

# Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010

Akinola E Akintayo\*

Lecturer, Faculty of Law, University of Lagos, Nigeria; doctoral candidate, Department of Public Law, Faculty of Law, University of Pretoria, South Africa

## Summary

*The notion of the neutral application of law is the very foundation of liberal societies, in spite of the fact that this notion has been debunked as a myth by a large body of scholarship. This notion continues to pervade liberal societies, operates discriminately against the poor and less privileged members of society and impedes poverty reduction efforts. The article demonstrates the exclusionary and discriminatory operation and impact of the myth of the neutral application of law on the right of the poor to adequate housing through a progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law, 2010, a supposedly neutral planning statute. It concludes that, for the fight against poverty to make any headway in Africa, poverty reduction must continually be mainstreamed. There must constantly be a pro-poor approach to laws and policies.*

**Key words:** *Lagos State; planning law; the poor; adequate housing; socio-economic rights*

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\* LLB (Lagos), LLM (Pretoria); akinat2002@yahoo.com. This article is an expanded form of a paper presented at the Poverty and Justice Seminar held at the University of Pretoria, 17-18 October 2012. My gratitude goes to the anonymous reviewers of the *African Human Rights Law Journal* and other colleagues whose incisive comments and suggestions in no small way added value to the article.

## 1 Introduction

The faith of liberal legal scholars in the neutral principles and application of the law can be referred to as hegemonic,<sup>1</sup> in spite of the fact that this notion has been debunked through a large body of scholarship, including the Critical Legal Studies movement (CLS) and other progressive scholars, whose main focus is the exposure of the extra-legal and political underpinnings and impact of the law. Many of these scholars have shown that this reliance on neutral principles and application of law is in fact false.<sup>2</sup> Despite this, the myth of the neutral and objective nature of legal rules continues to be maintained because it is the very foundation of liberal societies.<sup>3</sup>

Scholars have, however, shown that the unreserved and uncritical reliance on the notion of the neutral application of laws is majorly responsible for the continued perpetuation of poverty and the continued hindrance of socio-economic transformation efforts in Africa and elsewhere. This point is aptly put by Williams:<sup>4</sup>

The dominant political discourse in Western nations, reinforced by our legal cultures, teaches that poverty arises naturally and that the legal system bears no responsibility for causing it. Private law concepts of family, tort, property, and freedom of contract are made to appear as the necessary and neutral framework of social and economic power relations, arising independently of law. The dominant political culture denies that these background rules privilege any group or have anything to do with allocating wealth or income. The role of law in distributing property, valuing waged labour, and consequently devaluing other forms of 'subsistence work' and 'caregiving work', is almost always invisible. In fact, the stubborn persistence of poverty, in both developed and developing countries, results in significant part from political and legal decisions and institutions that generate and sustain a sharply unequal distribution of wealth and resources.

Therefore, it has become important, in light of the above, for scholars to continue to expose the myth of the neutral application of the law and to continue to demonstrate how the uncritical reliance on such a theory directly and indirectly discriminates against and prejudicially

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1 The leading exponent of this viewpoint is Weschler. See H Weschler 'Towards neutral principles of constitutional law' (1959) 73 *Harvard Law Review* 1.

2 See, eg, M Tushnet 'Legal scholarship: Its causes and cure' (1980-1981) 90 *Yale Law Journal* 1205; KE Klare 'The law school curriculum in the 1980s: What's left?' (1982) 32 *Journal of Legal Education* 336 340; MJ Matsuda 'Looking to the bottom: Critical legal studies and reparations' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323; LA Williams 'The legal construction of poverty: Gender "work" and the "social contract"' (2011) 22 *Stellenbosch Law Review* 463.

3 This point was buttressed by Tushnet, who says: 'The acquiescence of individuals to the liberal rule of law depends upon their continued unshakable faith in its objectivity. Thus the conflict between objectivity and subjectivity cannot readily be confronted within the legal sphere without undermining liberal society itself.' Tushnet (n 2 above) 1207.

4 Williams (n 2 above) 468 (fn omitted).

affects vulnerable members of society. It is important to keep emphasising the fact that, for the fight against poverty<sup>5</sup> to make any headway, poverty reduction must continually be mainstreamed. There must constantly be a pro-poor approach to laws and policies. The foregoing rationale informed the assessment in this article of the prejudicial and exclusionary impact of the Lagos State Urban and Regional Planning and Development Law 2010 (Lagos State Planning Law), a supposedly neutral planning statute, on the right of the poor and vulnerable members of society in the Lagos State of Nigeria to access adequate housing.

There are three reasons for choosing the Lagos State Planning Law to demonstrate the myth of the neutral application of law principles and their exclusionary impact on the poor residents of Lagos State. One, the Law is relatively new and is most likely an example of what is to come in the area of planning law in Nigeria if past experiences are anything to go by. This is because Lagos State is generally regarded as a progressive state by other states in the Nigerian Federation who copy its laws and policies.<sup>6</sup> Two, in its bid to transform the state and make it one of the world's megacities, Lagos State appears to have a penchant to initiate policies and enact laws regarded as capitalist and elitist in nature.<sup>7</sup> Three, the Lagos State Planning Law is a good example of otherwise well-intentioned legislation which, however, neglects to factor in the interest of less privileged members of society.

However, the question has to be answered as to why the rights-based approach to the examination and assessment of the prejudicial impact of this Law on the poor is used in the article, despite the weighty objections that have been raised by scholars against the ability of rights rhetoric to wrought social change. According to Malan, for instance, human rights only serve to entrench the state and perpetuates the *status quo* and is therefore not a suitable tool of

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5 There are many ways of defining poverty. The term is, however, generally defined as a lack of or insufficient access to basic socio-economic resources like food, water, housing, basic health care, etc. For a discussion of the various approaches and ways of defining poverty and the deficiencies of some of the approaches, see D Brand *et al* 'Poverty as injustice' (2013) 17 *Law, Democracy and Development* 273. For the purposes of this article, however, I adopt the general approach of defining poverty as a lack of or insufficient access to basic socio-economic resources like food, water, housing, basic health care, etc, as this definition satisfies my rather narrow objective(s) in this article.

6 See also 'Why Lagos will shape Nigeria's future' *Tell Magazine* 7 May 2012 44-49.

7 See, eg, Channels Television 'Lagos traffic law has reduced *okada* accidents by 95% – Kayode Opeifa' <http://www.channelstv.com/home/2012/11/10/lagos-traffic-law-has-reduced-okada-accidents-by-95-kayode-opeifa/> (accessed 10 November 2012), a news report where members of civil society refer to the newly-enacted Lagos State Traffic Law, 2012 as tyrannical and a victimisation of the poor. The law recently banned commercial motorcyclists (*okadas*) from plying specified major roads in Lagos without considering the effect this will have on the earning abilities of the teeming majority of Nigerians who rely on this mode of transportation as a source of livelihood.

empowerment for the individual.<sup>8</sup> According to him,<sup>9</sup>

[h]uman rights in fact do not bear testimony of an empowered individual. On the contrary, human rights rather furnish a catalogued description of individual people's needs, helplessness, powerlessness and dependence on the state.

Many scholars share Malan's view.<sup>10</sup>

There are, however, some scholars who are of the opinion that, skepticism against the ability of rights discourse to wrought social change notwithstanding, rights discourse has a liberating potential that progressive forces and movement cannot afford to ignore. According to Kairys:<sup>11</sup>

The law [human rights] though indeterminate, political and most often conservative, and though it functions to legitimate existing social and power relations, is a major terrain for political struggle that has, on occasions, yielded or encoded great gains and simply cannot be ignored by any progressive trend or movement.

Many scholars share Kairys's view, as do I.<sup>12</sup> As rightly pointed out by Rabinowitz,<sup>13</sup> the law may not have transformed the capitalist system or abolished poverty, but the law and human rights have brought about many changes and wrought transformation in its long history across the spectrum of human societies. These changes cannot be explained on the basis of the protection of dominant or class interests or the perpetuation of the *status quo* alone, as alleged by some scholars. The human rights approach to the assessment of the prejudicial effect of this Law on the poor is therefore not misplaced.

