

# JURIS REVIEW

*Journal of Contemporary Legal and Allied Issues,*  
*Department of Jurisprudence and Private Law, Faculty of Law,*  
*Abolowo University, Ile-Ife, Nigeria. IFJR 2015, Part 1 (Jan. - April) ISSN: 0794-1048*

## ARTICLES

- J.O. Agbana & S.A. Coker:-** Determining the Province of Fair Hearing in Dismissal and Termination of Appointment Cases: 1-17
- S. A. Lawal:-** The Relevance of the Company Secretary in the 21<sup>st</sup> Century: 18-37
- D. A. Obadina:-** Tackling Aggressive Tax Avoidance in Nigeria: An Agenda for Reform. 38-57
- \* **Aondofa Aligba:-** Fair Hearing and the Challenges of 180 Days Electoral Litigation Limitation Period:- 58-77
- \* **O. O. Arowosegbe:-** Interface Between the Three Arms of Government in Nigeria: 78-95
- C. M. Lakpini:-** An Appraisal of the Legal Framework Governing Export Processing Zones in Nigeria: 96-104
- F. Okon:-** Protection of Human Rights under the African Charter: Are Foreigners Protected? 105-119
- P. Folarin:-** Job Security As A Human Right: Prospects and Challenges:- 120-135
- I. Udofa:-** Between Winding-Up and Rehabilitation of Insolvent Companies in Nigeria: Which Way Forward? 136-151
- O. L Niyi-Gafar:-** Right of Access to Potable Water in Nigeria:- 152-164
- G.D. Oke:-** Enforcement of Human Rights in Nigeria:- 165-174
- A. A. Kana & E. O. Okebukola:-** International Criminal Court and Immunity of Sovereigns:- 175-186
- O. A. Savage-Oyekunle:-** Socio-Economic Rights and their Justiciability in Nigeria:- 187-216
- I. A. Oluwasemilore:-** An Overview of Copyright Protection in Nigeria:- 217-243
- K. Y. Olatinwo:-** The Legal Definition of Outer Space:- 244-257
- M. C. Ogwezy:-** Modern trend in International Dispute Settlement: A Shift from the International Court of Justice to Treaty Based Arbitral Tribunals:- 258-276
- \* **S. A Bello:-**The Nigerian State and the Challenge of Divisionism and Dichotomy: 277-289
- \* **A. A. Oyerinde:-** External Auditors and Corporate Governance in Nigeria:- 290-305

## SOCIO-ECONOMIC RIGHTS AND THEIR JUSTICIABILITY IN NIGERIA

\*  
O. A. Savage-Oyekunle\*

*There is nothing to fear from the idea of socio economic rights as real, enforceable, human rights on equal footing with all other human rights, and no cause for simplistic or categorical distinctions between these rights, and rights described as 'civil and political.' Human rights obligations require no more or less than reasonable efforts within the maximum extent that resource constraints permit, with priorities determined through inclusive democratic processes, and with an abiding concern for the situation of the most disadvantaged. - Louise Arbour<sup>1</sup>*

### Abstract

*This article examines the current position of socio economic rights in Nigeria including the provision of the Nigerian Constitution as to their enforcement before the law courts. The article commences from an examination of the jurisprudence of ESCRs generally including the justiciability debate; right unto the position adopted by the African Commission in defining socio economic rights matters decided by it. The approach adopted by courts in jurisdictions such as India and South Africa in interpreting and ensuring the realisation of socio economic rights is scrutinised with the anticipation that the Nigerian courts will emulate such actions with a view of making ESCRs justiciable in the country thereby assuring the protection of the dignity of Nigerian citizens.*

\* Oluremi .A. Savage-Oyekunle LLB, LLM (LASU), Lectuer, Faculty of Law, Lagos State University, Ojo, Lagos, Nigeria. Doctoral candidate University of Pretoria, South Africa; [remisavage@yahoo.com](mailto:remisavage@yahoo.com).

<sup>1</sup> Former UN High Commissioner for Human Rights (2005) at the LaFontaine-Baldwin lecture 'Freedom from want': from charity to entitlement <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3004&LangID=E> (accessed 11 April, 2012).

### Introduction

Nigeria is a country endowed with enormous human and natural resources. However, these resources have not been exploited to enhance the quality of life of its citizens instead the current state of affairs point to a situation whereby a few select individuals sit on the wealth of the nation and command the country's economy which when combined with governmental corruption perpetuates the cycle of 'want' in which a majority of the Nigerian populace wallow in. Currently, a majority of the Nigerian populace are threatened by extreme poverty, HIV/AIDS epidemic, mass unemployment and so on.<sup>2</sup>

The above position coupled with international advocacy for the protection of Economic, Social and Cultural Rights (ESCRs) has gathered momentum in recent years. Also, the fact that the Constitutions of some African countries<sup>3</sup> contain provisions which specifically protect the socio economic rights of their citizens and renders such rights justiciable before their national courts has made it necessary to advocate for the justiciability of socio economic rights in Nigeria.

In the Nigerian Constitution,<sup>4</sup> provisions specifically oust the jurisdiction of the courts to adjudicate on matters contained in its Chapter II.<sup>5</sup> The contents of the Fundamental Objectives and Directive Principles are the closest to ESCRs as recognised under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international/regional instruments; to which Nigeria is a signatory. It is considered that there is a necessity for the justiciability and protection of ESCRs in Nigeria including their inclusion as fundamental rights upon which access to the Nigerian courts can be granted as in the case of Civil and Political Rights contained in Chapter IV of the Constitution.

### Economic Social and Cultural Rights under International Law

Economic, Social and Cultural Rights (ESCR) are guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>6</sup> and other legally binding

<sup>2</sup> Samuel C. Upoh *et al* 'Appraising the trend of policy on poverty alleviation programmes in Nigeria with emphasis on a National Poverty Eradication Programme' (2009) 3(12) African Journal of Business Management 847-854 <http://www.academicjournals.org/AJBM> (accessed 5 April, 2012).

<sup>3</sup> African countries with justiciable economic, social and cultural rights include South Africa, Angola, Ethiopia, Uganda, Democratic Republic of the Congo etc.

<sup>4</sup> Section 6(6)(c) of the 1999 Nigerian Constitution

<sup>5</sup> Chapter II of the Nigerian Constitution 1999 contains the Fundamental Objectives and Directive Principles of the Government

<sup>6</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966.

international and regional human rights treaties.<sup>7</sup> Along with civil and political rights, they are enshrined in the Universal Declaration of Human Rights.<sup>8</sup> According to Viljoen,<sup>9</sup> they are as entitlements which give rise to the shared concern of ensuring societies where everyone has a minimum decent standard of living that is consistent with human dignity.

Before the Second World War, there was hardly any support for the protection of universal human rights as States took little or no interest in happenings within another State's territory. However, due to the gravity of the atrocities committed during the war, the situation changed and there was an interest in the idea of fundamental rights and freedoms.<sup>10</sup> The international community adopted the United Nations Charter that established the United Nations in 1945.<sup>11</sup> The adoption of the charter was the dawn of a new era in the promotion and protection of human rights internationally as it referred to human rights and fundamental freedoms as one of its aims and objectives. Also during this period, the realization that political unrest and the emergence of totalitarian regimes had been as a result of widespread unemployment and poverty led to the interest in the securing of economic and social rights based on the conviction that even in periods of recession, basic economic and social rights which will guarantee individual freedom and democracy can be enjoyed by all.<sup>12</sup>

After the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly,<sup>13</sup> work began on the drafting initially, of a single human rights Covenant which was meant to legally bind States that ratified it as to the universality, interdependent and fundamental nature of human rights which all humans possessed.<sup>14</sup>

<sup>7</sup> Such as the African Charter on Human and Peoples Rights, Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) etc.

<sup>8</sup> The Universal Declaration of Human Rights 1948, <http://www.un.org/Overview/rights.html>. See Articles 3-28 of the UDHR.

<sup>9</sup> Viljoen, 'The Justiciability of Socio-Economic and Cultural Rights: Experiences and Problems' (2006) 1 quoted by T Bulto 'The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights' (2010) 29(2) University of Tasmania Law Review 142.

<sup>10</sup> K McLean 'Constitutional Deference, Courts and Socio-Economic Rights in South Africa' (2009 PULP) 4

<sup>11</sup> UN Charter, 26 June 1945, entered into force on the 24<sup>th</sup> of October, 1945

<sup>12</sup> Eide 'Economic, Social and Cultural Rights as Human Rights' in A Eide *et al* (eds) 'Economic, Social and Cultural Rights: A Textbook' (1995) 29.

<sup>13</sup> The Human Rights Commission, a subset of the Economic and Social Council (ECOSOC) was established in 1946 and given the mandate to draft an international bill of rights for submission to the General Assembly of the United Nations. It should be noted that the Universal Declaration of Human Rights, though non-binding has acquired today the status of international customary law recognised by nations.

<sup>14</sup> De Schutter 'International Human Rights Law: Cases, Materials and Commentary' (2010 Cambridge) 16.

