption, unemployment, abject poverty of the masses, insecurity of the masses, hunger, homelessness, lack of unfettered access to justice, lack of quality and basic education, poor medical facilities and services, inequality before the law, religious intolerance sometimes orchestrated by politicians, *et cetera*.

5.1 Courts and Enforcement of Provisions Chapter II of the 1999 Constitution of Nigeria

There is no clear-cut position of the Courts in Nigeria on justiciability or otherwise of the provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999. There are precedents that uphold justiciability in certain contexts, just as there are other precedents that declare same Chapter non-justiciable. However, the point may be made that where non-implementation of specific socio-economic benefits are concerned, the predominant attitude of the Nigerian courts is the tendency to associate themselves with the non-justiciability school of thought and so hold that provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999 are non-justiciable.

On the other hand, the courts have held that the provisions of Chapter II of the Constitution of Federal Republic of Nigeria, 1999 are justiciable where:

1. The implementation of any of the provisions of the Chapter (Chapter II) infringes on any of the fundamental rights provided for under Chapter IV of the Constitution, particularly on the right of the private sector to establish private schools, to impart ideas and information, and
2. Where statutes enacted pursuant to Item 60(a) of the Exclusive Legislative List to actualize Chapter II provisions are challenged or questioned.

5.2 Chapters II and IV of the extant Constitution of Nigeria: Similarity and/or Disparity

Two Chapters in the 1999 Constitution of Nigeria are traceable to human rights and thus the Nigerian Constitution makes unmistakable distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other hand.⁴⁵ Undoubtedly, this approach is not strange or inconsistent with what obtains at the international level. For instance, the Universal Declaration on Human Rights (UDHR) recognizes the two sets of human rights.⁴⁶ In the hierarchy of human rights, civil and political right have taken primacy being usually

⁴³ See the Preamble to the Constitution of Federal Republic of Nigeria, 1999.

⁴⁴ *ibid*.

⁴⁵ While Chapter IV of the 1999 Constitution of Nigeria provides for civil and political rights, Chapter II of the same Constitution contains economic, social, and cultural benefits/rights.

⁴⁶ Articles 3-21 provides for civil and political rights while Articles 22-28 guarantee Economic, Social and Cultural Rights.

referred to as the “first generation rights” and the economic, social and cultural rights constitute the class of rights called the second generation rights.

However, in transforming the Declarations provisions into legally binding obligations, the United Nations adopted two separate International Covenants,⁴⁷ which, taken together, constitute the bedrock of the international normative regime in relation to human rights.⁴⁸

The challenge with the disparity created in the Nigerian Constitution between the rights, is that while the provisions of Chapter IV containing the civil and political rights are justiciable, it is feared arguably that the provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999 dealing with social, economic and cultural benefits are declared non-justiciable vide the ouster clause in *section 6 (6)(c)* of the 1999 Constitution of Nigeria. Consequently, in the event of deliberate and systematic violations of the economic, social and cultural rights, the citizens are powerless to seek legal redress, since the Constitution declares the rights/benefits non-justiciable.

The further implication of this disparity is that Nigeria is indirectly constitutionally empowered to evade the international obligations voluntarily undertaken by it upon its ratification of the various international human rights instruments, especially, the social economic or cultural right. It is this disparity which has made the economic, social and cultural rights, a neglected category of human rights in Nigeria. Recall that Nigeria is a country blessed with abundant human and natural resources and is not plagued by the numerous natural disasters like flood, tornado, wild-fire and earthquake which have devastated many nations of the world and rendered them prostrate. Regrettably, Nigeria has remained peripheral in the community of nations, with many of its citizens living in intolerable abject poverty and deprivation. The realization of the economic, social and cultural rights has thus remained a mirage. It is appreciated that the obligation of State Parties in the implementation of economic, social and cultural rights is to take steps to the maximum of their available resources with a view to achieving progressively, the full realization of the rights.

The courts in Nigeria tend to exercise jurisdiction in cases where implementation of Chapter II results in violation of Chapter IV of the Constitution. The inevitable and practical (though unintended) implication of this attitude is to render Chapter II justiciable where the issue or question also involves a breach of Chapter IV. In two cases, namely, *Archbishop Anthony Olubunmi Okogie & Ors v Attorney General of Lagos State*,⁴⁹ and *Adewole & Ors. v Alhaji Jakande & Ors*,⁵⁰ the Lagos State Government, by a circular dated the 26th day of March 1980, purportedly abolished all private primary educational institutions wherein fees are paid in the state. This was claimed to be done ‘towards ensuring that there are equal and adequate educational opportunities at all levels as provided in section 18 under Chapter II of the 1979 Constitution of Nigeria, a non-justiciable provision in the 1979 Constitution. The Plaintiffs, in separate actions, challenged the government policy on the ground that it was unconstitutional. It was contended that:

⁴⁷ One set is contained in International Covenant on Civil and Political Rights; while the other set is contained in International Covenant on Economic, Social and Cultural Rights.

⁴⁸ HJ Steiner & P Alston, *International Human Rights in Context Law, Politics, Morals Text and Materials* (Oxford: Clarendon Press, 1996) p. 256 cited in

⁴⁹ *ibid.*

⁵⁰ [1981].