There are in fact at least three reasons for the use of the rights-based approach to poverty reduction and socio-economic issues generally. The first is that, contrary to the arguments of some scholars, the rights-based approach is in fact capable of empowering the poor and the vulnerable for action.<sup>14</sup> This it does by providing vulnerable groups easier access to centres of power not otherwise provided to

8 K Malan *Politocracy* trans J Scott (2012) 206.

9 Malan (n 8 above) 219.

10 See, eg, M Tushnet 'An essay on rights' (1983-1984) 62 *Texas Law Review* 1363; P Gabel 'The phenomenology of rights-consciousness and the pact of the withdrawn selves' (1983-1884) 62 *Texas Law Review* 1563; R West 'Rights, capabilities and the good society' (2001) 69 *Fordham Law Review* 1901; K van Marle 'Lives of action, thinking and revolt – A feminist call or politics and becoming in post-apartheid South Africa' (2004) 19 *Southern African Public Law* 605.

11 D Kairys 'Introduction' in D Kairys (ed) *The politics of law. A progressive critique* (1998) 16.

12 See, eg, D Kennedy 'Critical labour law theory: A comment' (1981) 4 *Industrial Relation Law Journal* 503; Matsuda (n 2 above); M Pieterse 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796.

13 V Rabinowitz 'The radical tradition in the law' in Kairys (n 11 above) 680.

14 See, eg, K Klare 'Law making as praxis' (1979) 40 *Telos* 123; P Gabel & P Harris 'Building power and breaking images: Critical legal theory and the practice of law' (1982-83) *Review of Law and Social Change* 369; J Dugard 'Urban basic services:

them by mainstream societal institutions.<sup>15</sup> The second is that the rights-based approach takes socio-economic entitlements outside the deprivations and vicissitudes of majoritarian and elite politics.<sup>16</sup> This it does by transforming socio-economic entitlements into fundamental rights which serve as limitations on the governmental exercise of power and majoritarian politics. The third reason why the rights-based approach is the preferred approach is that it gives sustained attention to the plight of the poor and the vulnerable.<sup>17</sup> This it does by calling the attention of government and society to the desperate conditions of the poor and the vulnerable. These reasons informed my rights-based approach to the assessment of the legislation that forms the topic of this article.

My critical assessment of the discriminatory and exclusionary impact of the Law on the right of the poor to adequate housing proceeds as follows: First, I consider the content and scope of the right to adequate housing as a norm of international human rights law. This is followed by an examination of the right to access to adequate housing in Nigeria. Thereafter, the level of access to housing in Nigeria and Lagos State in particular is examined, followed by a brief examination of the context of the legislation. This is followed by a discussion of some of the provisions of the Lagos State Planning Law that may impact negatively on the poor. The article concludes with recommendations for reform.

## 2 Content and scope of the right to adequate housing

The right to adequate housing is pivotal to the enjoyment of not only other economic, social and cultural rights, but civil and political rights as well. For instance, a person with no access to adequate housing is likely to be homeless and wandering, exposed to the vagaries of weather and having his or her rights to dignity, privacy, family life, health, among others, violated. This is aptly described by Leckie:<sup>18</sup>

Without access to affordable, habitable and secure housing, a wide range of other human rights are sacrificed and consequently reduced in meaning

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14 'Rights, reality, and resistance' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 275.

15 J Raz 'Rights and politics' (1995) 71 *Indiana Law Journal* 27 42-43.

16 E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 468.

17 See generally OHCHR *Principles and guidelines for a human rights approach to poverty reduction strategies* <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (accessed 24 October 2012); OHCHR 'Human rights, poverty reduction and sustainable development: Health, food and water' A background paper presented at the World Summit on Sustainable Development in Johannesburg, 26 August to 4 September 2002 <http://www.ohchr.org/Documents/Publications/HRPovertyReductionen.pdf> (accessed 24 October 2012).

18 S Leckie 'The right to housing' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 167.

as the struggle to gain housing rights takes on increasing importance to those without a place to live.

The right, therefore, serves as a basis of sorts from which other rights are enjoyed by the individual. The recognition of the importance of the right accounts for its featuring prominently in international,<sup>19</sup> regional<sup>20</sup> and domestic bills of rights.<sup>21</sup> The right to adequate housing is not restricted to access to one's home or shelter. It encompasses the provision of adequate accommodation or shelter to vulnerable groups, such as children and prisoners, and the provision of enabling conditions for citizens to access land on an equitable basis.<sup>22</sup> The focus of this article is, however, restricted to that aspect of the right that deals with access to one's home, shelter or habitation.

When the right to adequate housing as defined above is mentioned, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is invariably the reference point in the category of applicable instruments on the international plane.<sup>23</sup> According to the Committee on Economic Social and Cultural Rights (ESCR Committee),<sup>24</sup> article 11(1) of ICESCR '... is the most comprehensive and perhaps the most important ...'<sup>25</sup> of the provisions dealing with the right to adequate housing. Article 11(1) provides:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The ESCR Committee, the quasi-judicial United Nations (UN) organ entrusted with the interpretation and administration of the provisions of ICESCR, has given content to the provisions of article 11(1) in two

19 See eg arts 25(1) and 11(1) of the Universal Declaration and ICESCR respectively.

20 Apart from the provisions of art 31 of the Revised European Social Charter, which explicitly provides for the right to housing, the explicit right to housing is conspicuously absent from the provisions of regional human rights treaties. In spite of this, however, the European Commission (before its scrapping in 1998) and the European Court on Human Rights have used the provisions of the European Convention to address housing issues, especially where it concerned forced evictions through expansive readings of the European Convention's privacy, family life and property rights provisions. Both the Commission and the Court have, however, not been forthcoming in using the provisions to impose positive obligations on states to fulfil the right to adequate housing. See Leckie (n 18 above) 159-169 for a discussion of some of the relevant cases.

21 See, eg, sec 28 of the Constitution of the Republic of South Africa, 1996.

22 See P de Vos 'The right to housing' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 85.

23 ICESCR was adopted in 1966 by the United Nations General Assembly to provide for rights regarded as subsistence and essential to the day-to-day survival of man. ICESCR was adopted alongside the International Covenant on Civil and Political Rights (ICCPR), which provides for civil and political rights.

24 The quasi-judicial UN organ saddled with the interpretation and administration of the provisions of ICESCR.

25 ESCR Committee General Comment 4 para 3.

of its General Comments, General Comments 4 and 7. General Comment 4 is the first substantive General Comment on the right to adequate housing, and deals with the particular content of the right to adequate housing. General Comment 7 deals with the ancillary issue of forced evictions. According to the ESCR Committee:<sup>26</sup>

The right to adequate housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather, *it should be seen as the right to live somewhere in security, peace and dignity.*

The foregoing interpretation is appropriate for two reasons. One:<sup>27</sup>

The right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant [ICESCR] is premised. Thus, 'the inherent dignity of the human person' from which the rights in the Covenant [ICESCR] are said to derive requires that the term 'housing' be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources.

Two: The right in article 11(1) refers 'not just to housing but to adequate housing'.<sup>28</sup> According to the ESCR Committee, adequate housing or shelter has six important components, which are as follows: 'adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost'.<sup>29</sup>

The interpretation given to article 11(1) of the Covenant by the ESCR Committee has received confirmation from both regional tribunals<sup>30</sup> and domestic courts.<sup>31</sup> For instance, the African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*<sup>32</sup> read together the provisions of articles 14,<sup>33</sup> 16<sup>34</sup> and 18(1)<sup>35</sup> of the African Charter on Human and Peoples' Rights (African Charter) to imply the right to adequate housing which is not expressly provided for in the Charter. According to the African Commission:<sup>36</sup>

26 ESCR Committee General Comment 4 para 7 (my emphasis).

27 As above.

28 As above.

29 As above.

30 Such as the African Commission, the quasi-judicial body entrusted with the interpretation and enforcement of the African Charter.

