

# Beyond justiciability: Realising the promise of socio-economic rights in Nigeria

Stanley Ibe\*

Programme Officer, Network of University Legal Aid Institutions (NULAI),  
Nigeria; Solicitor and advocate, Nigeria

## Summary

*This article examines the status of socio-economic rights in Nigeria against the promise of better living standards which they offer. Beginning with the regional mechanism for enforcement, it directs attention to creative methods of overcoming the hurdle of justiciability and challenges the judiciary to embrace India's integrative approach as well as the African Charter's promise of equal treatment for all manner of rights. It posits that a fair resolution of the crisis of socio-economic rights enforcement demands honest answers to questions of corruption and inept leadership, poverty and ignorance, absence of a human rights culture arising out of non promotion of its ideals, apathy and indifference of the international community, the debt burden and absence of a virile civil society. In the final analysis, only a multi-sectoral and multi-dimensional approach can guarantee the promise of socio-economic rights.*

## 1 Introduction

Africa is home to most of the world's poor and should ordinarily pay adequate attention to socio-economic rights. Unfortunately, its leaders, past and present, have yet to fully commit to this issue. The seeming

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\* LLB (Lagos State), LLM (Maastricht); stanibe@yahoo.com. This is an abridged version of a thesis originally submitted to the *Magister Iuris Communis* (MIC) Programme, Faculty of Law, Maastricht University, The Netherlands under Dr Fons Coomans' supervision. I would like to thank Dr Fons Coomans of the Centre for Human Rights, Maastricht University, The Netherlands and the two anonymous reviewers appointed by this *Journal* for their insightful comments on earlier drafts of this paper, and for the many ways in which they helped to refine the ideas presented in this paper.

absence of political will to guarantee these rights presents formidable obstacles to joining the world-wide movement towards interdependence and interrelatedness of all human rights.

In view of this state of affairs, individuals and groups look to the courts to resolve problems arising from violations of socio-economic rights. However, judicial enforcement of socio-economic rights is often viewed as unreasonable. The language of this specie of rights often grants considerable discretion to state authorities on the standard and timing of enforcement, which is why several states rely on the *progressive realisation* principle to avoid or delay responsibility arising under these rights. Added to this is the crisis of classification, which ensures that civil and political rights rank higher than economic, social and cultural rights.

There are two parallel regimes of socio-economic rights existing in Africa. The first, represented by South Africa, is that which specifically makes socio-economic rights enforceable in the courts. Under this regime, individuals and organisations alleging that their rights have been violated may approach the courts to seek redress. The other regime aligns with most of the Western world in the claim that socio-economic rights are 'no more than pious wishes'. Accordingly, states have adopted the Indian-styled *fundamental objectives and directive principles of state policy*.

Nigeria belongs in the latter category.<sup>1</sup> Specifically, its 1999 Constitution recognises and provides for these objectives and principles in chapter II. Promising as they may appear, chapter II provisions are unenforceable in the courts.<sup>2</sup> This is a fundamental point of departure from Indian jurisprudence, which has established precedence for applying the *integrative approach* ensuring that violations of socio-economic rights can be remedied by reference to their relationship with civil and political rights.

Beyond the 'integrative approach', India attributes the success of socio-economic rights litigation to its liberal attitude to public interest litigation. This is also uncommon in Nigeria. Litigants almost always have to establish *locus standi* to access the courts.

This article examines the regime of socio-economic rights in Nigeria. It posits the idea that, despite its imperfections, the African Charter on Human and Peoples' Rights (African Charter) provides a useful reference tool for domestic enforcement of socio-economic rights. It also recommends a careful adoption of the Indian model of integrative jurisprudence as well as a multi-dimensional approach to realising the promise of socio-economic rights.

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<sup>1</sup> Other countries in this category include Lesotho (1993), Liberia (1984), Malawi (1994), Namibia (1990), Sierra Leone (1991) and Tanzania. Countries with declaratory socio-economic rights provisions in their constitutions are Ethiopia (1996), Ghana (1992) and Uganda (1995).

<sup>2</sup> By virtue of sec 6(6)(c) of the 1999 Constitution.

## 2 Socio-economic rights under the African Charter on Human and Peoples' Rights

The African Charter represents 'a significantly new and challenging normative framework for the implementation of economic, social and cultural rights'.<sup>3</sup> It presents socio-economic rights free of claw-back clauses<sup>4</sup> — a refreshing departure from the regime of civil and political rights, which are subject to these clauses. Additionally, it does not contain a derogation clause. Unlike the International Covenant on Economic, Social and Cultural Rights (CESCR), state parties to the African Charter assume obligations that are of immediate effect and not subject to the 'progressive realisation' requirement.<sup>5</sup> Fundamentally, socio-economic rights share the same level of legal protection as other rights in the African Charter.

State parties owe obligations to respect, protect and fulfill all the rights in the African Charter, including socio-economic rights. The obligation to respect, like that arising under CESCR, means that states must 'refrain from actions or conduct that contravene or are capable of impeding the enjoyment of economic, social and cultural rights'.<sup>6</sup> This obligation is neither contingent on 'availability of resources' nor subject to the notion of 'progressive realisation'. The obligation to protect involves a duty to encourage third parties, including non-state actors, to respect these rights or refrain from violating them. The obligation to fulfill creates a duty that 'requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights'.<sup>7</sup>

The Charter guarantees such socio-economic rights as the right to work under 'equitable and satisfactory conditions' and equal pay for equal work,<sup>8</sup> the right to health,<sup>9</sup> the right to education,<sup>10</sup> family

<sup>3</sup> CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights — The system in practice, 1986-2000* (2002) 178-218 186.

<sup>4</sup> A claw-back clause is 'one that permits, in normal circumstance, breach of an obligation for a specified number of reasons'. See R Higgins 'Derogations under human rights treaties' cited in Odinkalu (n 3 above).

<sup>5</sup> However, note the Pretoria Declaration on Economic, Social and Cultural Rights adopted by the African Commission in 2004.

<sup>6</sup> F Morka 'Economic, social and cultural rights and democracy: Establishing causality and mutuality' in HURILAWS *Enforcing economic, social and cultural rights in Nigeria — Rhetoric or reality?* (2005) 85-100 88.

<sup>7</sup> The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, formulated in Maastricht 22-26 January 1997. The Maastricht Guidelines are published in (1997) 15 *Netherlands Quarterly Journal of Human Rights* 244.

<sup>8</sup> Art 15.

<sup>9</sup> Art 16.

<sup>10</sup> Art 17.

rights,<sup>11</sup> the right to economic, social and cultural development<sup>12</sup> and the right to a general satisfactory environment favourable to development.<sup>13</sup> Although the right to housing is not explicitly recognised under the African Charter, the combination of provisions protecting the right to enjoy the best attainable state of mental and physical health, the right to property and the protection accorded to the family<sup>14</sup> approximates to a right to shelter or housing for which a state party could be held to account. The right to food is implicit in such provisions, as the right to life,<sup>15</sup> the right to health and the right to economic, social and cultural development.