However, differences in opinion as to the nature of the two sets of rights contained in the declaration including enforcement mechanisms<sup>15</sup> led to the drafting of two separate Covenants viz the International Covenant on Civil and Political Rights (ICCPR)<sup>16</sup> and International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>17</sup>

The decision to draft two separate Covenants was based on the assumption that economic, social and cultural rights required legal obligations of a different nature and needed a different system of supervision from civil and political rights. Civil and political rights were generally regarded as imposing mainly negative duties of forbearance on States which were perceived to be capable of immediate and unconditional implementation by States.<sup>18</sup> On the other hand, economic and social rights were perceived as imposing mainly positive duties of performance of economic obligations on States, requiring a high level of resources for their implementation; States were therefore only expected of to take progressive steps towards their full realisation. This assumption is wrong as all human rights irrespective of the class they belong to require a combination of negative and positive conduct from states.<sup>19</sup>

Also, the separation of the rights into groups resulted in the acquisition of the perception that ESCRs belonged to the lower realm in the hierarchy of rights.<sup>20</sup> States are more readily disposed to the protection of civil and political rights based on the erroneous belief that they do not 'cost much' and only required non-interference with the integrity and freedom of their citizens and were therefore justiciable in the sense that they could be easily applied by courts whereas ESCRs were of a political nature and very high obligations on the State.<sup>21</sup>

Despite resistance and efforts aimed at separating the two sets of rights; evolution has over time led to their integration as subsequent human rights instruments adopted in later years contain both rights side by side with express references to their enjoyment by

<sup>15</sup> K. McLean (n 10 above) 5.

<sup>16</sup> Adopted December 1966 and entered into force in March, 1976. <http://www2.ohchr.org/english/law/ccpr.htm>

<sup>17</sup> Adopted December 1966 and entered into force in January, 1976. <http://www2.ohchr.org/english/law/cescr.htm>

<sup>18</sup> P. Alston *et al* 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156- 229.

<sup>19</sup> S. Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 South African Journal on Human Rights 361-362. See also F.W. Vierdag 'The Legal Nature of the rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Journal of International Law 103.

<sup>20</sup> K. Vasak 'A 30 Year Struggle: The sustained effort to give force of law to the Universal Declaration of Human Rights' (1977) 29 quoted in K. McLean (n 9 above) 7.

<sup>21</sup> Eide (n 12 above) 22.

individuals.<sup>22</sup> Moreover, during the World Conference on Human Rights, it was reiterated that all human rights were indivisible, universal, interdependent and interrelated and that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.<sup>23</sup>

Rights covered under the ESCRs framework include the right to work especially under just and fair conditions of employment,<sup>24</sup> the right to education which includes the ensuring that education is sufficiently available, accessible and acceptable to the individual with primary education being compulsory and available free to all;<sup>25</sup> the right to the highest attainable standard of physical and mental health,<sup>26</sup> the cultural rights of indigenous peoples and minorities within a country, the right to food, right to an adequate standard of living and also the right to adequate housing amongst others.<sup>27</sup>

### Fulfilling ESCRs

Under international human rights law, the primary duty bearers of rights are the State parties who have a duty to ensure that the rights of their citizens are protected.<sup>28</sup> Article 2 of the ICESCRs outlines the nature of State parties' obligations under the Covenant and determines how the implementation of substantive rights contained in the treaty should be effected. Among other things, the Article provides that States must take appropriate measures to progressively realise the rights provided for in the Covenant.<sup>29</sup>

Unfortunately, the provision that the State should take measures progressively to realise socio economic rights has been used to argue variously that economic, social and cultural rights are not enforceable as the article creates State obligations and not individual rights which have immediate effect and that the provisions of the article allows for progressive realization to the maximum of available resources.<sup>30</sup>

<sup>22</sup> *Ibid* at 24. Examples of the latter human rights instruments which contains both civil and political rights and economic, social and cultural rights include the Convention on the Rights of the Child, Convention on the Elimination of All forms of Discrimination Against Women and the Convention on the Elimination of All forms of Racial Discrimination etc.

<sup>23</sup> See the Vienna Declaration and Programme of Action, 1993, [www.ohchr.org/english/law/vienna.htm](http://www.ohchr.org/english/law/vienna.htm)

<sup>24</sup> See Articles 6, 7 and 8 of the Covenant on Economic, Social and Cultural Rights.

<sup>25</sup> Article 13.

<sup>26</sup> Article 12.

<sup>27</sup> See also Articles 11 and 15 of the ICESCR and articles 15, 16, 17 and 18 of the African Charter on Human and Peoples Rights.

<sup>28</sup> F. Viljoen 'International Human Rights Law in Africa' (2007 Oxford) 6.

<sup>29</sup> See generally Article 2 of the International Covenant on Economic, Social and Cultural Rights 1966.

<sup>30</sup> P. Alston *et al* (n 18 above) 166. See also, S. Verma 'Justiciability of Economic, Social and Cultural Rights: Relevant Case Law'

[http://www.ichrp.org/files/papers/96/108\\_justiciability\\_of\\_Economic\\_Social\\_and\\_Cultural\\_Rights\\_-\\_Relevant\\_Case\\_Law\\_Verma\\_Shivani\\_2005\\_background.pdf](http://www.ichrp.org/files/papers/96/108_justiciability_of_Economic_Social_and_Cultural_Rights_-_Relevant_Case_Law_Verma_Shivani_2005_background.pdf) (accessed 9 March, 2012).

This reasoning was however rejected by the Committee on ESCR in its General Comment No. 3<sup>31</sup> where it stated that the article imposes two obligations that are of great importance and immediate effect *viz* the undertaking to guarantee that the rights will be exercised without discrimination in any form and the undertaking 'to take steps'. The undertaking to take steps imposes the obligations of conduct and result in respect of all the rights contained in the Covenant.<sup>32</sup>

In fulfilling the obligations of conduct imposed by the undertaking "to take steps" under article 2(1) of the Covenant, the committee stated that States parties should use "all appropriate means, including particularly the adoption of legislative measures". It is the responsibility of the States parties themselves to assess what are the most "appropriate" measures, in addition to legislation that can be used in fulfilling their treaty obligations under the Covenant. The undertaking is not qualified or limited by other considerations and State parties are to adopt measures which can be administrative, financial, educational or social measures so far as they are deliberate, concrete and targeted as clearly as possible towards the achievement of goals that will result in the full realisation of ESCRs.<sup>33</sup>

On the 'obligation of result', the committee was of the view that State parties were "to take steps" with a view of achieving progressively, the full realization of the rights recognized in the Covenant". However, the "progressive realization" of rights should not be misinterpreted as depriving the obligation of all meaningful content and abdicated States of their responsibilities under the Covenant.<sup>34</sup>

Apart from the above, States under the ESCRs Covenant have the duties to respect, protect and fulfill the ESCRs of their citizens. The duty to respect means that the State must refrain from interfering directly or indirectly with the enjoyment of rights, the duty to protect means the State has a primary responsibility of protecting individual right bearers from infringement by third parties while the duty to fulfill incorporates an obligation to facilitate and an obligation to provide. This means State parties must undertake necessary positive legislative, administrative, budgetary, judicial and promotional measures which will ensure the direct enjoyment of social economic rights and make them a reality in

<sup>31</sup> The nature of States parties obligations, Art. 2(1), 14/12/90 (General Comment 3) in Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, HRDAGEN/Rev.9 (Vol I) 7-10, accessed on 9/03/2012.

<sup>32</sup> See Article 2(2) and Article 3 of the Covenant. See also K Henard 'Introduction: The Justiciability of ESCR Rights and the Interdependence of all Fundamental Rights' (2009) 2(4) Erasmus Law Review 2.

<sup>33</sup> Paragraphs 2, 7, 9 and 10 of General Comment 3. See also the 'Implementing economic, social and cultural rights in Nigeria: Challenges and Opportunities' (2010) 10 African Human Rights Law Journal 207.

<sup>34</sup> Paragraph 9 of General Comment 3.

practice.<sup>35</sup> It is necessary to state that the government's duty to respect and protect ESCRs is immediate and lack of resources is no excuse.<sup>36</sup>

### Justiciability of Economic, Social and Cultural Rights

The effective protection of human rights whether civil or political or socio economic rights requires that they are justiciable. Justiciability refers to the capability of judicial or quasi-judicial organs to hear and adjudicate on matters relating to rights contained in various human rights instruments based on the existence of laid down procedures to contest and redress violations. It is the power of courts to review/determine whether the terms of an agreed legal regime has been complied with so as to identify duties and entitlements where applicable.<sup>37</sup>

The justiciability of ESCRs has been the subject of vigorous debates. While some writers are quick to argue that socio economic rights are not justiciable based on the 'perceived' differences between the two sets of rights,<sup>38</sup> others are of the opposing view that there are no justified reasons for distinguishing socio economic rights from other categories of rights.<sup>39</sup> A major argument usually canvassed against the justiciability of social and economic rights include that the rights are not sufficiently well defined in order to make them adjudicable and this will allow judges to act arbitrarily by making laws in a bid to provide meaning to the rights instead of applying laws thereby exceeding their powers under the doctrine of separation of powers. It is the reasoning by this group that the courts should leave the implementation of ESCRs to the legislature and executive who have the legitimacy of making social policies.<sup>40</sup>

Other arguments against the justiciability of socio economic rights include that the courts are ill equipped to deal with complex issues relating to problems of social policy,

<sup>35</sup> F Viljoen (n 28 above) 7; De Schutter (n 14 above) 242. See also Paragraph 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted in January 1997.