31 Eg, the Constitutional Court of South Africa.

32 (2001) AHRLR 60 (ACHPR 2001).

33 Art 14 of the African Charter guarantees the right to property.

34 Art 16 of the African Charter guarantees the right to enjoy the best attainable state of physical and mental health.

35 Art 18(1) of the African Charter obliges the state to protect the family as the natural unit and basis of society.

36 *SERAC v Nigeria* (n 32 above) para 60.

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing.

The scope of the right to adequate housing, according to the African Commission, 'goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace – whether under a roof or not.'<sup>37</sup> As far as the Commission is concerned, following from the foregoing, the right to privacy is implicit in the right to adequate housing.

In addition to this, international human rights law requires that all rights, adequate housing inclusive, are to be enjoyed by all right-bearers without discrimination. This principle of non-discrimination is one of the absolute principles of international human rights law and is entrenched in international,<sup>38</sup> regional<sup>39</sup> and domestic<sup>40</sup> bills of rights. Discrimination has been defined by the ESCR Committee as<sup>41</sup>

any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.

The prohibited grounds of discrimination listed in ICESCR include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>42</sup>

The ESCR Committee has also correctly recognised that discrimination has many dimensions and operates in both the private and public spheres. The Committee, therefore, distinguishes between formal and substantive discrimination, and direct and indirect discrimination.<sup>43</sup> Formal discrimination refers to a situation where a law or policy of a state discriminates as a matter of law against a person on any of the prohibited grounds. Substantive discrimination is

37 *SERAC v Nigeria* para 61.

38 Art 2 Universal Declaration; arts 2(1) & 26 ICCPR; art 2(2) ICESCR.

39 See, eg, art 1(1) of the American Convention on Human Rights; art 14 of the European Convention on Human Rights; and art 2 of the African Charter.

40 Eg, sec 42 of the Constitution of the Federal Republic of Nigeria 1999, as amended.

41 ESCR Committee General Comment 20 para 7. The Human Rights Committee, the quasi-judicial body responsible for the interpretation of ICCPR, had earlier adopted a similar definition in relation to the rights contained in ICCPR. See Human Rights Committee General Comment 18 para 7.

42 Art 2(2) ICESCR. The grounds listed above are the ones listed in ICESCR. More recent human rights instruments have added new ones. Eg, disability is now a prohibited ground of discrimination by virtue of the 2006 UN Convention on the Rights of Persons with Disabilities.

43 ESCR Committee General Comment 20 paras 8-10.

a situation of apparent equality as a matter of law, but there is discrimination in practice. Direct discrimination, on the other hand, occurs where an individual is subjected to more unequal or detrimental treatment than another individual who is similarly placed, while indirect discrimination refers to 'laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination'.<sup>44</sup> All these dimensions and manifestations of discrimination are covered and prohibited by the Covenant's non-discrimination clauses.<sup>45</sup>

Human rights regimes in this regard impose four levels of obligation on states.<sup>46</sup> These are the obligation to respect, the obligation to protect, the obligation to promote, and the obligation to fulfil. The obligation to respect imposes on states the duty to refrain from interfering with or impairing the enjoyment of the various rights and freedoms of the right holders. The obligation to protect imposes on states the duty to protect right bearers from the injurious and violating acts of others. The obligation to promote imposes on states the duty to create an enabling environment for the effective enjoyment of rights and freedoms, that is, by promoting tolerance and raising awareness on the import of human rights, among others. The obligation to fulfil requires states to take active measures to ensure the effective realisation of rights and freedoms. These four levels of obligation translate into two types of duties for states: the negative and positive duties.

The negative duty of states requires states to refrain from interfering or impairing the rights and freedom of right-bearers. With regard to socio-economic rights, generally, and the right to adequate housing, in particular, the negative duty incumbent upon the state, at the very minimum, obliges it and all of its organs to<sup>47</sup>

abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family or household or community housing needs.

44 ESCR Committee General Comment 20 para 10(b).

45 ESCR Committee General Comment 20 paras 8-15.

46 Leckie (n 18 above) 155-158; see also *SERAC v Nigeria* (n 32 above) paras 44-47.

47 The African Commission in *SERAC v Nigeria* (n 32 above) para 61, quoting S Leckie 'The right to housing' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 113-114. The South African Constitutional Court emphatically put the point thus: 'At the very minimum, socio-economic rights [which includes the right to adequate housing] can be negatively protected from improper invasion' *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 para 78. See also *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2006 (1) BCLR 78 (CC), where the litigants successfully relied upon the negative duty dimension of the right to have access to adequate housing.

The positive duty of states requires states to ensure the effective realisation of rights and freedoms. With regard to socio-economic rights, particularly the right to adequate housing, the state is required to take steps 'to the maximum of its available resources' to progressively achieve the full realisation of the right.<sup>48</sup> The steps to be taken are inclusive of the adoption of appropriate legislative measures.<sup>49</sup> ICESCR's requirement for state parties to progressively realise rights to the maximum of available resources means, in essence, that states are required 'to move as expeditiously as possible towards the realisation of the rights'<sup>50</sup> through the equitable and effective use of available resources.<sup>51</sup> Inadequate and/or dwindling resources are, without more, not a valid excuse or ground for the non-realisation of the rights in the Covenant.<sup>52</sup>

As can be gathered from the foregoing, the right to adequate housing or the right to have access to adequate housing, howsoever coined, guarantees more than just a right to a dwelling place. It is a right to live in some decent place in peace, security and dignity. This right generates four levels of obligations for a state. First is the negative obligation to refrain from impairing the ability of individuals and communities to house themselves; second is the obligation to protect right-holders from third party interference; third is the obligation to promote the right through education and the promotion of tolerance and awareness of the right(s) in question; and, lastly, the positive obligation to take active and pro-active steps to progressively realise the right to adequate housing. With specific reference to the poor, international human rights law and comparative international law make it clear that the right to adequate housing is to be ensured to all persons at all economic levels of the society, irrespective of income or access to economic resources.

### 3 Nature of the right to adequate housing in Nigeria

Unlike South Africa, Nigeria does not have a justiciable socio-economic rights regime. Nigeria's socio-economic rights provisions are contained in Fundamental Objectives and Directive Principles, chapter II of the Constitution of the Federal Republic of Nigeria 1999, as amended (Nigerian Constitution). Some provisions of chapter II of the Nigerian Constitution provides for sundry socio-economic entitlements. Although not couched in the traditional language of rights, the framing of the relevant provisions of the chapter,

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48 Art 2(1) ICESCR.

49 As above.

50 The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (1987) 9 *Human Rights Quarterly* 125 para 21.

51 Limburg Principles (n 50 above) 125-126.

52 As above.

nevertheless, indicate that they are substantially socio-economic rights (or at least a good number of them).<sup>53</sup> Thus, the apparent intention behind the relevant directive principles in chapter II is the entrenchment of socio-economic entitlements made contingent upon the happening of another event. This event(s) may be the availability of resources, executive action in terms of policies, or legislative action in terms of the enactment of the requisite enabling laws.

Some of these socio-economic rights that are distillable from the relevant provisions of the Nigerian Constitution are the rights to suitable and adequate shelter, suitable and adequate food, a national minimum wage, old age care and pension, unemployment and sick benefits and the right of welfare for disabled persons;<sup>54</sup> the rights to have an opportunity without discrimination to secure an adequate means of livelihood and suitable employment;<sup>55</sup> the rights to just and humane conditions of work and adequate facilities for leisure, social, religious and cultural life;<sup>56</sup> the right to the health, safety and welfare of all persons in employment;<sup>57</sup> the right to adequate medical and health facilities;<sup>58</sup> the right to equal pay for equal work without discrimination on prohibited grounds;<sup>59</sup> the right of children, young persons and the aged to be protected from exploitation, moral and material neglect;<sup>60</sup> the right to public assistance in deserving cases;<sup>61</sup> and the right to free education at all levels.<sup>62</sup> As can be gathered from the foregoing, the right to adequate housing is one of the socio-economic rights provided for in chapter II of the Nigerian Constitution through the provisions of section 16(2)(d) of the Nigerian Constitution, which provides that suitable and adequate shelter is to be ensured to all.

