

THE NIGERIAN JURIDICAL REVIEW

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LEGAL FRAMEWORK FOR THE PROTECTION OF SOCIO-ECONOMIC RIGHTS IN NIGERIA*

Abstract

Global political and social realities dictate the imperative of a holistic intellectual and practical embrace of human rights. The prevailing approach of abandoning the specious dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other hand, creates many heady legal questions. This paper examines the challenge of the justiciability of the latter category of rights within the frameworks of their statutory and constitutional protection in Nigeria. The paper argues that the courts should utilize their interpretative jurisdiction to expound the respect and protection bound obligations of the State towards the protection of socio-economic rights.

1. Introduction

One of the most tendentious issues in human rights discourse is the potency of socio-economic and cultural rights. The debate in respect of which so much intellectual stamina has been applied revolves on the twin questions as to the status of socio-economic rights as rights and the justiciability or enforcement of such rights. In other words, there is the recurring question of whether socio-economic rights are rights as known to a lawyer bred in the positivist tradition, the breach of which will attract legal repercussions. The problem of status entwines with the more intractable question of whether the courts can entertain a complaint of a breach of such right.

What seems to innervate this debate is the apparent lack of precision with which national and international instruments provide for social and economic rights in contradistinction to civil and political rights, notwithstanding the complementarity of these sets of rights, theoretically and practically. The vagueness of these rights has created interpretative challenges of immense proportions for the courts. Thus when we talk about the right to education or the right to adequate housing they are erroneously understood as imposing an immediate obligations on the State to provide free education for all or to provide houses for every citizen.

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Again, a critical issue in human rights discourse in Nigeria is the efficacy of socio-economic rights guaranteed in both the African Charter on Human and Peoples' Rights (AFCHPR), and the Fundamental Objectives and Directive Principles of State Policy enshrined in Chapter II of the 1999 Constitution (as amended) in relation to section 6(6)(c) of the same Constitution. The section impliedly and expressly denies the justiciability of the socio-economic rights provided for in the Charter and Chapter II, respectively. Put differently, there is the crucial question whether the Charter which has been domesticated in Nigeria¹ provides the platform for the justiciability of the socio-economic rights in Nigeria.

In this paper, we shall attempt to present a synoptic overview of efforts at the international level for the protection of economic, social and cultural rights, and then interrogate the legal and constitutional frameworks for their protection under Nigerian law and how their realization can be achieved through the courts.

2. Nature of Socio-Economic Rights

Without intending to enter into the definitional quandary of human rights,² suffice it to say that, for our purposes in this paper, human rights are basically rights which inheres in every human person by virtue of common humanity. In this connection, human rights are both natural and universal. This assertion receives better clarification when we draw a distinction between human rights and legal rights.³ Human rights have their source in natural law and therefore, they are not the gift of any authority or government. However, human rights may be confirmed or crystallized by

¹ The Charter is domesticated in Nigeria by virtue of the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria, 1990. It is now Cap. A9, Laws of the Federation of Nigeria, 2004.

² Such definitions have always reflected ideological, emotive and intellectual prejudices of the definers, and have proved to be either too wide or too narrow. For some definitions see M. Cranston, *What are Human Rights?* (London: The Brodley Head, 1973); F. E. Dowrick, (ed.) *Human Rights Problems, Prospects and Texts* (Westmead UK: Saxon House, 1979) pp. 8-9; Osita Eze, *Human Rights in Africa: Selected Problems* (Lagos: Macmillan, 1984), p. 5

³ J. Hausermann, "The Realization and Implementation of Economic, Social and Cultural Rights" in R. Beddard and D. M. Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement*. (Houndmills, Basingstoke, Hampshire, London: Macmillan Academic and Professional Ltd, 1992), p. 47

positive law or legal instruments.⁴ It is also farcical to think of human rights as a gift of western civilization. Clearly, concepts such as the right to personal liberty, freedom of association and right to fair hearing have always been ingrained in every society, traditional and modern. What may appropriately be referred to as “western” is “the normative or legal translation of the concept of human rights as we know it today”.⁵

It is instructive to note that the term “human rights” is not restricted to any particular brand of rights but an amalgamating phrase which captures both civil and political rights on the one hand and social, economic and cultural rights on the other hand. However, contemporary human rights scholarship has adopted a taxonomy of human rights,⁶ which labels socio-economic rights as second generation rights. 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). Owing to the nature of these second generation rights they are referred to as “positive rights” because they require affirmative government action for their realization. Some authors have styled them welfare rights,⁷ rights of credit,⁸ or security oriented rights.⁹

The debates as to the true nature of economic and social rights are older than the ICESCR. Indeed, sequel to the resolution of the General Assembly of the United Nations (UN) to formulate an International Bill of Rights, it was decided that the Bill should

⁴ *Ibid.*

⁵ J. Oloka-Onyango, “The Concept of Human Rights in the International Order”, in A. Kalu and Y. Osinbajo (eds.) *Perspectives on Human Rights*. (Lagos : Federal Ministry of Justice, 1992), p. 2

⁶ The four broad classification of human rights regime are: civil and political rights (first generation rights), social, economic and cultural rights (second generation rights), rights to development in peace and Justice (third generation rights), emerging or penumbra rights (fourth generation rights)

⁷ R. Plant, “A Defence of Welfare Rights, in Beddard and D.M. Hills (eds.). *op. cit.*, p. 22

⁸ K. Vasak, “For the Third Generation of Human Rights: Rights of Solidarity”, noted in C.C. Nweze, “Education of the Concept of socio-Economic Rights in Human Rights Jurisprudence: International and National Perspectives,” *NBJ*, Vol. 1, No. 1 (2001), p. 79

⁹ Sohn, “The New International Law: Protection of the Rights of Individuals rather than States” noted in C.C. Nweze, *ibid.*

take the form of two or more international instruments, namely a Declaration, a Convention (covenant) and Measures of Implementation.¹⁰ That decision was later modified in favour of having two Covenants instead of one, and that the measures of implementation shall be embodied in the texts of the Covenants. These two Covenants were to be simultaneously submitted and approved by the General Assembly and opened for signature at the same time.¹¹ The reversal of the earlier decision to have one draft Covenant hinged on the differences in implementation strategies. It was reasoned that:

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.¹²

It is for these reasons, and perhaps more, that in the ever growing literature on human rights law and praxis, jurists and commentators have continued to query the status of economic and social rights as rights, or at best relegated them as second-rate rights. In a turgid critique of socio-economic rights Professor Maurice Cranston said:

I believe that a philosophically respectable concept of human rights has been muddled, obscured, and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category. The traditional human rights are political and civil such as the right to life, liberty, and a fair trial. What are now being put forward as universal rights are economic and social rights, such as the right to employment, insurance, old-age pensions, medical services and holidays with

¹⁰ General Assembly Resolution 217 F (III), Dec. 17, 1947;