<sup>36</sup> S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights' (n 19 above) 366.

<sup>37</sup> Miamingi 'Inclusion by exclusion? An assessment of the justiciability of socio-economic rights under the 2005 Interim National Constitution of Sudan' (2009) 9 African Human Rights Law Journal 81.

<sup>38</sup> A Nolan *et al*, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (2007) CHRGI Working Paper No. 15. See also D Bilchitz 'Towards a reasonable approach to the minimum core obligation: Laying the foundations for the future socio-economic rights jurisprudence' (2003) 19 South African Journal on Human Rights 1.

<sup>39</sup> A An-Na'im 'To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights' in Yash Ghai *et al* 'Economic, Social and Cultural Rights in Practice: the Role of Judges in Implementing Economic, Social and Cultural Rights' (2004 Interights) 7. See also K McLean (n 10 above) 109.

<sup>40</sup> De Schutter (n 13 above) 740-741.

<sup>41</sup> that the adjudication of socio economic rights would be narrowing the room for the exercise of democratic self-determination in the sense that by determining socio economic rights, the courts might need to determine in increasing detail, the scope and character of various governmental policies including the levels of redistribution required thereby leading to significant judicial control of the State budget,<sup>42</sup> that judicial enforcement of socio-economic rights is undemocratic because though judges are unelected, they set aside decisions of the democratically elected representatives of the people.<sup>43</sup> Accordingly, it has been argued that to determine justiciability, there must be a clear mechanism for judicial review of socio economic rights before the law courts for alleged violations and where the standing of individuals in the review process is unclear, or does not exist, the rights are non justiciable.<sup>44</sup>

On the justiciability of socio economic rights debate, the committee on ESCRs in its general Comment 9 had this to say:

*in contrast to civil and political rights, the assumption is too often made that judicial remedies are not essential with regard to violations of economic, social and cultural rights, although this discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.*<sup>45</sup>

It stated further:

*It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each*

<sup>41</sup> Holmes *et al* 'The Cost of Rights: Why Liberty depends on Taxes' quoted by De Schutter, (n 14 above) 741, also see M Wesson 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 South African Journal on Human Rights, 284.

<sup>42</sup> M. Walzer 'Philosophy and Democracy' (1981) 9 Political Theory 391-392 quoted in De Schutter, (n 14 above) 742.

<sup>43</sup> C. Mbazira 'Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice' (2009 PULP) 5-6.

<sup>44</sup> C. Jung *et al* 'Economic and Social Rights in Developing Country Constitutions: Preliminary Report on the III HR Dataset' (2011) [www.tiesr.org/TIESR%20Report%20v%203.1.pdf](http://www.tiesr.org/TIESR%20Report%20v%203.1.pdf) (accessed 5 March, 2012).

<sup>45</sup> General comment 9, para 10, in Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, HRI/GEN/1/Rev.9 (Vol. 1) 7-10, (accessed 9 March 2012) 49.

*legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the Courts to protect the rights of the most vulnerable and disadvantaged groups in society.*<sup>46</sup>

Arguments against the justiciability of economic, social and cultural rights have been widely discredited on the basis that socio economic rights are similar to civil and political rights in the sense that they both engender positive and negative obligations, the enjoyment of both groups of rights are resource dependent,<sup>47</sup> both categories are indivisible and interdependent,<sup>48</sup> both can be exercised either as individual rights or collective rights, the enjoyment of the two groups of rights are essentially for the wellbeing and dignity of all persons, both have obligations which are to be immediately realised and the judicial intervention by the courts in socio economic rights does not place a greater burden over and above that already acquired in the adjudication of civil and political rights.<sup>49</sup>

<sup>46</sup> General comment 9, para 10 Ibid.

<sup>47</sup> C. Mbazira 'Litigating Socio-Economic Rights in South Africa' (n 43 above) 50-51; De Schutter, (n 13 above) 742-744; M. Scheinin 'Economic and social rights as legal rights' in Eide *et al* (eds) Economic, social and cultural rights: A textbook (2005) 41.

<sup>48</sup> S. Liebenberg 'The International Covenant on Economic, Social and Cultural Rights' (n 19 above) 362.

<sup>49</sup> Miamingi (n 37 above) 82-83.

The recent adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (CESCR)<sup>50</sup> which creates an international complaints mechanism for claiming socio economic rights just like its civil and political rights counterpart<sup>51</sup> by the United Nations General Assembly can be said to be an attempt to close the historic gap in human rights protection under the international system and makes a strong and unequivocal statement about the equal importance of all human rights.<sup>52</sup> The Optional Protocol to the ICESCR has however not entered into force as it requires a minimum of ten ratifications.<sup>53</sup>

### The African Charter and Economic, Social and Cultural Rights

Although Africa is a continent with vast natural resources,<sup>54</sup> it has not translated to economic and social enjoyment for its people. Instead the continent's trademark is an embarrassing level of poverty, ignorance, diseases and underdevelopment that is incomparable to other continents.<sup>55</sup> The poverty level has been worsened by the current HIV/AIDS epidemic as Sub-Saharan Africa bears an inordinate share of the global HIV burden.<sup>56</sup> Consequently, as a result of the epidemic, there is a decline in the state of health and increased mortality rates of many Africans with levels of unemployment and the consequential loss of income arising from physical incapacity increasing.<sup>57</sup> Also, the

<sup>50</sup> Known as the Optional Protocol to CESCR or OP-ICESCR. Adopted by the United Nations General Assembly on 10 December 2008.

<sup>51</sup> Unlike the Covenant on Economic, Social and Cultural Rights 1966, the Covenant on Civil and Political Rights 1966 was adopted together with an Optional Protocol (OP-ICCPR) which established laid down procedures for the lodging of individual complaints of civil and political rights violations with the Human Rights Committee which is the supervisory body of the CCPR.

<sup>52</sup> A Nolan *et al* (n 38 above). Under the OP-ICESCR, individuals and groups can lodge a complaint with the committee on the ICESCR alleging a violation of all or any ESCR once their government has ratified the OP-ICESCR. See also Chenwi 'Correcting the Historical Asymmetry Between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 9 African Human Rights Law Journal 23-51.

<sup>53</sup> See Article 18 of the Optional Protocol to the ICESCR. As at today, only 39 countries have signed the optional protocol and only 8 of these countries have gone ahead to ratify them. Of the 39, 10 countries are of African origins but none of them have gone ahead to ratify it. African countries that have signed the protocol include Ghana, Cape Verde, Democratic Republic of the Congo, Gabon, Mali etc.

<sup>54</sup> M Alemayehu 'Industrializing Africa: Development Options and Challenges for the 21<sup>st</sup> Century' (2000 Trenton: Africa World Press) quoted by Viljoen (n 28 above) 568.

<sup>55</sup> C Mbazira 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 African Human Rights Law Journal 334.

<sup>56</sup> HIV/AIDS Health Profile: Sub-Saharan Africa, 2011, [http://www.usaid.gov/our\\_work/global\\_health/aids](http://www.usaid.gov/our_work/global_health/aids) (accessed 15 January, 2012).

<sup>57</sup> C. Mbazira 'Enforcing the Economic, Social and Cultural Rights' (n 55 above) 334.

seeming absence of political will by its leaders presents formidable obstacles and has led to continued/renewed agitation for the protection of economic, social and cultural rights in the continent.<sup>58</sup>

At the time of the adoption of the African Charter on Human and Peoples' Rights, the African continent clearly understood and recognised the indivisibility of all human rights<sup>59</sup> by enshrining ESCRs<sup>60</sup> along with its civil and political rights counterpart in the charter in contrast with the prevailing trend that had led to socio-economic rights being condemned to an inferior status.<sup>61</sup> The inclusion of socio economic rights in the African Charter has been said to be as a result of the realisation that the States had the responsibility of championing rapid political, social and economic reforms. African States had been left socio economically underdeveloped by their colonialist masters despite the large-scale exploitation of natural resources which had taken place on their soil.<sup>62</sup>

The bid to ensure the protection of the rights contained in the African Charter led to the establishment of the African Commission on Human and Peoples' Rights (ACHPR)<sup>63</sup> which has under its protective mandate, the power to receive communications from State and non-State actors about violations of the provisions of the charter to the commission<sup>64</sup> and where violations of the provisions of the Charter are found to have occurred; remedies are ordered against the offending party.<sup>65</sup>

Although the indivisibility, interdependence and justiciability of all human rights are recognised under the Charter, in practice the socio economic rights of African citizens have not been adequately protected. It has been correctly summed that the rejection of the justiciability of socio economic rights in a majority of African constitutions may be associated with the failure of African leaders to recognise phenomena such as poverty, malnutrition, illiteracy and unemployment as human rights problems.<sup>66</sup> According to

<sup>58</sup> Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 African Human Rights Law Journal 225.