However, the Achilles heel of the Nigerian socio-economic rights framework is that the Constitution forbids the enforcement before any court of law in Nigeria of the provisions of chapter II, inclusive of the socio-economic rights therein. This is by virtue of section 6(6)(c) of the Nigerian Constitution.<sup>63</sup> Consistent with this constitutional ouster

53 O Fagbohun 'Legal arguments for the non-justiciability of chapter 2 of the 1999 Constitution' in E Azinge & B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 150 169.

54 Sec 16(2)(d) Nigerian Constitution.

55 Sec 17(3)(a).

56 Sec 17(3)(b).

57 Sec 17(3)(c).

58 Sec 17(3)(d).

59 Sec 17(3)(e).

60 Sec 17(3)(f).

61 Sec 17(3)(g).

62 Sec 18(3).

63 Sec 6(6)(c) of the Nigerian Constitution provides: 'The judicial powers vested in accordance with the foregoing provisions of this section ... shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of this Constitution.'

of jurisdiction, Nigerian courts have, since the 1979 Constitution of Nigeria came into force, confirmed the non-justiciability of chapter II in several cases pursuant to section 6(6)(c) of the Constitution. The Nigerian Court of Appeal decision in *Archbishop Okogie v The Attorney-General of Lagos State*<sup>64</sup> presented the first opportunity for Nigerian appellate courts to pronounce upon the provisions of section 6(6)(c) of the 1979 Constitution.<sup>65</sup> The Court held in that case that the provisions of chapter II are, pursuant to section 6(6)(c) of the Constitution, not justiciable and that, where a government is intending to fulfil its obligations under chapter II through laws or policies, such laws or policies must not be in violation of constitutionally-guaranteed rights under chapter IV of the Constitution.

Later cases emanating from Nigerian courts on the justiciability of chapter II of the Nigerian Constitution have generally followed this position. Thus, in the more recent case of *Adebisi Olafisoye v Federal Republic of Nigeria*,<sup>66</sup> the Supreme Court of Nigeria held that chapter II of the Constitution, as it presently stands, is not justiciable by virtue of the provisions of section 6(6)(c) of the Constitution. However, if a matter is justiciable by virtue of other provisions of the Constitution or the government has evinced an intention that a matter be justiciable by virtue of a policy or law, then the particular provision of chapter II dealing with the subject matter of executive or legislative action will cease to be non-justiciable.<sup>67</sup>

The judicial sanction of section 6(6)(c) of the Nigerian Constitution and the consequent non-justiciability of Nigeria's socio-economic rights regime are, however, in sharp contrast to the obligations imposed by the domestication in Nigeria of the African Charter, that did not make the traditional distinction between civil and political rights and socio-economic and cultural rights in its provisions.<sup>68</sup> There is, therefore, controversy regarding whether the African Charter has not in fact rendered sterile the argument that socio-economic rights are not justiciable in Nigeria. The African Charter provides for socio-economic rights alongside civil and political rights. Socio-economic rights provided for in the African Charter alongside the more traditional first generation rights are the right to work,<sup>69</sup> the right to

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64 [1981] 2 NCLR 337.

65 Before the *Okogie* case there was the earlier case of *AJA Adewole & Others v Alhaji L Jakande & Others* (1981) 1 NCLR 262 with similar facts and decision in the High Court of Lagos State.

66 (2004) 4 NWLR (Pt 864) 581.

67 *Adebisi Olafisoye* (n 56 above) 659-660. See also *Attorney-General of Ondo State v Attorney-General of the Federation* (2000) 9 NWLR (Pt 772) 222 and *Federal Republic of Nigeria v Anache & Others* (2004) 14 WRN 1.

68 Nigeria ratified and domesticated the African Charter in 1983 via the African Charter (Ratification and Enforcement) Act Cap A9 LFN 2004.

69 Art 15 African Charter.

health,<sup>70</sup> the right to education,<sup>71</sup> and the right to economic, social and cultural development.<sup>72</sup> Although the right of access to adequate housing is not expressly provided for in the African Charter, in *SERAC and Another v Nigeria*,<sup>73</sup> the African Commission has read the right as being implied in the Charter. This is through a cumulative reading of the right to property,<sup>74</sup> the right to enjoy the best attainable state of physical and mental health<sup>75</sup> and the obligation of states to protect the family as the natural unit and basis of society.<sup>76</sup>

Nigeria domesticated the African Charter in 1983 via the African Charter (Ratification and Enforcement) Act.<sup>77</sup> The Charter became part and parcel of Nigeria's domestic regime from that time onwards. This state of affairs was confirmed by the Supreme Court of Nigeria in several cases. The *locus classicus* in this area of the law is *Abacha and Others v Fawehinmi*,<sup>78</sup> in which the Supreme Court held that the African Charter was a statute with international flavour in Nigeria; it was superior to other domestic statutes but inferior and subject to the provisions of the Nigerian Constitution. This has since been confirmed by Nigerian courts in many other cases.<sup>79</sup>

However, despite the numerous judicial decisions confirming the African Charter as part and parcel of Nigeria's domestic regime, there is ongoing controversy among scholars as regards the precise impact and implication of the African Charter on Nigeria's socio-economic rights framework. While some argue that the enforcement of socio-economic rights in Nigeria via the provisions of the African Charter is untenable and will be unconstitutional, others hold the view that such a course is legally justifiable and legitimate in view of the domestication of the Charter in Nigeria.<sup>80</sup>

The controversy among scholars regarding the precise impact of the African Charter on Nigeria's socio-economic rights regime appears to be mirrored in the Nigerian lower courts' decisions. Thus, while earlier cases from Nigerian lower courts appear to have taken the position that socio-economic rights are enforceable in Nigeria via the

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70 Art 16.

71 Art 17.

72 Art 22.

73 n 32 above.

74 Art 14 African Charter.

75 Art 16(1).

76 Art 18(1).

77 Cap A9 LFN 2004.

78 (2001) AHRLR 172 (NgSC 2000) para 15.

79 See, eg, *Agbakoba v Director of State Security Service & Another* (1999) 1 NWLR (Pt 625) 129 and *Ogugu v State* (1994) 9 NWLR (Pt 366) 1; among many others.

80 See generally E Azinge & B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010). See also ON Ogbu 'The fundamental objectives and directive principles of state policy as a barometer for appraisal of Nigeria's nascent democracy' (2002) 1 *Journal of Economic, Social and Cultural Rights* 75; UO Umzurike 'The African Charter on Human and Peoples' Rights and economic, social and cultural rights' (2002) 1 *Journal of Economic, Social and Cultural Rights* 101, among others.

African Charter, more recent cases appear to eschew such interpretation. Thus, the Federal High Court of Nigeria, Port Harcourt Division, held that the non-treatment of HIV/AIDS-positive prisoners was a violation of article 16 of the African Charter in *Odafe and Others v Attorney-General of the Federation and Others*,<sup>81</sup> and the Federal High Court of Nigeria, Benin Judicial Division, held that gas flaring in the Niger Delta region of Nigeria was a violation of articles 4,<sup>82</sup> 16<sup>83</sup> and 24<sup>84</sup> of the African Charter in *Gbemre v Shell Petroleum Development Company Nigeria Ltd and Others*.<sup>85</sup> The Federal High Court, Abuja, in the very recent case of *Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another*<sup>86</sup> declared unconstitutional the provisions of the new FREP Rules, which include the African Charter as part of the human rights instruments that can be enforced via the more speedy mechanisms of the Rules. This is because, according to the Court, the African Charter contained other categories of rights not included in the fundamental rights provisions of chapter IV of the Nigerian Constitution. The latter category of rights are, therefore, according to the Court, not within the constitutional contemplation of fundamental rights and cannot be enforced via the FREP Rules, as to do so will violate the Constitution.

