

REALIZING SOCIO-ECONOMIC RIGHTS IN NIGERIA AND THE JUSTICIABILITY QUESTION: LESSONS FROM SOUTH AFRICA AND INDIA

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ABSTRACT

The Constitution of Nigeria, 1999 provides for socio-economic rights in its Chapter II, but these rights are considered non-justiciable, and as such regarded as mere principles and goals of the Nigerian government. Over the year, Nigerian Judiciary has refused to uphold these rights, citing constitutional impediments as reasons for its incapacity. The Civil Society groups in Nigeria have not done enough to promote the actualization of this class of rights. Contrary to the conservative and lethargic attitude of the Nigerian courts, the Judiciary in South Africa and India, faced with similar circumstances, has taken the bull by the horn through judicial activism by enforcing these rights. This paper discusses the attitude of the Nigerian courts, legislature and Executive and the docility of the civil society all culminating in the present state of affairs in contradistinction to the judicial activism of the South African and Indian Courts. The paper argues that the incapacity of the Nigerian Courts has emboldened the executive to regard socio-economic rights as insignificant, leading to increased poverty amongst Nigerian populace. The paper suggests that the Nigerian Courts should emulate the strategies adopted by the South African and Indian Courts in interpretation of socio-economic rights.

Introduction

As the dust of the Second World War settled, there was an increasing desire by nations, through concerted efforts, to protect mankind from any form of global atrocities. Indeed, this development led to the establishment of the United Nations in 1945. The concept of human rights predates the United Nations (UN), but in the formal sense, it was the UN that introduced human rights in its present form to regulate the relation between individuals and the government of their state. The introduction of human rights into international law discourse through the Universal Declaration of Human Rights (UDHR) in 1948, led to the ideological divide between the West and the East in the negotiating process of the framework for the recognition and protection of human rights. It has been observed that this divide resulted in the creation of a

dichotomy of human rights along the existing Cold War groupings with the traditional West placing emphasis on civil and political rights and the East showing a preference for economic, social and cultural rights.¹

The dichotomy between various categories of human rights exists at both the domestic and the international levels of human rights discourse. This categorization has created an imaginary and indeed practical hierarchy of rights that places civil and political rights over socio-economic rights. This has resulted to the belief that civil and political rights are first generation and impose immediate but negative duty on the state while socio-economic rights are denounced as second generation without any certainty of actualization.

The inability of the Western and Eastern blocs to be unanimous led to the drafting and adoption of two set of rights documents: the International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR). It is to be noted that even at the stage of the creation of the two categories of rights, there appears to be different standards for their actualization. ICCPR were considered more important than ICESCR. States have repeatedly hid under nebulous phrases like “available resources” and “progressive realization” to justify their failure to implement the socio-economic rights.²

This dichotomy of interpretation at the international level has crept into the constitutional language of many nations. Most countries, especially developing ones have carried over this practice by recognising civil and political rights as immediately enforceable rights while economic, social and cultural rights are considered as promotional policy of state and tagged as non-justiciable fundamental objectives and directive principles of state policy. Nigeria, no doubt, falls into this category. Nigeria is a signatory to major international human rights treaties³ such

¹ Ebobrah Solomon T. (2007) “The Future of Economic, Social and Cultural Rights Litigation in Nigeria,” 1(2) *Review of Nigeria Law and Practice*. 108-124.

² Duru Onyekachi W. “Evolution of Constitutional Guarantee Socio-economic Rights under the Nigerian and South African Constitution”
www.academia.edu/6792712/EVOLUTION_OF_CONSTITUTIONAL_GUARANTEE_OF_SOCIO-ECONOMIC_RIGHTS_UNDER_THE_NIGERIAN_AND_SOUTH_AFRICAN_CONSTITUTIONS_A_CRITICAL_OVERVIEW. assessed on 17th November, 2016

³ Ajigboye Oyeniyi, (2014) “Realisation of Health Right in Nigeria: A Case for Judicial Activism,” 14(3) *Global Journals Inc.* USA. 23-34.

as the International Covenant on Civil and Political Rights (the “ICCPR”)⁴, the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”)⁵.

Indeed, the 1999 Constitution of the Federal Republic of Nigeria represent a classic example of national constitutions that distinguishes between these categories of rights. This practice is a carryover from the 1979 Constitution which is the first constitution that introduced socio-economic rights in Nigeria in its chapter II. There was a similar provision on socio-economic rights in the aborted 1989 Constitution. The socio-economic rights in the chapter II of the 1999 Constitution is however rendered impotent by virtue of section 6(6)(c) of the Constitution. No court has the power to determine any question on the provision chapter II.

At a time when many nations have continued to hold on to the historical disadvantage of socio-economic rights to justify their non-implementation and enforcement, some nations have blazed the trail by establishing an enforceable rights regime for socio-economic rights. It is noteworthy that while the judiciary in India has adopted expansive and derivative interpretations of the civil and political rights to breathe life into the socio-economic rights, South Africa appears more radical in its approach by enshrining socio-economic rights in its constitution, and more importantly making it enforceable rights through the courts.

This paper therefore examines the historical trajectory of socio-economic rights in Nigeria. The work notes that the Nigerian constitution and the lethargic attitude of its judiciary have collectively combined unenviably to incapacitate an enforceable regime of socio-economic rights. Using the experiences of South Africa and India, the paper argues for a paradigm shift in the attitude of the judiciary, and indeed all other organs of governments to make socio-economic rights enforceable and justiciable. The work underscores the point that it is imperative to employ all the available strategies to make socio-economic rights available to Nigerian citizens including legislative initiative, civil society advocacy, judicial activism and constitutional amendment.