<sup>59</sup> Paragraph 7 of the preamble to the African Charter on Human and Peoples' Rights.

<sup>60</sup> Arts 2, 3, 5, 7, 14, 15, 16, 17, 18, 22 & 24 of the Charter. However, some ESCRs provided for under the ICESCR 1966 were not provided for under the Charter. The rights include the right to water, food, housing and the right to social security.

<sup>61</sup> Yeshanew 'Approaches to the Justiciability of Economic, Social and Cultural Rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and Perspectives' (2011) 11 African Human Rights Law Journal 318.

<sup>62</sup> C Mbazira 'Enforcing the Economic, Social and Cultural Rights' (n 55 above) 334-338.

<sup>63</sup> Article 30 of the African Charter on Human and Peoples Rights

<sup>64</sup> See generally Articles 44-59 of the Charter.

<sup>65</sup> T Bulto (n 9 above) 143-144.

<sup>66</sup> C Mbazira 'A Path to Realising Economic, Social and Cultural Rights in Africa? A Critique of the New Partnership for Africa's Development' (2004) 4 African Human Rights Law Journal 37-38.

Khoza, the Commission's promotional activities have usually paid lip service to ESCRs while still predominantly focused on civil and political rights.<sup>67</sup> Also, another reason attributed for the failure to protect socio economic rights properly was the initial redundancy of the African Commission in exercising its protective mandate by interpreting in full, the rights contained in the Charter.<sup>68</sup>

Notwithstanding this, in some early cases such as *Free Legal Assistance Group & Ors v. Zaire*,<sup>69</sup> the Commission tried to enforce the basic and immediate elements of socio economic rights by finding that the failure of the government to provide access to medicines, safe drinking water and electricity amounted to a violation of the right to health under Article 16 of the charter.<sup>70</sup> In *Social and Economic Rights Action Centre (SERAC) & anor v. Nigeria*,<sup>71</sup> the Commission departed from its usual manner and took a giant stride in proclaiming the protection of the socio economic rights of Africans. In the *SERAC's* case, the allegation was that the Government of Nigeria through its servants, the Nigerian National Petroleum Company (NNPC) in conjunction with Shell Petroleum Development Corporation (SPDC), a multi-national company, caused environmental damage and health problems among the Ogoni People, an indigenous community in the Niger Delta region of the country due to constant exploitation of oil resources. The Nigerian Government did not carry out necessary environmental impact assessments neither did it enforce applicable international environmental standards. Protests by the citizens of the area led to violent attacks by security agents of the Government; who apart from killing civilians also destroyed their homes and sources of food supply. In finding the Nigerian Government liable for violations of the rights of the Ogoni people to life, food,

<sup>67</sup> Khoza 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Holds a Seminar in Pretoria' (2004) 4 African Human Rights Law Journal 334.

<sup>68</sup> Initially, a sizeable number of the commissioners in the African Commission simultaneously held public positions in their countries thereby affecting the independence and impartiality of members, has they had no wish to condemn their governments. See C Mbazira 'Enforcing the Economic, Social and Cultural Rights' (n 55 above) 343-347.

<sup>69</sup> (2000) AHRLR 74 (ACHPR 1995).

<sup>70</sup> Ibid at paragraph 47. This decision has however been criticised on the basis that the Commission did not properly analyse the normative contents of the right to health. See Yeshanew (n 60 above) 322. See also *Morne van der Linde et al* 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the *SERAC* Communication' (2003) 3 African Human Rights Law Journal 172-173. Other such cases include *International Pen and Others* (on behalf of *Saro-Wiwa*) *v Nigeria*, (2000) AHRLR 212 (ACHPR 1998), *Malawi African Association and Others v Mauritania*, (2000) AHRLR 149 (ACHPR 2000) etc.

<sup>71</sup> (2001) AHRLR 60 (ACHPR 2001)

health, housing etc, the Commission stated that the Nigerian Government had failed to live up to its minimum expectations under the Charter.<sup>72</sup>

The Commission's decision in the *SERAC's* case was hailed on several accounts including that it gave a normative content to some of the socio-economic rights contained in the Charter,<sup>73</sup> that it went ahead to read into the Charter; rights which are not expressly provided for such as rights to food and shelter, that the decision made clear and elaborate recommendations that was above the declaratory nature of its past decisions;<sup>74</sup> that it referred to the minimum core obligations owed by State parties to its citizens under the ICESCR including the duties to respect and protect the economic, social and cultural rights of its citizens.<sup>75</sup>

Also, in *Purohit & Anor v. The Gambia*,<sup>76</sup> the complainants, who were mental health advocates, submitted a communication to the African Commission on behalf of mental patients detained at a psychiatric hospital in the Republic of The Gambia. The complainants alleged that the provisions of the Lunatic Detention Act under which mental health patients were detained in the country were outdated and the conditions/manner of treatment meted to the mental patients amounted to a violation of various provisions of the African Charter, including their right to health.<sup>77</sup> The Commission while not hesitating to find the government of The Gambia in violation of the various rights,<sup>78</sup> most especially the right to health which is important to all aspects of a person's life and crucial to the realisation of all other rights;<sup>79</sup> however, adopted the ESCRs' Committee progressive realisation standard of 'taking concrete and targeted steps while taking full advantage of available resources' to realise the right to health without discrimination based on realities on ground as to the level of poverty in Africa.<sup>80</sup>

According to Mbazira, the approach adopted by the African Commission was justified due to the reason that the formulation of the rights in the African Charter is not substantially different from that of Covenant on Economic, Social and Cultural Rights and there is no

<sup>72</sup> See *SERAC's* case para 58-68.

<sup>73</sup> Articles 2, 4, 14, 16, 18(1), 21 and 24 of the ACHPR

<sup>74</sup> C. Mbazira 'Enforcing the Economic, Social and Cultural Rights' (n 55 above) 347.

<sup>75</sup> F. Coomans 'The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52 International and Comparative Law Quarterly 749-757. See also Yeshanew (n 61 above) 324.

<sup>76</sup> (2003) AHRLR 96 (ACHPR 2003)

<sup>77</sup> Ibid. Paras 5-9.

<sup>78</sup> Ibid. See paras 53,57,58,59,60,76 and 83.

<sup>79</sup> The enjoyment of the right to health includes the right to health facilities, access to goods and services which are to be guaranteed without discrimination of any kind. Ibid. Para 80.

<sup>80</sup> Ibid at para 84.

reason why Africa should adopt a different standard which appears to be idealistic and out of touch with reality.<sup>81</sup>

Despite the far reaching recommendations in both cases, a major challenge which has always resulted in an extremely frustrating experience for the victims of socio economic rights violations is the inability of the African Commission to implement its decisions and recommendations.<sup>82</sup> The Commission has been severely criticized as a toothless bulldog that only barks but cannot bite because its decisions are not binding on State parties<sup>83</sup> and this makes a mockery of whatever achievements that might be gained as they are reduced to nothing more than symbolic gestures made to expound the meaning of the rights.<sup>84</sup>

A measure adopted to overcome the problems of non-implementation of the Commission's decisions was the adoption of the Protocol that established the African Court on Human and Peoples' Rights to complement the protective mandate of the African Commission.<sup>85</sup> The Protocol allows aggrieved persons, whether State or non-State (NGOs),<sup>86</sup> to bring complaints before the African Human Rights Court for violations of the African Charter and the court is empowered to offer remedies for human rights violations.<sup>87</sup> Parties will however, only have automatic access to the Court upon a State's

<sup>81</sup> C. Mbazira, *Enforcing the Economic, Social and Cultural Rights* (n 55 above) 353.

<sup>82</sup> C. Mbazira, *Ibid* at 355.

<sup>83</sup> Yerima 'Comparative Evaluation of the Challenges of African Regional Human Rights Courts' (2011) 4(2) *Journal of Politics and Law* [www.ecsnet.org/jpl](http://www.ecsnet.org/jpl) accessed on 13/03/2012.

<sup>84</sup> Khoza (n 67 above) 335. See also Udombana 'An African Human Rights Court and African Union Court: A needful Duality or Needless Duplication?' (2002-2003) 28 *Brook Journal of International Law* 811, 821-822 & 826.

<sup>85</sup> The Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights was adopted by the African Heads of State and Government in 1998. The court came into being on January 25, 2004 with the ratification by fifteen African member States. This was almost immediately followed by the creation of the African Court of Justice as the principal judicial organ of the African Union. Concern over the proliferation of enforcement bodies in Africa brought to the fore the question whether the establishment of the two Courts was a necessity or merely a needless duplication. See generally Udombana (n 83 above) 811. Currently, another protocol to merge both courts has been adopted. The merged court will have two chambers: one for general legal matters and the other for hearing of matters related specifically to human rights.