Nigerian appellate courts have not had the opportunity to pronounce upon the precise impact and implication of the domestication of the African Charter on the justiciability of socio-economic rights in Nigeria, with the result that this area of the law appears still to be in a state of flux. Notwithstanding this, three things at least are clear from the foregoing discussion. The first is that chapter II of the Nigerian Constitution, barring legislative or executive action, is not justiciable. Secondly, it is also clear that, at least with regard to civil and political rights, which has a counterpart in chapter IV of the Nigerian Constitution, the African Charter is part and parcel of Nigeria's domestic law.

Lastly, while Ebobrah has correctly argued, in my view, that a clear reading of the relevant provisions of the Nigerian Constitution shows that section 6(6)(c) of the Constitution does not remove the competence of the legislature to translate the socio-economic rights in chapter II into enforceable rights, nor does the provision prohibit Nigerian courts from entertaining socio-economic rights cases where such rights have been translated into subjective rights by law or

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81 (2004) AHRLR 205 (NgHC 2004).

82 Right to life.

83 Right to health.

84 Right to a healthy environment.

85 (2005) AHRLR 151 (NgHC 2005).

86 Suit FHC/ABJ/CS/640/2010, decision of the Federal High Court Abuja, delivered on 29 November 2012.

policy,<sup>87</sup> the African Charter is not one of the laws transforming the socio-economic rights in chapter II into subjective rights. This is because, as can be gathered from the pronouncement of the Supreme Court of Nigeria in *Abacha and Others v Fawehinmi* above, the African Charter, although superior to other local statutes, is inferior to and subject to the Nigerian Constitution. Thus, scholars and courts that have argued that the enforcement of the socio-economic rights provisions in chapter II of the Nigerian Constitution through the African Charter will violate section 6(6)(c) and section 1(1) and (3) of the Nigerian Constitution appear to be correct. I therefore disagree with Ebobrah and others who argue that the African Charter can ground claims for socio-economic rights enforcement in Nigeria,<sup>88</sup> and I agree with Otubu, who is of the opinion that the justiciability of socio-economic rights in Nigeria remains with future legislation.<sup>89</sup> The conclusion flowing from the above is that socio-economic rights, including the right of access to adequate housing, are not yet justiciable in Nigeria.

#### 4 Level of access to housing in Nigeria and Lagos State

Lagos State of Nigeria was created on 27 May 1967 when Nigeria was divided into 12 states out of the then four existing regions of the Federal Republic of Nigeria.<sup>90</sup>

The state is located on the south-western part of Nigeria with the southern boundary of the state framed by about 180 kilometre along the Atlantic coastline while the northern and eastern boundaries are framed by Ogun State. The Republic of Benin formed the western boundary.

Lagos State is the smallest state in Nigeria with an approximate land area of about 358 861 hectares or 3 577 square kilometres, representing about only 0,4 per cent of Nigeria's entire land mass.<sup>91</sup> The state is also the most affluent and the most urbanised because only about 5 per cent of the state's population are in rural areas.<sup>92</sup>

With regard to the level of access to adequate housing in Nigeria, the situation at the national level presents a dismal and critical picture.

87 ST Ebobrah 'The future of economic, social and cultural rights in Nigeria' (2007) 1 *CALS: Review of Nigerian Law and Practice* 117-119.

88 Ebobrah (n 87 above) 120-122.

89 A Otubu 'Fundamental right to property and right to housing in Nigeria: A discourse' (2011) 7 *Acta Universitatis Danubius Juridica* 38.

90 L Oduwaye 'Challenges of sustainable physical planning and development in metropolitan Lagos' (2009) 2 *Journal of Sustainable Development* 161.

91 As above

92 As above.

The population of Nigeria is currently estimated to be between 167 million<sup>93</sup> and 178,5 million people.<sup>94</sup> Although there appears to be no precise data on the number of people with or without access to adequate housing in the country,<sup>95</sup> feelers and reports from governmental and other quarters indicate that Nigeria has a housing deficit of between 17 million housing units in 2012<sup>96</sup> to about 60 million housing units in 2014.<sup>97</sup> The country, therefore, is presumed to require about 720 000 units of housing annually to meet the housing needs of its teeming population.<sup>98</sup> As if the huge gap between available housing and the housing needs of the teeming population of Nigeria are not bad enough, studies also show that about 75 per cent of available housing in Nigeria's urban centres is substandard and sited in slums.<sup>99</sup> Reports indicate that these houses are characterised by natural ageing, poor sanitation, overcrowding, scarcity and high cost, wrong development and use of buildings and increased deterioration of the natural environment, among others.<sup>100</sup>

With specific reference to Lagos State, while access to housing at the national level is gloomy, the situation in Lagos State appears to be even worse. This is both because of the urbanised character of the state, as pointed out earlier, and the continuing increase in the population of the state, fuelled by the continuing influx of rural population from other states of the Federation. Thus, while as at 2006 the population of Lagos State is estimated to be about 17,5 million people, the government of Lagos State is today working with a population estimate of 21 million people.<sup>101</sup> As of 2010, when the national housing deficit is estimated to be about 18 million units of housing, the Lagos State housing deficit alone is estimated at about five million units of housing, representing about 31 per cent of the

93 National Population Commission, Nigeria 'Nigeria over 167 million population: Implications and challenges' <http://www.population.gov.ng/index.php/84-news/latest/106-nigeria-over-167-million-population-implications-and-challenges> (accessed 5 August 2014).

94 World Population Review 'Nigeria population 2014' <http://worldpopulationreview.com/countries/nigeria-population/> (accessed 5 August 2014).

95 It is, however, reported that 60% of Nigerians were homeless as of 2004 with Nigeria's housing stock put at 23 houses per 1 000 inhabitants in 2007. See E Olugbenga & O Adekemi 'Challenges of housing delivery in metropolitan Lagos' (2013) 3 *Research on Humanities and Social Sciences* 1.

96 'Nigeria requires additional 720 000 housing units annually - Wogu' *The News* <http://thenewsnigeria.com.ng/2014/06/26/headline-nigeria-requires-additional-720000-housing-units-annually-wogu/> (accessed 5 August 2014).

97 'Nigeria needs \$30m to provide adequate housing - FG' *Vanguard* <http://www.vanguardngr.com/2012/02/nigeria-needs-30m-to-provide-adequate-housing-fg/> (accessed 3 July 2014).

98 As above.

99 AF Larenwaju 'Urbanisation, housing quality and environmental degeneration in Nigeria' (2012) 5 *Journal of Geography and Regional Planning* 422.

100 Larenwaju (n 99 above) 425-427. See also AO Olotuah 'Housing development and environmental degeneration in Nigeria' (2010) 3 *The Built and Human Environment Review* 42.

101 Lagos State Government 'Population' <http://www.lagosstate.gov.ng/pagelinks.php?p=6> (accessed 10 August 2014).

national housing deficit.<sup>102</sup> As at the national level, as pointed out above, the nature of most of the available housing in Lagos State is also substandard and sited in slums. As aptly summarised by Olugbenga and Adekemi:<sup>103</sup>

The extent of the housing shortage in Lagos is enormous. The inadequacies are far-reaching and the deficit is both quantitative and qualitative; even those households with shelter are often subjected to inhabiting woefully deficient structures as demonstrated in the multiplication of slums from 42 in 1985 to over 100 as at January 2010.

As a result of the immense pressure for housing in the state, especially the poor's housing, the Lagos urban poor are transforming the state to meet their housing needs according to their income levels, and this most times is in violation of official laws and plans.<sup>104</sup> Thus, although there is no official law or plan structuring Lagos into rich and poor areas, the Lagos urban poor's quest for housing and activities in relation thereto has stratified the state into three types of areas: low-income/high density areas; medium income/medium density areas; and high income/low density areas.<sup>105</sup> While it is not uncommon to see the rich and the poor co-existing in the different areas, the features of the particular areas in question often times predominate. Thus, in addition to the exponential growth of slums from 42 in 1985 to over 100 in January 2010, as pointed out above, Lagos State appears to have been stratified between the rich and poor through usage.