The Charter specifically makes all rights justiciable before the African Commission on Human and Peoples' Rights (African Commission).<sup>16</sup> Accordingly, the African Commission had no difficulty in holding Nigeria responsible for a violation of certain provisions of the African Charter namely, freedom from discrimination, the right to life, the right to property, the right to health, the right to housing (implied in the duty to protect the family under article 18), the right to food, the right of people to freely dispose of their wealth and resources and the right to a safe environment.<sup>17</sup> All violations were the consequences of environment degradation arising from extensive oil exploration in the Niger Delta region.

The *SERAC* communication remains the most significant decision of the African Commission on socio-economic rights to date.<sup>18</sup>

In *Malawi African Association and Others v Mauritania*,<sup>19</sup> five joined communications alleged the existence of slavery and similar practices in Mauritania. Specifically, the communication examined allegations that black Mauritians were enslaved, routinely evicted or displaced from their lands, which were then confiscated by the government along with their livestock. The African Commission found that the health of prisoners deteriorated due to insufficient food, blankets and inadequate hygiene and therefore held the government of Mauritania in violation of article 16. The significance of this decision lies in the finding that acts

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<sup>11</sup> Art 18.

<sup>12</sup> Art 22.

<sup>13</sup> Art 24.

<sup>14</sup> Art 18.

<sup>15</sup> Art 4.

<sup>16</sup> Art 45 of the African Charter describes the functions of the African Commission to include ensuring the protection of human and peoples' rights under conditions laid down in the Charter.

<sup>17</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001). See review of the decision at <http://www.communitylawcentre.org.za/ser/casereviews/serac.php> (accessed 3 June 2006). See also F Coomans 'The Ogoni case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749-760.

<sup>18</sup> For more on the *SERAC* decision, see sec 4.2 of this article.

<sup>19</sup> (2000) AHRLR 149 (ACHPR 2000).

which constitute a violation of socio-economic rights may yet violate civil and political rights — an acknowledgment of the indivisibility and interdependence of all rights.

The right to health also featured in *Purohit and Another v The Gambia*,<sup>20</sup> when the applicants alleged, amongst other things, that the legislative regime in The Gambia for mental health patients violated the right to enjoy the best attainable state of physical and mental health (article 16) and the right of the disabled to special measures of protection in keeping with their physical and moral needs. Holding that The Gambia fell short of satisfying the requirements of articles 16 and 18(4) of the African Charter, the African Commission stated that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.

Regrettably, many of these decisions have not been fully implemented by defendant states. Indeed, because the African Commission is not empowered to enforce its decisions, many states do not consider enforcement a necessity.

The African Charter has been criticised as lacking in conceptual clarity. The vagueness of socio-economic rights in it makes enforcement difficult.<sup>21</sup> To take an example: The right to enjoy the best attainable state of mental and physical health leaves more questions than answers. It neither describes 'standard of health' nor 'best attainable state', thereby leaving states with little guidance as to obligations arising out of it and individuals with no clue as to the standard of expectation from their governments. Although the African Commission has managed to interpret the provisions relating to health as indicated above, it is still a shortcoming of the African Charter that some of its provisions on socio-economic rights are rather vague and open to varying interpretations. It remains to add that the African Charter does not provide for all socio-economic rights. Some of the recognised rights are limited in their application. For example, the right to property is limited to the extent that it may be encroached upon in the interest of public need or in the general interest of the community.<sup>22</sup>

The more worrisome issue is the non-justiciability of socio-economic rights in several jurisdictions in Africa. When it is realised that the African Commission is a supranational system for the promotion and protection of human rights, it becomes clearer what challenge the promise of socio-economic rights is faced with. The right of audience before the Commission is contingent on exhaustion of local remedies, except in

<sup>20</sup> (2003) AHRLR 96 (ACHPR 2003).

<sup>21</sup> See M Gomez 'Social economic rights and human rights commissions' (1995) 17 *Human Rights Quarterly* 155 161.

<sup>22</sup> This must, however, be in accordance with the provisions of appropriate laws.

cases where these remedies are either unavailable or politically inexpedient. This leads to the need to address the absence of local remedies usually sustained by the justiciability principle.

### 3 The justiciability of socio-economic rights

The concept of justiciability centres around two primary concerns namely, the legitimacy of judicial intervention and the competence of courts to adjudicate issues in the sphere of socio-economic rights.<sup>23</sup> Many courts are reluctant to decide on cases arising out of socio-economic rights claims because they believe that these rights relate to questions of social policy which best fall within the power and competence of politicians and policy makers. As a result of this judicial reluctance, socio-economic rights are often characterised as non-justiciable.

#### 3.1 The justiciability debate

A prominent Nigerian legal scholar defines justiciability as 'a combination of judicial power and duty bestowed constitutionally on the courts to adjudicate violations of the law'.<sup>24</sup> This aligns with the idea that it is not primarily the nature of socio-economic rights that denies judicial enforcement of these rights, but the lack of competence or willingness of the adjudicating body to entertain, examine and pronounce on claims affecting these rights.<sup>25</sup>

Ghai and Cottrell<sup>26</sup> provide a fitting context to the justiciability debate. They identify two sides to the justiciability principle namely, the assumption that courts are inherently incapable<sup>27</sup> of adjudicating on socio-economic rights because they do not have the capacity to make well-informed decisions about methods of implementation and are ill-equipped to ensure or supervise the enforcement of their decisions and the contention that these rights are non-justiciable because

<sup>23</sup> See S Muralidhar 'Economic, social and cultural rights: An Indian response to the justiciability debate' in Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice — The role of judges in implementing economic, social and cultural rights* (2004) 23, citing P Hunt 'Introduction' in *Reclaiming social rights: International and comparative perspectives* (1996) 24.

<sup>24</sup> B Nwabueze *Judicialism in Commonwealth Africa: The role of the courts in government* (1977) 21.

<sup>25</sup> See *Economic, social and cultural rights — Handbook for national human rights institutions*, publication of the Office of the United Nations High Commissioner for Human Rights [http://www.ohchr.org/english/about/publications/docs/train/2\\_e.pdf](http://www.ohchr.org/english/about/publications/docs/train/2_e.pdf) (accessed 13 April 2006).

<sup>26</sup> Ghai & Cottrell (n 23 above).

<sup>27</sup> Liebenberg echoes this sentiment, thus 'another objection that is frequently raised against the inclusion of economic and social rights as justiciable rights in a constitution is that the courts lack the institutional competence to enforce rights of this nature'. See S Liebenberg 'The protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds) *Economic, social and cultural rights* (2001) 55, 60.

constitution makers have, for other policy reasons, chosen to exclude courts from these areas by casting these rights as Directive Principles of State Policy (DPSPs) rather than individual rights. A short excursion into history might be useful to understand this perspective.