¹¹ General Assembly Resolution 543 (VI), Feb. 5, 1952

¹² See Roosevelt, General Assembly Official Records, 6th Session 1951-2, Plenary Session, p. 505

pay. There is both a philosophical and logical objection to this. The philosophical objection is that the new theory of human rights does not make sense. The political objection is that the circulation of a confused notion of human rights hinders the effective protection of what are correctly seen as human rights.¹³

Admittedly, the issues that have constituted serious challenges to the realization of economic and social rights include the vagueness of some of the norms, obligations imposed on State Parties to the ICESCR, and the monitoring mechanism. For instance, Article 2 (1) of the ICESCR is to the effect that each state party “*undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means*”. This is in contradistinction to Article 2 (1) of the ICCPR by which each State Party “*undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant.*” A comparison of the two provisions will reveal that the ICCPR imposes on State Parties an immediate obligation to maintain a defined standard, while the ICESCR begs the question and makes the realization of economic and social rights merely promotional and a matter very much in the future. Again, since the realization of economic and social rights is dependent on “*available resources*”, the situation is being exploited by many governments around the world with no political will to ensure respect for human rights principles.¹⁴ These governments have instead erroneously claimed that the promotion and protection of civil and political is by far cheaper for them to attain because their obligation is to a large extent limited to non-interference with their citizens rights¹⁵.

The denouement of most analyses of the real and perceived challenges facing the realization of economic and social rights is to find a concrete platform for the non-justitiability of those rights. Most conclusions on the non-justitiability of economic, social and cultural rights are essentially based on an

¹³ M. Cranston, *op. cit.*, p. 65

¹⁴ See “Background Information on Economic, Social and Cultural Rights,” ICJ Review No. 55, p. 10

¹⁵ *Ibid.*

integrative comparison with civil and political rights.¹⁶ This approach has proved inimical to the promotion and protection of economic and social rights, as it has ‘contributed to the existing timid and compromising attitudes to those rights’.¹⁷ Michael Addo’s revisionism of the concept of justiciability exposes the general unsuitability of transporting domestic law conceptions of justiciability to international law. For him a fuller understanding of the concept of justiciability must address the question of procedures, namely adversarial justiciability which refers to the mechanisms of judicial process and inquisitorial justiciability which envisions an institutional review and reporting system.¹⁸ He argues that both arms of rights are amenable to both procedures, though depending on the issues and circumstances.

Also, Yash Ghai and Jill Cottrell warn against confusing two aspects of justiciability. They draw a distinction between explicit non-justiciability on the one hand and non-justiciability predicated on appropriateness on the other hand.¹⁹ The first refers to situations where the constitution or some other law expressly exclude the jurisdiction of the courts as is the case under the Nigerian and Indian Constitutions, while the second distinction raises grave concerns of legitimacy for the court enforcement of economic and social rights because the courts may not be able to apply ‘clear standards or rules by which to resolve a dispute or where the court may not be able to supervise the enforcement of its decision or the highly technical nature of the questions, or the large questions of policy involved may be thought to present insuperable obstacles to the useful involvement of courts.’²⁰

No matter the pretensions or persuasion of any particular theorist, the truth is that because of the inter-relatedness and indivisibility of rights both branches of rights are worth pursuing together. Indeed, at a more specific level, it is not an over simplification to state that some economic, social and cultural rights are as justiciable as some civil and political rights. The problem lies in what Katarina Tomasevki refers to as “the

¹⁶ M. Addo, “Justiciability Re-examined” in R. Beddard and D.M. Hill, *op. cit.*, p. 99.

¹⁷ *Ibid.*, p. 93

¹⁸ *Ibid.*, p. 97

¹⁹ Y. Ghai and J. Cottrell, *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interight, 2004), pp. 66 – 70, discussed in William Twining, *General Jurisprudence* (New York: Cambridge University Press, 2009), p. 421.

²⁰ *Ibid.*, p. 69

prevailing hostile intergovernmental environment towards efforts to institutionalize the justiciability of economic, social and cultural rights as a category”.²¹ In all, it seems that the debates about the nature of economic and social rights are only of philosophical interest, lack credibility and pragmatic value in the light of the constant inclusion of these rights in international instruments.²² International human rights jurisprudence is replete with instruments relating to gender discrimination, environmental protection and labour rights,²³ which ensure the justiciability of some economic, social and cultural rights.

3. International Protection of Socio-Economic Rights

The United Nations Charter is the source of modern global promotion and protection of human rights, even though its provisions on human rights are of a general nature.²⁴ The Universal Declaration of Rights (UDHR)²⁵ and the ICESCR²⁶ sifted and crystallized the rights. Articles 22-27 of the UDHR provides for socio-economic rights and Articles 6-15 of the ICESCR does same.

Both the UDHR and the ICESCR recognize the right to earn a living from work freely chosen.²⁷ Also, the right to just and favourable conditions of work, to form and join trade unions and to strike is recognized.²⁸ The right to social security and social insurance is recognized by both documents,²⁹ in addition to the right to adequate standard of living.³⁰ This involves amplitude of issues such as food, clothing, housing and Medicare. To this end, State Parties are obligated to improve methods of food production,

²¹ K. Tomasevski, “Justiciability of Economic, Social and Cultural Rights”, ICJ Review, No. 55, p. 203

²² J. Hausermann, *op. cit.*, p. 55

²³ There are several International Labour Organization (ILO) Conventions dealing with issues such as limitations of hours of work, principle of holidays with pay, fixing of minimum wages, minimum standards of safety, etc. Note for instance Convention No. 134 of 1970, No. 114 of 1960, No. 139 of 1974.

²⁴ See Articles 1 (3), 55 and 56.

²⁵ It was adopted on 10 December, 1948 by resolution 217A (111) of the General Assembly.

²⁶ Adopted by the UN General Assembly on 16 December, 1966.

²⁷ See Article 23 UDHR and Article 6 ICESCR.

²⁸ Article 8 ICESCR.

²⁹ Article 23 UDHR and Article 9 ICESCR.

³⁰ Article 25 UDHR and Article 11 ICESCR.

conservation and distribution of food, and ensuring an equitable distribution of world food supplies according to need.³¹

In appreciation of the fact that the family is the fundamental group unit of society, Article 10 of the Covenant recognized the right to family protection and assistance. It accords mothers special protection before and after childbirth, during which period mothers should be entitled to paid leave with adequate social security benefits. It further obligates State Parties to criminalize the exploitation of children through child labour.