Housing in the urban poor areas of Lagos is majorly the Brazilian 'face me I face you' type of rooms in houses where occupants share kitchens, toilets and other conveniences.<sup>106</sup> While the occupancy rate in high income/low density areas like Victoria Island, Ikoyi, Lekki and Eti-Osa averages 1,4 per room, and 3,6 in the middle income/medium density areas of Surulere and Apapa, the occupancy rate in the low income/high density areas of Mushin, Ketu, Ajegunle and Ebutte-Metta, among others, averages 8,0 per room.<sup>107</sup>

To compound issues further, studies reveal that poor residents of Lagos State have to resort to self-help to secure some kind of housing and facilities for themselves. Thus, while the housing supply for the upper classes has never been in short supply, meeting the housing deficit of the poor residents of Lagos State has been a thorny and knotty issue. Several initiatives and programmes to ameliorate the acute housing shortage for the poor in the state has had little or no

102 Olugbenga & Adekemi (n 95 above) 3.

103 As above.

104 As above.

105 OT Lawanson 'Poverty and environmental degradation in the Lagos metropolis' (2007) 11 *Journal of Environmental Science* 36.

106 T Lawanson 'Poverty and environmental conditions in the Lagos megacity: Consequences for environmental health' (2010) 7 *Journal of Environmental Science* 99 101.

107 See Oduwaye (n 90 above) 161; Lawanson (n 106 above).

impact, with the result that over 90 per cent of the housing supply for the poor in the state is from the informal private sector.<sup>108</sup> According to Olugbenga and Adekemi:<sup>109</sup>

The informal private sector in Lagos comprising people of different income background resorted to self-help housing strategy. This sector has taken the risk of buying untitled land from informal market dominated by cabal popularly referred to as 'Omo-Onile'. After the purchase of the land, the majority of these people will take it upon themselves to construct their own roads, providing water and extending electricity for kilometres to provide a roof over their head. Over 90% of the housing supply in Lagos is from this sector with the resultant effects of lack of standardization and distorted urban planning system.

Ironically, it is this lack of standardisation and the distorted urban planning system resulting from the poor's self-help to secure housing for themselves, coupled with the high cost of building materials, land and expertise to construct proper and housing regulation compliant houses that render the poor more vulnerable to harsh consequences under the new Law than the more affluent. The identification of some of these unpalatable consequences is the focus of this article and will be discussed shortly. First, a brief background to the new Law.

## 5 Brief background to the Law

The Lagos State Planning Law is aimed at achieving environment-centred development and more. According to its Preamble, the objectives of the Law are 'to provide for the administration of physical planning, urban development, urban regeneration and building control in Lagos State and for connected purposes'.<sup>110</sup> Additionally, as can be gathered from its provisions, the Law is a consolidation of the various laws regulating planning and developments in Lagos State.<sup>111</sup> It, therefore, variously provides for: the review and preparation of development plans in the state,<sup>112</sup> the application for and grant of planning permits,<sup>113</sup> the preservation and planting of trees and greeneries,<sup>114</sup> and the regulation of buildings,<sup>115</sup> among others.

The Lagos State Planning Law established six different agencies: the Lagos State Physical Planning Permit Authority (Planning Permit

108 Olugbenga & Adekemi (n 95 above) 4.

109 As above.

110 Preamble, Lagos State Planning Law.

111 That the Law is a consolidation of several laws regulating planning and development in the state can be gathered from sec 101 of the Law which repealed a number of laws dealing with the subject matters now covered under the new Law.

112 Sec 5 Lagos State Planning Law.

113 Secs 27-39.

114 Sec 40.

115 Sec 47.

Authority); the Lagos State Building Control Agency (Building Control Agency); the Lagos State Urban Renewal Agency (Renewal Agency);<sup>116</sup> the Physical Planning and Building Control Agency Appeals Committee (Appeals Committee);<sup>117</sup> and the Technical Advisory Committee on Physical Planning and Building Control (Advisory Committee),<sup>118</sup> to administer the provisions of the Law. The overall responsibility, control and administration of the Law are vested in the Ministry of Physical Planning and Urban Development (Ministry).<sup>119</sup>

## **6 Some provisions of the Law that may prejudicially affect the poor**

### **6.1 Powers of the Commissioner for Environment to direct the sealing up or demolition of any structure contravening the Lagos State Planning Law**

Sections 3(b) and (c) of the Law authorise the Commissioner for Environment to direct the sealing up or demolition of any unauthorised premises, structure or development in contravention of the Law. The important question here is whose structures or developments are most likely to be affected by the exercise of the powers under these provisions. The obvious answer is that it is those of the poor. They are the ones most likely to be living in areas and in structures and developments authorities are likely to consider unauthorised and not in line with the provisions of the Law. This is because, as pointed out earlier, most of the available housing for the poor in Lagos is sited in slums where the poor engage in self-help to secure some kind of housing for themselves. As pointed out as well, most of the housing in these areas is also substandard and in violation of housing laws because of the poor's lack of requisite wherewithal to build standard and housing regulations-compliant houses. Areas most likely to be affected in this regard are the over 100 slum areas in Lagos State. Some of these are Mushin, Ketu, Ajegunle, Ebutte- Metta, Isale Eko, Makoko, Oshodi, Ojo, Orile, Olusosun, Shitta, Ipodo-Ikeja, Idi-Araba, Yaba and Onipanu, among many others.

There is evidence that the above supposition is not in fact far-fetched. In July 2012, Makoko, a waterfront settlement which has been home to at least 85 000 people for more than a century, was demolished by officials of the Lagos State Ministry of Environment in conjunction with the Nigerian police force without due process, compensation or provision of alternative housing on the ground that the settlement is unauthorised and constitutes a blight on the mega-

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116 Secs 1(1)(a)-(c).

117 Secs 79-89.

118 Secs 90-98.

119 Secs 1(2) & (3).

city the government of Lagos State is planning to create.<sup>120</sup> There are reports that thousands of those affected by the demolition have now taken refuge under bridges.<sup>121</sup>

## 6.2 Procedure for objecting to Draft Development Plans made under the Lagos State Planning Law

Section 5 of the Law provides for the preparation and subsequent implementation of Draft Development Plans for the state. Anybody whose interest or development is to be affected by a Draft Development Plan is authorised to raise an objection thereto under a procedure stipulated in section 8 of the Law: a written statement by the objector or his advocate. The statement must define the nature and reasons for the objection and the suggested alterations and/or amendments that will resolve the objection.<sup>122</sup> This makes literacy and/or the ability to secure the services of a lawyer a requirement for objection. These provisions background the fact that available records reveal that about 42,1 per cent of adults are *not* literate in the English language in Nigeria.<sup>123</sup> While I think that this record is a gross underestimation of the level of English language literacy in Nigeria, even if one is to work with the 42,1 per cent, the act of omission or commission involved in not taking the interests of these 'illiterate' members of society into account in the Law is an indictment on the inclusive and sensitive nature of Nigeria's laws and policies.<sup>124</sup> This is much more so since citizens' participation is one of the new and more contemporary norms of physical planning laws.<sup>125</sup> Provisions such as the provisions of section 8 of the Law are in fact meant to facilitate and concretise citizens' participation, a most important contemporary norm of physical planning in the new Law.<sup>126</sup>

Therefore, to make writing and English language literacy a condition for participation, as the provisions of section 8 of the Law appear to have done, is most likely to exclude poor people who are more likely to be illiterate in the English language and unable to write.

120 C Ezeobi 'Makoko residents to protest loss of king, homeland' <http://www.thisdaylive.com/articles/makoko-residents-to-protest-loss-of-king-homeland/120634/> (accessed 20 October 2012).

121 See, eg, K Busari 'Displaced Makoko residents find shelter under 3rd mainland bridge' <http://www.punchng.com/feature/displaced-makoko-residents-find-shelter-under-3rd-mainland-bridge/> (accessed 20 October 2012).