The Irish Constitution is the first of the common law constitutions to contain DPSPs. It acknowledges the second of Ghai's explanations for the concept of justiciability in the following words:<sup>28</sup>

The principles of social policy set forth in this Article are intended for the general guidance of the *Oireachtas* [the legislature]. The application of those principles in the making of laws shall be the care of the *Oireachtas* exclusively, and shall not be cognisable by any court under any provisions of this Constitution.

An-Na'im<sup>29</sup> disagrees with this principle. He thinks that the role of judicial enforcement should be assessed and developed in relation to each human right instead of 'denying it to some purported class of rights because they do not fit the model of judicial enforcement of certain civil and political rights'.<sup>30</sup>

Liebenberg, for her part, believes that the argument about socio-economic rights involving complex policy choices in the realm of economics and public policy is unacceptable considering that all rights have 'social policy implications'.<sup>31</sup>

Lester and O'Conneide<sup>32</sup> belong to the group of scholars who believe that it is a<sup>33</sup>

common mistake to place these broad categories of rights into separate and rigidly watertight compartments, with civil and political rights seen as 'justiciable' and enforceable in courts of law, while socio-economic rights are seen as non-justiciable and a matter exclusively for the legislative and executive branches of government, along with voluntary action.

The learned authors seem to suggest that the three arms of government — legislative, executive and judicial — should be involved in the implementation of socio-economic rights. They, however, argue that, for reasons of democratic legitimacy, crucial resource allocation decisions are better left in the hands of the legislature and executive. In essence, they advocate a restricted judicial supervisory role<sup>34</sup> in the field of socio-

<sup>28</sup> Art 45 of the Irish Constitution of 1937, as amended.

<sup>29</sup> A An-Na'im 'To affirm the full human rights standing of economic, social and cultural rights' in Ghai & Cottrell (n 23 above) 7-16.

<sup>30</sup> n 29 above, 7.

<sup>31</sup> Liebenberg (n 27 above) 60.

<sup>32</sup> L Lester & C O'Conneide 'The effective protection of socio-economic rights' in Ghai & Cottrell (n 23 above) 17-22.

<sup>33</sup> n 32 above, 18.

<sup>34</sup> In this regard, they think the judiciary has an important role to play where there exists a sufficiently gross failure to uphold basic socio-economic rights and the other two branches have comprehensively failed to fulfill their responsibilities.

economic rights in view of the constitutional separation of powers and the limits of judicial expertise.

An-Na'im's response to the proposal for restricted judicial supervisory role is that it could lead to a situation where the courts 'avoid all responsibility for discrimination in effect or outcome by simply doing nothing'. He is confident that judicial enforcement is unlikely to slide into 'detailed determination of policy and practice precisely because judges are aware of the limitation of their office and the nature of the judicial process'.

Viljoen introduces a new dimension to the justiciability debate. In a paper entitled 'The justiciability of socio-economic and cultural rights: Experiences and problems',<sup>35</sup> he relies on a taxonomy devised by Shue, in terms of which justiciability becomes dependent on the obligation of states in respect of a particular right. He identifies the three levels of obligations incumbent on states namely, the obligation to respect, protect and fulfill.<sup>36</sup>

The United Nations (UN) Committee on Economic Social and Cultural Rights (Committee on ESCR) offers a benchmark for states looking to meet their international obligations in respect of socio-economic rights. It invites parties, when dealing with questions relating to the domestic application of CESC, to consider them in the light of two principles of international law:<sup>37</sup>

The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties, is that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. In other words, states should modify the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.

Although CESC does not contain a provision similar to article 2(1) of the International Covenant on Civil and Political Rights (CCPR), by which state parties are obliged to, *inter alia*, 'develop the possibilities of judicial remedy', the Committee on ESCR holds the view that state parties seeking to justify their failure to provide domestic legal remedy for violations of socio-economic rights would need to show either that such remedies are not 'appropriate means' within the contemplation of article 2(1) of CESC, or that, in view of other means used, they are unnecessary.<sup>38</sup> This is an arduous task for non-implementing states.

The question of justiciability is one of legal creativity and political will.

<sup>35</sup> Unpublished draft paper on file with author.

<sup>36</sup> This typology is discussed in earlier sections of this work.

<sup>37</sup> Committee on ESCR General Comment No 9 of 1 December 1998 para 3.

<sup>38</sup> As above.



Although CESCRO has yet to become Nigerian law,<sup>39</sup> lawyers could have recourse to the African Charter which is. Indeed, lessons from countries such as India suggest that clear linkages can and should be established between civil and political rights, which are justiciable, and socio-economic rights which are not. Beyond legal creativity, there is the need for some level of judicial activism without which the expected result will not be achieved.

The absence of political will to follow through on decisions of courts is one of the most frustrating aspects of enforcing them. Unless there is a genuine commitment to implement on the part of government, judicial decisions could be deprived of their utility.

Securing the socio-economic rights of the most vulnerable depends to a great extent on stakeholders' resolve to recognise and effectuate the indivisibility and interdependence of all rights. As the Economic and Social Committee on the Citizens' Europe confirms, economic and social rights are 'indissolubly linked to civil and political rights: Together these citizens' rights and accompanying duties constitute the cornerstone of a free, democratic society founded on respect for human rights.'<sup>40</sup>

### 3.2 India's experience with enforcing directive principles

The Indian Constitution<sup>41</sup> contains a chapter on fundamental rights<sup>42</sup> consisting of mainly civil and political rights, which are enforceable in the High Courts and the Supreme Court. Like the Nigerian Constitution, it also contains a chapter on DPSPs,<sup>43</sup> which embodies the socio-economic rights provisions. This chapter recognises such rights as those to 'adequate means of livelihood',<sup>44</sup> work, education and 'public assistance in case of unemployment'.<sup>45</sup>

While fundamental rights mentioned in part III are justiciable under the constitution, DPSPs are not justiciable and their non-compliance cannot be taken as a claim for enforcement against the state. The Constitution expressly bars the courts from enforcing the provisions of part IV, but admits that the 'principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.<sup>46</sup>

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<sup>39</sup> Nigeria operates the dualist system in relation to domestic application of international law. Therefore international treaties ratified by her still have to be incorporated into domestic legislation to be applicable. See sec 12 of the 1999 Constitution.

<sup>40</sup> Opinion of the Economic and Social Committee on the Citizens' Europe, 23 September 1992 (Opinion 1037) para 1.2.3.

<sup>41</sup> See <http://indiacode.nic.in/coiweb/welcome.html> (accessed 12 April 2006).

<sup>42</sup> Part III.

<sup>43</sup> Part IV.

<sup>44</sup> Art 39(a).

<sup>45</sup> Art 41.

<sup>46</sup> Part IV, ch 37.

At the time of drafting the Constitution, It was thought that DPSPs should remain non-justiciable until appropriate actions were taken by the state to bring about changes in the economy.