Article 21(2) of the Covenant recognizes the right of everyone to the highest attainable standard of physical and mental health. In furtherance of this right State Parties are to take the following steps:

- a. Provide for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child.
- b. Improve all aspects of environmental and industrial hygiene.
- c. Prevention, treatment and control of epidemic, endemic, occupational and other diseases.
- d. Creation of conditions which would assure to all medical service and medical attention in the event of sickness.³²

Ample provisions are made in Article 26 of the UDHR and Articles 13 and 14 of the ICESCR with respect to the right to education. Both instruments prescribe that primary, secondary and higher education be made available in order to realize the right to education. Specifically, primary education is to be compulsory and free to all, while secondary education is to be made generally available by the progressive introduction of free education. Higher education shall be made generally accessible to all, on the basis of capacity.³³ Education shall be directed to the overall development of the human personality and to the strengthening of respect for human rights.³⁴ At the regional level, the European Social Charter³⁵ and the African Charter on Human and Peoples Rights³⁶ represent separate regional efforts to protect economic, social and cultural rights. These regional instruments

³¹ *Ibid.*

³² Article 12 (2) (a) – (d) ICESCR.

³³ Article 13 (2) (a) – (c) ICESCR.

³⁴ Article 26 UDHR; Article 13 (1) ICESCR.

³⁵ The Charter was signed in Turin in 1961 and took effect in 1965.

³⁶ The African Charter was adopted at the Nairobi Summit of 1981 and came into force in 1986.

contain provisions similar to the ICESCR and UDHR in the ventilation of socio-economic rights.³⁷

In addition, there have been concerted efforts at the international level to develop and interlace socio-economic rights with civil and political rights. In 1986 the International Commission of Jurists (ICJ) organized a meeting of experts in Maastricht, the Netherlands to halt the deceptive bogey being propelled by some Western scholars that the ICESCR places no real or legal obligations on states and that the instrument was merely a statement of aspirations. The Limburg principles which emerged from the meeting observed that 'although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable over time'. The Principles in guideline number 6 indicate that there are three levels of obligation in matters of economic, social and cultural rights, namely; the obligation to respect, to protect and to fulfil. As the Principles explained:

Like civil and political rights, economic, social and cultural rights impose three different types of obligation on states: the obligations to respect, protect and fulfil. Failure to perform any of these three constitutes a violation of such rights. The obligation to respect requires state to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus the right to housing is violated if the state engages in arbitrary forced evictions. The obligation to protect requires the state to prevent violations of such rights by third parties. Thus the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires state, to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus the failure of states to provide essential primary health care to those in need may amount to a violation.

Furthermore, the universality, indivisibility, interdependence and interrelatedness of human rights were restated at the Vienna Conference in 1993. The Vienna Declaration enjoins a global resolve to 'treat human rights globally in a fair and equal manner on the same footing, and with the same emphasis'. Also, the

³⁷ For instance, socio-economic rights are set out in Articles 13-18 of the African Charter on Human and Peoples' Rights.

Bangalore Declaration and Plan of Action³⁸ excoriated jurists for neglecting the pivotal issues of economic, social and cultural rights. The Declaration suggests that by concentrating on the familiar path of civil and political rights to the exclusion of economic, social and cultural rights, lawyers and judges have neglected to utilize the opportunities provided by the ICESCR and the challenge it presents. In the words of Adama Dieng, the Secretary General of the ICJ, on the occasion:

We are not downgrading civil and political rights. We are simply appealing to judges and lawyers everywhere to see the legitimate role of the law to address the vital issues of economic, social and cultural rights. To ordinary citizens, who never enter a court room or a police station, the most urgent human rights are often those concerned with access to, education, food and housing.

4. National Protection of Socio-Economic Rights.

So far, we have sketched an outline of the theoretical foundations of socio-economic rights and the international legal regime and efforts at providing a concrete bases for the realization of these rights. What we shall now do is to examine in some details the domestic protection of socio-economic rights adopting a two pronged approach, namely, the constitutional and statutory frameworks.

(i) Constitutional Framework

Before 1979, Nigeria's past constitutional experiments had been concerned with the traditional civil and political rights. It was the 1979 Constitution of Nigeria that, for the first time, in line with the developing global trend provided for socio-economic rights. Chapter II of that Constitution is styled "Fundamental Objectives and Directive Principles of State Policy". Its inclusion in that Constitution was quite polemical haven been subjected to the competing ideals of whether to include the Chapter and make it non - justiciable, by regarding it as presenting a philosophical road map to the good life; or to include it and make it justiciable,

³⁸ The Bangalore Declaration and Plan of Action is the document adopted at the end of the Conference on Economic, Social and Cultural Rights and the Role of Lawyers, held in Bangalore, India, between 23-25 October, 1995, under the auspices of the International Commission of Jurists (ICJ).

considering its contents as determinants of state legitimacy; or to jettison it as being impolitic for inclusion in a legal charter.³⁹

The 1999 Constitution also replicates the same Fundamental Objectives and Directive Principles of State Policy in its Chapter II, which runs from sections 13-24. The Chapter spells out the political, economic, social, educational, foreign policy and environmental objectives of Nigeria. It also outlines the national ethics, obligations of the mass media, directives on Nigerian culture and the duties of the Nigerian citizen. However, the tragedy of Chapter II of the Constitution is located in section 6(6)(c) of the Constitution, which provides that the judicial powers vested in the courts:

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.

Thus by virtue of section 6(6)(c), Chapter II of the Constitution is enfeebled as it is rendered non-justiciable. This in our view amounts to a dislocation of the foundation of the whole edifice of the Nigerian nation-state.

Item 60 of the Exclusive legislative list clothes the National Assembly with the power to establish and regulate authorities for the promotion and enforcement of the observation of the provisions of the Fundamental Objectives and Directive Principles of State Policy.⁴⁰ In *Attorney General of Ondo State v. Attorney General of the Federation & Ors*,⁴¹ the Supreme Court held that section 4 (2) of the 1999 Constitution provides that the National Assembly has the power to make laws for the peace, order and good government of Nigeria, and by item 60(a) of the exclusive legislative list, it is vested with the power to legislate on matters within Chapter II of the Constitution. Mowoe⁴² argues that this Supreme Court decision makes nonsense of section 6 (6)(c) of the Constitution in relation to the non- justiciability of Chapter II

³⁹ For a presentation of the contending views, see W. I. Ofonagoro, *et al* (eds.) *The Great Debate – Nigerian Viewpoints on the Draft Constitution* (Lagos: Daily Times, 1977).

⁴⁰ See Part I of the Second Schedule to the Constitution.

⁴¹ [2002] 9 NWLR (Pt. 772) 222.

⁴² K.K. Mowoe, *Constitutional Law in Nigeria* (Lagos: Malthouse Press Ltd, 2008), pp. 274-275. Professor Mowoe was re-echoing the view of Professor Nwabueze before the court in that case.

and that the power of the National Assembly to legislate with respect to item 60(a) of the exclusive legislative list is limited to the “establishment and regulation of authorities for the Federation or any part thereof in order to promote and enforce the observance of the Fundamental Objectives and Directive Principles”. Thus the phrase “enforce the observance” of the provision of Chapter II ‘is probably to be achieved not just through such established authorities but also through the investigative and other regulatory powers of the National Assembly’. These submissions do not hold the whole truth. As we shall argue anon, the efficacy of section 6(6)(c) will only arise in the absence of any provision to the contrary in the Constitution. The combined reading of item 60(a) of the exclusive legislative list and section 4(2) of the Constitution constitute an exception to the rule of non-justiciability of Chapter II in section 6(6)(c) of the Constitution. In our opinion, the decision of the Supreme Court has effectively opened a new vista in the quest to give the socio-economic rights enshrined in Chapter II constitutional potency. Instructively section 13 of the Constitution provides 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 of the Constitution.