⁴ Ratified on 1st October, 1993

⁵ Ratified on 1st October 1993

Conceptual Analysis

Justiciability

The term “Justiciability” has been defined by many authors. It has been understood to refer to issues that are capable of being subjected to the scrutiny of a court of law and other quasi-judicial entity⁶. A right is said to be justiciable when a judge can consider this right in a concrete set of circumstances and when this consideration can result in the further determination of this right’s significance⁷. The Black’s Law Dictionary has this to say on justiciability:

“The quality or state of being appropriate or suitable for adjudication by a court... Concept of justiciability has been developed to identify appropriate occasions for judicial action ...”⁸

On the other hand, non-justiciability connotes that the court is unable to adjudicate a matter, even when real interest are being infringed. It presupposes limitations on the organ of government entitled to interpret the law. It has been observed that the concept of non-justiciability evolved from the interpretation of Justice Frankfurter of the provision of the United States Constitution to the effect that it “shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion, and ... against domestic violence.” This provision was held to only impose a duty of peculiar political nature.

Specifically referring to Nigeria, it was argued further⁹ that the provisions of the constitution empowered the courts to determine all matters between individuals, government and its agencies and that these provisions do not excuse issues those that are political, economic or social and has nothing to do with non-justiciability theories.

⁶ Ajigboye Oyeniyi, (2014) “Realisation of Health Right in Nigeria: A Case for Judicial Activism,” 14(3) *Global Journals Inc.* (note 3)

⁷ Ikpeze Ogugua V. (2015) “Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development,” 5(18) *Developing Country Studies*. 49.

⁸ *Black’s Law Dictionary*, Eight Ed. 882.

⁹ *Ibid.*

Socio-Economic Rights

Civil and political rights have gained attraction more than any category of rights. It has however been argued that human rights is not restricted to any particular brand of rights but an “Amalgamating phrase” which captures both civil and political rights on one hand, and socio-economic rights on the other¹⁰. Along this line it has also been observed that socio-economic rights by its nature may be hidden in the more enforceable civil and political rights, and that it is possible to interpret civil and political rights in a manner that enhances the realisation of socio-economic rights.¹¹

Socio-economic rights are generally referred to as second generation rights and therefore, positive in nature as they require affirmative action by the government for its realisation. Typical examples of social, economic and cultural rights include the rights to education, work, social security, food, and an adequate standard of living. These rights are protected both under the Universal Declaration of Human Rights (UDHR) and the International Covenants on Economic Social and Cultural Rights (ICESCR).

In their joint work, Robertson and Merrill¹² argued that socio-economic rights are merely promotional which government pledges to secure progressively, having regard to their resources. Government exist to ensure that the largest component of the society have the best form of opportunities in terms of economic and social standing¹³. It has been observed that the challenges in the realisation of socio-economic rights are the vagueness of some of the norms and the obligations imposed on state parties which are merely promotional and their realisation is dependent on the available resources. This is in marked contrast to norms creating the civil and political rights which imposes on the state parties immediate and defined standards. The general nature of socio-economic rights has been succinctly captured in the following words:

¹⁰ Nwuta Samuel I. (2011-2012) “Legal Framework for the Protection of Socio-Economic Rights in Nigeria,” 10 *Nigerian Judicial Review*. 24.

¹¹ Ebobrah, Solomon T. (2007) “The Future of Economic, Social and Cultural Rights Litigation in Nigeria,” 1(2) *Review of Nigeria Law and Practice*, (note 1).

¹² Robertson, A. H. and Merrills, J. G, (1992) *Human Rights in the World*, edn. 230-232

¹³ Ibid.

Economic and social rights are objectives to be achieved progressively. Therefore a much longer period of time is contemplated for the fulfilment of the objectives. For civil and political rights, states ratifying the Covenant will immediately be subjected to an obligation to give effect to the rights. The enactment of legislation is generally sufficient to effect the enjoyment of civil and political rights, while legislation is not sufficient for the attainment of socio-economic rights. Very much depends on the economic condition of the State. The machinery of complaint, the Committee on Human Rights envisaged for civil and political rights is not a suitable body for dealing with economic and social rights, since they can only be achieved progressively and since the obligation of members with respect to them are not as precise as those for the other set of rights.¹⁴

Nyerere¹⁵ however observed that the continued emphasis on civil and political rights will be meaningless without the realisation of socio-economic rights. He alluded to the life of a person who cannot afford medical treatment when he is sick. This was re-echoed by Justice Bhagwati of Indian Supreme Court:

“To the large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long, unbroken story of want and destitution, notions of freedom and liberation, though representing some of the most cherished values of a free society would sound as empty words bandied about in the drawing rooms of the rich and well-to-do, and the only solution for making these rights meaningful to them was

¹⁴ See Roosevelt, General Assembly Official Records, 6th Session 1951-2, Plenary Session, p. 505

¹⁵ Nyerere Julius, “Stability in Africa”, An address presented at the University of Toronto, Canada in 1969, reproduced in *Africa Contemporary Record 2* (1969 - 1970) pp. 30-31, cited by J.O. Ihonvbere in his article, “Underdevelopment and Human Rights in Africa” in Shepherd, G. W. Jr. (ed.) *Emerging Human Rights: The African Political Economy Context* (New York: Greenwood Press, 1990) p. 56.

to re-make the material conditions and use in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured”¹⁶.