Apparently deferring to the Constitution, Indian courts stuck to the original understanding of the distinction between justiciable rights and non-justiciable principles, regarding DPSPs as subordinate to the rights and holding that measures to implement the principles could not contravene any of the rights. This was the position until Indira Gandhi, then Prime Minister, introduced a state of emergency in 1975. It has been said that this event, and the public reaction to it, wrought a major change in the attitude of the judiciary, and that the Supreme Court as a result became activist from 1978.<sup>47</sup>

Beginning with the *Maneka Gandhi* case, the Supreme Court introduced an interesting method of interpreting socio-economic rights namely, by expanding the guarantee of the right to life in article 21 to include within it and recognise a whole gamut of socio-economic rights.<sup>48</sup> The same principle guided the Court in *Kesavananda Bharati v State of Kerala*<sup>49</sup> in holding that fundamental rights and DPSPs are complementary.

Applying the principle to the right to food, the court in *Peoples Union for Civil Liberties (PUCL) v Union of India and Others*<sup>50</sup> directed all state governments to ensure that all public distribution shops are kept open with regular supplies and observed that it is the primary responsibility of government to prevent hunger and starvation. Significantly, the court not only recognised the right to food as existing under article 21, it also sought to broaden the scope of the right to include distribution and access to food and the right to be free from malnutrition, especially of women, children and the aged. These orders, like several others, reinforced the argument that courts do have authority to order positive actions with financial or budgetary implications.

It needs to be noted that the new method of interpretation brought with it the advent of public interest litigation and judicial activism in India as well as a new problem in that the existing remedies, for instance damages and injunction, became inadequate to address the suffering of the disadvantaged in socio-economic rights violation cases.

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<sup>47</sup> See S Ibe 'A multidimensional approach to enforcing economic, social and cultural rights' in HURILAWS (n 6 above).

<sup>48</sup> In *Francis Coralie Mullin v Union Territory of Delhi* 1981 (1) SCC 608, the Supreme Court held that the right to life includes the right to live with human dignity and all that goes along with it.

<sup>49</sup> (1973) 4 SCC 255.

<sup>50</sup> WP (Civil) No 196/2001 cited in J Kothari 'Social rights and the Indian Constitution' (2004) 2 *Law, Social Justice and Global Development Journal* (LGD) [http://www.go.warwick.ac.uk/elj/lgd/2004\\_2/kothari](http://www.go.warwick.ac.uk/elj/lgd/2004_2/kothari) (accessed 31 March 2007).

Consequently, the court evolved new remedies intended to elicit affirmative action on the part of the state and its authorities.<sup>51</sup>

Another interesting development in the jurisprudence of India lies in the approach to the right to education. In *Unni Krishnan JP v State of Andhra Pradesh*,<sup>52</sup> the court was requested to interpret the provisions of article 45 of the Indian Constitution, which imposes an obligation on the state to provide 'free and compulsory education for all children until they complete the age of 14'.<sup>53</sup> In a rare display of judicial creativity, the court held that the passage of 44 years since the making of the Indian Constitution in 1950 had converted the state's obligation under article 45 (a DPSP) into a fundamental right. In its words, the right to education is implicit in and 'flows from the right to life guaranteed under article 21'<sup>54</sup> and a child (citizen) has a fundamental right to free education up to the age of 14 years'.<sup>55</sup> The state of India responded nine years later by inserting, through the ninety-third amendment to the Constitution, article 21(a) which recognises the fundamental right to education for children between the ages of six and 14.<sup>56</sup>

In *Paschim Banga Khet Majoor Samity v State of West Bengal*,<sup>57</sup> the applicant sought to enforce a state obligation under article 47 to improve public health care with particular reference to the treatment of patients during an emergency. The Supreme Court specifically rejected the argument that socio-economic rights are unenforceable due to a shortage of resources, observing that 'a state could not avoid [its] constitutional obligation on account of financial constraints'. The Court did not stop at declaring the right to health a fundamental right and enforcing the right of a labourer by asking the government of West Bengal to pay him compensation for the loss suffered; it also

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<sup>51</sup> In *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802, the Supreme Court made an order giving various directions for identifying, releasing and rehabilitating bonded labourers, ensuring minimum wages payments, observance of labour laws, providing wholesome drinking water and setting up dust-sucking machines in the stone quarries. The Court also set up a monitoring agency, which would continuously check the implementation of those directions.

<sup>52</sup> (1993) 1 SCC 645.

<sup>53</sup> The right to education stands on a very different footing in Indian social rights jurisprudence because of the very specific endeavour of the drafters of the Constitution to realise this right within a time frame of ten years.

<sup>54</sup> *Unni Krishnan* 730.

<sup>55</sup> n 54 above, 735.

<sup>56</sup> S Muralidhar 'Implementation of court orders in the area of economic, social and cultural rights: An overview of the experience of the Indian judiciary' paper presented to the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002 <http://www.ielrc.org/content/w0202.pdf> (accessed 6 May 2006).

<sup>57</sup> (1996) 4 SCC 37.

directed the government to formulate a blueprint for primary health care with specific emphasis on treatment of patients during an emergency.<sup>58</sup>

According to Muralidhar, India's success in socio-economic rights jurisprudence is attributable to a few developments:<sup>59</sup>

- (1) the declaration of the indivisibility of the fundamental rights on the one hand, and DPSPs on the other;
- (2) the recognition that the doctrine of substantive due process permeates the entire part III comprising fundamental rights. Thus, in order to pass judicial scrutiny, an executive, quasi-judicial or legislative action would have to justify the 'just, fair and reasonable' test;
- (3) the expansion of the scope and content of the fundamental right to life as encompassing 'the bare necessities of life such as adequate nutrition, clothing, and shelter and facilities for reading, writing and expressing ones self in diverse forms';
- (4) the innovation of public interest litigation as a tool to achieve social objectives by enabling easy access to courts for those disadvantaged socially and economically; a conscious effort made to relax the rules of standing and procedure and free litigants from the stranglehold of formal law and lawyering;
- (5) the expanded notion of the right to life enabled the court, in its public interest litigation jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of socio-economic rights.

In the next section, we shall consider whether and to what extent Nigeria can draw inspiration from India's success at enforcing socio-economic rights.

### 3.3 Justiciability in Nigeria

#### 3.3.1 Muralidhar's principles

The first point hardly requires elucidation. It is universally accepted that all rights are interrelated, inter-connected and interdependent. The crucial point to note, though, is that the world is not unanimous in its attitude to socio-economic rights. Socio-economic rights have been discounted as 'pious wishes' in most parts of the developed world. For example, the United States holds the view that 'at best, economic, social and cultural rights are goals that can only be achieved progressively,

<sup>58</sup> It is instructive to note that the Supreme Court had occasion to hold, for the first time, that the right to health is an integral fact of a meaningful right to life in *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42.

<sup>59</sup> Muralidhar (n 56 above).

not guarantees'.<sup>60</sup> While this is understandable in view of the fact that social security is not a problem in most parts of the developed world, it is clearly unacceptable in the context of Africa, where the vast majority of the population struggles to make a living.

Muralidhar's reasonability test<sup>61</sup> is one that is patently absent in Nigeria, especially in the context of socio-economic rights. This is partly due to the fact that courts are not keen to examine claims arising out of alleged violations of socio-economic rights.