<sup>86</sup> See generally Article 5 of the Human Rights Protocol. A downside of the protocol is the provision of optional jurisdiction with respect to individuals and NGOs. The protocol provides in Article 5(3) that the court may entitle relevant Non-Governmental Organisations ... with observer status before the Commission, and individuals to institute cases directly before it in accordance with Article 34(6) of this Protocol.

<sup>87</sup> See Article 27(1) of the Protocol. By the provision of Article 30 of the Protocol; State parties to the protocol expressly undertake to comply and execute the judgements of the African Court.

ratification of the Protocol.<sup>88</sup> For others whose States have not ratified the Protocol access to the African Court may only be through the Commission.<sup>89</sup>

However, the requirement of only allowing NGOs and individuals with observer status to have access to the court based on the provisions of Article 34(6) which provides that State parties to the protocol must make a declaration accepting the competence of the Court to receive cases under Article 5 (3) of the Protocol is one currently generating a lot of furore and which has the capacity to undermine the reasons for the creation of the African court in the first instance.<sup>90</sup>

### Justiciability of Economic, Social and Cultural Rights under Domestic Legislations

A major problem that has continued to plague the advancement of ESCRs in Africa is that of its judicial enforcement at the domestic courts. Currently, there are two methods of protecting ESCRs in Africa. The first is through the inclusion of ESCRs in the constitution of a country as rights that can be the subject matter of judicial review and enforcement.<sup>91</sup> This is based on the reasoning that all rights being the same, can be enforced by adjudicatory organs in so far as they are expressly protected as justiciable substantive norms<sup>92</sup> and the second is where the rights are merely constitutionalised as Directive Principles of State Policy (DPSP)<sup>93</sup> which are just codes of conduct according to which the governance of a country should take and are not justiciable.<sup>94</sup>

Recent decisions of the African Commission<sup>95</sup> on socio economic rights claims and some African jurisdictions such as South Africa have shown that social and economic

<sup>88</sup> Article 5(2) of the Protocol.

<sup>89</sup> Maybe where the African Commission refers cases it has decided upon but which States parties have refused to comply with its recommendations.

<sup>90</sup> Currently, the African Court on Human and Peoples Rights is conducting a public hearing on an application filed by Femi Falana, a Nigerian lawyer against the African Union contesting the provisions of Article 34(6) which has effectively blocked the access of NGOs and individuals whose countries refuse to make the declaration granting access to the Human Rights Court. Currently, only few countries such as Burkina Faso, Ghana, Malawi, Mali and Tanzania have submitted the declaration granting their citizens and NGOs access to the Court. The Protocol on the Statute of the African Court of Justice and Human Rights also contains this restrictive access provisions in Article 30(f) which is subject to the provision of Article 8(3) of the Protocol on the merged courts.

<sup>91</sup> The South African Constitution 1996, the Angolan Constitution 2010, the Ethiopian Constitution 1994 and the Ghanaian Constitution 1992 are ready examples.

<sup>92</sup> Yeshanew (n 61 above) 320.

<sup>93</sup> Nigeria, Ireland, India, and Lesotho are ready examples.

<sup>94</sup> Yerima (n 83 above).

<sup>95</sup> See *SERAC and CESR Vs. Nigeria* African Commission on Human Rights, Case No. 155/96, Decision made at 30th Ordinary Session, Banjul, The Gambia, 2001.

rights can be justiciable. In South Africa,<sup>96</sup> the protection of rights such as the right of access to adequate housing,<sup>97</sup> right to health care, food and water, and social security,<sup>98</sup> the right of children to nutrition, shelter, health care services and social services<sup>99</sup> are guaranteed though some of the rights are subject to internal limitations of the State taking reasonable legislative/other measures within available resources to progressively realise them.<sup>100</sup>

In jurisdictions where ESCRs are justiciable, there is the necessity to adopt an approach which while identifying the essential elements of the rights to be protected; also requires that there is constantly in existence, a method of judicial review that inquires into the reasonableness or justifiability of a State's action or inaction.<sup>101</sup> The reasonableness approach was developed by the South African Constitutional Court, who have continued to be at the forefront in ensuring that socio economic rights are constantly subjected to judicial review as individuals and non-governmental organisations alleging that their rights have been violated approach the courts for redress.<sup>102</sup> The approach involves the scrutinisation of governmental programmes for reasonableness without dictation or pre-emption of policy choices while maintaining a level of appropriate deference to the executive and legislative branches. Using this approach, the Government is advised to take steps where it has taken none or to revise adopted measures to meet constitutional standards where they are found to be unreasonable. According to the courts, the reasonableness of a States' programme among other things will depend on its coordination, balance and flexibility; such programme should make necessary provisions for short, medium and long-term needs without excluding a significant sector of society; it must be transparent, reasonably conceived and implemented and should be grounded in reality etc.<sup>103</sup>

South African courts are primarily bound by the constitution<sup>104</sup> and they have an obligation to give meaning to its provisions while carrying out their judicial functions

<sup>96</sup>South Africa is yet to ratify the International Covenant on Economic, Social and Cultural Rights despite having signed the Covenant in 1994.

<sup>97</sup>South African Constitution 1996, Section 26(1)

<sup>98</sup>Ibid Section 27(1)

<sup>99</sup>Ibid Section 28(1)(c)

<sup>100</sup> See sections 26(2) and section 27(2)

<sup>101</sup> Yeshurow (n 61 above) 320-321.

<sup>102</sup> *V. Verma* (n 30 above) 42; *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 1 SA 765 (CC), Government of the Republic of South Africa v. *Grootboom*, 2001, 1 SA 46 (CC), *Minister of Health v. Treatment Action Campaign*, 2005, 5 SA 721 (CC) etc.

<sup>103</sup> Yeshurow (n 61 above) 326; S. Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 South African Journal of Human Rights (SAHR) 16.

<sup>104</sup> See Section 8(1) of the South African Constitution

which includes adjudication on socio economic matters. It has been stated that not only are they obliged to adjudicate socio-economic rights; they also have a responsibility to "forge new tools" and "shape innovative remedies" to achieve their goals.<sup>105</sup> According to the South African Constitutional Court, a dispute relating to socio economic rights will definitely require the Courts to evaluate State policy and to give judgment on whether or not it is consistent with the Constitution. Where it is discovered that a government policy is inconsistent with the Constitution, it is the duty of the courts to make a declaration to that effect, and where it is established that a right in the Bill of Rights has been infringed; the court has an additional duty of granting appropriate reliefs including making just and equitable orders.<sup>106</sup>

In *Soobramoney v. Minister of Health, KwaZulu-Natal*,<sup>107</sup> the applicant was terminally ill and needed dialysis treatment to prolong his life. The hospital refused treatment because the procedure was not lifesaving. In response, Mr Soobramoney sued the hospital hoping that the court would order the hospital to perform the procedure. The Constitutional Court however held that the applicant could not succeed in his claim and found that the denial of the required treatment did not breach the provisions of the constitutions on the right of everyone to access health care services<sup>108</sup> and emergency medical treatment.<sup>109</sup> In arriving at its decision, the court was of the view that the applicant's treatment was not one which warranted 'emergency health care' but access to health care services. In determining whether his right to access health care had been violated, the court reviewed the measures taken by the hospital to provide dialysis treatment including the policy used for the selection of patients. It was discovered that the applicant did not qualify, as the treatment was only offered as a temporary measure for those who were eligible for transplant.

<sup>105</sup> *Fose v Minister of Safety and Security* (1997) (3) SA 786 (CC) [94] as cited in President of the Republic of South Africa and Another v *Modderklip Boerdery* (Pty) Ltd (5) SA 3 (CC) [57] quoted by M Brennan 'To Adjudicate and enforce Socio Economic Rights: South Africa Proves that Domestic Courts are a Viable Option' (2009) 9(1) Qut Law & Justice Journal 76 <http://ljj.law.qut.edu.au/editions/v9n1/pdf> (accessed 22 March, 2012).

<sup>106</sup> Section 38 and 172(1) SA Constitution. See also *Minister of Health v. TAC & Others* 2002 (5) SA 703 (CC), paragraph 101.

<sup>107</sup> 1998 1 SA 765 (CC). This was the first socio economic rights case to be determined by the Constitutional Court.

<sup>108</sup> section 27(1) of the 1996 Constitution

<sup>109</sup> *Ibid.* section 27(3).