The real issue is not whether socio-economic rights are second-rated rights; it is the fact that governments have continued to relegate it to the background. This is surprising considering the fact that it is the duty of every responsible government to provide the basic necessities of life to its citizenry. It is in this light that this paper shall construe the status of socio-economic rights in Nigeria.

Socio-Economic Rights in Nigeria

As we have noted earlier, Nigeria is a signatory to the Universal Declaration on Human Rights and the convention establishing socio-economic rights: International Covenant on Economic Social and Cultural Rights (ICESCR). Major constitutional developments prior to the 1979 Constitution have focussed extensively on the traditional civil and political rights. Indeed, socio-economic rights were not accorded any constitutional relevance. It was not until the 1979 Constitution came into force that socio-economic rights gained a semblance of currency¹⁷. This major turnaround in the annals of the country’s constitutional development was greatly influenced by an emerging global trend of socio-economic rights recognition, especially in India.

The 1979 Constitution of the second republic introduced for the first time a legal regime for the recognition of socio-economic rights. This was considered a clear departure from the previous constitutional developments which failed to provide for socio-economic rights. Specifically, Chapter II of the 1979 Constitution provided for socio-economic rights styled as “Fundamental Objectives and Directive Principles of State Policy”. These rights, to a large extent, were a “copy and paste” of the International Covenant on Economic Social and Cultural Rights (ICESCR). These rights were in addition to the Fundamental rights contained in Chapter IV of the Constitution. The 1989 Constitution of the aborted third republic contained provisions on socio-economic rights similar to the 1979 Constitution.

¹⁶ *Minerva Mills Ltd v Union of India* (1980) SC.

¹⁷ The provisions were contained in Chapter II of the 1979 Constitution on the introduction of the presidential form of government fashioned in the garb of the government of United States of America.

It is instructive to note that the provisions came earlier in time before the fundamental human rights which in our view is an acknowledgment of the importance attached to these set of rights and one may dare say that it is in realisation of the fact that the drafters of the Constitution believed that fundamental rights will be hollow, abstract and meaningless unless socio-economic rights were provided as a precursor of fundamental rights. It is indeed a major role of government of Nigeria to provide the basic necessities of life for the citizenry and that it is the only way that the citizens can actually enjoy the rights provided under Chapter IV.

The 1999 Constitution continued the same tradition of the 1979 Constitution by replicating the same Fundamental Objectives and Directives Principles of State Policy in its Chapter II, spanning sections 13-24. The provisions represent set of objectives which are social, economic, educational and cultural as well as such other obligations of the state.

It has been observed that the need to include socio-economic rights in the Constitution as a fallout of some factors among which are “heterogeneity of the society, the increasing gap between the rich and the poor, the growing cleavage between the social groups, all of which combine to confuse the nation and bedevil the concerted march to orderly progress”.¹⁸ In what has been considered as a Constitutional tragedy, section 6(6)(c) of the 1999 Constitution declared the provisions of Chapter II non-justiciable. The section provides that the judicial powers vested in the court:

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

It has been noted that this has resulted in the “dislocation of the foundation of the whole edifice of the Nigerian nation-state”¹⁹. This position is unassailable considering the importance of these

¹⁸ Duru Onyekachi W. “Evolution of Constitutional Guarantee Socio-economic Rights under the Nigerian and South African Constitution”, (note 2)

¹⁹ Nwuta Samuel I. (2011-2012) “Legal Framework for the Protection of Socio-Economic Rights in Nigeria” 10 Nigerian Judicial Review. 22-48. 14

rights to the Nigerian people. Indeed, section 6(6)(c) of the constitution has ultimately dragged the country back to Pre-1979 era, where socio-economic rights were not reckoned with.

Instructively, the situation is not all that bad as the provision of item 60(a) of the Exclusive list gives the National Assembly the power to make laws to promote and enforce the observance of the socio-economic rights as contained in Chapter II of the Constitution. The effect of this is that the parliament can make the provisions of chapter II justiciable through legislative enactments. It has however been observed that the *“duty and responsibility on all organs of government is limited to the extent that the judiciary cannot enforce any of the provisions, and thus to that extent, the executive do not necessarily have to comply with any of the provisions unless and until the legislature have enacted specific laws for enforcement”*²⁰. This position cannot be faulted at all. Decisions of the courts have lent credence to this argument.

It has been pointed out that the combined effect of section 4(2) of the 1999 Constitution and item 60 (a) of the Exclusive Legislative list has constituted an exception to the non-justiciability of Chapter II of the Constitution. Along this proposition, the Supreme Court in the case of A.G. Ondo State V. A.G. Federation²¹ held that the National Assembly has power to make laws for the observance of Chapter II. The question however is how far are the courts employing these provisions to determine cases bordering on socio-economic rights?