So, what the Constitution has done in effect by this provision in relation to item 60(a) of the exclusive legislative list and section 4(2) is to set a robust agenda for legislative action in addressing issues of socio-economic rights.

A perusal of the provisions of Chapter II of the 1999 Constitution will reveal that it draws inspiration from established human rights norms under the UDHR and ICESCR. This is instantiated by certain sections of Chapter II. Section 16(2)(d) which talks about suitable and adequate shelter, food, age, and pensions, sick benefit and welfare of the disabled, undoubtedly has its ancestry in Article 25 of the UDHR and Article 11 of the ICESCR. Section 18(1) and (3)(a) – (c) restate the right to education in Article 26 of the UDHR, and 13 and 14 of the ICESCR. The directive on Nigerian cultures is an adaptation of Article 15 ICESCR.⁴³

It is perhaps the constitutional disability of Chapter II that accentuates the impression that there is no legal rationale for the

⁴³ See further section 17(a)-(h) which essentially mirrors Articles 6,7,10 and 11 of the ICESCR

inclusion of a seeming charter of pious exhortations in a legal document such as the Constitution.⁴⁴ Such mindset ignores the fact that a constitution is both a legal as well as a political charter.⁴⁵ What is a constitution, if not the assemblage of principles governing the organization, structures and procedures of a political community within the contexts of a peoples' cherished ideals and collective aspirations? It therefore follows that a constitution should not only be a vehicle of legal rules but also as a courier of the memorial for the organization of man into a political community. Great philosophers of the enlightenment era posit that the reason for man exiting the state of nature, which in the words of Thomas Hobbes was 'short, brutish and nasty', in favour of a political community was to achieve security and mutual advantage.⁴⁶ A society in which the people live in dehumanizing conditions has divorced itself from the very reason for entering into the social contract. So what happens to the social pact when the welfare and security⁴⁷ of the people are abandoned by government? David Hume, for instance said that the people 'are freed from their premises, ... and return to that state of liberty which preceded the institution of government'⁴⁸.

The situation is even more compounded when there is nothing to serve as a constant reminder to those who govern of their responsibility to the governed. We surmise that the import and significance of Chapter II is to constantly keep welfare issues in the front burner and serve as a medium of silent social revolution, so that those in power will live in the consciousness of who their masters really are. It is a barometer to appraise our

⁴⁴ Professor Abiola Ojo, for instance said that matters in the objectives and directive principles smack of the contents of the manifesto of a political party and unsuitable for inclusion in the Constitution. See A. Ojo, "The Objectives and Directives must be Expunged" in W.I. Ofonagoro, *et.al.* (eds.), *op. cit.*, p. 47.

⁴⁵ Professor Nwabueze discusses the nature of the Constitution in this wise. See B. O. Nwabueze, *The Presidential Constitution of Nigeria* (London: C. Hurst & Co., 1982), pp. 7-11.

⁴⁶ For a vivid examination of constitutional ideas of some philosophers of the enlightenment, see Alan Rosenbaun, ed. *Constitutionalism: The Philosophical Dimension* (New York, West-Port, Connecticut and London; Greenwood Press, 1988).

⁴⁷ Section 14 (2)(b) of the 1999 Constitution that "the security and welfare of the people shall be the primary purpose of government."

⁴⁸ Quoted in Wade Robison, "Hume and the Constitution", in Alan Rosenbaun, (ed.), *op. cit.*, p.43.

nascent democracy.⁴⁹ After all, section 14(2)(a) reminds everyone that “sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its power and authority”. It is perhaps for this reason that section 224 of the 1999 Constitution insists that the programme as well as the objects of a political party shall conform to the provisions of Chapter II of the Constitution.

Nevertheless, the emasculation of Chapter II has some intriguing interpretative concerns. In the first place, the question may be asked if the apparent conflict between section 13 of the Constitution which imposes a duty on all arms of government, including the judiciary, “to conform to, observe and apply” the provisions of Chapter II, and section 6(6)(c) actually ousts the jurisdiction of the courts in respect of same Chapter. It is settled law that in the interpretation of the Constitution the whole provisions must be considered together⁵⁰ and that where there are two provisions, one enlarging the court’s jurisdiction and the other restricting its jurisdiction, the courts will guard its jurisdiction jealously by adopting a liberal interpretation in favour of assuming jurisdiction.⁵¹ The philosophical underpinnings of these judicial attitudes is to enable the courts to avoid injustice and absurdity. But, it will be the height of injustice and profound absurdity to apply a restrictive interpretation which will allow the duplicitous provision of section 6(6)(c) of the Constitution to cage the provisions of Chapter II. This is particularly so in the face of the preamble to the Constitutions which pontificates that the essence of the Constitution is ‘for the purpose of promoting the good government and welfare of all persons in our Country’.⁵² If Chapter II of the Constitution will help us to achieve these, then

⁴⁹ O. Ogbu, “The Fundamental Objectives and Directive Principles of State Policy as a Barometer for Appraisal of Nigeria’s Nascent Democracy” *Journal of Economic, Social and Cultural Rights*, (2002) Vol. 1 No. 3, pp. 75-100.

⁵⁰ See *Nafiu Rabi'u v. The State* (1980) 8-11 S.C. 130; *Ujah v. A.G. Benue State* (1982) NCLR 330; *Obepka v. COP* (1980), 1 NCLR 113.

⁵¹ See *Anisminic v. Foreign Compensation Commission* (1968) 2 AC 147 at 170; *Sofekun v. Akinyemi* (1980) 5-7 at 25-27; *Oba Adeyemi v. A.G. Oyo State* (1984) 1 SCNLR 525 at 602.