The integrative approach to enforcing socio-economic rights, like the point immediately above, is yet unknown to Nigeria's jurisprudence on socio-economic rights.

The most interesting point for Nigeria is that dealing with public interest litigation. It is interesting because Indian courts made a conscious effort to relax *locus standi* rules. This is not exactly the case in Nigeria. Human rights groups like the Human Rights Law Service (HURI-LAWS) have made significant contributions to strategic impact litigation with such landmark cases as *Bayo Johnson v Lufadeju*<sup>62</sup> and *Peter Nemi v Attorney General of Lagos State*.<sup>63</sup> However, in both cases, as in many others, *locus standi* was not a problem because the disputes involved persons whose rights were allegedly infringed and who were therefore seeking retrospective relief.

*Locus standi* is the foundation upon which any claim before the courts succeeds or fails. To establish *locus standi*, applicants must demonstrate sufficient interest in the case and this must be personal interest 'over and above' those of the general public.<sup>64</sup> This has been a major hurdle for groups desirous of bringing public interest cases before Nigerian courts.

The problem of *locus standi* is compounded by the non-justiciability of socio-economic rights guaranteed under section 6(6)(c) of the 1999 Constitution, to the extent that judicial powers do not 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 this Constitution.

The success of public interest litigation in India is traceable, in part, to its ability to expand and relax the rule of *locus standi* in two areas namely, the litigant need not have a direct or sufficient interest in the matter

<sup>60</sup> Comments submitted by the USA Report of the Open-ended Working Group on the Right to Development, UN Doc E/CN.4/2001/26, cited in K Tomasevski 'Unasked questions about economic, social and cultural rights from the experience of the Special Rapporteur on the Right to Education (1998-2004)' (2005) 27 *Human Rights Quarterly* 709 713.

<sup>61</sup> Muralidhar (n 56 above).

<sup>62</sup> (2002) 8 NWLR Part 768 192.

<sup>63</sup> (1996) 6 NWLR Part 452 42.

<sup>64</sup> See *Thomas & Others v Olufosoye* (1986) 1 NWLR Part 18 669.

brought to the court and the victim of the violation may be a social group or a collective identified only by its disadvantaged position in society. Instructively, public interest litigation emerged out of dissatisfaction with a traditional adversarial litigation system where the court plays the role of umpire without considering broader perspectives and the impact of its judgments. Public interest litigation demands continuing judicial involvement with a view to monitoring and supervising court orders in order to provide effective relief. Judicial activism is at the root of public interest litigation and an important aspect of the process of its evolution was the relaxation of the traditional rule of *locus standi*.<sup>65</sup> Nigerian judges must rise to the occasion by using their privileged positions to redress grievances regarding the violation of basic human rights of the poor or about the concern or conduct of government policy, which affects a large part of the society and not just the individual petitioner.

Opponents of this system could argue that adopting the Indian model would inundate the courts with reckless claims. This is indefensible in view of the inherent powers of the court to ascertain a *prima facie* cause of action at the preliminary stage. In the absence of a *prima facie* case, the court is entitled to dismiss an application without going into the merits. Fear could also be expressed that new cases arising from relaxed rules of *locus standi* would unacceptably increase courts' case loads. While this argument may be accurate, it is submitted that upholding the rights of individual citizens should be the primary objective of any effective justice system. Therefore, cases alleging infringement of individual rights or rights-related issues should enjoy primacy in our courts. The problem of case-load management is an institutional one which can be tackled by building more court rooms, appointing more judges and improving their conditions of service. Most importantly, Nigeria is long over-due for automation. An automated system of court proceedings will accelerate the administration of justice in the country.<sup>66</sup>

#### 4 Socio-economic rights under Nigeria's 1999 Constitution

Since independence, Nigeria's successive Constitutions have made provisions for a Bill of Rights. However, it was the 1979 Constitution that first adopted the India-styled<sup>67</sup> DPSPs as an explicit provision.

<sup>65</sup> See RK Timalseña 'Public interest litigation and the protection of human rights in Nepal' [http://www.interights.org/doc/WS2\\_Timalseña.doc](http://www.interights.org/doc/WS2_Timalseña.doc) (accessed 10 May 2007).

<sup>66</sup> The Lagos State Judiciary and a few appellate courts now operate automated systems, but this is not enough. Other states must embrace automation to accelerate justice delivery.

<sup>67</sup> This is discussed in the preceding section of this work.

The 1999 Constitution recognises socio-economic rights in chapter II, consisting of DPSP provisions.<sup>68</sup> Chapter II was devised to fulfill the promises made in the Preamble to the Constitution, *inter alia*:

to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice and for the purpose of consolidating the unity of our people.

The Preamble and provisions of chapter II reflect the high ideals of a liberal democratic polity and thus serves as guidelines to action or major policy goals.<sup>69</sup> The rationale for the inclusion of chapter II in the 1979 Constitution, as in 1999, lies in the fact that governments in developing countries have tended to be pre-occupied with power and its material prerequisites with scant regard for political ideals as to how society can be organised and ruled to the best advantage of all. This is particularly true of Nigeria because of its heterogeneity, the increasing gap between the rich and the poor, and the growing cleavage between the social groupings.<sup>70</sup>

The first section of chapter II recognises the duty and responsibility of all organs of government, and 'all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of this Constitution'.<sup>71</sup> Section 224 provides that the programmes and objectives of a political party shall conform with the provisions of chapter II. Additionally, item 60 of the Exclusive Legislative List gives the National Assembly power to make laws with respect to the establishment and regulation of authorities to promote and enforce the observance of the fundamental objectives and directive principles contained in chapter II. However, section 6(6)(c) of the same Constitution forbids the courts from entertaining claims arising under or as a result of chapter II.

To resolve the apparent conflict in these provisions, it has been suggested that the duties and responsibilities of all organs of government are limited to the extent that the judiciary cannot enforce any of the provisions of chapter II. To that extent, the executive does not have to comply with any of the provisions unless and until the legislature has enacted specific laws for their enforcement.<sup>72</sup> In other words, the social and economic rights articulated in chapter II cannot be enforced with-

<sup>68</sup> The term was first used in the 1979 Constitution. Justice Mamman Nasir described fundamental objectives as identifying 'the ultimate objectives of the nation' and the directive principles as laying down the 'policies which are expected to be pursued in the efforts of the nation to realise the national ideals' (see *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350).

<sup>69</sup> O Agbakoba & U Emelonye *Test of progressive realisation of economic, social and cultural rights in Nigeria (1990-1999 Budget Analysis)* (2001) HURILAWS, Lagos 1-2.

<sup>70</sup> J Akande *Introduction to the Constitution of Nigeria* (2000) 52.

<sup>71</sup> Sec 13.