Judiciary and the Justiciability Debate in Nigeria

The powers of the court in Nigeria to determine any question as provided by section 6(6)(b) of the Constitution is circumscribed by section 6(6)(c) of the same Constitution with respect to Chapter II. This perhaps explains the reasons why the courts have been exercising restraint in determining issues relating to Chapter II of the Constitution. However, the emerging global trends, especially in India and South Africa have shown that the judiciary can expand the

²⁰ Duru Onyekachi W. “Evolution of Constitutional Guarantee Socio-economic Rights under the Nigerian and South African Constitution” (note 2)

²¹ A.G Ondo State v A.G Federation, (2002) 9 NWLR (Pt 772) 222

frontiers of socio-economic rights. The lethargic attitude of the Nigerian courts came to the fore in the famous case of *Okogie V. A.G. Lagos State*²². In this case, the court after considering the facts of the case came to the following conclusion:

While Section 13 ... makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, Section 6(6)(c) of the same Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles. It is clear that section 13 has not made chapter II justiciable.

This case has remained the position of the law up to this present moment. Scholars are however divided on the justiciability of Chapter II of the 1999 Constitution. On one side is the Anti-justiciability school of thought who argued that the provisions of chapter II are a mere collection of manifesto of aims and aspirations, a moral homily and toothless bulldogs and called for its elimination or in the alternative to be retained as a moral guide. Their position is premised on the fact that the Constitution is a legal document whose concern is stating the supreme rules of law, and not opinions, aspirations, directives and policies.²³ The Pro-justiciability school of thought were of the view that the socio-economic rights as contained in chapter II should be retained but that the courts should be proactive in its enforcement. We are in agreement with this position because a constitution is both a political, legal and a moral document.

On the judicial scale, the principle in *Okogie's* case is the law subject to the provision of item 60(a) of the constitution. It has been argued that the court ought to have adopted an innovative way of interpreting the provisions of Chapter II in a way that would confer justiciable rights²⁴. Another interesting finding in *Okogie's* case is the court's decision that the provisions of Chapter II are subsidiary to that of Chapter IV of the same Constitution. This therefore means that in the event of any conflict between the two chapters, chapter II would prevail. Our view is that such an ambiguous proposition flies in the face of the emerging global standards with respect to the

²² *Okogie v. A.G. Lagos State* (1981) 2 NCLR 337

²³ Abiola Ojo, (1974) "The Objectives and Directives must be Expunged," Sunday Times, 24 October.

²⁴ Nwuta Samuel I. "Legal Framework for the Protection of Socio-Economic Rights in Nigeria" (2011-2012) 10 *Nigerian Judicial Review*. Note 21

enviable position of socio-economic rights. Along this line, It has been observed that such “ambiguity can lead to an erosion of respect for the authority of the constitution as a whole, and, potentially, weaker enforcement of civil and political rights than might otherwise have been achievable.”

The lack of political will by States to provide and enforce socio-economic rights is, in most cases, premised on the status of those rights. There appears to be a wrong perception of socio-economic rights. States have, over time, considered civil and socio-economic rights as imposing immediate duty, while socio-economic rights as merely achievable on the basis of progressive realization. This position is grossly unjustifiable, and in fact we agree with the submission of Nwuta that the realization of the two set of rights must be pursued contemporaneously because they are not mutually exclusive but indivisible, interrelated and inter-dependent human needs which are paramount to human survival. The point here is that socio-economic rights are no less valuable than civil and political rights, and the two are necessary for human existence. The right to life would be meaningless in a society where the people have no right to clean and decent environment. Indeed, of what use is the right to personal liberty when the vast majority of the people are living in abject poverty? Justice Chandrachud, J of the Indian Supreme Court captured our position in the following words:

Our decision on this vexed question must depend on the postulates of our Constitution, which aims at bringing about a synthesis between Fundamental Rights and the Directives of State Policy, by giving to the former a place of pride and the latter, a place of permanence. Together not individually, they know the core of the Constitution. Together, not individually they constitute its true conscience. If the State fails to create conditions in which the Fundamental Freedom could be enjoyed by all, the freedom of the many will be at the mercy of the freedom of the few, and then all freedom will vanish. In

order, therefore, to preserve their freedom, the privileged few must part with a portion of it²⁵.

The questions that beg for answers are: What is the purpose of socio-economic rights? Are they meant to improve the standards of living of the people or demean it? Clearly, a look at these rights would reveal that they constitute basic necessities of human existence. Food, education, housing, shelter, jobs are irreducible minimum requirements that promote human survival. In fact, we are of the view that the government should be at the vanguard of actualizing those rights because they form the very basis of their legitimacy. Curiously, socio-economic rights form the campaign points of most politicians during electioneering period. It is on the basis of these promises that the electorates voted for them. Now, having secured power on the back of socio-economic rights, it smacks of deceit and dishonesty for government to turn volte-face on their promises. And this explains why we pitch our tent with Uwais when he noted that both civil and political rights and socio-economic rights form a single organic unit with the aim of liberating the citizens from the unjustified restrictions from the States, and provide liberty to all²⁶.

The judiciary in Nigeria appears to have done so little to make the realization of the rights justiciable. The usual reference is to Section 6(6)(c) of the Constitution and it appears little is made use of other provisions of the Constitution that may even assist in coming into a different conclusion. In India, for instance, the court has invoked the constitutional provision of right to life to give teeth to other provisions that were generally seen as non-justiciable. In the case of *Unnikrishnan J.P. v. State of Andhra Pradesh*²⁷, the Indian court invoked the right to life to interpret right to education. A similar case was presented before the Nigerian Court in the case of *Badejo v. Federal Ministry of Education*²⁸. The applicant in this case challenged an alleged

²⁵ Kesavenanda Barati v. State of Kerala AIR (1973) SC at 1970

²⁶ Uwais Muhammad. (2007) “Fundamental Objectives and Directive Principles of State Policy: Possibilities and Prospects” in O. Okpara (ed); *Human Rights Law and Practice in Nigeria*, (Vol. 1) (Abakaliki: Publican International Nig. Ltd. 266.