⁵² Although the preamble does not form part of the Constitution in the sense that it cannot found a cause of action, it is in itself a manifestation and articulation of the intention of the framers of the Constitution and provides the philosophical basis of the Constitution. The courts have recourse to it in constitutional interpretation. See *Adesanya v. The President of Nigeria* (1981) 2 NCLR 358; *A.G. of Ogun State v. A.G. Federation* (1982) 3 NCLR 166.

section 13 of the Constitution ought to be preferred to section 6(6)(c) of the Constitution.⁵³

In the second place, the words “except” and “otherwise” appearing in section 6(6)(c) implodes it. Generally, the word “except” is exclusionary⁵⁴ in nature and takes the form of a proviso, while the word “otherwise” literally means opposite⁵⁵, so, what those two words signify in the context of section 6(6)(c) of the Constitution is that the provision of that section will stand unless there is nothing to the contrary in any other provision of the Constitution. This view was endorsed by the Supreme Court in *Federal Republic of Nigeria v. Anache*.⁵⁶ Fortunately, section 13 which imposes a duty on the three arms of government to comply with the provisions of Chapter II, effectively excludes the import of section 6(6)(c).⁵⁷ The net effect of this interpretative approach “is that if any of the persons mentioned in section 13 is found liable, he cannot escape liability by [invoking] the provisions of section 6(6)(c) of the Constitution,”⁵⁸

Now, with regard to Chapter IV (section 33-46) of the Constitution which deals with Fundamental Rights, the Constitution seems to establish an inverse relationship with Chapter II in terms of justiciability and protection. Thus Chapter IV which provides for civil and political rights is immediately justiciable and requires a *four-fifths* majority of both Houses of the National Assembly which shall be approved by resolution of the Houses of Assembly of not less than two-thirds of the States of the Federation, for its alteration.⁵⁹ But the alteration of Chapter II needs the *two-thirds* majority of both Houses of the National Assembly.⁶⁰ Consequently, if there is any conflict between the two Chapters it is clear that the provisions of Chapter IV will prevail.⁶¹

⁵³ C. Okeke (ed.), *Towards Functional Justice: Seminar Papers of Justice Chukwudifu A. Oputa* (Ibadan: Gold Press Ltd., 2007), p. 5.

⁵⁴ See *The Chambers Dictionary*, (New Delhi : Allied Chambers (India) Ltd., 2006, p. 562.

⁵⁵ *Ibid.*, p. 1148.

⁵⁶ (2004) Vol. 14 WRN 1, S.C.

⁵⁷ Justice Oputa shares this view. See C. Okeke, (ed.) *op. cit.*, p. 9.

⁵⁸ *Ibid.*

⁵⁹ See 1999 Constitution, (as amended) section 9 (3).

⁶⁰ *Ibid.*, s. 9 (2).

⁶¹ See *Okogie v. A.G. Lagos State* (1981) 2 NCLR 337; *Adewole v. Jakande* (1981)1 NCLR 264.

However, conventional wisdom and practical realities dictate that the realization of the two Chapters must be pursued simultaneously, because civil and political rights and socio-economic rights are not mutually exclusive categories but indivisible, interrelated and inter-dependent human goods which are secreted in the interstices of each other so as to attain the good life as promised in the preamble to the Constitution. Of what use is the right to a fair hearing when the proverbial common man cannot fund the process of activating the court's jurisdiction. As Bhagwati, J. of the Indian Supreme Court said:

Together they are intended to carry out the objectives set out in the preamble of the Constitution and to establish an egalitarian social order informed with political, social and economic justice, and ensuring the dignity of the individual not to a few privileged persons but to the entire people of the Country, including the have-nots and the handicapped, the lowliest and the lost.⁶²

In the same vein, Chandrachud, J. said:

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 it.⁶³

It is therefore clear that both Chapters form one organic unit with the same view to free citizens from unreasonable restrictions from the State, and provide liberty to all.⁶⁴

In the ongoing exercise to amend the 1999 Constitution, one of the major issues presented for public debate and voting is whether Chapter II should be made justiciable and enforceable

⁶² *Minerva Mills v. Union India*, AIR (1980), SC at 1989.

⁶³ *Kesavenanda Barati v. State of Kerala* AIR (1973) SC at 1970

⁶⁴ M. Uwais, "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, 2007), p. 266.

like Chapter IV of the Constitution.⁶⁵ This question will viscerally elicit an affirmative answer. In this regard the draft 1995 Constitution provides a template for legislative action. In that Draft Constitution some of the respect, protection and fulfilment bound obligations for the realization of economic, social and cultural rights which are normally banished to Chapter II were moved to Chapter IV. For instance, under that Constitution the right to free and compulsory Primary Education,⁶⁶ the right to free adult literacy programmes,⁶⁷ the right to free medical consultation in government health institutions,⁶⁸ the rights to eradicate corrupt practices, abuse of power, protect and preserve public property, and to combat misappropriation and squandering of public funds,⁶⁹ were made justiciable.

(ii) Statutory Framework

In Countries with written constitutions, the constitution is always the *fons et-origo* of all other laws, and naturally claims supremacy over those laws. In Nigeria, the 1999 Constitution announces in unequivocal terms its supremacy⁷⁰ and that any other law that is inconsistent with it is void to the extent of the inconsistency.⁷¹ As has been shown the Constitution does not expressly clothe the socio-economic rights enunciated in Chapter II with justiciability. But the statutory protection offered socio-economic rights belies arguments against their justiciability. This juridical paradox instantly exposes the inherent defect in this approach.⁷²

In Nigeria, the examination of some statutes will reveal that they guarantee and render justiciable certain well known socio-economic rights under some international human rights instruments such as the UDHR and ICESCR. The Labour Act⁷³, for instance, in sections 13, 16, 18 and 34, makes provision for “just and humane conditions of work,” which are a re-affirmation

⁶⁵ See the “Template for Voting on Key Issues at the House of Representatives Peoples’ Public Session on the Review of the 1999 Constitution” published in *The Guardian*, November 7, 2012, p. 36.

⁶⁶ See the draft 1995 Constitution, section 45(1).

⁶⁷ *Ibid.*, section 45(2).

⁶⁸ *Ibid.*, section 43.

⁶⁹ *Ibid.*, section 35 (a)-(c).

⁷⁰ See section 1 (1).

⁷¹ See section 1 (3).

⁷² C.C. Nweze, “Evolution of the Concept of Socio-Economic Rights in Human Rights Jurisprudence. International and National Perspectives” vol. 1 No. 1 2001, *Nigerian Bar Journal*, p. 88.

⁷³ See Cap. LI, LFN, 2004.

of Article 23 of the UDHR, Article 7 of the ICESCR and Article 15 of the AFCHPR. The Employees Compensation Act,⁷⁴ which provides for compensation to an employee injured in the course of employment and the Nigerian Social Insurance Trust Fund (NSITF) Act, which provides for social security and insurance benefits for an employee are only embellishments and amplification of the provisions in the above mentioned human rights instruments. Also, the Child's Right Act, 2004, and the Compulsory and Basic Education Act, 2004, give vent to the right to education provided for in Article 17(1) of the AFCHPR, Article 26 of the UDHR and Articles 13 and 14 of the ICESCR.