Even though a lot of criticisms were levied against the Constitutional Court for its decision in this case<sup>110</sup> and a violation of socio economic rights was not found to have occurred, it should be stated that a number of objectives were achieved in the sense that the court recognised that ESCRs are the State responsibility and can be judicially enforced; it acknowledged that in appropriate instances, the courts can defer to the reasoning of other relevant organs of government including reasonably justified economic limitations when rendering decisions so as not to overburden the legislature with unrealistic remedies and that socio economic rights can be properly adjudicated if heard by a competent judiciary.<sup>111</sup>

The case of *Minister of Health and Others v Treatment Action Campaign & Ors*,<sup>112</sup> is an example of the situation where the courts have exercised their powers to question the decision/policies of the government on socio economic rights issues. In the case, a non-governmental organisation, the Treatment Action Campaign (TAC), sued the South African government over their program on the prevention of mother to child transmission of HIV. The government had implemented a policy whereby doctors could administer a drug, nevirapine to positive pregnant women, who attended hospitals at specific pilot sites; doctors outside of these sites were prohibited from administering the drug. Statistics showed that only 10% of those who needed to receive the drugs were covered at the sites; the remainder of the women could not receive treatment. The NGOs' sought to have the prohibition on distribution outside of the pilot sites struck down and an order forcing the State to create immediately, an expansive program.<sup>113</sup>

In a unanimous ruling, the court stated that all that can be expected is for the State to act reasonably to provide access to socio economic rights on a progressive basis and the State's policy regarding the provision of nevirapine was an inflexible and unreasonable one which denied a lot of mothers and their new born children access to a potentially lifesaving drug.<sup>114</sup> The court amongst others; ordered that the State remove the restrictions that prevent the drug from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites and also plan and implement an effective, comprehensive and

<sup>110</sup> G Devenish 'The nature, evolution and operation of socio-economic rights in the South African Constitution' (2007) 70(1) THRH 84; C Ngweni and R Cook 'Rights Concerning Health' in D Brand et al (ed) 'Socio-economic Rights in South Africa' (2005) 135 & 137.

<sup>111</sup> M Brennan (n 105 above) 125-126.

<sup>112</sup> 2002 (5) SA 703 (CC).

<sup>113</sup> E C Christiansen 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2006-7) 38 Columbia Human Rights Law Review 368-369.

<sup>114</sup> See TAC's case at paragraph 80

progressive programme for the prevention of HIV transmission from mother to child all over the country.<sup>115</sup>

In *Occupiers of 51 Olivia Road & ors v City of Johannesburg*,<sup>116</sup> the City of Johannesburg brought an eviction application to the High Court, to evict a number of people occupying several buildings in the inner city of Johannesburg on the grounds that the buildings were unfit for human habitation, dangerous and unhygienic and that apart from their eviction promoting public health and safety, would also reverse inner city decay in terms of the Johannesburg Inner City Regeneration Strategy. The city's application was opposed on the grounds that the respondent's right of access to adequate housing under section 26(1) of the Constitution would be infringed if the eviction order was granted and that the city had failed to meet its positive obligations to achieve the progressive realisation of the right of access to adequate housing and was therefore prevented from evicting the respondents.<sup>117</sup> After opposing judgements by the High Court and the Supreme Court of Appeal,<sup>118</sup> the Constitutional Court adopted a position which was a surprise in the sense that instead of addressing the question of adequate housing, it made an interim order that the parties discuss on how to alleviate the applicants' plight and make housing as good as practicable. Though the court's approach can be regarded as an unwillingness to engage in the primary dispute before it; the discussion produced a result that hitherto seemed impossible as the occupiers agreed to vacate on the condition that the city provided them with an alternative accommodation within the vicinity; this the city not only did but also provided access to all necessary amenities.<sup>119</sup> The decision in the case

<sup>115</sup> Ibid. paragraph 135. It has been stated that the SA's government change in policy which resulted in the accelerated expansion of the programme to provide Nevirapine throughout the country was done in pre-empting the Constitutional Court's decision against it and this may have influenced the court to issue declaratory orders only. See K McLean (n 10 above) 132.

<sup>116</sup> 2008 3 SA 208 (CC)

<sup>117</sup> K McLean (n 10 above) 147-148

<sup>118</sup> The High Court in upholding the respondents claim and dismissing the city's application issued a declaratory order regarding the city's failure to comply with its constitutional obligations and placed an obligation on it not to evict the occupiers until it had developed a pragmatic programme to deal with their predicament. On the other hand, the Supreme Court of Appeal was of the view that the deprivation of unsafe housing did not amount to an infringement of the right of access to adequate housing but that the eviction itself triggered an obligation on the city to provide emergency basic shelter to those who then found themselves in a crisis situation. It therefore granted the eviction order against the occupiers, but ordered the city to provide housing assistance to those in need. See K McLean (n 10 above) 148-149.

<sup>119</sup> It can be stated that the order for constructive discussion allowed the occupants to be treated as persons with rights and dignity, which allowed them to be more amenable to suggestions. Also the order allowed each party to be constructive as to solutions to their problem.

has been said to signal a new trend in the Constitutional Court jurisprudence in socio economic rights decisions which is based on an emphasis on meaningful engagement.<sup>120</sup> In countries where ESCRs are not justiciable, national policy objectives made up of core economic, social and cultural rights issues are constitutionalised as Directive Principles of State Policies (DPSPs). The Directive Principles are principles which have no force of law but are just meant to guide the State in the adoption of policies are State policies and goals.<sup>121</sup>

The notion of inserting some rights as directive principles into the Constitutions of African States was imported from the Indian Constitution which provided the model for their first transplant through the Nigerian Constitution of 1979.<sup>122</sup> The Indian Constitution set out some rights as fundamental rights that can be the subject matter of litigation in the courts and others as directive principles of State policy that the State shall strive to promote, secure and protect so as to minimise inequalities amongst its citizens even though they cannot be enforced by the law courts.<sup>123</sup> Despite the non-justiciability of the directive principles in India, De Villiers is of the view that the main rationale for the inclusion of the directive principles in the Indian constitution was to provide a code of conduct for governance in the country with the expectation that the State will adhere to them and act in accordance with their aims when making laws. The non justiciability of the directives however does not mean that they can be ignored by the courts as the way in which justiciable fundamental rights are understood and interpreted depends upon the vision formulated in the directives.<sup>124</sup>

According to Yeshanew, an interdependence approach can be used in the enforcement of economic, social and cultural rights through a reliance on the interrelatedness and intertwining of all rights whether it be civil or political or ESC rights.<sup>125</sup> A ready example of utilisation of the approach is through the expanded judicial

<sup>120</sup> K. McLean (n 10 above) 151.

<sup>121</sup> Most Constitutions with directive principles specifically provide for the non justiciability. See JC Mubangizi 'Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience' 10 <http://www.enelsyn.gr/papers/w13/Paper%20by%20Prof.%20John%20Cantius%20Mubangizi.pdf> (accessed 22 March, 2012).

<sup>122</sup> The Indian Constitution of 1950 as amended by Constitution (Ninety-Seventh) Amendment Act, 2011. Chapter III of the Constitution provides for the fundamental rights while Chapter IV provides for a cluster of rights under its directive principles. See Olowu, An integrative rights-based approach to human development in Africa, PULP, 2009, pgs. 90-91.

<sup>123</sup> See Articles 37 and 38 of the Indian Constitution.

<sup>124</sup> B. de Villiers 'Directive Principles of State Policy & Fundamental Rights: The Indian Experience' (1992) 8 South African Journal on Human Rights 32-33.

<sup>125</sup> Yeshanew (n 61 above) 332.

interpretation given to the right to life guaranteed under Article 21 of the Indian Constitution by the Indian Supreme Court in its public interest litigation so as to overcome objections raised on grounds of the unjustifiability of ESCRs. In appropriate instances, the right to life has been interpreted as including the rights to a livelihood, nutrition, health care, shelter, basic necessities of life, education etc.<sup>126</sup>

Though the justiciability of economic, social and cultural right in India developed in stages,<sup>127</sup> the Indian Supreme Court are currently at the forefront in protection of the directive principles and therefore socio economic rights through the application of the interdependence of human rights approach and based upon the belief that the courts have a duty not only to interpret laws but also make it through a sharing of the constitution's passion for social justice. Accordingly, the Courts in *Francis Coralie Mullin v. Administrator Union Territory of Delhi*,<sup>128</sup> interpreted the right to life contained in the constitution as not only relating to the protection of the life of citizens but also includes the right to live with dignity while in *Shantistar Builders v. Narayan Khimalal Tatome*,<sup>129</sup> the court interpreted the right to life to include the right to shelter and decent environment that will allow for physical, mental and intellectual growth.<sup>130</sup>

The *People's Union for Civil Liberties (PUCL) v. Union of India*<sup>131</sup> case has been widely hailed for its success in improving government policy on socio-economic rights. The case arose as a result of lack of access to food due to a massive drought which had resulted in the starvation and death of a lot of people in several Indian States. The

<sup>126</sup> Ibid at 333-334 and Shivani Verma (n 10 above). It is necessary to State that under recent amendments to the Indian Constitution, Article 21A provides for the right of children between the ages of 6 and 14 to free and compulsory education under Chapter III of the Constitution.