²⁷ (1993) 1 SSC. 645.

²⁸ (1990) 4 NWLR (Pt. 143) 354.

discriminatory conduct of the respondent, claiming that she was denied admission into a federal college on the grounds of her state of origin. The court however dismissed her application on the grounds that the applicant lacked *locus standi*. Though the Court of Appeal set aside the decision of the trial court and held that the applicant had the *locus standi*, it nevertheless dismissed the appeal because the relief has been overtaken by events. In what is considered by many as a commendable decision, the court in the case of *Gbemre v. Shell Petroleum Development Company of Nigeria & 2 Ors*²⁹ declared that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter. The basis of the court's decision is that an endangered environment constitutes a threat to the fundamental right to life and dignity of human person and as such protecting the environment, which is part of socio-economic right, is the most potent means to securing the right to life and dignity. Apparently, this judgment drew the ire of the government who made spirited attempt to frustrate its execution. The judge who delivered the judgment was not only transferred to another division, the casefile of the matter mysteriously disappeared. These cases pictured the uncertainty and unpredictability of the attitude of the Nigerian courts and indeed the government towards socio-economic rights.

The challenge is compounded by the litigating public and the counsel representing them as they are in the best position to provide the authorities on which the judiciary will determine the matters. Thus, there is need for the counsel representing the parties to properly marshal argument that will enable the judiciary to be proactive in its approach on the matters touching and concerning socio-economic rights in Nigeria. The judiciary too cannot afford to be complacent on this issue as they can also take the driver's seat through their decisions which are expected to be pragmatic and give life to the availability of socio-economic rights to the citizens. This is the approach in other jurisdictions and this is the expectation of an average Nigerian.

²⁹ *Jonab Gbemre v. Shell Petroleum Development Company of Nigeria & 2 ors*. Unreported Suit No. FHC/B/CS/53/05 delivered on 14th November, 2005.

Socio-Economic Rights in South Africa

What is today known as socio-economic rights gained foothold in South Africa when the 1996 Constitution came into force. Previous Constitutions of the South Africa paid little attention to human rights generally let alone socio-economic rights. The coming into force of the 1996 constitution, with its recognition of socio-economic rights, was considered as a revolutionary step in the annals of the of South Africa's constitutional developments. It is more interesting to realize this milestone was achieved even without the ratification of the ICESCR, the global instrument regulating socio-economic rights.³⁰

The South African Constitution contains a Bill of rights, detailing both the traditional civil and political rights and socio-economic rights. These are rights entitlements covering shelter, job, health care, food and water. Specifically, section 24 provides for a right to a safe and healthy environment. Section 25(5) guarantees property rights. Section 26 provides everyone access to adequate housing. Access to health care facilities, food, water and social security are guaranteed under section 27. Section 28(1)(c) covers children's' rights to shelter and health care services. Brand observed that these rights by their nature can be categorized into three. While section 26 and 27 are termed 'qualified socio-economic rights', section 28(1)(c), 29(1)(a) and 35(2)(e) are considered as 'basic socio-economic rights'. The third group is section 26(3) and 27(3) which describe the elements of the two sections.

Of all these rights, it is apparent that the provisions of section 26 and 27 of the South African Constitution constitute the traditional social economic rights. The reason for this is not far-fetched; it is because they guarantee everyone the right of access not only to important components of an adequate standard of living but also to things that are ordinarily regarded as basic amenities or necessities of life. No doubt, by establishing an enforceable regime of socio-economic rights through constitutional provision, South Africa has become an important reference point among jurisdictions of the world. The benefit of this innovation is startling. Indeed as Brand noted,

³⁰ Brand Daniel, 'Introduction to Socio-Economic Rights in the South African Constitution' in D Brand and C Heyns (eds) *Socio-Economic Rights in South Africa* (PULP, 2005).

‘The Constitution enables the enforcement of socio-economic rights, creating avenues of redress through which complaints that the state or others have failed in their constitutional duties can be determined and constitutional duties can be enforced. In this sense, constitutional socio-economic rights operate pro-actively. They are translated into concrete legal entitlements that can be enforced against the state and society by the poor and otherwise marginalized to ensure that appropriate attention is given to their plight³¹.

It is important to add that these rights as enshrined in the South African Constitution are made justiciable, thereby conferring power on the courts to determine any question with regard to those rights. This is in mark contrast with the Nigerian Constitution which, though provides for a socio-economic rights regime, but fundamentally failed to make them justiciable rights.

Is the non-justiciability of socio-economic rights under the Nigerian constitution enough reason why the South African experience cannot serve as a guide? We think not because Nigeria is a signatory to the global covenant which has even moved Nigeria away from the position of South Africa that was not at the time of its 1996 constitutional arrangement was not a signatory. It is our position that Nigeria is even in a more comfortable position than South Africa to give life to the letter and spirit of CSER as a global player. The Covenant makes the socio-economic rights available subject to availability of resources. The state of affairs is not using resources as escape route but rather it is a constitutional impediment that is used as justification.