In this connection, the AFCHPR which provides a potpourri of rights presents us with a platform for further discussion. During the second military interregnum in Nigerian politics the status of the AFCHPR which is incorporated into Nigerian law⁷⁵ was subjected to rigorous interpretation by courts in a most courageous manner⁷⁶. The courts adopted an attitude of according the Charter primacy over military decrees.⁷⁷

The judicial approach of according the African Charter primacy over other municipal laws was expanded by the Court of Appeal in *Fawehinmi v. Abacha*⁷⁸. In that case one of the issues raised for determination by the Court of Appeal was the effect of incorporating the African Charter into municipal law. It was held that the African Charter is *sui generis*, a legislation with international flavour, and a such no government will be allowed to contract out by local legislation its international obligations. Indeed, Pats-Achalonu JCA, pontificated that:

⁷⁴ This was signed into law on 17 December 2010.

⁷⁵ See African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. 10 LFN, 1990, now Cap A9 Vol. 1 LFN, 2004.

⁷⁶ The courage and ingenuity of Nigerian courts in using global human rights legal resources to shape governmental policy, decisions and actions have been extolled. See O.C. Okafor, "On the Patchiness, Promise and Perils of "Global" Human Rights Law" *NIALS Diaspora Scholars Lecture*, 2011, pp. 19-21.

⁷⁷ See for instance, *Opayemi Bamidele & Ors v. Professor Grace Alele Williams and the University of Benin*, Unreported Suit No. 13/6m/89 (Benin); *The Registered Trustees of the Constitutional Rights Project (CRP) v. The President of the Federal Republic of Nigeria & 2 Ors*, Suit No. M/102/93 (Lagos); *Oshevire v. British Caledonian Airways Ltd.*, (1990) 7 NWLR (Pt 163) 489.

⁷⁸ (1996) 9 NWLR (Pt. 375) 710.

by not merely adopting the African Charter but enacting it into our organic law, the tenor and intent of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal.⁷⁹

This decision was greeted with praise and ululation within the human rights community.⁸⁰ However, it took the timely intervention of the Supreme Court⁸¹ to correct a jurisprudential anomaly which had crept into our legal system. For one, Nigerian legal system does not admit of any dichotomy or superiority complex in respect of Acts made or deemed to be made by the National Assembly. Beyond the admission that the African Charter is a statute with “international flavour” because of its pedigree, there is nothing in our *corpus juris* conferring primacy or higher pedestal on Cap. 10 in relation to other statutes made by the National Assembly. On this issue even the Supreme Court sounded contradictory in *Abacha v. Fawehinmi*.⁸² The Supreme Court stated, per Ogundare, JSC that:

if there is a conflict between it [i.e Cap. 10] and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.⁸³

He however disagreed that it was superior to the Constitution, with the caveat that it does not mean that its international flavour can:

...prevent the National Assembly, or the Federal Military Government before it, to remove it from our body of municipal laws by simply repealing Cap. 10. Nor also is the validity of another statute necessarily affected by the mere fact that it violates the African Charter or any other treaty for that matter.⁸⁴

⁷⁹ *Ibid.*, at p. 758.

⁸⁰ See for instance, O. Eze and E. Onyekpere, *Study on the Right to Health* (Lagos: Shelter Rights Initiative, 1998), p.44; S. Amadi, “African Charter on Human and Peoples’ Rights and the Judicial Protection of ECS Rights in Nigeria,” *LASER Contact*, Vol. 2 No. 2, Shelter Rights Initiative, 1998, p.11; M. O. Unegbu, “Human Rights Enforcement in Nigeria: Some Procedural Problems,” (1999) *Abia State University Law Journal*, p. 1.

⁸¹ *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660), 228.

⁸² *Ibid.*

⁸³ *Ibid.* See also *Guardian Newspapers Ltd v. A.G. Federation* [1995] 5 NWLR (Pt. 398) 703; *Comptroller of Prison v. Adekanye* [1999] 10 NWLR (Pt. 623) 400.

⁸⁴ *Ibid.*, at p. 289.

This is an indirect way of nullifying the ‘greater vigour and strength’ mantra. As Justice C. C. Nweze wittingly noted while appraising Ogunbare, JSC’s statement, ‘if a treaty can be removed from our body of laws; can be repealed at will, and, if a local statute, which violates a treaty, cannot be invalidated by that treaty, can it be seriously argued that such a treaty overrides that domestic law? That answer would appear to be in the negative!’⁸⁵ Fortunately, it was Achike, JSC, who in his dissenting judgment restated the correct position of the law. He said:

The general rule is that a treaty which has been incorporated into the body of the municipal laws ranks at par with the municipal law. It is rather startling that a law passed to give effect to a treaty should stand on a higher pedestal’ above all other municipal laws, without more, in the absence of any express provision in the law that incorporated the municipal law?⁸⁶

It is our submission that whatever conceptual errors the courts must have committed in their decisions during the repressive military era, as to the relationship between Cap. A9 in relation to other statutes and the Constitution should be understood in the light of the circumstances in which they were made. Most of the decisions were desperate attempts to secure a legal base for the protection of human rights against the brazen erosion of basic freedom by the military. Alternatively, they may be regarded as samples of judicial riot against totalitarianism.

These cases deal with violations of some of the liberty oriented rights under the Charter. What is not clear is the extent to which the decisions of the courts would have been affected if it were a socio-economic right that was in issue.⁸⁷ The closest the court came to answering this question was in *Ogugu v. The*

⁸⁵ C.C. Nweze, *Justiciability of Treaty Human Rights in Nigerian Courts: A Comparative Legal Process Analysis* (Unpublished Ph.D. Thesis, University of Nigeria, 2000), p. 191.

⁸⁶ At p. 316.

⁸⁷ Professor U. O. Umzurike argues that this problem stems from the *holus bolus* incorporation of the Charter into the law. He is of the view that it would have been better to rely on the Constitution as already incorporating civil and political rights, and that a resort to ‘other measures’ such as disseminating the knowledge in civics and in education would have been enough to satisfy our obligations in Article 1 of the Charter. See U. O. Umzurike, “The African Charter and Nations Laws: The Issue of Supremacy” in C.C. Nweze and O. Nwankwo (eds.) *Current Themes in The Domestication of Human Rights Norms* (Enugu: Fourth Dimension Publishing Co., Ltd, 2003), p. 49.

State,⁸⁸ where the Supreme Court held that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act was applicable and enforceable in Nigeria in the same manner and through the same procedure as any other laws. This clearly gives the impression that any category of rights under the Charter is enforceable by the Courts.