<sup>127</sup> According to Villiers, the first phase was characterized by the reasoning that the fundamental rights contained in Chapter III of the Indian Constitution were superior and should be given preference in the event of conflict. Examples of cases decided during this period include *Madras v. Champakam Dorairajan* 1951 AIR SC 226, *H M Quareshi v. State of Bihar* 1958 SC 731. The second phase which has been described as the complimentary stage was the period when efforts were made to interpret fundamental rights and the DPSP in a way that they were seen as supplementing each other. Cases decided here include *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845, *Chandra Bhawan Boarding and Lodging Bangalore v. The State of Mysore* 1970 SCR 600. The current stage is that were the courts are engaged in judicial activism and are interpreting socio economic rights through their relationship and interdependence on fundamental rights. The case of *Maneka Gandhi v. Union of India* 1978 1 SCC 248 marked a watershed in the promotion/protection of the DPSPs. See generally, B. de Villiers (n 124 above) 29-49.

<sup>128</sup> AIR 1981 SC 746.

<sup>129</sup> AIR 1990 1 SCC 520.

<sup>130</sup> T Usher 'Adjudication of Socio-Economic Rights: One Size Does Not Fit All' (2008) 1(1) UCL Human Rights Review 154-171 <http://www.uclshrp.com/review> (accessed 24 March, 2012).

<sup>131</sup> Writ Petition No. 196 of 2001



(1) of the Constitution which provides that international treaties between the federation and other countries must first be enacted as Domestic Laws in order to be enforceable in Nigeria.

However, Nigeria cannot be said to have a good history in the domestication of the human rights treaties it ratifies as only a few have been domesticated in the country. The treaties that have been codified as laws include the African Charter on Human and Peoples Rights,<sup>139</sup> the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.<sup>140</sup> Despite the non- domestication of the other ratified human rights treaties, Nigeria still has an international obligation to observe their provisions as the domestic legal arrangements of a country cannot excuse the failure to discharge treaty obligations and there is a legitimate expectation by citizens of the country that their government will observe the terms of the treaty in its acts affecting them.<sup>141</sup>

Irrespective of the fact that the Nigerian State is a party to various treaties relating to human rights, it still has a poor record of protection due to the various violations of the ESCRs especially in areas relating to health,<sup>142</sup> education<sup>143</sup>, food, social security, housing, environment, work e.tc.<sup>144</sup> Accessing health care facilities is a major problem especially for the poor, those living in rural areas and people living with HIV. In Nigeria people living with HIV/AIDS (PLHAs) frequently experience gross violations of human rights including denial of treatment in health institutions, breaches of privacy and confidentiality, terminations of employment, ejection from housing, and other forms of discrimination and

<sup>139</sup> African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9 LFN 2004.

<sup>140</sup> The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child have both been domesticated under the Child Rights Act, 2003. Another international treaty that has been domesticated is the Geneva Conventions Act, Cap. G3 LFN 2004.

<sup>141</sup> International Commission of Jurist 'Access to Justice: Human Rights Abuses Involving Corporations: Federal Republic of Nigeria' (2012) <http://documents.icj.org/Nigeria.pdf> (accessed 27 March, 2012). It should be noted that Nigeria has not entered any reservations or objections to the provisions of the various treaties.

<sup>142</sup> Art. 25 of the UDHR, Art. 12 CESC, Art.16 ACHPR and Section 17(3) (d) of the 1999 Constitution.

<sup>143</sup> Art. 26 UDHR, Art. 13 ESCR, Art. 17 ACHPR and Section 18 Nigerian Const. 1999. Recently, in *SERAP v Nigeria and Universal Basic Education Commission, ECW/CCJ/APP/12/7*. The Economic Commission of West African States (ECOWAS) Court of Justice found Nigeria in violation of the right to education provided for under the African Charter and other domestic legislations. It ordered the Nigerian government should make adequate arrangements for compulsory and free education for every Nigerian child while dismissing Nigeria's objection that education is merely a prerogative of government policy under the non-justiciability of Chapter II provisions of the Constitution.

<sup>144</sup> Art. 22 and 23 UDHR, Art.11 ESCR, Art. 15 ACHPR and Sections 17(3)(a), (e) & (g), 20 etc.

social exclusion.<sup>145</sup> Also, there is an insufficiency of trained health personnel, insufficient health facilities and inequitable access to drugs.<sup>146</sup> Maternal mortality is a major health challenge in the country with an alarming level of maternal deaths which arise predominantly from preventable causes.<sup>147</sup> Apart from the above, the Niger Delta region which produces the bulk of the nation's oil revenue has a majority of its communities suffering from lack of basic infrastructures; poor social amenities coupled with environmental degradation which results from oil exploration activities in the area.<sup>148</sup>

With the various violations of socio economic rights that continually take place in Nigeria; an automatic response should have been the filing of necessary applications before the courts for redress or enforcement of the rights contained in the international instruments ratified; most especially under the African Charter that has been domesticated in Nigeria, but this has not been possible as a result of the provisions of section 6(6)(c) of the Constitution which renders the contents of its Chapter II non justiciable.<sup>149</sup> The section provides that the powers of the courts shall not "extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directives".

<sup>145</sup> See Center for the Right to Health for Policy Project 'HIV/AIDS and Human Rights in Nigeria: Background Paper for HIV/AIDS Policy Review in Nigeria' (2003) <http://www.heart-intl.net/HEART/030106/HIVAIDSandHumanRights.pdf> (accessed 27 March, 2012).

<sup>146</sup> Onyemelukwe 'Access to anti-retroviral drugs as a component of the right to health in international law: Examining the application of the right in Nigerian jurisprudence' (2007) 7 African Human Rights Law Journal, p. 463.

<sup>147</sup> Federal Ministry of Health 'Saving Newborn Lives in Nigeria: Newborn Health in the Context of the Integrated Maternal-Newborn and Child Health Strategy' (2011) <http://www.countdown2015mnch.org/documents/nigeria/nigeria-full-report.pdf> accessed 28 March, 2012).

See also Ujah 'Factors Contributing to Maternal Mortality in North-Central Nigeria: A Seventeen Year Review' (2005) African Journal of Reproductive Health quoted by Akinrinola Bankole *et al* 'Barriers to Safe Motherhood in Nigeria' <http://www.guttmacher.org/pubs/2009/05/28/MotherhoodNigeria.pdf> accessed 18 March, 2012).

<sup>148</sup> Yusuf 'Oil on troubled waters: Multinational corporations and realising human rights in the developing world, with specific reference to Nigeria' (2008) 8 African Human rights Law Journal, pp. 80 & 83. Though the creation of the NDDC has to some extent tried to alleviate the sufferings of the people in this region, a lot still has to be done. See also Jonah Rexler 'Beyond the Oil Curse: Shell, State Power, and Environmental Regulation in the Niger Delta' (2010) XII(1) Stanford Journal of International Relations [http://www.stanford.edu/group/sjir/12-1/fall10-final\\_3.pdf](http://www.stanford.edu/group/sjir/12-1/fall10-final_3.pdf) accessed 27 March, 2012).

<sup>149</sup> Chapter II of the 1999 Nigerian Constitution provides for some socio economic rights under its Directive Principles of State Policy but specifically provides that they are merely meant to guide State policy and expresses ideals of things to be done and are not justiciable.

According to Olowu<sup>150</sup>, the fundamental objectives and directive principles were essentially a set of guidelines designed to secure the national targets of social wellbeing, social justice, political stability, and economic growth in accordance with the espoused vision of the preamble to the Constitution. However, based on the constitutional provisions as to their non justiciability before Nigerian courts, they can be said to have become worthless platitudes.

As a result of the provisions of section 6(6) (c), the Nigerian courts have been quick to 'hands off' or exercise great caution in matters relating to the enforcement of socio economic rights. In *Archbishop Anthony Okogie and Others v. The Attorney-General of Lagos State*,<sup>151</sup> The plaintiffs brought an action before the court challenging the Lagos State Government's decision to abolish the operation of private schools in the State in pursuit of the educational objectives of ensuring equal and adequate educational activities at all levels under section 18(1) of the Constitution. The Court held that by virtue of section 6 of the 1979 Constitution, the provisions of chapter II of the Constitution were not enforceable and that it was not in the power of the Court to make any pronouncement on them except it is permitted by legislation. This reasoning was also adopted in *Badejo v. Federal Minister of Education*<sup>152</sup> where the Appeal Court held that the right to education was not a justiciable right under the 1979 Nigerian Constitution.<sup>153</sup> It was only recently in *Uzuokwu v. Ezeonu II*<sup>154</sup> that the directive principles of State policy were first referred to as rights when the courts stated that:

*"...there are rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution"*<sup>155</sup>

The reasoning that the provisions of Chapter II can be made justiciable through appropriate legislation as indicated in the Okogie's case was again reiterated in *Attorney*

<sup>150</sup> Olowu 'An integrative rights-based approach to human development in Africa' (PULP 2009) 95. The preamble to the 1999 Constitution also provides for this.

<sup>151</sup> (1981) 2 NCLR 350.