122 Secs 8(1)(a) & (b) Lagos State Planning Law.

123 National Bureau of Statistics *The national literacy survey* (2010) 18.

124 Of course, the kind of omission, disregard or commission just discussed is not peculiar to Lagos State or the Law. It is a feature of most laws and policies in Nigeria, as elsewhere.

125 L Oduwaye 'Citizenship participation in sustainable planning and management in Nigeria' (2006) 20 *Journal of Human Ecology* 43; IO Smith 'Evolving strategies for sustainable physical planning and development through legislation: The Lagos State Urban and Regional Planning and Development Law in focus' in IO Smith (ed) *Essays on the Lagos State Urban and Regional Planning and Development Law 2010* (2014) 12-15.

126 Smith (n 125 above) 13.

The poor are also the category of people most likely not to be able to afford the cost of hiring a lawyer to act for them in raising objections, something that a rich but 'illiterate' person can conveniently do. This provision is therefore more likely to operate against the poor and to exclude them from the participation process provided under the Law than the more affluent. Is there a more sensitive and inclusive procedure that could have been adopted by the Law? Yes, the Law could have provided that complaints or objections could to be made orally to the relevant agency that will then reduce it to writing where the objector is illiterate.

### **6.3 Powers of the Renewal Agency to declare an area an improvement area and to order the demolition of buildings in areas so designated**

The Renewal Agency, one of the agencies saddled with the implementation of the Law, is empowered by section 53(1) of the Lagos State Planning Law to, after a Draft Development Plan has been approved in respect of any area, declare any area an improvement area for the purpose of 'rehabilitating, renovating and upgrading the physical environment, social facilities and infrastructure of the area'. Where any area has been declared an improvement area, the Renewal Agency is empowered to demolish or order the demolition of all or part of improvements or buildings in such an area and to recover all or part of the cost of the demolition from the owner(s) of such improvement(s).<sup>127</sup> However, what areas are likely to be declared an improvement area? These will most probably be the over 100 slum areas of the state. It is a notorious fact that poor people are the ones inhabiting areas normally tagged 'slums'. So it is the poor whose buildings or improvements will be more vulnerable to demolition under the Law.

### **6.4 Section 58(2) powers of the Renewal Agency to pay compensation for demolition**

Section 58(1) of the Lagos State Planning Law provides that where the Renewal Agency intends to demolish a building or improvement used for human habitation, the Agency shall make recommendations to the governor of the state through the Commissioner for Environment for the acquisition of the property. Where the property is acquired, the Law provides that compensation shall be payable in line with the provisions of the Nigerian Land Use Act.<sup>128</sup> In order to understand the import of this statutory reference, a brief examination of the relevant provisions of the Land Use Act<sup>129</sup> is necessary.

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127 Sec 55(1)(c) Lagos State Planning Law.

128 Sec 58(2).

129 Cap L5 LFN 2004.

Under the Land Use Act, all land in the territory of any state of the Federation of Nigeria is vested in the governor of that state in trust, to be administered for the use and common benefit of all Nigerians in accordance with the provisions of the Land Use Act.<sup>130</sup> The governor of each state is, however, empowered to grant a statutory right of occupancy in respect of land in urban areas,<sup>131</sup> while the local government having jurisdiction over land not in urban areas, is empowered to grant or a customary right of occupancy in respect thereof.<sup>132</sup> A statutory or customary right of occupancy is revocable by the governor or relevant local government on the ground of overriding public interest, which in the instant case would mean the requirement of the land by the government of a state or the local government in the state for public purposes.<sup>133</sup> When a customary or statutory right of occupancy is revoked on the ground of overriding public interest, compensation is payable for the value of the unexhausted improvements on the land at the date of the revocation of the right of occupancy and the acquisition of the land.<sup>134</sup>

Section 51 of the Land Use Act, which is the interpretation section, defines unexhausted improvements as meaning<sup>135</sup>

[a]nything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of long-lived crops or trees, fencing, wells, roads and irrigation or reclamations works, but does not include the result of ordinary cultivation other than growing produce.

That is, compensation is payable under the provisions of the Land Use Act only for improvements or enhancements of the value of the land which are the result of expenditure of labour or capital improving the quality, utility or productivity of land, the subject matter of acquisition, at the prevailing value of such improvements at the date of revocation. There is no recognition of value or interest in bare land for purposes of compensation.

In *Osho and Another v Foreign Finance Corporation and Others*,<sup>136</sup> the Supreme Court gave judicial sanction to the provisions of section 51(1) of the Land Use Act that compensation under the Act is only payable for the value of unexhausted improvements at the date of the revocation of the right of occupancy and the acquisition of land. In the above-mentioned case, the statutory right of occupancy of the

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130 Sec 1 Land Use Act.

131 Sec 5.

132 Sec 6. It should be noted, however, that the Governor can grant statutory right of occupancy over land, whether in urban or non-urban areas, by virtue of the provisions of sec 5(1)(a) of the Land Use Act.

133 Secs 28(2)(b) & 28(3)(a) Land Use Act.

134 Sec 29(1).

135 Sec 51(1).

136 (1991) 4 NWLR (Pt 96) 157.

appellant had been unlawfully revoked by a governor of a state contrary to the relevant provisions of the Land Use Act. Upon the unlawful revocation, the structures of the appellant on the land were destroyed by the respondents. When sued for compensation, the respondents contended that the revocation extinguished all interests of the appellants in the land. The Supreme Court rejected this contention and held that, even where a revocation is validly done under the Land Use Act; it is the right of the citizen whose interest in the land is extinguished to be paid compensation for the value of the unexhausted improvements on the land at the date of revocation.<sup>137</sup>

Recently, in *CSS Bookshop Ltd v RTMCRS*,<sup>138</sup> the Supreme Court expatiated on the meaning of developed land or improvements as used under the Land Use Act. The Court adopted the definition of developed land in section 51(1) of the Land Use Act as the existence of<sup>139</sup>

any physical improvement in the nature of road development services, water, electricity, drainage, building, structure or such improvement that may enhance the value of the land for industrial, agricultural or residential purposes.

The Court went further to state that the governing criteria of whether or not land is developed within the meaning of the Land Use Act is whether anything has been done to enhance the value of the land. Development is therefore not restricted to those things expressly listed under the provisions of the Land Use Act.<sup>140</sup>

The discriminatory implication or impact of the provisions analysed above for the poor stems from the fact that, even where occupation is not deemed unlawful or in contravention of the Lagos State Planning Law, the poor and the vulnerable are still not likely to have any improvements on the land worthy of substantial compensation under section 58(2) of the Law, or entitled to nominal compensation only, which may not secure them alternative shelter. This is because shelter for the poor, often times, consists mainly of shacks and/or rudimentary items of building. If this situation is contrasted with the situation of the more affluent members of society who will have duplexes and mansions on their land, the discriminatory effect of the supposedly neutral provisions of the Law becomes glaring.

### 6.5 Retroactive enforcement of the Lagos State Planning Law

Another provision of the Law that may negatively affect the poor is section 60(2), which provides that

[a]n enforcement notice may be issued under subsection (1) of this section, notwithstanding that the unauthorised development, renovation,

137 *Osho* (n 136 above) 197-198.

138 (2006) 11 NWLR (Pt 992) 530.

139 *CSS Bookshop* (n 138 above) 574.

140 *CSS Bookshop* 574-575.

alteration, repair or addition took place before the commencement of this Law.

This provision appears to criminalise developments that were not unlawful before the commencement of this Law. If that indeed is the intention, it is a violation of section 36(8) of the Nigerian Constitution which prohibits retroactive penal legislation and is for that reason, alone, unconstitutional. Of course, the provision is capable of another more favourable and constitutionally-compliant interpretation, namely, that the provision applies only to developments that were unlawful under previous laws. However, agencies responsible for the issuing of the enforcement notice may not adopt this more favourable interpretation. Out of their ignorance of the law or even by wilful default, officials of state may adopt the more prejudicial interpretation, and the poor, lacking the means to secure competent legal assistance, if any at all, will labour under the injustice occasioned by the misinterpretation without any redress whatsoever. Of course, the situation will be different with more affluent members of the society who possess the wherewithal to challenge unconstitutional laws, policies and administrative practice. In addition to the foregoing, however, the poor are also the ones the provision is much more likely to be applied against as they are the ones that are more than likely to have unauthorised developments.