Arguably, since Cap. A9 (the AFCHPR) is still a sub-constitutional statute it is still inferior to the Constitution⁸⁹ and matters which are not justiciable in it, namely economic and social rights in Chapter II, cannot be made justiciable by 'judicial legislation.' In this regard, Nweze has forcefully argued that even in respect of other domestic statutes by which socio-economic rights have been entrenched and consequently, made justiciable, those rights do not enjoy the juridical status of human rights.⁹⁰ He posits that because those sub-constitutional statutes are not expressed to be made pursuant to any treaty obligations their justiciability is through the ordinary legal process of writ of summons and can only be redressed by ordinary private law remedies as opposed to fundamental rights where constitutional law remedies are awarded.⁹¹ For him, the rights created by these ordinary Acts of Parliament are at best "part of the heritage of traditional analytical jurisprudence".⁹²

These arguments are plausible but they evince the dangers inherent in the subutilization of intellectual discourse relating to the justiciability of socio-economic rights. For instance, if we agree that the right to humane conditions of work provided for in the Labour Act is justiciable but deny the same right protected in Cap. A9 and recognized in Chapter II of the Constitution equivalent juridical potency as human rights on the pretext that the later is circumscribed by section 6(6)(c) of the Constitution would that not amount to rendering opaque the jurisprudential crystallization of socio-economic rights? Again, if by some contemplation the National Assembly through some pieces of legislation provide for the justiciability of *all* the socio-economic rights in Cap A9 and Chapter II of the Constitution, and as a result make them empty shells, as it were, will the corrosive provision of section 6(6)(c) of the Constitution be called in aid to defeat the juridical status of the rights created by those legislation as human

⁸⁸ [1994] 9 NWLR (Pt. 366), 1

⁸⁹ The Supreme Court also said that much in *Abacha v. Fawehinmi* (Supra)

⁹⁰ C.C. Nweze, above note 79, p. 278.

⁹¹ *Ibid.*

⁹² *Ibid.*

rights? Clearly, invoking section 6(6)(c) in the circumstance will be otiose. Besides, if the tenuous argument that rights protected under the various sub-constitutional statutes of the legislature do not enjoy the juridical status of human rights is stretched further then it means that a country must operate a written constitution with an entrenched bill of rights before the citizens of that country can enjoy human rights. This is a startling proposition! The argument fecundates a sort of Diceyan dilemma as to whether human rights are better protected under a written or unwritten constitution. However, a discussion of this issue is outside the pale of this paper. But more specifically, it must be appreciated that human rights do not owe their creation or existence to a constitution. While we crave for the elevation of economic, social and cultural rights to constitutionally guaranteed fundamental rights, we must observe that the entrenchment of fundamental rights in a constitution only testifies to a nations accepted minimum, not maximum, content of human rights. It does not make such rights immutable. Thus the character and content of other rights protected by other Acts of parliament are not diminished by their packaging. If it were so then a country like Britain, with no formal bill of rights and an unwritten constitution, will need to make a new beginning in human rights circles. Moreover, giving legislative impetus to socio-economic rights accord with the Limburg Principles' "obligation to fulfill" which carries with it the implication that a State should 'take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization' of socio-economic rights.

5. The Role of the Courts in the Justiciability Question.

Thus far, we have seen that the Constitution does not admit of express justiciability of Chapter II of the Constitution. The decision to make Chapter II of the Constitution non justiciable was informed by the exaggerated fear that investing the courts with the competence to make mandatory orders directing the government to provide specific social and economic rights "would be palpably impudent as being fraught with the danger of destructive confrontation".⁹³ This fear dissolves in the face of the more coercive power of judicial review of legislative and executive actions, the exercise of which has curtailed legislative and executive lawlessness, and shunted governments onto the path

⁹³ B. O. Nwabueze, "Fundamental Objectives and Directive Principles of State Policy: Its Nature and Functions", in W. I. Oforogoro, *et. al.*(eds.), *op. cit.*, p. 49.

of good governance.⁹⁴ Indeed, in other climes the recognition and enforcement of social and economic rights by the courts have become *de rigueur* and no cataclysm has ensued.⁹⁵ Interestingly, the ECOWAS Court has had occasion to order the Nigerian government to make adequate arrangements for the free and compulsory education of every Nigerian child,⁹⁶ and the African Commission on Human and Peoples' Rights has endorsed the observance of the respect bound obligation for the realization of economic, social and cultural rights.⁹⁷

Section 13 of the Constitution enjoins all authorities and persons exercising legislative, executive or judicial power, to conform to, observe and apply the provisions of Chapter II of the Constitution. Also, Section 14 takes it further by stating that "the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice." One only needs to read eight further sections to discover the true foundations of an ideal Nigerian State. Therefore, a society that stifles the means to self-actualization negates the first principle for the establishment of a political community and thereby discharges its citizens from any form of political obligation. As Professor Nwabueze remarked:

An unjust society cannot maintain its unity and cohesion because it cannot arouse in its members a strong enough feeling of loyalty, what is worse, it also arouses him to intense indignation and disaffection. It is a denial of the individuals worth as a human person, a manifestation by society of uncaring attitude towards him. An individual or group denied recognition by society cannot but feel alienated and disaffected.⁹⁸

⁹⁴ Ogbu perceptively shares this pinion. See O. N. Ogbu, "The Significance and Essence of the Fundamental Objectives and Directive Principles of State Policy," *UNIZIK Law Journal*, Vol. 5, No. 1, p.276 at 283.

⁹⁵ In South Africa the courts have done this in *Grootboom v. Oostenberg Municipality & Ors.* (2000) 3 BCLRR (C); *Lindiwe Mazibuko & Ors v. The City of Johannesburg & Ors.* (2001) 1 SA 765. The Indian courts have done so in *Upendra Baxi v. State of Uttar Pradesh & Ors.*(1986) 4 SCC 106; *Hussain v. Union of India* (1996) AIR 2717; *Vellore Citizens Welfare Forum v. Union of India* (1996) AIR 2715.

⁹⁶ See *SERAP v. Federal Republic of Nigeria & Universal Basic Education Commission*, ECW/CCJ/APP/08/08.

⁹⁷ See *SERAC & CESR v. Nigeria* (2001) AHRLR 60 (ACHPR 2003).

⁹⁸ B. O. Nwabueze, "Ideological Foundation for Viable Political Order for Nigeria"; Conference Paper (1986)

In the words of Justice Oputa:

While it is true that the courts cannot right wrongs overnight, it is also true that the reaffirmation of – say the Directive Principles – by the courts will build up a body of public opinion which may compel all “the persons and institutions” enumerated in section 13 of the Constitution to wake up and do what is expected of them. Also, in its judgments on justiciable issues like the Right to life, the courts can call on the legislature to actualize the expectations in the Directive Principles by passing appropriate and enabling Laws.⁹⁹

It must be admitted that as a result of our courts lethargic attitude towards expanding the jurisprudential frontiers for the justiciability of Chapter II, the Nigerian judiciary is facing a legitimacy crisis as to whether it really deserves such cognomens as “the fountain of justice”, “the last hope of the common man”, “the bastion of human rights,” “the watch-dog of the Constitution” etc. The courts must begin to interpret the constitution with a view to securing a concrete basis for the justiciability of socio-economic rights. To be able to do this, the courts must shed ‘the phonographic theory of common law tradition that judges do not make law, and are concerned with legal not social justice.’¹⁰⁰ The myth of formalism and legal justice must be exploded so as not to through interpretation manacle social justice. In an attempt to grapple with this problem, the Indian Supreme Court says Justice Bhagwati,

...started wielding judicial power in a manner unprecedented in its history and developed the strategy of Public Interest Litigation calculated to bring social justice and human rights within the reach of the common man.