<sup>72</sup> Akande (n 70 above) 53.

out the enactment of a specific law, or the establishment of a specific body, for their enforcement. This is an unduly narrow interpretation as it is not in line with the current ideas on the judicial enforcement of social and economic rights. Indeed, Scheinin has demonstrated that the trend worldwide is towards justiciability of social and economic rights.<sup>73</sup>

Section 14 of the 1999 Constitution provides that Nigeria 'shall be a state based on the principles of democracy and social justice'. It also recognises that 'sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority'. Perhaps the most crucial portion of this section is sub-sections 2(b) and (c), which provide that the security and welfare of the people shall be the primary purpose of government; and the participation by the people in their government 'shall be ensured in accordance with the provisions of the Constitution'. This section reiterates the principles upon which every democratic system is built. It is unclear, though, how this would be realised, in the absence of a mechanism for enforcement.

Section 16 enumerates economic objectives. It enjoins the state to direct its policy towards ensuring the promotion of planned and balanced economic development,<sup>74</sup> the provision of suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment and sickness benefits and welfare of the disabled.<sup>75</sup>

Section 17 provides for a state social order founded on freedom, equality and justice, in furtherance of which the exploitation of human resources in any form shall be for the good of the community.<sup>76</sup> Section 17 also enjoins the government to direct its policy towards ensuring equal opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment,<sup>77</sup> just and humane conditions of work (including adequate facilities for leisure, social, religious and cultural life),<sup>78</sup> health, safety and welfare of all persons in employment,<sup>79</sup> adequate medical and health facilities,<sup>80</sup> equal pay for equal work,<sup>81</sup> and protection from exploitation (for children, young persons and the aged).<sup>82</sup>

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<sup>73</sup> M Scheinin 'Economic and social rights as legal rights' in Eide *et al* (n 27 above) 29.

<sup>74</sup> Sec 16(2)(a).

<sup>75</sup> Sec 16(2)(d). The Draft 1995 Constitution elevated some of the rights from the chapter on Fundamental Objectives and Directive Principles on State Policy to the chapter on enforceable fundamental rights. The rights so elevated were the right to free and compulsory education, the right to free medical consultation at government expense and the right to eradicate corrupt practices. Unfortunately, these rights were not included in the 1999 Constitution.

<sup>76</sup> Sec 17(2)(d).

<sup>77</sup> Sec 17(3)(a).

<sup>78</sup> Sec 17(3)(b).

<sup>79</sup> Sec 17(3)(c).

<sup>80</sup> Sec 17(3)(d).

<sup>81</sup> Sec 17(3)(e).

<sup>82</sup> Sec 17(3)(f).



Section 18 guarantees equal and adequate educational opportunities at all levels and urges the government to provide, *as and when practicable*, free, compulsory and universal primary education, free secondary education, free university education and free adult literacy programmes. The phrase 'as and when practicable' appears to echo the mandate of CESC in seeking 'progressive realisation' of these rights.

It is pertinent to observe that the outgoing federal government introduced the Universal Basic Education (UBE) programme in November 1999 to replace the abandoned Universal Primary Education (UPE) policy of 1979. Unlike the UPE, UBE provides free and compulsory primary and junior secondary education to all children of school age.<sup>83</sup> It draws inspiration from a document entitled World Declaration on Education for All and Framework for Action to meet Basic Learning Needs prepared by the Women Conference on Education for All held in Jomtien, Thailand, 5 to 9 March 1990.<sup>84</sup>

One of the innovations of the 1999 Constitution is section 20, which provides that 'the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'.

The foregoing provisions of chapter II present interesting points of argument before Nigerian courts. However, few cases have arisen out of them in view of the seemingly unfavourable judicial attitude to them deriving from lawyers' inadequate creativity in prosecuting these cases.

#### 4.1 Judicial attitude to socio-economic rights actions

Judicial attitude to socio-economic rights litigation in Nigeria is characterised by great caution and subtle passivity. Following a strict interpretation of section 6(6)(c) of the 1999 Constitution<sup>85</sup> has meant that Nigerian courts are almost always incapable of or unwilling to entertain socio-economic rights claims.

The Court of Appeal had the first opportunity to define judicial attitude to socio-economic rights claims in *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State*.<sup>86</sup> By a circular dated 26 March 1980, the Lagos State government purported to abolish private primary education in the state. The plaintiffs challenged the circular as unconstitutional. They applied, under the relevant provisions of the 1979 Constitution, for reference to the Federal Court of Appeal of, *inter alia*, the question:<sup>87</sup>

<sup>83</sup> See ROA Ahiede 'Universal basic education in Nigeria: Matters arising' (2006) 20(2) *Journal of Human Ecology* 97-101.

<sup>84</sup> See DI Denga 'Evolving a new education culture: The universal basic education focus' <http://www2.ncsu.edu/ncsu/aern/educult.html> (accessed 10 May 2007).

<sup>85</sup> The 1979 Constitution also had a similar provision.

<sup>86</sup> n 69 above.

<sup>87</sup> As above.

[w]hether or not the provision of educational services by a private citizen or organization comes under the classes of economic activities outside the major sectors of the economy in which every citizen of Nigeria is entitled to engage in and whose right so to do the state is enjoined to protect within the meaning of section 16(1)(c) of the Constitution of the Federal Republic of Nigeria.

The Court also considered the extent of the obligation imposed on the government to 'direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels'.

In his decision, Justice Mamman Nasir set out the rationale for DPSPs. He observed that DPSPs aim to identify the ultimate objectives of the nation and lay down the policies which are expected to be pursued in the nation's quest to realise its objectives. He also examined the seemingly contradictory provisions of the 1979 Constitution<sup>88</sup> and concluded that:<sup>89</sup>

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

Clarifying the ambiguity as to the precise role of the judiciary, he expressed the view that:<sup>90</sup>

the obligation of the judiciary to observe the provisions of chapter II is limited to interpreting the general provisions of the Constitution or any other statute in such a way that the provisions of the chapter are observed . . . subject to the express provision of the Constitution.

The judge also made it clear that 'the arbiter for any breach of and guardian of the fundamental objectives . . . is the legislature itself or the electorate',<sup>91</sup> as it is clear from the provisions of section 4(2) and item 59(a) of the Exclusive Legislative List in the Second Schedule to the Constitution<sup>92</sup> that the National Assembly 'has the duty to establish authorities which shall have the power to promote and enforce the observance of chapter II of the Constitution'.<sup>93</sup> Until such authorities are established, it will be 'mere speculation to say which functions they may perform or in which way they may be able to enforce the provisions of chapter II'.<sup>94</sup>

<sup>88</sup> Secs 13 & 6(6)(c).

<sup>89</sup> *Okogie* case (n 68 above) 350 paras 1-2.

<sup>90</sup> n 89 above, paras 2-3.

<sup>91</sup> n 89 above, paras 7-8.

<sup>92</sup> 1979 Constitution, with equivalent provisions in the 1999 Constitution.

<sup>93</sup> *Okogie* case (n 68 above) para 1.

<sup>94</sup> As above.