OKEKE: Pro-Justiciability Approach towards enforcing the Provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999

1. the policy of the state government violated their rights to participate in sectors of the economy other than the major sectors of the economy,⁵¹ a ‘non-justiciable’ section of the of the 1979 Constitution).
2. the responsibility of the Government to provide equal and adequate educational opportunities at all levels is restricted to government but does not preclude the plaintiffs (i.e. private sector) from providing educational services;⁵².
3. the policy violated their constitutionally guaranteed fundamental right to hold opinions, receive and impart ideas without interference.⁵³

In *Okogie’s case*, the Plaintiff applied for reference to the Court of Appeal. The Court of Appeal proceeded on the general note that Chapter II is not judicially enforceable, in other words the Chapter is non-justiciable. At the same time, the Court of Appeal held that the court shall not declare any government policy or legislation as invalid merely for non-conformity with Chapter II of the 1979 Constitution unless the alleged non-conformity, non-observance or non-application of Chapter II also infringes on constitutionally guaranteed fundamental rights contained in Chapter IV. The court found in favour of the Plaintiffs on the basis that sections 16(1)(c) and 18 of the 1979 Constitution guarantee their rights to participate in the economy and hindering them would amount to a violation of their fundamental right under section 36 of the Constitution - fundamental right to hold, receive and impart ideas.

What is instructively deducible from the foregoing premises and court decision is that there is a working nexus between the economic, social, and cultural benefits/rights contained in Chapter II of the Constitution of the Federal Republic of Nigeria 1999⁵⁴ and the fundamental rights contained in Chapter IV of the same Constitution. There is therefore no need in practice to cling to any disparity in such a way as to this working nexus. Even the Universal Declaration on Human Rights (UDHR) where the disparity seem to originate, has affirmed that human rights are declared to be ‘universal, indivisible, inter-dependent and interrelated’⁵⁵. Thus, this constitutional disparity in Nigeria need be resisted and or cast out. This has become particularly important and urgent because the civil and political rights cannot be meaningfully enjoyed in a state of economic and social deprivation. For example, where there is resources to make provisions for quality health facilities and services, or for healthy environment but the government fails to provide them, it could lead to death of the poor masses which in true light amounts to breach of the right to life.

The courts in Nigeria tend to hold that Chapter II is justiciable in instances where statutes based on actualizing Chapter II provisions are challenged. Thus, in *Attorney General of Ondo State v Attorney General of the Federation & Ors.*,⁵⁶ the Ondo State Government, on principle of federalism, challenged the constitutionality of the enactment of the Corrupt Practices and Other related Offences Act under which the Independent Corrupt Practices and Other Related Offences Commission was established to fight corruption throughout the country, including through prosecution of alleged offenders. Recall that section 15 (5) of the 1999 Constitution

⁵¹ See Constitution of the Federal Republic of Nigeria 1979, s. 16(1) (c).

⁵² See Constitution of the Federal Republic of Nigeria 1979, s. 18.

⁵³ See Constitution of the Federal Republic of Nigeria 1979, s. 36(1), an expressly identified justiciable section of the 1979 Constitution.

⁵⁴ Which Chapter II is *impari materia* with Chapter II of the Constitution of the Federal Republic of Nigeria 1979. In fact, Chapter II of the 1979 Constitution seem to have been transferred body, soul, and spirit into the 1999 Constitution.

⁵⁵ See paragraph 5 of the Vienna Declaration and Programme of Action, 1993.

⁵⁶ *ibid.*

which donates power to the state (the government) to abolish all forms of corrupt practices is contained under Chapter II of the Constitution. The Supreme Court, per Uwaifo, JSC, justified the enactment of the Act on the Fundamental Objectives and Directive Principles of State Policy, borrowing from the Indian jurisprudence, as follows:

[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. 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.

In a similar breath, in *AG Lagos State v. AG Federation*,⁵⁷ the Supreme Court held that the National Assembly was competent to enact the Federal Environmental Protection Agency Act for the protection of the environment, in furtherance of Chapter II.

The above two cases confirm an alternative route by which chapter II could be enforced in the face of the courts' general reluctance to enforce the Chapter.

6. Conclusion and Recommendations

Though, one cannot ignore the fact that the availability of resources plays an important role in a State's ability to protect and enforce socio-economic rights, it is the researcher's conclusion and position that the requirement of resources should not, of itself, necessarily mean that socio-economic rights cannot be justiciable. In Nigeria, the news of mind-boggling sums of money, national resources and the commonwealth of Nigeria and Nigerians looted, embezzled and stolen by people who occupied / occupy seats and corridors of power, vexatious claims of money being swallowed by snakes, taken by monkeys and eaten by termites, yet the leaders feign that there is no resources for implementation of the commendable provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999.

Section 6(6)(c) and section 13 of the Constitution of the Federal Republic of Nigeria 1999 together with Item 60(a) of the Exclusive Legislative List contained in Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999 appear to be contradictory in their respective provisions and or positions vis-à-vis the justiciability or judicial enforceability of the provisions of Chapter II of the Constitution. It is worrisome to us what the intendment of the ouster clause contained in section 6(6)(c) of the Constitution of the Federal Republic of Nigeria 1999 could be. If the duties/obligations which the Constitution pretends to impose on the government are in effect deliberately declared to be without any liability, then one may safely opine that the provisions, as magnificent/beautiful as they appear, are but for fancy or are deceptively inserted into the Constitution. An urgent review and alteration of the extant Constitution of Nigeria for the purpose of casting out every [seeming] contradiction and or judicial cowardice which hinders or obscures the justiciability of those commendable provisions contained in Chapter II of the said extant Constitution of Nigeria is hereby

⁵⁷ [2003] 12 NWLR (Pt. 833) 1 SC.

OKEKE: Pro-Justiciability Approach towards enforcing the Provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999

respectfully recommended. In the meantime, the Nigerian Courts should therefore rise up, take courage and put on the robe of judicial activism; *ut res magi valeat quam pereat*. The provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999 should be interpreted to give effect to the commendable provisions of that Chapter of the Constitution especially when the government fails to take reasonable measures toward a progressive implementation of the provisions. The courts should say nay to any interpretation or attitude, which would render the provisions of that Chapter of the Constitution a toothless bulldog or mere window dressing.