#### **6.6 Offences and penalties for non-compliance**

From the foregoing analysis, it is clear that the poor are more likely than other classes of residents to run afoul of the Lagos State Planning Law. It, therefore, follows that they are the ones also that are most vulnerable to the offences and penalties stipulated for non-compliance. Significant in this respect are the provisions of sections 75(5) and (6) of the Law. Section 75(5) provides that where the relevant agency incurs any cost in the course of demolition, removal or the enforcement of compliance, the cost shall be assessed and served on the owner, developer or occupier of the illegal development(s) for payment. Failure to pay the assessed cost is an offence punishable by a fine of N100 000,00 (about US \$637) or one month community service, in addition to the payment of the assessed cost.<sup>141</sup> One can just imagine how difficult it will ordinarily be for anybody to pay for the cost of demolishing his or her house under pains of punishment, not to talk of the poor who can hardly find the means to survive from day to day.

#### **6.7 Proliferation of enforcement agencies**

Another defect noticeable about the Lagos State Planning Law is the proliferation of agencies established to administer it. As stated earlier, six different agencies are established to implement the provisions of

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<sup>141</sup> Sec 75(6) Lagos State Planning Law.

the Law. The powers of some of these agencies overlap and some of their functions are duplicated. The proliferation of agencies and the duplication of functions and powers in the administration of the Law will hinder the access and ability of citizens, the poor in particular, to comply with the Law and to fulfil their housing needs. This hindrance will occur in two main ways. First, it makes compliance with the Law cumbersome and difficult. Prospective builders and developers will have to run from pillar to post and from one agency to another to comply, piecemeal, with the requirements of the Law. This will in turn occasion undue delay and will increase the cost of access to adequate housing. These effects run counter to the negative obligation of the state not to, through the application of any law, policy or practice impede or impair individuals' ability to access adequate housing.

The assessment done in this section shows that the Lagos State Planning Law unfairly discriminates against and disproportionately affects the rights of the poor to adequate housing much more than less vulnerable residents of Lagos State. This is a violation of the non-discrimination principle of international and regional human rights laws, as contained in the international bills of rights<sup>142</sup> and article 2 of the African Charter. It also violates section 42 of the Nigerian Constitution, which expressly prohibits discrimination against any citizen of Nigeria on grounds of ethnic group, place of origin, sex, religion or political opinion.<sup>143</sup> Second, it is a violation of the state's negative obligation not to by law or policies impair access or the efforts of the poor to secure adequate housing. It is also a violation of the state's positive obligation to promote and fulfil the right.

## 7 Conclusions and recommendations

This article examined the exclusionary and discriminatory impact of the Lagos State Planning Law, a supposedly neutral planning statute, on the poor's right to adequate housing. The point is made that the main purport and objective of the Lagos State Planning Law is the balancing of physical development on land and environmental protection, but that the application of the Law in practice will impact disproportionately the right to adequate housing of the poor and the vulnerable more than affluent members of the Lagos State residents where the Law is applicable.

In light of the foregoing, the following recommendations are made. On a more general level, laws and policies should mainstream poverty for a more effective response to the vulnerability and disadvantage of poverty. If poverty is mainstreamed, this will mean that before any law is enacted or policies fashioned out, the consideration of how such laws or policies will affect the interests and coping ability of the poor

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142 That is art 2 of the Universal Declaration, art 2(1) of ICCPR and art 2(2) of ICESCR.

143 Secs 42(1) & (2) Nigerian Constitution.

will become part and parcel of the preparation and planning processes of such laws and policies. The implication of this is that the interest of the poor will be prioritised, and indirect or not so apparent prejudicial effects of laws and policies on the poor will be much more likely to be paid attention to and interrogated. This approach may operate to ameliorate some of the more damaging implications of assumptions like the liberal-legal notions of the neutral application of laws on the materially less privileged.

The justification for this kind of approach lies first in the fact that several studies have shown that laws and policies are in fact complicit, to a very high degree, in the inability of the poor to work their way out of poverty through inadvertent stumbling blocks that are thrown in the way of their access to the basic necessities of life and the ability to surmount poverty.<sup>144</sup> Second is the fact that the socio-economic development of as many members of society as possible is a condition precedent for the robust, even and lasting economic development of any country. This is a fact that various studies have confirmed.<sup>145</sup> Mainstreaming poverty in laws and policies will serve to ensure that as many people as possible are empowered to get out of poverty, either through direct or indirect efforts of the state. Perhaps the most important justification for the recommendation suggested here is that a society where the gap between the poor and the rich is too wide and where there are too many poor people and very few very rich people, is a recipe for disaster. A case in point is the raging insurgency in the northern part of Nigeria, which has majorly been blamed on extreme poverty which provided fertile ground for the insurgency to thrive, as is the case with most such civil unrest in other parts of the world.

On a more specific level, the Lagos State Planning Law should establish a one-shop/stop institution or agency to implement the provisions of the Law. There are at least two reasons for this recommendation. The first is that the Law as it presently stands is beset with duplications. As correctly observed by Oni, the duties imposed by the Law on the Ministry itself are what agencies established under the Law are set up to implement, and a closer look at the functions to be performed by the Ministry and those to be performed by the agencies shows a clear duplication of functions and a lack of independence of action on the agencies' part, as they are subject to directions and control of the Ministry.<sup>146</sup> This is probably a pointer to the fact that there are no compelling reasons under the

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144 R Hale 'Coercion and distribution in a supposedly non-coercive state' (1923) 38 *Political Science Quarterly* 470; MR Cohen 'Property and sovereignty' (1927-1928) *Cornell Law Quarterly* 8; R Hale 'Bargaining, duress and economic liberty' (1943) 43 *Columbia Law Review* 603; Williams 'Welfare and legal entitlements: The social roots of poverty' in Kairys (n 11 above) 569, among many others.

145 See, eg, M Nussbaum *Women and human development: The capabilities approach* (2000); A Sen *Development as freedom* (2001), among others.

146 BA Oni 'The Lagos State Urban and Regional Planning and Development Law 2010: Prospects and challenges' in Smith (n 125 above) 30.

Law to break down physical planning into six different sub-categories with six agencies to administer.

The second reason for the recommendation here is that to require six different agencies to relate with a barely literate public on a subject matter that a one stop/shop will probably take care of, will create unnecessary bottlenecks, delays, wastage of resources and precious time. It may also give rise to conflicting directions and regulations in view of the duplication of functions discussed earlier. The resultant effect of this can only be chaos and confusion and the creation of further avenues for unscrupulous civil servants to exploit and fleece members of the public, something for which some governmental institutions and agencies are notorious. The establishment of a one-shop/stop institution or agency to implement the provisions of the Law is most likely, therefore, to make for easier and cost-effective compliance with the requirements of the Law.

Secondly, compensation for the deprivation of interest in land should recognise value beyond developments on land, especially in cases where the land in question is being used for accommodation by the poor and the more vulnerable members of society. This is because the poor can hardly be expected to have developments on land that will qualify for substantial compensation that will be able to secure alternative accommodation or housing, unlike the case of the more affluent members of society. Recognition of the poor's occupancy or housing rights on land *simpliciter* will reduce this discriminatory impact of the Law on the poor's right to adequate housing.

Lastly, efforts should henceforth be made by all persons and authorities in Nigeria to fulfil not only the country's negative duty to refrain from impairing the ability of citizens to adequate housing, but her positive duty to provide housing for the indigent members of society who cannot afford the cost of housing for themselves as well. This is currently missing under Nigeria's human rights framework, as discussed above. Its inclusion will go a long way towards extending the frontiers of the fight against poverty in the country.