It is easy to understand the current attitude towards socio-economic rights litigation after a careful review of the *Okogie* case. Besides the fact that the Constitution makes express provisions against entertaining such cases, there is also the challenge of precedent. Nigeria's legal system is based upon a system of judicial precedent. Consequently, High Courts to which disputes arising out of violations of chapters II and IV<sup>95</sup> must be instituted at the first instance, are obliged to respect the decision of the Court of Appeal until either the Court of Appeal itself or the Supreme Court varies or annuls that decision. That has been slow to come, 25 years after the *Okogie* decision was reached.

There are, however, few other cases challenging the *status quo*.

In *Oronto Douglas v Shell Petroleum Development Company Limited*,<sup>96</sup> the applicant sued for the protection of the right to a safe environment guaranteed by article 24 of the African Charter. He contended that, contrary to the Environmental Impact Assessment Law, the defendants engaged in the construction of a hazardous liquified natural gas plant without the requisite environmental impact assessment study. A High Court in Nigeria refused to entertain the suit on grounds of *locus standi*, but the Court of Appeal subsequently sent the case back to the lower court for hearing.<sup>97</sup>

In December 2005, SERAC obtained a decision in the case of *Aiyeyemi and Others v The Government of Lagos State and Others*.<sup>98</sup> The case was against the planned forced eviction of the former Maroko evictees<sup>99</sup> from their present location at Ilasan Estate. Justice OA Taiwo of the Lagos High Court granted an injunction restraining the government of Lagos from demolishing the houses and accepted one of SERAC's major arguments, namely that the state government cannot demolish applicants' houses and forcefully evict them without an order of a court of competent jurisdiction.

SERAC appeals to the principles of equity, good conscience and *ubi jus ibi remedium* in its socio-economic rights litigation. This strategy is fairly successful to the extent that it draws inspiration from Nigerian case law. In *Mojekwu v Mojekwu*,<sup>100</sup> the court struck down a customary rule which requires the surviving brother of a man who dies intestate to inherit property of the deceased if the surviving wife has no son. The court neither relied on CEDAW nor on CESC, but on a principle of the Nigerian legal system which demands that, before a customary rule could be applied, it must not be repugnant to natural justice, equity and good conscience.

<sup>95</sup> Ch IV contains the fundamental human rights provisions of the Nigerian Constitution. In contrast to ch II, the provisions of ch IV are justiciable.

<sup>96</sup> (1999) 2 NWLR Part 591.

<sup>97</sup> The High Court's treatment of the action thereafter is not available to the present author.

<sup>98</sup> Unreported Suit No M/474/2003.

<sup>99</sup> The first eviction of Maroko residents is discussed below.

<sup>100</sup> (1997) 7 NWLR Part 283.

In *Bello v Attorney-General of Oyo State*,<sup>101</sup> the Supreme Court held that the doctrine of *ubi jus ubi remedium* is a principle of universal application which ensures a remedy for every citizen who has suffered any wrong.

Finally, in *Ukeje v Ukeje*,<sup>102</sup> the Court admitted that a customary rule which deprives a woman from inheriting her deceased father's estate as a result of her gender is a violation of the non-discrimination provision of the Nigerian Constitution. The Court also described the practice as repugnant to natural justice, equity and good conscience.

SERAC's strategies are interesting. While the principle of non-discrimination is generally applicable, the doctrine of natural justice, equity and good conscience applies in the context of Nigeria's customary law system. There is some sense in arguing that natural justice, equity and good conscience are universally acceptable principles as well. Ultimately, the courts are at liberty to apply either or both of these principles.

Judicial attitude to socio-economic rights claims remains cautious. Mindful of the possibilities that exist in other climes, Nigerian judges ought to embrace a more proactive approach to claims arising out of socio-economic rights violations. Perhaps this could act as the elixir to rouse the executive and legislative arms of government from their apathetic attitude to the 'rights of the poor'.<sup>103</sup> In this regard, lawyers must do more by bringing some international best practices to the attention of the courts.

This section does not exhaust the case law on the subject.<sup>104</sup> However, it does demonstrate the dilemma of litigants in this field, namely the reluctance of courts to entertain claims arising out of socio-economic rights. There is, however, another window of opportunity at the regional level.

#### 4.2 Enforcing socio-economic rights through the African human rights system

The African Charter is part of Nigerian law.<sup>105</sup> It accords equal status to socio-economic as to civil and political rights. The fact that the African Charter does not contain a special provision like section 46 of the 1999 Constitution for the enforcement of its human and peoples' rights within a domestic jurisdiction does not matter in the context of Nigeria, because there is no *lacuna* in Nigerian law for the enforcement of its

<sup>101</sup> (1986) 5 NWLR Part 45 828.

<sup>102</sup> Unreported decision.

<sup>103</sup> Farmer uses this phrase to describe socio-economic rights. See P Farmer *Pathologies of power: Health, human rights and the new war on the poor* (2003).

<sup>104</sup> There are other cases which are not available to the author but they are few and far-between.

<sup>105</sup> By virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, ch 10, Laws of the Federation of Nigeria 2000.

provisions. Confirming this position, the Supreme Court, in the celebrated case of *Ogugu v State*,<sup>106</sup> held that the African Charter:<sup>107</sup>

like all other laws fall within the judicial powers of the courts . . . Thus by virtue of the provisions of sections 6(6)(b), 236 and 230 of the 1979 Constitution, . . . it is apparent that the human and peoples' rights are enforceable by the several high courts depending on the circumstances of each case and in accordance with the rules and practice of each court.

The *Ogugu* decision does not establish the superiority of the African Charter in the hierarchy of Nigerian laws. The Supreme Court clarified this point in *Abacha v Fawehinmi*.<sup>108</sup> In that case, the Court agreed that, whenever a treaty is enacted into law by the National Assembly, as is the case with the African Charter, it becomes binding and effective like other laws within the judicial powers of the courts. However, Justice Ekundayo made it clear that, even though the African Charter possesses 'a greater vigour and strength' than any other domestic statute, it is not 'superior to the Constitution'. This echoes the clear provisions of section 1(1)(3) of the 1999 Constitution as to its supremacy and primacy on the hierarchy of laws.

The jurisprudence of the African Commission with respect to socio-economic rights establishes a commitment to realising the promise of these rights without the requisite capacity to enforce them. For example, in the *SERAC* communication,<sup>109</sup> the Centre for Economic and Social Rights and SERAC jointly submitted a petition to the African Commission in respect of economic and social rights violations in Nigeria. The communication focused on violations of the right to health and clean environment,<sup>110</sup> housing,<sup>111</sup> food,<sup>112</sup> as well as life,<sup>113</sup> in Nigeria's oil-rich Delta area.

The African Commission found Nigeria in violation of these rights and made several recommendations, including the establishment of a Development Commission for the Oil Minerals Producing Areas of Nigeria. However, the fact that the Commission relies on the Assembly of Heads of State and Government, a political organ of the African

<sup>106</sup> (1994) 9 NWLR Part 366 1.

<sup>107</sup> As above.

<sup>108</sup> (1996) 9 NWLR Part 475 710.

<sup>109</sup> n 17 above.