He continued:

What the Court did was to bring about a revolution in the judicial process. The Court expanded the frontiers of fundamental rights and natural justice and in the process rewrote some parts of the Constitution. The right to life and personal liberty enshrined in Article 21 of the Indian Constitution was converted *de facto* and *de jure* into procedural due process clause contrary to the intention of the makers of the Constitution. This expanding right was construed, through a process of judicial interpretation to encompass the right to bail, the right to speedy trial, the right to dignified treatment in

⁹⁹ C. Okeke (ed), *op. cit.*, p. 11.

¹⁰⁰ K. K. Mowoe, *op. cit.*, p. 284.

custodial institutions, the right to legal aid in criminal proceedings, the right to live with basic human dignity, the right to livelihood, and above all, the right to a healthy environment. The Supreme Court developed a new normative regime of rights insisting that the State cannot act arbitrarily but instead, must act reasonably and in public interest on pain of its action being invalidated by judicial intervention.¹⁰¹

The breath taking incursions made by the Indian Supreme Court present a model for our courts.

A few instances will exemplify the approach of the Indian Courts. In *Deo Singh Tomer v. State of Bihar*¹⁰² it was held that a persons' right to hearing was intrinsic to his right to life. Similarly, in *Mohim Jain v. State of Katamaka*,¹⁰³ the Indian Supreme Court invalidated a state law which permitted medical colleges to charge exorbitant admission fees on the ground that it discriminated against the poor, and in effect curtailed the right to education which is essential to the right to life. Also, in *UPSE Board v. Harri Shanker*¹⁰⁴ the court re-affirmed that the right to education is an intrinsic part of the right to life. The court observed that though it cannot enforce the observance of the principles, they are nevertheless bound to evolve, affirm and adjust principles of interpretation which will further and not hinder the goals set out in the Directive Principles.

The plenary powers vested in the courts under the 1999 Constitution is a clear indication that the courts have been positively assigned a role for setting an agenda for public policy. Thus the Nigerian courts have a constitutional leeway to make public policy choices and programmes depending on the needs of society. As Justice Oputa rightly observed:

... although the courts are creatures of the Constitution yet their interpretative jurisdiction (their power to interpret the Constitution) does seem to place them above the Constitution. The Constitution is a mere skeleton. It is interpretation by the courts that adds flesh and infuses blood into the skeleton to

¹⁰¹ P.N. Bhagwati; "The Role of the Judiciary in the Democratic Process; Balancing Activism and Judicial Restraint (1992) *JHRPL* Vol. 2, No. 3, pp. 14-15.

¹⁰² (1988) AIR SC 1782.

¹⁰³ (1992) AIR SC 1964.

¹⁰⁴ (1999) AIR SC 65.

make it a living organism. It is therefore not an idle boast to say that the Constitution is what the judge say it is.¹⁰⁵

Every society, and more especially every democratic society is often confronted with certain critical questions which relate to issues of social justice, protection of human rights, curbing executive lawlessness, checking corruption, etc. To grapple with these issues, the courts must, therefore, consciously engage in judicial law making so as to exemplify the interrelatedness of law and social change. Thus in a developing society, such as ours, 'there is nothing in law to conserve when the citizens are suffering from poverty, hunger, employment, etc.'¹⁰⁶ Furthermore, a broad constructionist approach should not be compromised by the courts in the interpretation of the provisions of the Constitution, for as Kayode Eso, JSC pointed out " a narrow interpretation straight-jacketed on the fear of a judge not being a legislator into the confines of words which might even be equivocal is with respect a negation of the true essence of justice",¹⁰⁷

In the realm of justiciability of Chapter II of the Constitution what we expect of our courts is to demonstrate a preparedness to, as the courts in India have done, through progressive interpretation utilize the justiciable and enforceable provisions of Chapter IV, to make Chapter II enforceable. It is gratifying to note, however, that the Nigerian courts seem to be waking up from long and deep slumber. The attitude of the Supreme Court in *Atake v. Afejuku*¹⁰⁸ is quite commendable. In that case one of the issues was whether the appellant, a retired judge could represent himself as a legal practitioner in view of section 256 of the 1979 Constitution which provides that a judicial officer on ceasing to hold office cannot 'appear or act as a Legal Practitioner.' In holding that the appellant could represent himself the court had recourse to the non-justiciable section 17(2)(a) in Chapter II of the 1979 Constitution and section 33(1) of the justiciable Chapter IV of the same Constitution. Similarly, in *Adamu v. A.G. Borno State*,¹⁰⁹ it was held that where in the implementation of Fundamental Objectives and Directive Principles of State Policy,

¹⁰⁵ J. C. Oputa, "The Independence of the Judiciary; Myth or Reality", in Amucheazi and Olatawura (eds.), *The Judiciary and Democracy in Nigeria* (Abuja: National Orientation Agency, 1998), p. 110

¹⁰⁶ Oputa, JSC'S Valedictory Address, October 1989.

¹⁰⁷ *Fawehinmi v. Akilu* [1987] 4 NWLR, p. 848.

¹⁰⁸ [1994] 9 NWLR (Pt. 368) 399; See also, *INEC & Anor. v. Balarabe Musa & Ors.* [2003] NWLR (Pt. 806) 72.

¹⁰⁹ [1996] 8 NWLR (Pt. 465) 203.

say on ground of religion, a breach of a citizen's fundamental right of freedom of religion and freedom from discrimination occurs, that breach of fundamental right is justiciable.

5. Conclusion

Our survey has shown that at the international and national levels there exists a coherent body of laws for the protection of socio-economic rights. What seems to have stunted the growth and speed of efforts at realizing these rights is the philosophical obscurantism about the nature of socio-economic rights, which has accentuated the problem of justiciability of these rights. However, current global economic realities hint at the imperativeness of pursuing a socio-economic agenda for the upliftment of the materially poor in societies.

We have also demonstrated that to make socio-economic rights pragmatic and not esoteric, the courts must rise equal to the occasion through progressive and broad interpretation to make Chapter II of the Constitution justiciable. It is by doing this that the civil and political rights which we also cherish can be meaningful. In this wise, it is suggested that the respect and protection bound obligations for the realization of socio-economic rights should be made justiciable in the current effort at amending the Constitution, while the fulfilment bound obligations should progressively be made justiciable.

The seemingly new approach of Nigerian courts to an expansive interpretation of Chapter II of the Constitution notwithstanding, the thrust of our argument is that our courts should adopt, as an *ideology* rather than on *ad hoc* basis, a broad and progressive interpretative approach to the Constitution which showcases the complementarity and justiciability of Chapters II and IV of the Constitution.