<sup>152</sup> (1990) LRC (Const) 735

<sup>153</sup> Section 6(6)(c) of the 1979 constitution is the same as Section 6(6)(c) of the 1999 constitution. See Durojaiye 'Litigating the Right to Health in Nigeria: Challenges and Prospects' in Killander (ed)

'International Law and Domestic Human Rights Litigation in Africa' (PULP 2010) 157.

<sup>154</sup> (1991) 6 N.W.L.R. (pt. 200) 708 ( C.A.)

<sup>155</sup> Ibid at pgs. 761-762.

*General of Ondo State v. Attorney General of the Federation and Ors.*,<sup>156</sup> where the Supreme Court while reaffirming the non justiciability of socio economic rights also held that the provisions of the Fundamental Objectives and Directive Principles of State Policy can be enforced through the promulgation of appropriate legislations. In this case, the court in emphasis affirmed thus:

*"... to ensure that the Directive Principles are not a dead letter, whatever is necessary should be done to see that they are observed as much as practicable so as to give cognisance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand."*<sup>157</sup>

It is felt that the approach usually adopted by the Nigerian courts wherein socio economic rights are simply declared as non-justiciable; or stating that nothing can be done except appropriate legislation is passed is not progressive or in line with current trends and is a fundamental departure from current Indian jurisprudence, from which Nigeria adopted the principle of non-justiciable directive principle.<sup>158</sup> The Indian courts have applied the integrative approach in ensuring that violations of socio economic rights are remedied through reference to their interrelatedness with civil and political rights and there is nothing stopping the Nigerian courts from doing the same.

The judiciary is charged with the duty of upholding the constitution including acting as the society's watchdog. There is a need for Nigerian courts to be proactive in the sense that instead of 'blanketedly' declaring that their hands are tied due to the provisions of section 6(6)(c), they can continually make reference to the provisions of the African Charter and other international instruments that have been ratified by the Nigerian State in

<sup>156</sup> (2002) 6 SC Pt 11 pg.179.

<sup>157</sup> Ibid. See also Durojaiye in Killander (ed) (n 153 above)158.

<sup>158</sup> Ibid 'Beyond justiciability' (n 58 above) 226.

cases involving the violations of the socio economic rights of citizens as was done in the case of *Gbemre v. Shell Petroleum Development Company and 2 Ors*<sup>159</sup> where the court held that the acts of the defendants constituted a violation of the plaintiffs rights to life, dignity, health and clean environment under the African Charter.<sup>160</sup> It should be noted that in the above case, the federal high court issued a series orders including that the first and second respondents take immediate steps to stop gas flaring in the area; that the third respondent, the Attorney-General of the Federation should initiate proceeding at the National Assembly to amend the existing law regulating activities in the petroleum industry including the making of continuous gas flaring a crime in the country.<sup>161</sup>

Recently in relation to the protection of the right to health, the Lagos High Court in *Georgina Ahamefule v Imperial Medical Center & Alex Molokwu*<sup>162</sup> among other issues declared that the denial of treatment to the plaintiff, who was a former employee of the 1<sup>st</sup> defendant based on her HIV status was a violation of the provisions of article 16 of the African Charter and article 12 of the ICESCR to which Nigeria is a party.<sup>163</sup>

With the passing of the Fundamental Rights (Enforcement Procedure) Rules in 2009, it is felt that problems associated with the litigation of socio economic rights in the country will be alleviated as the rules declares in its preamble that the courts shall at every stage of human rights action, ensure that the provisions of the African Charter is expansively and purposely interpreted and applied; with the view of advancing and realising the rights and freedoms contained therein. Additionally, the rules provides that the courts will respect all municipal, regional and international Bills of Rights cited to it or brought to its attention, including others it is aware of for the purpose of advancing an applicant's rights and freedoms.<sup>164</sup>

<sup>159</sup> Suit FHC/B/CS/53/05,

<sup>160</sup> Articles 4, 16 and 24 of the ACHPR. See also *See Oronto Douglas v Shell Petroleum Development Company Limited* (1999) NWLR Pt 591 pg. 466. See also *Odafe & ors v Attorney General & ors* (2004) AHRLR 205 where the court recognised the right to health under the African Charter and used it as a basis for ensuring the medical treatment of some prisoners.

<sup>161</sup> *Ibid* at para 6.

<sup>162</sup> Suit NO. ID/1627/2000.

<sup>163</sup> E Durojaye 'So sweet, so sour: A commentary on the Nigerian High Court's decision in *Georgina Ahamefule v Imperial Hospital & Another relating to the rights of persons living with HIV*' (2013) 13 *African Human Rights Law Journal* 468. See also *Georgina Ahamefule v Imperial Medical Center & Alex Molokwu* (unreported) Suit NO. ID/1627/2000 [www.scribd.com/doc/126185950/Georgina-Ahamefule-vs-Imperial-Medical-Center-Dr-Alex-Molokwu-ID-1627-2000-Judgement](http://www.scribd.com/doc/126185950/Georgina-Ahamefule-vs-Imperial-Medical-Center-Dr-Alex-Molokwu-ID-1627-2000-Judgement) (8 February 2014). In the case, the plaintiff was awarded seven million naira as damages. However the case is currently on appeal.

<sup>164</sup> See generally the preamble to the Fundamental Rights Enforcement Procedures Rules (2009) assessed from <http://www.accessjustice-ng.org/articles/New%20FREPRules%20.pdf> on 27 March, 2012.

The problem associated with *locus standi* in the litigation of human rights has also been eased as there is provision for the initiation of public interest litigations in so far as the actions relate to human right issues.<sup>165</sup> The inclusion of public interest litigations in the 'rules' is a welcome development as it is an avenue for further increase in the jurisprudence of socio economic rights in the country with a practical 'opening' of the flood gates of litigation by previously silenced voices; the vulnerable and defenceless in the Nigerian society.<sup>166</sup>

### Conclusion

According to the Committee on Economic, Social and Cultural Rights; a State party where a significant number of its citizens are deprived of essential amenities for living a dignified life is *prima facie*, failing to discharge its obligations under the Covenant.<sup>167</sup> The ratification of international human rights treaties places a huge burden on a State to satisfy the human rights yearnings of its people especially those relating to socio economic rights which has a direct corollary on the everyday lives of especially the poor and downtrodden; who cannot afford access to basic amenities without government assistance. Even though the provision of amenities that guarantee socio economic rights is such that require huge capital and infrastructural investments, it is still the primary duty of a responsible and responsive government to do all that is necessary to achieve them and where they can only be achieved progressively, it must be seen that the government is taking steps towards their achievement with essential basic facilities having been initially put in place.

A large population of Nigerian citizens are currently living on less than a dollar per day despite the huge resources generated by the government daily from oil revenues. The fact that Nigeria is a major exporter of crude oil has not translated into any major benefit for its people.<sup>168</sup> To effectively enforce and protect the socio economic rights of Nigerian citizens; it is important that the campaign against corruption is intensified as the problem of accessing socio economic infrastructures is not caused by a scarcity of resources but by misdistribution and inequitable allocation of resources. It is therefore felt that an inclusion of automatically justiciable socio economic rights like its chapter IV counterpart in the

<sup>165</sup> See paragraph 3(e) *ibid* and also *Ibid*. See also Durojaiye in Killander (ed) (n 153 above) 165.

<sup>166</sup> Like the Indian Courts have variously adjudicated on the socio economic rights of Indian citizens through an application of inter relatedness of rights approach and public action litigations. See *Peoples Union for Civil Liberties (PUCL) v Union of India* a's case and Ibe, *Beyond justiciability*, pp. 234-236.

<sup>167</sup> General Comment 3, paragraph 10 in *Compilation of General Comments*, assessed on 9/03/2012.

<sup>168</sup> Ogunfolu 'Can Socio-economic Rights Make the Nigerian State More Accountable?' assessed from [http://waynemorsecenter.uoregon.edu/twail/document/twail\\_working\\_paper\\_7.pdf](http://waynemorsecenter.uoregon.edu/twail/document/twail_working_paper_7.pdf) on 26 March, 2012.

Constitution apart from assisting in the prioritizing of State expenditure; will also make the State Government more accountable for their actions including reckless and poor policy decisions.

While the decisions in *Gbemre v. Shell Petroleum Development Company and 2 Ors* and *Georgina Ahamefule v Imperial Medical Center & Alex Molokwu*<sup>169</sup> is a step in the right direction, it is felt that the courts can be more proactive by expeditiously deciding cases relating to violations of socio-economic rights especially the violations can be linked to violations of rights already recognised in chapter four of the country's Constitution.

Also, as done in India where the right to education was been moved into the list of fundamental rights under Article 21A of the Indian constitution; it is suggested that some socio economic rights like the right to health care, education, food and adequate livelihood be incorporated into Chapter IV of the constitution. Doing this will lead to a three-fold achievement *viz* a confirmation of the indivisibility of all rights; the guarantee of access to the courts for violations and enforcement socio economic rights and the allowing of disadvantaged groups in the society to have a voice through the interpretation and protection of their socio economic rights by the courts.

---

<sup>169</sup> Suit FHC/B/CS/53/05 and Suit NO. ID/1627/2000.