<sup>110</sup> Arts 16 & 24 African Charter.

<sup>111</sup> The right to housing is not expressly protected by the African Charter. However, the African Commission held that the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health (art 16); the right to property (art 14); and the protection accorded to the family (art 18) forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected.

<sup>112</sup> The African Commission argued that the right to food is implicit in such provisions as the right to life (art 4), the right to health (art 16) and the right to economic, social and cultural development (art 22).

<sup>113</sup> Art 4.

Union, and the good will of states for the enforcement of its decisions meant that the government of Nigeria could treat the decision with levity. This partly explains why the problems of the Niger Delta region persist.<sup>114</sup>

Perhaps the recently established African Court on Human and Peoples' Rights will provide the impetus for a more effective African Commission. It is, however, too early to assess the Court's capacity to achieve this.

## 5 Concluding remarks

Several factors militate against the realisation of the promise of socio-economic rights in Nigeria. Besides justiciability, there are problems of corruption and inept leadership, poverty and ignorance, lack of effective promotion and enforcement, apathy and indifference of the international community, the debt burden and perhaps the absence of a virile civil society.

To concentrate on justiciability alone is to miss the point. If socio-economic rights become immediately justiciable in Nigeria today, there would still be no guarantee of socio-economic rights, as enforcement of decisions could become a major issue. To resolve this issue, it is suggested that the legislative arm of government begins to take its oversight functions more seriously. The legislature can and should develop and implement effective monitoring strategies, ensuring that people enjoy the fruits of the national budget. Effective monitoring must be backed by innovative reporting to achieve maximum results. Civil society could also be useful in this regard, as they possess the skills and spread to monitor budget implementation. The executive must be alive to its responsibility for ensuring the welfare of the people by allowing popular participation in public policy making and instituting pro-poor programmes.

The challenge of corruption is one that has been difficult to tackle. The outgoing administration has provided the institutional and legal framework by establishing the Anti-Corruption Commission and the Economic and Financial Crimes Commission. Although the latter organisation has been criticised as being too partisan in the performance of its duties, no one can claim that it has not been a 'thorn in the flesh' of corrupt officials in the private or public sectors. To strengthen these organisations, it is recommended that the enabling legislations be amended to guarantee their financial and operational independence. Unless and until public officials know that their actions in and out of

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<sup>114</sup> See Amnesty International Report 'Ten years on: Injustice and violence haunt the oil delta' <http://web.amnesty.org/library/Index/ENGAFR440222005> (accessed 24 May 2006).

government could be the subject of investigation, accountability and transparency levels will continue on a downward spiral.

Poverty and ignorance are formidable inhibitions on the path to realising socio-economic rights.<sup>115</sup> Many Nigerians struggle to meet the basic requirements of food, clothing and shelter. Some literally live from 'hand to mouth'. It is therefore inconceivable for this category of Nigerians to look in the direction of the courts. For the ignorant, enlightenment and empowerment are important tools. Civil society groups must play a role in mobilising and organising the poor and deprived populations, like SERAC did with a view to engaging the government where necessary. Morka argues, in this regard, that poverty eradication warrants the evolution of 'processes that enable the poor and other marginalised groups, communities or nationalities to participate in both envisioning and shaping outcomes on matters that concern them'.<sup>116</sup>

Empowerment is also essential. An example of what an empowered population can achieve is best described by the *Maroko* case.<sup>117</sup> Maroko was a slum community in Lagos, Nigeria with a population of about 300 000 people and minimal access to essential infrastructure. When, in 1991, the state military government announced plans to demolish Maroko with a view to allocating the land to property speculators, Civil Liberties Organisation (CLO), a human rights non-governmental organisation (NGO) based in Nigeria, sought a restraining order from a Lagos court to stop the demolition pending its suit challenging the demolition order. The court refused to grant the restraining order and before the next adjourned date, the state government demolished the entire settlement, evicting several hundreds of thousands in the process. Fifteen years after the demolition, the struggle to redress the flagrant violation of the socio-economic rights of the Maroko people continues in the courts and elsewhere. However, following SERAC's lead, the Maroko evictees organised themselves under the auspices of the Maroko Evictees Association and made very extensive media presentations on their case and the possible threat to future evictees. The Lagos State government found the Maroko evictees a formidable force in view of the extensive media attention and public sympathy they attracted. Although the issues have yet to be fully resolved, the Lagos government has been more inclined to discussing than before.

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<sup>115</sup> Nigeria is ranked 158 of the 177 countries on the UNDP's 2005 Human Development Index. The 2005 Human Development Report paints a grim picture of Nigeria's state of development. According to the Report, 70,2% of Nigerians live below the poverty line. See <http://www.hdr.undp.org>.

<sup>116</sup> F Morka 'Combating poverty through the international human rights framework', on file with author.

<sup>117</sup> See S Amadi 'Programmatic and conceptual paralysis in protecting and promoting economic, social and cultural rights in Africa' [http://www.communitylawcentre.org.-za/projects/Socio-Economic-Rights/conferences/samuel\\_amadi\\_paper.pdf](http://www.communitylawcentre.org.-za/projects/Socio-Economic-Rights/conferences/samuel_amadi_paper.pdf) (accessed 24 May 2006).

The challenge for NGOs working in the field of socio-economic rights is to follow the SERAC lead in the *Maroko* case. People need to be mobilised in their numbers to challenge certain infractions, through the courts and, more importantly, through the media and the court of public opinion.

The challenge of monitoring and enforcement is one for the National Human Rights Commission and human rights NGOs. The Commission was established by the Human Rights Commission Act of 1995 to, *inter alia*, create an enabling environment for extra-judicial recognition, promotion and enforcement of all rights recognised and enshrined in the Constitution and under the laws of the land. It was also designed to provide a forum for public enlightenment and dialogue on human rights issues. Unfortunately, it is limited by its dependence on the executive for the appointment of key officers and funding. It is therefore recommended that the Commission's Act be amended to make it financially and operationally independent with a view to guaranteeing efficiency and effectiveness. NGOs have been active in monitoring violations of civil and political rights, but very few have bothered to monitor violations of socio-economic rights. It is therefore recommended that more NGOs should focus on these important human rights, without which civil and political rights lack any significant meaning.

The indifference of the international community is one which Nigeria can do very little about. The challenge is to embrace African Charter provisions on socio-economic rights, expand and create the necessary mechanisms for protecting them. Happily, Nigeria has escaped the debt burden. Government must use resources otherwise reserved for debt servicing and repayment to improve the living standard of Nigerians.

A virile civil society is crucial to preserving socio-economic rights. From participation through monitoring to litigation, civil society can provide the environment for public accountability necessary for the guarantee of socio-economic rights. However, this is best achieved in an atmosphere of congeniality. It is therefore recommended that organisations active in the promotion of socio-economic rights should coalesce to present a united front on these issues.

The crisis of socio-economic rights enforcement could be resolved in the interest of justice. A fair resolution would require a multi-dimensional approach involving all arms of government and civil society.