It has been stressed that:

The inclusion of social and economic rights in the Bill of Rights is a clear articulation that democracy is as much about the right to vote, and of free expression and of association as it is about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

³¹ Ibid.

Instructively, the South African Constitutional Court, drawing mandate from these constitutional provisions, has been courageously impressive in the interpretation of socio-economic rights. In some of the cases decided, the constitutional court has declared that socio-economic rights are no less significant than civil and political rights. Indeed, section 7(2) of the South African Constitution placed a duty on the state to ‘promote, protect and fulfill the rights in the Bill of Rights.

The *Grootboom* case³² is one of the leading authorities on the attitude of South African courts to the enforcement of socio-economic rights. In this case, the judiciary underscored the importance of socio-economic rights by affirming that all the rights are interrelated and inter-connected, and that there is a duty on the state to take positive action to meet the needs of those living in deplorable condition of poverty. Yakoob, J. captured it in the following words:

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

To demonstrate the resolve of the court to protect socio-economic rights even at the extreme, Yakoob, J added:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress

³² Government of the Republic of South Africa v. Grootboom & Ors. 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)

however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.

This decision has demonstrated the willingness and courage of the Constitutional Courts to enforce socio-economic rights. No doubt, the Grootboom case is a precedent setting on the justiciability of socio-economic rights in South Africa and a path to tread by other courts in Africa, especially Nigeria. Subsequent cases have been decided in the light of the jurisprudence of Grootboom case. In yet another celebrated case³³, a non-governmental organization, Treatment Action Campaign (TAC), in its efforts to force government to provide anti-retroviral drugs for the combat of HIV/AIDS, specifically demanded that nevirapine, a drug that could reduce by half the rate of mother-to-child transmission of HIV, be freely distributed to women infected with the virus. The Court held that the state's policy and measures in preventing mother-to-child transmission of HIV (which restricted the availability of the drugs) was a breach of the right of access to health care services under section 27 (1) of the Constitution and ordered the state to provide the required medication and remedy its programme. The court further held that the State's policy of not making nevirapine available at hospitals and clinics, other than for research and training, was unreasonable.³⁴

This case is important because it showed that the government's continued reliance on some nebulous concepts of "available resources" and "progressive realization" to justify their lack of provision of socio-economic rights cannot hold in the face of an active judicial enforcement.³⁵ There is a downside to the South African experience. The constitutional court has been accused of double standards in interpreting socio-economic rights and adopting a deferential approach.³⁶ It has been criticized of applying lower standard in their review of socio-economic rights,

³³ Minister of Health & Ors. v. Treatment Action Campaign & Ors. 2002 (5) SA 703 (CC), (2002) 45 WRN 94

³⁴ Ibid.

³⁵ Verma Shivani, (2005) "Justiciability of Economic, Social and Cultural Rights Relevant Case Law," *International Council of Human Rights Policy, Geneva*. 16

³⁶ McLean K, (2009) "*Constitutional Deference, Courts and Socio-Economic Rights in South Africa*," Pretoria University Law Press) 211.

leading to weak remedies and creating problem for the enforcement of its judgments. It has also been argued that the court's failure to adopt a minimum content approach in interpreting socio-economic rights is a justification for the court preference for the reasonableness approach because it leaves the court with some measures of discretion.³⁷ We are of the view that these criticisms notwithstanding, South African Constitutional court has demonstrated its willingness to hold state accountable to its socio-economic responsibilities which have become a model in many jurisdictions.

The Indian Experience

Recognition of socio-economic rights in India followed similar trajectory of most countries in the world. The 1956 Constitution of India creates a regime of two classes of rights in the same fashion as the international instruments regulating civil and political rights and socio-economic rights. Part III of the Constitution provides for the fundamental rights such as right to life, right to equality, right to freedom of speech and expression, while Part IV of the constitution houses typical socio-economic rights styled "Directive Principles of State Policies" like right to work, right to health, right to education and others. Instructively, Article 37 of the Indian Constitution declares that those rights under Directive Principles of State policies are not enforceable in a court. Article 37 provides these rights:

Shall not be enforceable in any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

It could be discerned that the purport of Article 37 is to incapacitate the judiciary in determining any question on socio-economic rights, thereby making those rights non-justiciable. Indeed, the courts appeared helpless in deciding earliest cases³⁸ on socio-economic rights. In these cases, the court declared that when there is a conflict between fundamental rights and socio-economic

³⁷ Brand Daniel, (2003) 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights For?"' in H Botha et al (eds) *Rights and Democracy in a Transformative Constitution*, Sun Press, Stellenbosch. 55.

³⁸ State of Madras v Champakam Dorairajan, AIR 1951 SC 525, In re Keral Education Bill AIR 1958 SC 956, Deep Chand v State of Uttar Pradesh, AIR 1959 SC 648, UPSE Board v Hari, AIR 1979 SC 65

rights, fundamental rights stand supreme, and that the breach of socio-economic rights does not constitute a violation of any law that can guarantee judicial remedies. This development created a general dissatisfaction among litigants who felt that the courts were not doing much to justify their position as the last hope of the common man and the guardian of the Constitution.

In what appeared to be a major jurisprudential turnaround, the courts, especially Supreme Court, in subsequent cases³⁹ declared that both fundamental rights and socio-economic rights are complementary, interrelated and indivisible. This ground breaking decision marked an important watershed, leading to a creative judicial interpretation of socio-economic rights inspired by a robust judicial activism. In fact, in continuation of its activism the court held that, in deserving situations, fundamental rights should be subordinate to socio-economic rights.⁴⁰ This fundamental departure has distinguished the Supreme Court from its peers in other jurisdictions.

The Indian judiciary was able to achieve this milestone through the adoption of some creative and innovative strategies in their interpretative jurisdiction of socio-economic rights. Concepts like judicial review, expanded interpretation of right to life,⁴¹ Public Interest Litigations (PIL)⁴² have come to define the versatility of Supreme Court of India. The Supreme Constitutional Court has invoked Article 21 (the right to life) of the Indian Constitution to enforce socio-economic rights. It is to be noted that “the expanded notion of the right to life enabled the courts, in its PIL jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of ESCRs.”⁴³ It has been observed that the power of the court to review the actions

³⁹ State of Kerala v NM Thomas, AIR 1976 SC 496, Manhegowda v State of Karnataka AIR 1984 SC 1151, Lingappa v State of Maharashtra AIR 1985 SC 389, Laxmi Kant v Union of India, AIR 1987 SC 232

⁴⁰ State of Kerala v N.M. Thomas (1976) 2SCC 310 at 367

⁴¹ In Paschim Banga Khet Mazdoor Samaty v. State of Bengal (1996) SSC. 37., the Supreme Court declared the right to health a fundamental right and order that the farmer, whose health had deteriorated after a fall from a train, be compensated by the West Bengal Government, it also directed the government to formulate a detailed blue-print for primary health care with particular reference to the treatment of patients during an emergency. Also, in Unnikrishnan J.P. v. State of Andhra Pradesh, the court held that the right to education is implicit and flows from the right to life guaranteed under Article 21.

⁴² Some of the Public Interest Litigations cases are: *Consumer Education and Research Centre v. Union of India*; *Paschim Banga Khet Mazdoor Samaty v. State of Bengal*.

⁴³ Verma Shivani, (2005) “Justiciability of Economic Social and cultural Rights relevant case law” *International Council of Human Rights Policy, Geneva*. 16

of other organs of state has enabled the court to declare as unconstitutional acts that violate the law, including those infringing on socio-economic rights.⁴⁴ In fact, in *Maneka Gandhi's* case,⁴⁵ the court held that any procedure prescribed for the derogation from any of the rights must not be arbitrary, unfair and unreasonable. It has noted that Public Interest Litigations have assumed a remarkable trend in India, especially when socio-economic rights are involved, and that the courts have shattered the wall of locus standi, procedural technicalities and jurisdictional competence in favour of a liberalized regime. The judiciary in India has been able to influence the policies of government through their judgments on socio-economic rights. Of particular interest is the right to education. This right came to fruition as a result of the decision of the court in the case of *Unnikrishnan J.P. v. State of Andhra Pradesh*⁴⁶ where the court invoked the right to life to interpret right to education. The State responded to this declaration nine years later by inserting, through the 93rd amendment to Constitution, Article 21-A which provides for the fundamental right to education for children between the ages of six and fourteen.⁴⁷ This is how judicial activism can foster socio-economic development in a country.

Like every rose, the Indian perspective has its thorn. The courts have been criticized on the basis that its decisions with respect to right to work, right to shelter have not been satisfactory as it appears the court is adopting a deferential approach on these issues. The court has also drawn the ire of some writers who are of the view that the judiciary has violated the principle of separation of powers by giving judgments that tend to formulate policies for the government.⁴⁸ However, when one considers the feat achieved by the Indian judiciary, in spite of the unfavourable constitutional climate, it is less likely that these criticisms would be justified.

⁴⁴ Muralidhar S, "An Overview of the Experience of the Indian Judiciary First South Asian Regional Judicial Colloquium on Access to Justice", New Delhi, 1-3 November, 2002. Available online at <http://www.ielrc.org/content/w0202.pdf> (Accessed on 19th November, 2016)

⁴⁵ *Maneka Gandhi v. Union of India* and Another 1978-(001)-SCC- 0248-SC, 1978-(002)-SCR-0621-SC, 1978-AIR-0597-SC

⁴⁶ 1 SSC. 644

⁴⁷ Verma Shivani, "Justiciability of Economic Social and cultural Rights relevant case law" 2005 (International Council of Human Rights Policy, Geneva). 17.

⁴⁸ Ghai Y & Cottrell J. (2004) "The Role of the Court in Implementing Economic, Social and Cultural Rights," in Ghai and Cottrell, eds., *Economic, Social and Cultural Rights in Practice – The Role of Judges in Implementing Economic, Social and Cultural Rights*, Interights, London. pp.58-89

Comparative Analysis and Lessons for Nigeria

The story of socio-economic rights in South Africa, India and Nigeria has shown that the countries approach those rights from different perspectives. We shall analyse these differences based on its constitutional provisions, nature of justiciability and the attitude of the judiciary in those countries, and what Nigeria can learn from the two nations.

Constitutional Provision

Our analysis has shown that the three countries provide for rights that have been generally considered as socio-economic rights in their constitution. While sections 26 and 27 of the South African Constitution provide socio-economic rights, Part IV of the Indian constitution contains provisions of those rights. In Nigeria, chapter II of the 1999 constitution houses socio-economic rights. The difference appears to be that unlike the constitution of India and Nigeria, where their constitutions separate fundamental rights from socio-economic rights, South African constitution makes no such distinction. Both civil and political rights and socio-economic rights are provided in the same portion under the Bill of Rights of the constitution. Nigeria can learn from the South African experience by amending the constitution to provide for a Bill of Rights, comprising both civil and political rights and socio-economic rights without any distinction. We believe this would create a sense of equality between those rights. While there is no justification for non-justiciability of socio-economic rights, it is important to stress that the amendment could even be limited to section 6(6)(c) of the constitution to make the rights truly and effectively available for the citizens.

Justiciability

Also while the constitutions of both India and Nigeria declare that socio-economic rights as non-justiciable, the South African constitution makes no such declaration, and in fact it places a duty on the organs of the states to protect, promote and fulfill the rights under the Bill of Rights without distinction. The South African constitution presents a model for Nigeria to adopt. We therefore, call for a constitutional amendment along this line. It is in the light of expansive constitutional interpretation placed on right to life that it is easy to appreciate that right to life

will become hollow and meaningless without right to health, education and employment as they are factors that can actually shorten human life.

Attitude of the Judiciary

It is to be noted that of the three jurisdictions, the courts in India and South Africa have been very pro-active. Though South African judiciary has a conducive constitutional climate for a justiciable socio-economic rights, Indian courts have been most creative and courageous in interpreting those rights adopting some innovative strategies in the absence of a justiciable legal order. Nigeria obviously does not come close to the two jurisdictions. The courts in Nigeria have failed to give teeth to socio-economic rights. The dearth of proactive judgments have largely accounted for the lack of interest to institute actions on socio-economic rights in Nigeria. Nigeria courts are no more in a precarious situation than their Indian counterpart, but the difference lies in the lack of courage and creativity to break the artificial wall of legal technicalities which has become the bane of Nigerian courts.

The Indian and South African experiences present model for Nigerian judiciary. The absence of a justiciable climate of socio-economic rights in Nigeria should spur the judiciary to find a way round this obstacle by adopting some creative strategies for the enforcement of these rights as done by India and South Africa. Specifically, the Nigerian Judiciary can learn from their Indian counterpart in the following ways:

- i. Adopting a very effective process of judicial review of government policies with regards to socio-economic rights;
- ii. Appreciating the indivisibility and interconnectivity of socio-economic rights and civil and political rights;
- iii. Interpreting right to life and personal liberty in an expansive and derivative nature in order to accommodate other equally important socio-economic rights;

- iv. Establishing a judicial climate that would encourage Public Interest Litigation by individuals and groups. This would imply the relaxation of the doctrine of locus standi and legal technicalities.
- v. Applying the minimum content rights principle to the enforcement of socio-economic rights. This would serve as a yardstick for the courts to judge the level of seriousness to socio-economic rights.

Conclusion

It has been shown that the major challenge of socio-economic rights is traceable to its historical foundation. It has always been seen as a class of rights not imposing immediate enforceable duties on the state and as we have noted, this has found its way into the Constitutions of many nations. The laws creating socio-economic rights appear permissive of lack of enforceability as it is clothed in resource availability garb. One of the ways to raise the bar on socio-economic rights is to amend the laws in a way that it will make it compulsory as we have the civil and political rights. It is now beyond question that the political class especially in Africa will always hide under resource challenge to deny citizens of these rights.

The 1999 Constitution of Nigeria has adopted this practice to the detriment of socio-economic rights. We have shown that this constitutional impairment is not a basis for the courts to remain docile in the face of the violation of socio-economic rights. The Indian and South African experiences have shown that with the right attitude, the judiciary can devise effective strategies to surmount a constitutionally imposed incapacity. In the same vein, legislative intervention is an imperative in the sense that laws may be put in place to strengthen the judiciary and make socio-economic rights available to Nigerians.

The Nigerian judiciary must also shun the reactionary trend and engage in judicial activism as it is in other jurisdictions, consider that this is the only way the political class can be pushed to make these rights available to the citizens. It is now time for the judiciary to make the availability of the rights equal to those of civil and political rights otherwise the civil and political rights may become ineffective and ineffectual.

CASES CITED

Minerva Mills Ltd v Union of India, SC 1980.

A.G Ondo State v A.G Federation, 9 (Pt 772) 222. NWLR 2002.

Okogie v. A.G. Lagos State 2 NCLR 337. 1981.

Kesavenanda Barati v. State of Kerala AIR (1973) SC at 1970.

Unnikrishnan J.P. v. State of Andhra Pradesh. 1 SSC. 645.

Badejo v. Federal Ministry of Education (1990) 4 NWLR (Pt. 143) 354.

Jonab Gbemre v. Shell Petroleum Development Company of Nigeria & 2 ors. Unreported Suit No. FHC/B/CS/53/05.

Government of the Republic of South Africa v. Grootboom & Ors. 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

Minister of Health & Ors. v. Treatment Action Campaign & Ors. 2002 (5) SA 703 (CC), (2002) 45 WRN 94

State of Madras v Champakam Dorairajan, AIR 1951 SC 525.

Deep Chand v State of Uttar Pradesh, AIR 1959 SC 648.

State of Kerala v NM Thomas, AIR 1976 SC 496.

Manchegowda v State of Karnataka AIR 1984 SC 1151.

Lingappa v State of Maharashtra AIR 1985 SC 389

Paschim Banga Khet Mazdoor Samaty v. State of Bengal (996) SSC. 37

Laxmi Kant v Union of India, AIR 1987 SC 232